

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**CASE NO: FOC 4568/06 – 07/ UN 1**

In the matter between:

**LUCIAN GABRIËL MEYER**

**1<sup>ST</sup> COMPLAINANT**

**CARIN MEYER**

**2<sup>ND</sup> COMPLAINANT**

and

**ANDRE VAN DER MERWE**

**RESPONDENT**

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**DETERMINATION IN TERMS OF SECTION 28(1) (a) OF THE FINANCIAL  
ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002  
("FAIS Act")**

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**A. INTRODUCTION**

- [1] This case revolves around an investment made by complainants in the GAREK scheme. Respondent's marketing of this scheme was comprehensively dealt with in a determination issued by this Office in the matter of *Adolf Jacobus Hare and Christina Elizabeth Hare vs Andre van*



*der Merwe* FOC 2759/06-07 KZN (1) (Hare).

- [2] In the Hare determination I made reference to determinations which would follow. This is one such determination.
  
- [3] This is part of a batch of complaints submitted collectively by Mr Adolf Hare, a complainant in the Hare determination.
  
- [4] Whilst statements were obtained from each complainant, the gravamen of each complaint was materially similar. They were therefore jointly forwarded to respondent.
  
- [5] Respondent did not deal with each complaint individually, but elected to submit a generic response applicable to all complainants within this group. This in effect is what he describes as a 'typical presentation' to clients<sup>1</sup>.
  
- [6] Whilst each complaint must, of course, be properly founded within the FAIS Act, it follows, that the material similarities both in respect of the contraventions of the FAIS Act and the history of GAREK scheme as detailed in the Hare determination lay the foundation for this and the other determinations which follow.
  
- [7] Importantly, the contraventions of the FAIS Act detailed in the Hare

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<sup>1</sup> See Hare Page 13 – 15 Para 38 - 41



determination are almost without exception duplicated within this group of complaints.

[8] In the result to reiterate the infringements already elucidated in the Hare determination would be superfluous. I have therefore restricted my comments to pertinent issues and, where necessary make reference to paragraphs in the Hare determination. It goes without saying that it is necessary that the Hare determination be read in conjunction with this case.

[9] The Hare determination contains a synopsis of the mandate and main findings of a report that the former Minister of Trade and Industry had commissioned against the GAREK scheme (The DTI Report).<sup>2</sup>

## **B. THE PARTIES**

[10] 1<sup>st</sup> Complainant is Dr Lucian Gabriël Meyer a medical doctor residing at 21 Dean Avenue, Waverly, Bloemfontein.

[11] 2<sup>nd</sup> Complainant is Mrs Carin Meyer, a radiologist, married to 1<sup>st</sup> complainant and residing at 21 Dean Avenue, Waverly, Bloemfontein.

[12] Respondent is Mr Andre van der Merwe, previously an authorised financial services provider carrying on business at 12 Mc Iverstraat, Uvongo, Kwa-

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<sup>2</sup> See Hare Page 2- 7 Para 5-12



Zulu Natal. Respondent was disbarred as a financial services provider by the Financial Services Board (FSB) on 9<sup>th</sup> November 2009.

**C. THE COMPLAINT**

- [13] At all material times 1<sup>st</sup> Complainant both on his own account and as a representative of 2<sup>nd</sup> complainant, whilst relying on the advice of respondent purchased unlisted shares in his name and that of 2<sup>nd</sup> complainant.
- [14] Pursuant to a number of telephone conversations with respondent 1<sup>st</sup> complainant purchased unlisted shares on the 30<sup>th</sup> September 2004.
- [15] These were comprised of R12 500, 00 in his name and an additional R12 500, 00 in the name of 2<sup>nd</sup> complainant.
- [16] The relevance of this date is that 1<sup>st</sup> complainant was advised by respondent that the 30<sup>th</sup> September was the cut off date for the purchasing of shares prior to listing.
- [17] Respondent contacted 1<sup>st</sup> complainant several times thereafter, 'even after hours' with a postponed cut off date and induced him to personally make a further investment of R30 000, 00 on the 12<sup>th</sup> November 2004.
- [18] In December 2004, 1<sup>st</sup> complainant attended a presentation at respondent's home. This and subsequent conversations with respondent led 1<sup>st</sup> complainant to make further investments amongst which are two in his own name, being R25 000,00 on the 5<sup>th</sup> January 2005 and 24<sup>th</sup> January 2005 respectively.
- [19] In addition he invested R25 000, 00 in 2<sup>nd</sup> complainant's name on 6<sup>th</sup>





January 2005.

- [20] Supposedly the extended cut off date for listing was the end of December 2004 but respondent advised that he was able to extend the date for his clients.
- [21] The basis of respondent's advice was in all material respects similar to that which he rendered in the Hare matter and as such it would be superfluous to rehash this.
- [22] Complainants request the return of their investments plus interest thereon.

**D. THE RESPONSE**

- [23] As the complaint could not be resolved between the parties, it proceeded to investigation. Respondent was requested to provide copies of his 'entire file of papers', as well as a statement detailing the manner in which the investment was entered into and the commission earned.
- [24] The file of papers was requested in order to ascertain whether any documentation evidencing compliance with the FAIS Act existed.
- [25] Save for copies of the application and mandate forms, and copies of deposit slips and banks transfers, nothing which could assist respondent in his defence was provided.



[26] In his reply, as mentioned in paragraph 5 supra, respondent submitted the generic response, detailed in the Hare determination.

[27] That reply save for setting out the background to the company as well as respondent's contention that investors had been appraised of the risks involved and that a proper due diligence had been carried out proffered nothing of any substance evidencing compliance with the FAIS Act.

#### **E. DETERMINATION**

[28] Respondent has effectively elected both in the Hare determination as well as in this matter to base his defence on the so-called typical presentation.

[29] The issues in this matter are directly in line with those mentioned in the Hare<sup>3</sup> determination and are as follows:

**29.1.** Whether the respondent rendered the financial service herein negligently and or in a manner which is not compliant with the FAIS Act;

**29.2.** If it is found that the respondent did render the financial service negligently and or failed to comply with the FAIS Act, whether

**29.3.** such failure caused the complainant's loss; and

**29.4.** The quantum of damages.

[30] In view of the absence of any compliance documentation it stands to

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<sup>3</sup> See Hare Page 16 Para 42



reason that there are multifarious material contraventions of the FAIS Act. To detail each and every contravention would be voluminous and hence I have restricted myself to some of the more pertinent issues.

**Negligent or intentional misrepresentation of the product in contravention of the FAIS Act**

[31] As outlined in the Hare determination<sup>4</sup> it is evident that respondent as a result of his failure to carry out the most basic of due diligences, either lacked a proper understanding of the product or more seriously 'may have been complicit in a fraud perpetrated against innocent investors'.

[32] The 'various derivations and related shareholdings of GAREK are confusing and it would be fair to say that without the benefit of the DTI report and time to peruse these transactions carefully it would be impossible to grasp this questionable structure<sup>5</sup>'

[33] In reality and as exposed by the DTI report the shares purchased by complainant were worthless; investors' funds having been expended on company expenses, directors' remuneration etc. and, of course commissions.

[34] Section 7 (1) (c) (xiii) of the Code requires disclosure of appropriate information of 'any material investment or other risks associated with the

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4 See Hare Page 31 - 34 Para

5 See Hare Page 27 Para 84



product.' Clearly this information would need to be set out explicitly in any documentation or client advice record. They quite simply did not exist.

[35] According to 1<sup>st</sup> complainant, respondent made no mention of the risks involved in this investment. Whilst respondent disputes this in his typical presentation I have already commented on this in Hare as nothing more than a fallacy. Barely two months prior to this investment respondent boasted that '*the company have (sic) achieved outstanding results, and large development has taken place in the structure.*' He went further and enticed existing clients into purchasing more shares<sup>6</sup>.

[36] Complainants were never in a position to understand either the structure of or the risks involved in the scheme. All respondent was interested in doing was to place more pressure on 1<sup>st</sup> complainant to act expeditiously given the imminent listings.

### **Appropriateness of advice**

[37] No attempt was made by respondent to gather 'available information regarding the complainants financial situation, financial product experience and objectives.'<sup>7</sup> In the circumstances there was no way in which respondent could have determined whether such a product was appropriate to complainants needs or not.

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6 See Hare Page 23 - 24 Para 68 - 70

7 General Code of Conduct For Authorised Financial Service Providers Section 8 (1) (a)





[38] Even if one were to assume that in the event that an investment in unlisted shares was appropriate to complainants needs one would expect that an appropriate due diligence would have been conducted into the company by the adviser prior to marketing such shares.

[39] Quite simply this did not occur<sup>8</sup>.

#### **Disclosure of the advice fee**

[40] The documentation provided being the mandate, application form and copies of deposit slips are essentially identical to those detailed in the Hare determination<sup>9</sup>.

[41] As I stated in Hare<sup>10</sup>, other than the fact that these appear to be what I can consider options on options nowhere on either of these forms is there any indication of what complainants are actually buying.

[42] Not only does this document inadequately disclose the essence of what is being purchased, it contains no details of any commission, charges or other expenses.

[43] The DTI report detailed the commissions earned by respondent<sup>11</sup>, which commission is required to be disclosed in terms of section 3 (1) (a) (vii) of the General Code. This respondent has failed to do.

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8 See Hare Page 33 - 34 Para 109 - 115

9 See Hare Page 25 - 27 Para 77 - 84

10 See Hare Page 26 Para 81

11 See Hare Page 12 Para 34.2



### **Intermediary Services**

- [44] The definition of a financial service encompasses both the furnishing of advice and rendering of intermediary services.
- [45] The definition of intermediary service in the FAIS Act means;-  
*'....any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-  
the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or...'*
- [46] The FAIS Act and its obligations came into effect on 30<sup>th</sup> September 2004, and as of this date intermediary services conducted on behalf of complainants by respondent were done so in contravention of the FAIS Act given that respondent was not so authorised in terms of section 7 (1) to carry out intermediary services.
- [47] It is irrefutable that respondent dealt with and processed complainants investments starting with the initial investment on the 30<sup>th</sup> September 2004
- [48] Without respondent having provided the aforesaid intermediary services the transactions would not have taken place and complainants would not have lost their money.

### **CONCLUSION**



- [49] As already mentioned there are numerous other contraventions. No disclosure documentation was provided to complainants and respondent was not even licensed to sell shares, to name but a few<sup>12</sup>.
- [50] Quite simply the advice could not have met complainants needs, given the fact that the shares themselves are worthless.
- [51] Respondent evidently did not concern himself with the fact that essentially he acted in a position of conflict of interest; his loyalties lying with GAREK and the commission which it paid<sup>13</sup>.
- [52] Not only did he invest complainants in worthless shares but they have lost whatever growth they would have received, had they been appropriately invested.
- [53] As stated in the Hare determination<sup>14</sup> I have no doubt that the many violations of the Code were deliberate, and as such in inducing complainants to invest with GAREK he knowingly placed them at risk from inception.
- [54] It was respondent's actions both in recommending the scheme and providing the attendant intermediary services that led directly to complainants making the investment and in consequence losing their funds.
- [55] In the circumstances, I deem it appropriate not only that complainants be

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12 See Hare Page 30 Para 98

13 See Hare Page 34 Para 114

14 See paragraphs 118 of Hare Page 35



placed back in the position which they were prior to the investment but that interest thereon accrue from the date that the monies were invested.

I make the following order:

## **ORDER**

The complaint is upheld and;

1. Respondent is hereby ordered to compensate complainants as follows;
  - a. 1<sup>st</sup> Complainant R12 500, 00 plus interest thereon from 30<sup>th</sup> September 2004.
  - b. 1<sup>st</sup> Complainant R30 000, 00 plus interest thereon from 12<sup>th</sup> November 2004
  - c. 1<sup>st</sup> Complainant R25 000, 00 plus interest thereon from 5<sup>th</sup> January 2005.
  - d. 1<sup>st</sup> Complainant R25 000, 00 plus interest thereon from 24<sup>th</sup> January 2004
  - e. 2<sup>nd</sup> Complainant R12 500, 00 plus interest thereon from 30<sup>th</sup> September 2004.
  - f. 2<sup>nd</sup> Complainant R25 000, 00 plus interest thereon from 6<sup>th</sup> January 2005.
2. Interest on the aforesaid amounts shall accrue at the rate of 15.5 per

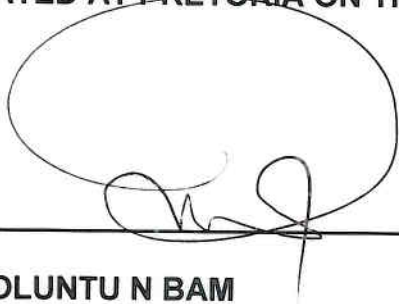




cent per annum to date of final payment;

3. Respondent is ordered to pay the case fee of R1 000, 00.

**DATED AT PRETORIA ON THIS 22<sup>nd</sup> DAY OF OCTOBER 2010**

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, positioned above a horizontal line.

**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

