

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA.

CASE NO. FOC 06348/09-10/KZN 1

In the matter between:

JOHANN GEORGE VENTER

1st COMPLAINANT

ANNA MARIA VENTER

2nd COMPLAINANT

and

ANDRE VAN DER MERWE

RESPONDENT

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

A. THE PARTIES

[1] The 1st Complainant is Mr Johann Venter an adult male businessman residing at Uvongo

[2] The 2nd Complainant is Mrs Anna Maria Venter an adult female bookkeeper, residing at Uvongo.

[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. There have been many other investors who invested in this scheme. They have lost millions of rand in the process. This Office is seized with a number of complaints relating to financial services rendered in the course of recommending investments in the GAREK scheme.

[5] 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).

[6] Essentially the GAREK scheme involved the formation of various companies which solicited investments from members of the public through the sale of unlisted shares.

[7] 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).

[8] 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).

[9] 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

[10] The 1st Complainant met the Respondent at the school where both their children attended. They also attended the same church meetings and they talked a few times. During year 2007 the Respondent visited the

Complainant at work and asked him if he could look at his insurances as he is a broker and he might be able to help him with his insurance policies.

10.1 The Respondent arranged one of the 1st and 2nd Complainant's policies to be paid out as the future value would not be adequate. The Respondent later visited the 1st complainant at work to tell him about a wonderful opportunity to invest in an offshore oil company.

10.2 Later in the year 2007 the Complainants were introduced to African Gulf Energy (AGE) shares and were provided with information by Respondent on the company and its prospects. The Respondent further advised the Complainants that the listing was very soon and that it would be listed by the latest June/July 2008. According to the 1st Complainant, the Respondent encouraged investment in GAREK on the basis that the pre-listing share was a bargain and imminent listing will result in a substantial increase in the value of the shares. In order to benefit from the listing, Respondent advised complainants to invest immediately as the time was fast running out and the listing was due to happen very soon.

- 10.3 The Respondent promoted the company in glowing terms and made much of the fact that he himself had invested in AGE by taking a huge bond on his own house as well and pointed out his credibility.
- 10.4 During the meeting between the 1st Complainant and the Respondent the latter emphasised that this investment was conducive to the Complainants future financial requirements.
- 10.5 According to the Complainants, no proper needs assessment was carried out and no interviews were conducted to assess whether this investment was appropriate for the Complainants and his family's future financial requirements or their present financial position.
- 10.6 The challenges that lay ahead for AGE and the risks associated with the investment were never mentioned or discussed.
- 10.7 It is now common cause that the proposed imminent listing of the purchased shares never materialised. The Respondent further advised the Complainant that for various reasons, the

listing dates were being postponed. Again none of these dates actually materialised.

10.8 As such and acting on the advice of the Respondent, the investments were made.

10.9 On the 1st of April 2008 both Complainants invested R50, 000.00 into the Respondent's account and the 2nd Complainant further invested R20, 000.00 into the Respondent's account. The Total amount invested by the Complainants amounts to R 70,000.00. To date almost 3 years later no listing has taken place.

10.10 Complainants are requesting return of the money that they invested plus interest on it from the 1st of April 2008.

D. THE RESPONSE

[11] 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".

11.1 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:

- 11.2 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.
- 11.3 The Respondent contends that the matter has not been resolved with the Complainant and allegations raised by the Complainants are rejected, based on the following reasons:
 - 11.4 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 his 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.

11.5 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.

11.6 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.

11.7 The Respondent was never aggressive at any time and did not pressurise complainants to invest;

11.8 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;

11.9 The Respondent states that he never made excuses, about the facts, he merely conveyed what management of the investment companies had stated.

- 11.10 Respondent denies that prospectuses were prepared or necessary as all the shares were traded on a re-sale basis.

E. THE ISSUES

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

- 12.1 Jurisdiction of this Office over the Respondent.
- 12.2 Whether the respondent rendered the financial service herein negligently and/ or in a manner which is not compliant with the FAIS Act;
- 12.3 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
- 12.4 The respondent was required to provide a copy of his entire file of papers. In this regard the only documents provided by respondent were a one-page document 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.

12.5 As will become clear no document evidencing any form of compliance with the FAIS Act was provided.

12.6 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 shall confine myself in this determination to some of the more pertinent breaches.

F. JURISDICTION

[13] The basis of this office's jurisdiction is that the Respondent is a licensed intermediary in terms of the FAIS Act and does not dispute that the investments in question were made through him as a financial service provider. This brings the matter squarely within the jurisdiction of the FAIS ombud.

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

[15] It would be convenient at this stage, for reasons that would become clear in the rest of this determination, to deal with the Respondent Attorney's submissions:

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

15.2 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 Complainant will recover any part of his investment from GAREK.

15.3 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.

15.4 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.

15.5 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 will pass.

15.6 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.

15.7 In as much as the Respondent had no control over the listing he never the less conveyed dates to his clients on the basis that he had verified them and that they were true.

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

G. FINDINGS

1. For reasons set out herein and 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

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

1.3. The Respondent is liable for the Complainants' loss.

2. 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.

3. 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.

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

H. QUANTUM

1. The amount of the investment was R70.000, 00. The investment was made on the 1st April 2008.
2. Since making the investment Complainants received absolutely no return from the investment and even lost the capital.
3. 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 1st April 2008 to date of payment.

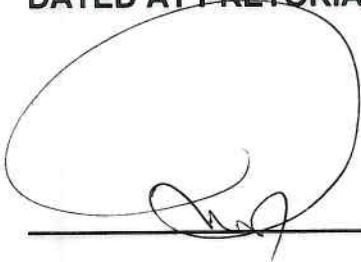
I. ORDER

I make the following order:

1. The complaint is upheld.
2. The Respondent is ordered to pay the Complainants:

- 2.1 The amount of R70,000.00
- 2.2 Interest on the amount of R70.000.00 at the rate of 15,5% from the 1st April 2008 to date of payment
3. The respondent is ordered to pay the case fee of R1, 000.00 within 30 days of date of this determination.

DATED AT PRETORIA ON THIS 4th DAY OF NOVEMBER 2010

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a smaller 'B' and some trailing lines, positioned above a horizontal line.

NOLUNTU N. BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

$$x^2 - 1 = (x-1)(x+1)$$

Therefore, the prime factors of $x^2 - 1$ are $(x-1)$ and $(x+1)$.

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