

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

**PRETORIA.**

**CASE NO. FOC 07188/9-10/KZN 1& 07195/09-10/KZN 1**

**In the matter between:**

**MARIA MARGARIDA NORTON**

**1<sup>st</sup> COMPLAINANT**

**PHILIP JOHN NORTON**

**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. THE PARTIES**

[1] The 1<sup>st</sup> Complainant is Mrs Maria Margarida Norton an adult female, nursery manager whose postal address is P O Box 1636 Manaba Beach.

[2] The 2<sup>nd</sup> Complainant is Mr John Philip Norton, an adult male business person whose postal address is P O Box 1636 Manaba Beach.

- [3] The respondent is Mr Andre van der Merwe an authorised financial services provider carrying on business at 12 Mc Iver straat, Uvongo, Kwa-Zulu Natal.

## **B. INTRODUCTION AND BACKGROUND**

- [4] This case revolves around investments made by Complainants in an entity known generally as the GAREK scheme. Complaints and enquiries relating to the GAREK scheme were steadily coming into the Office since late 2006. In order to properly understand what the scheme was all about, it became necessary to await a report that the former Minister of Trade and Industry had commissioned against the scheme. This report was only finalised in May 2009 (The DTI Report).
- [5] Essentially the GAREK scheme involved the formation of various companies which solicited investments from members of the public through the sale of unlisted shares.
- [6] These shares were sold on the promise that they would increase substantially in value upon the listing of the entity in which the shares were sold on the Johannesburg Securities Exchange South Africa (JSE).

- [7] The unlisted shares purchased by Complainants were essentially in two connected entities namely Global Africa Resource and Energy Corporation Limited (GAREK) and Mwamko Africa Trade Resource Industrial and Commerce Corporation Limited (MATRIC).
- [8] Intrinsically related to GAREK and MATRIC are several other unlisted companies amongst which we have Resourcefin Strategies International Limited (RSI); Independent Holdings Limited (IHL); Appropriate Structures in Emerging and Markets Limited (ASEM); and Holistic Resources Limited (HRL) and AGE.

### **C. THE COMPLAINT**

- [9] The Respondent advised the Complainants and their immediate family members including the 1<sup>st</sup> Complainant's 77 year old mother to invest in unlisted companies shares. He advised the Complainants that these shares were about to be listed and they would pay exceptional dividends.
- 9.1 During their meeting the Respondent made mention of the following companies that were involved: Resource Strategies International Ltd (RSI), Mwamko Afrika Resources & Energy Corporation Ltd (GAREK) and African Gulf Energy PLC (AGE). It all seemed an excellent investment opportunity.

9.2 On the 7<sup>th</sup> of July 2003, the Complainants filled in the application forms and bought shares upon the advice of the Respondent.

9.3 The Complainants were introduced to Resourcefin Strategies International Ltd by the Respondent. Apparently the Complainants were given only two days to decide on the proposed investment. Respondent advised Complainants that the prevailing opportunity was about to expire and as such the Complainants were encouraged to act expeditiously.

9.4 Acting on the advice of the Respondent, the investments were made as follows:

- 7<sup>th</sup> of July 2003 the 2<sup>nd</sup> Complainant paid R20, 000.00

On the 3<sup>rd</sup> of October 2003, in respect of this investment, Certificate 3392 for 4000 RSI shares was issued.

- 17<sup>th</sup> of May 2004 the 2<sup>nd</sup> Complainant paid R10, 000.00
- 31<sup>st</sup> of July 2004 the 1<sup>st</sup> Complainant paid R5, 000.00
- 16<sup>th</sup> of August 2004 the 2<sup>nd</sup> Complainant paid R13, 250.00

On 26 of August 2004 the 1<sup>st</sup> Complainant received a confirmation of 2000 shares bought in Matric & GAREK.

- 9.5 On the 25<sup>th</sup> of February 2005 the Respondent sent news letters to the Complainants and their respective family members.
- 9.6 The investments that were made up to and including the 16<sup>th</sup> of August 2004 fall outside of the jurisdiction of this Office. Accordingly in this determination I deal only with investments that were made after 30 September 2004.
- 9.7 On the 28<sup>th</sup> of May 2008 the 2nd Complainant paid, R10, 000.00 in purchase of shares and the 1<sup>st</sup> Complainant made a R5, 000.00 direct deposit to buy AGE shares.
- 9.8 On the 3<sup>rd</sup> of June 2008 the 1<sup>st</sup> Complainant received an approved application of 6509 shares from the Respondent.
- 9.9 On the 30<sup>th</sup> of July 2008 the 2<sup>nd</sup> Complainant paid R5, 000.00 in purchase of shares.
- 9.10 Complainants knew the Respondent as a licensed financial advisor and also because the Respondent's son was in the same school with the Complainants' daughter.

- 9.11 The Complainants further state that the Respondent promoted the company in glowing terms by pointing out his credibility and further pointed out the involvement of the former President of Botswana.
- 9.12 No interviews were conducted to assess whether this investment was conducive to the Complainants and their family members for future financial requirements or their present financial position.
- 9.13 The challenges that lay ahead for GAREK and the risks associated with the investment were never mentioned or discussed.
- 9.14 The promised listing and several future listing dates never materialised. Various reasons were advanced for the delay. On the 16<sup>th</sup> of October 2009 the Complainants received a letter from the Respondent's lawyers, stating that the Respondent has no legal obligation to refund their investment. The lawyers further stated that the investment is re-saleable and not refundable and that the Complainant and her family must give the Respondent a mandate to sell their shares or they can sell their shares themselves and that if the Respondent sells their shares there is no guarantee of a time frame.

9.15 The Complainants and their family members' state they were misled by a licensed financial provider and the communication was less than adequate.

9.16 To date, almost 7 years later, no listing has taken place. Complainants have requested a return of the money that they have invested plus interest on it from the 7<sup>th</sup> of July 2003.

#### **D. THE RESPONSE**

[10] As the Complaint could not be resolved between the parties, it proceeded to investigation at which point Respondent was requested to provide copies of his "entire file papers".

[11] The Respondent was also required to submit a reply to the allegations, taking into account the requirements of the FAIS Act. In particular to provide a statement on how the investment was entered into, with supporting documentation, if available; the exact commission earned; and specific details as to the source of the investments and the contact details of the individuals or entity that provided the investment.

The Respondent's response can be summarised as follows:

[12] The Respondent chose not to deal with this claim specifically but decided to treat this claim together with other similar claims, all of which represent investments through GAREK and related companies, with reference to a letter dated 5 July 2010 which was written by the Respondent's attorney Mr Mike Werner.

12.1 The Respondent contends that the matter has not been resolved with the Complainants and allegations raised by the Complainants are rejected, based on the following reasons:

12.2 All Complainants are using "last resort" and not "first resort" procedures in that the complainants' queries should be directed to the entity in which the Investment was made. He further contends that only in the event of the Complainant having exhausted their remedies against GAREK, should the FAIS Ombud become involved and that there is no record of the Complainants communicating directly with the entity in which he or she invested.

12.3 FAIS Ombud is limited to deal with financial institutions, which do not fall within the jurisdiction of any other Ombud Scheme or where there is uncertainty over jurisdiction. It is then the contention of the Respondent that the Ombud has infringed its granted authority.



- 12.4 Most of the Complainants have laid criminal charges against the Respondent, thus the demands of the Ombud constitutes an infringement of the Respondent's constitutional right to remain silent when a criminal investigation is pending.
- 12.5 The Respondent was never aggressive at any time and did not pressurise complainants to invest;
- 12.6 The Respondent submits that the investments are in a Capital Growth Share, not a dividend share. The time of the listing is not under the Respondent's control;
- 12.7 The Respondent states that he never made excuses, about the facts, he merely conveyed what management of the investment companies had stated.
- 12.8 Respondent denies that prospectuses were prepared or necessary as all the shares were traded on a re-sale basis.

## **E. THE ISSUES**

[13] The following are the issues to be determined:

13.1 Jurisdiction of this Office over the Respondent.

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

13.3 If it is found that the respondent did render the financial service negligently/ and or failed to comply with the FAIS Act, whether such failure caused the Complainant's loss; and

13.4 Quantum

[14] It is apposite to mention that the respondent was required to provide a copy of his entire file of papers. In this regard the only documents provided by respondent were one page documents headed "APPLICATION FORM" and "MANDATE FORM" respectively. Other documents provided were deposit slips and/or bank printouts, accompanied in some instances by correspondence from Complainants to respondent advising of deposits.

[15] As will become clear no document evidencing any form of compliance with the FAIS Act was provided. In fact to do justice to the many and varied contraventions of the FAIS Act and the Code would be voluminous. As such, and in the interests of brevity, I confine myself in this determination to some of the more pertinent breaches.

## F. JURISDICTION

[16] The Respondent makes the point that the Ombud has infringed its granted authority. It is the understanding of the respondent that the FAIS Ombud is there to deal with financial institutions which do not fall within the jurisdiction of any other Ombud scheme or where there is uncertainty over jurisdiction. Put simply, the respondent is of the view that this Office lacks jurisdiction to entertain this and other complaints lodged by Complainants against him.

The basis of this Office's jurisdiction is that the Respondent rendered financial services to complainant as contemplated in the FAIS Act. He does not dispute that the investments in question were made through him. This brings the matter squarely within the jurisdiction of the FAIS Ombud.

[17] The Ombud does not assume any jurisdiction over the companies introduced by the Respondent to his clients, as was suggested by the Respondent's attorney.

[18] I now deal with the Respondent Attorney's submissions:

18.1 The criticism that the Complainants are resorting to "a last resort" by approaching the Ombud instead of first exhausting their remedies against the entity in which the investments were made, is of no substance.

18.2 It is not in dispute that GAREK and related companies have no assets and that their shares are entirely worthless. There is no prospect that the Complainants will recover any part of their investment from GAREK.

18.3 These proceedings are not an infringement of the Respondent's constitutional rights to remain silent when a criminal investigation is pending. As far as this Office was able to ascertain, the Respondent is currently not facing any prosecution.

18.4 The Respondent nevertheless did not make any election to remain silent, on the contrary he responded to this Office's request in terms of Section 27 of the FAIS Act.

The Respondent further made out no case that the provisions of Section 27 are unconstitutional.

18.5 The Respondent's attorney denies that Respondent pressurised the Complainants to invest. This submission must equally be rejected. On the evidence before me, the Respondent's *modus operandi* in respect of all of his investments was to entice his clients to invest quickly or else the opportunity would pass.

18.6 Respondent's attorney states that the Respondent had no control over the time of listing nor did he make any excuses on behalf of GAREK. The Respondent's attorney simply missed the point. In as much as the Respondent had no control over the listing he nevertheless conveyed

dates to his clients on the basis that he had verified them and that they were true.

18.7 Respondent also failed to give a full explanation to his clients of the risks inherent in such investments.

## **G. FINDINGS**

[19] For reasons set out in the following determinations:

- i) A.J. HARE and ANOTHER vs. ANDRE VAN DER MERWE case no. FOC 2759/06-07 KZN (1) A and
- ii) L.W.WHEELER and ANOTHER vs. ANDRE VAN DER MERWE case no. FOC003586/09-10/KZN 1,

I find that the Respondent is in breach of the FAIS Act and Code of Conduct.

[20] As a result of such a breach the Complainants were induced into investing in a financial product that was high risk and entirely unsuitable for the Complainants' profile.

[21] I also find that it was the result of such breach that Complainants lost their investment, which now effectively resides in a block of worthless shares.

[22] In the result I find that Respondent must be held liable for the Complainants' loss.

## **H. QUANTUM**

[23] The total amount of the Complainants' investment, which falls within the jurisdiction of this Office is R20, 000. 00. It is recommended that the Complainants' seek legal advice on how to recover the remainder of their investment against the Respondent, the GAREK companies and directors.

23.1 Since making the investment Complainants received absolutely no return from the investment and even lost the capital.

23.2 It would be appropriate to make an order that in addition to re-paying the capital, Respondent must be ordered to pay interest on the capital from 28<sup>th</sup> of May 2008 to date of payment.

## **I. ORDER**

I make the following order:

1. The complaint is upheld.

2. The Respondent is ordered to pay:-

1<sup>st</sup> Complainant the amount of R5 000.00

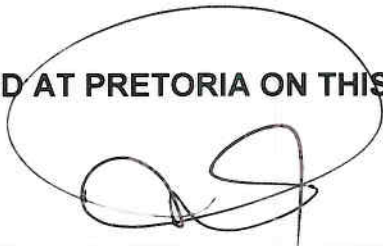
2<sup>nd</sup> Complainant the amount of R15 000

2.1 Interest on the amount of R5 000 at the rate of 15, 5% from the 28<sup>th</sup> May 2008 to date of final payment.

2.2 Interest on the amount of R15 000 at the rate of 15.5 % from the 30<sup>th</sup> of July 2008 to date of final payment.

3. The Respondent is ordered to pay the case fee of R1, 000.00 within 30 days from date of this determination

**DATED AT PRETORIA ON THIS 19<sup>th</sup> DAY OF JANUARY 2011.**



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**NOLUNTU N. BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**

