

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 00688/07-08 KZN 1

In the matter between:

STEPHANUS MALCOLM VAN DER MERWE

FIRST COMPLAINANT

CHARL VAN DER MERWE

SECOND COMPLAINANT

and

JOHAN WILLEM VAN DER WALT

RESPONDENT

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

A. THE PARTIES

[1] The 1st complainant is Mr Stephanus Malcolm van der Merwe, a pensioner residing at Dolphin Caravan Park, Ballito, KwaZulu-Natal.

[2] The 2nd complainant is Charl van der Merwe, 1st complainant's son and a business analyst currently residing in Queensland Australia. At all material times 2nd complainant was represented by 1st complainant.

[3] The respondent is Mr Johan Willem van der Walt, who at all relevant times was an authorised financial services provider, with FSP 210. Respondent is currently retired and residing at unit 41, Faerie Glen Estates, Faeire Glen Road, Margate.

B. BACKGROUND

[4] Respondent had been 1st complainant's investment adviser since his retirement in 1993. It was in this capacity that respondent initially advised 1st complainant to invest in two separate entities namely African Health Investors Fund ('AHIF') and Jansk International Ltd ('Jansk').

[5] Turning first to AHIF, in the first half of 2004 respondent advised 1st complainant that AHIF was to be incorporated into a large company known as Imuniti Holding Limited ('Imuniti'), and that as an existing AHIF shareholder, 1st complainant could either have his shares paid out alternatively buy preferential shares therein with his AHIF funds. Respondent advised him that this was a fantastic opportunity and strongly recommended that he invest therein. The shares were to earn dividends at 15% payable half yearly.

[6] In respect hereof 1st Complainant received correspondence, both from respondent and an attorney Dr NAJ van Rensburg stating that a trust namely the AHIF Investment Trust had been set up to administer investors interests. The trustees whereof being the respondent and Dr NAJ van Rensburg. Investors could become a beneficiary of the trust, thereby becoming eligible for the conversion of the investment in the trust into Imuniti Holdings.

- [7] Persuaded by respondent that this was the chance of a lifetime which the man in the street does not normally qualify for, 1st complainant elected not to only reinvest but added an additional R150 000 on the 27th July 2004.
- [8] Whilst important both from a background perspective and complainants' understanding of Imuniti and AHIF, this investment as well as prior holdings in AHIF predate the jurisdiction of the Office, namely the 30th September 2004.
- [9] However post the 30th September 2004, in a facsimile to 1st complainant dated 10th November 2004 respondent advised that existing members would get preference to apply for additional shares. These shares would qualify for the same benefits as existing shares but requests had to be in by the end of November 2004.
- [10] Convinced of the merits of the investment, 1st complainant acting on behalf of 2nd complainant invested R100 000,00 on 30th November 2004.
- [11] Various delays followed with the actual listing only occurring on or about the 1st July 2006. The 2nd complainants share certificate is dated 4th September 2006.
- [12] In little over a year the share price declined to a fraction of its original purchase price.

JANSK

- [11] In so far as the investment Jansk is concerned; 1st Complainant had an existing investment in Jansk a public company incorporated in the British Virgin Islands. This entity was formerly a 100% shareholder of Gardener-Ross Holdings Limited.
- [12] Jansk was subject to an investigation by the Financial Services Board, subsequent to which South African investors' interests, including those of 1st complainant were converted into preference shares in Gardener-Ross Holdings Limited.
- [13] This was affirmed in a facsimile from respondent to 1st complainant dated 23rd May 2005 which stated that 149 427 preference shares were to be issued with a fixed dividend of 18.75% per annum from 1st March 2005 until the redemption date of 28th February 2007.
- [14] Around October/November 2005 respondent informed 1st complainant that Gardener-Ross Holdings were being incorporated into a new company to be known as Acc-Ross Holdings Limited which was to list on the JSE. Respondent strongly recommended that he buy shares in Acc-Ross as the prospects were very good that he would treble his investment.

- [15] Acting on respondent's advice that the investment would purchase discounted preference shares in Acc-Ross with an annual dividend of 18.75%, 1st complainant completed the forms provided by respondent and deposited R360 000,00 on the 28th November 2005.
- [16] Supposedly to ensure that this investment was correctly allocated and received the same benefits as that of the original Jansk/Gardener-Ross investment particularly the 18.75% annual dividend, respondent instructed 1st complainant to write his Jansk/Gardiner-Ross investment number on the deposit slip.
- [17] This understanding was confirmed in correspondence dated 21st February 2006 wherein respondent specifically referred to the 18.75% dividend payments in respect of the R360 000 investment.
- [18] Shortly thereafter 1st complainant began to question whether the R360 000 had indeed bought normal Acc Ross shares as opposed to preference shares. Thus in June of 2006 he met with respondent in an attempt to clarify the issue. The shares had at this point fallen to around 30cents and he was concerned that he had lost a major portion of his money. He was relieved when respondent confirmed that none of his money had purchased shares in Acc-Ross and was in fact still earning dividends at 18.75%. At the meeting respondent gave him a copy of an Acc-Ross share certificate in his name, but stated that it had been incorrectly issued and that he would sort it out.

¹ This does not accord with the application form which reflects 1st complainant as having paid the full price for ordinary shares and not preference shares.

- [19] This assurance was short lived. On the 20th December 2006 1st complainant wrote to Mrs Rochat at Acc-Ross Holdings to clarify the situation. There was some backwards and forwards communication to clarify details but on the 19th February 2007 Mrs Rochat confirmed that not only had the R360 000 investment been in ordinary Acc-Ross shares all along, as opposed to preference shares with an 18.75% dividend, but the original Jansk investment as referred to in paragraph 15 had also been converted into ordinary Acc-Ross shares. It had been the understanding that these would be redeemed on the 28th February 2007.
- [20] However, yet again in an e-mail dated 12th February 2007 respondent advised 1st complainant that his Acc Ross shares of R360 000 were added to his Jansk investment and would reflect in the Computershare certificate as preference shares with a dividend of 18.75% per annum.
- [21] 1st Complainant challenged respondent on the differing versions, to which respondent replied via an e-mail on the 22nd February 2007, stating that this was an error that had been rectified last year at the request of Mr Adolphe Botha, a previous director of Jansk who had now been appointed by Acc-Ross to close the Jansk/Gardener Ross investments.
- [22] However in subsequent correspondence addressed directly to Mr Adolphe Botha he confirmed Mrs Rochat's version.

[23] In any event whilst the shares themselves were up on the first day of listing², thereafter they declined substantially in value before recovering to their original value in November of 2008 when Acc-Ross merged with Pinnacle Point Holdings. However shortly thereafter they went into free-fall and eventual liquidation on the 2nd November 2011.

[24] There is little if any chance that 1st complainant will recover any of his investment according to him.

C. RESPONDENT'S VERSION

[25] In respect of the Imuniti complaint, the essential basis of respondent's defence was simply to question how the 1st complainant as an adult could have made his decisions without proper consultation or having been provided all necessary information as required in terms of the FAIS Act. Additionally he states that information was provided by way of a prospectus which complied with all the JSE listing requirements.

[26] However, despite being requested to provide a copy of his file, respondent provided no documentation to support either his version nor anything evidencing any compliance with the FAIS Act.

[27] As for the AHIF investment trust which had supposedly been set up to

² 1stComplainant only received his share certificate more than a year later.

administer investor's interests, respondent stated that he had been released as a trustee and therefore deferred queries to Dr NAJ van Rensburg.

[28] Dr van Rensburg in turn stated that AHIF was liquidated and thus no trust was registered and no money had been received for distribution.

[29] He expounded upon this by stating that a Mr Louw from AHIF then came up with the idea to repay investors by raising money which would then be deposited in a trust and distributed by the respondent and Dr van Rensburg. As Mr Louw could not raise the money no trust was ever registered.

[30] As an alternative Mr Louw offered investors' shares in Imuniti Holdings, being a project which Mr Louw and a business associate were developing to distribute generic medicines.

[31] It is perhaps apropos to point out that in a letter dated the 8th of October 2004 Dr van Rensburgh confirmed not only the existence of the trust but the fact that it was set up to ensure that the administration process progressed in an orderly manner. Likewise a facsimile from respondent on the same date makes reference to the trust.

[32] Turning to the Jansk / Gardener- Ross complaint, respondent once again did not provide any documentation evidencing compliance with the FAIS Act but did reply as follows:

- 32.1. 'Let me start with Mr van der Merwe's accusation that he was misled regarding the process of the R360 000 investment for which he received a share certificate from Acc Ross Holdings Ltd. This was never intended to happen and I was not responsible. This is how it came about.'
- 32.2. 1st Complainant had an investment in Jansk International Ltd. During 2004; brokers were notified that Jansk Investments was being returned and that administration would continue on the same benefits to investors to accommodate the fund in South Africa.
- 32.3. Correspondence from Gardener Ross Holdings Limited dated 18th April 2005 stated that Gardener Ross Holdings preference shares were issued to the Jansk Investors. These preference shares, with a preference dividend yield of 18.75% per annum for the 2 years ending 28th February 2007 are redeemable on 29th February 2008 at R1.00 per preference share.³
- 32.4. 1st Complainant had R360 000 to invest and respondent recommended that he add it to the existing Jansk investment. Respondent was told by Mr Jac de Beer⁴ that a Jansk investor may add to his investment by placing a deposit with Watermark Securities Trust account, and quoting the existing Jansk Investment no.

³ Gardener Ross Holdings Limited letter dated 3rd May 2005, with reference to the preference shares states 'The nature and profile of the subsidiaries and projects of Gardener Ross Holdings Limited, as well as the 18.75% dividend coupon for the next 2 years makes this an attractive investment vehicle which is fully tradable, with a clear redemption value.'

⁴ Gardener Ross Holdings Limited letter dated 3rd May 2005 reflects him as the Chief Operating Officer.

- 32.5. However, when it came to ascertaining the value of the investment and obtaining share certificates; it was impossible to make contact with Mr Jac de Beer over a period of 12 months and longer. Respondent then tried to contact Mr Adolphe Botha and was told that he had left Jansk International.
- 32.6. Later attempts to ascertain the position regarding the Jansk Investors were unsuccessful, this despite contacting Mr Botha and attempts⁵ to take this up with Mr de Beer he was unsuccessful.
- 32.7. In March 2006 respondent was contacted by a Mr Paul Davids, a director of Watermark Securities who phoned to collect a list of Jansk International clients. Apparently he had been appointed by Mr Jac de Beer to dematerialise the Computer Share certificates. Watermark securities then sent Acc-Ross Holdings share certificates to all Jansk members even if they did not apply for Acc-Ross shares⁶.

D. DETERMINATION

- [33] 1stComplainant is a pensioner for whom the funds in Imuniti and Jansk/Gardener Ross represented a substantial portion of his retirement savings. These were funds that 1st complainant was in no position to gamble with. Respondent was well aware of this, having been 1stcomplainants

5 According to respondent e-mails, sms's and phone call were not responded to

6 See paragraphs 51 to 58

financial adviser as far back as 1993. Whilst no less excusable, 2nd complainant is still at a comparatively early stage in his working career, and thus in a better position to recover from losses.

[34] Respondent does not dispute complainant's allegations that respondent advised them to invest in either Imuniti or Acc-Ross, but primarily attempts to justify this with the bald allegation that 1st and 2nd complainants were provided with the prospectus and necessary information as required by the FAIS Act, thereby enabling them to make an informed decision.

[35] However despite being afforded ample opportunity to do so, respondent has failed to provide any documentary evidence of any compliance with the FAIS Act and General Code in respect of either of the investments. In particular documentation required in terms of sections 8 of the General Code which speaks to the appropriateness of the product in terms of his clients' risk profile and financial needs; a record whereof is required in terms of section 9 is absent. There is not even so much as a disclosure of the charges or commission as required by section 3 of the General Code.

[36] On its own the complete lack of compliance is reason for concern, but it becomes particularly disconcerting when one realises that in respect of the investment into Imuniti, 1st complainant who handled the investment on behalf of 2nd complainant appears to have been intentionally misled by respondent. I can come to no other conclusion given what follows in so far as the history and relevant correspondence from respondent are concerned.

- [37] As set out in para 5 and 6, 1st complainant was advised that AHIF was to be incorporated into a large company known as Imuniti, a trust having been set up to assist with the conversion of AHIF shares into Imuniti.
- [38] All indications now point to this having been a fabrication, with no trust ever having existed. Queries in respect thereof resulted in respondent claiming to have been released as a trustee, and Dr van Rensburg advising that that AHIF was liquidated and without funds no trust could be set up.
- [39] As pointed earlier in paragraph 32 Van Rensburg's version directly contradicts his earlier correspondence to complainants. In a letter dated 19th July 2004 he assures investors that their investment is secure, a trust having been set up. On the 8th October 2004 he again confirms the existence of the trust, with its trustees being himself and respondent. Respondent's correspondence such as the letters of the 22nd July 2004 and 12th October 2004 echo Dr Van Rensburg's letters.
- [40] In reality what was portrayed by respondent as the opportunity of a lifetime, being the successful conversion of existing shares in AHIF into a large company known as Imuniti via a trust was nothing of the sort.
- [41] Imuniti was a totally new and speculative venture with no track record whatsoever, Complainants were given to understand that 2nd complainant's

investment of R100 000, 00 would derive the same benefits as existing shares⁷ namely a dividend of 15% payable half yearly. The application form and deposit slip, reflects R100 000,00 being paid into the NAJ van Rensburg Trust on the 30th November 2004. However Imuniti only listed much later on or about July 2006, and complainants contend that no interest or dividends were paid either in respect of this or prior investments.

[42] Accordingly the Office directed queries to respondent to account for the method of investment and interest earned as well as the authority under which the monies were held in trust.

[43] That respondent failed to reply to these questions, in of itself speaks volumes.

[44] No doubt, had complainants been aware of the true state of affairs; they would have been reluctant to invest further. It is inconceivable that respondent was unaware of this, especially given that not a single bit of his correspondence corrects the original version that a trust had been formed. This leads me to conclude that he deliberately cultured the impression that all was well in order to induce complainants to make additional investments such as the R100 000,00 of 2nd complainant in November 2004.

[45] This was then followed up with 1st complainant's investment of R360 000,00 which respondent led him to believe would purchase preference shares in

⁷Shares in AHIF which at that point no longer actually existed

Acc-Ross with an annual dividend of 18.75% at a discounted price.

[46] Respondent does not dispute that he rendered this advice but as set out in paragraph 33 contends that he was not responsible for the R360 000, 00 being invested in ordinary Acc-Ross shares as opposed to preference shares. However the application form clearly refers to ordinary shares as opposed to preference shares, and certainly no documentation on file supports respondents' version. In fact the only documentation referring to preference shares is respondent's own correspondence to 1st complainant.

[47] Respondent had been 1st complainant's adviser since 1993, and was aware that this was 1st complainant's retirement money that he was dealing with. Despite the obvious need to preserve capital the uncontested evidence points to a history of investments into high risk single stock unlisted shares, resulting in 1st complainant sustaining irrecoverable losses. The investment into Acc-Ross was no different.

[48] 1st Complainant already had a sizable portion of his family's retirement savings invested in Jansk/Acc-Ross a single entity; such that the recommendation to invest the additional R360 000,00 was so grossly reckless as to be akin to placing most of your eggs in one basket.

[49] Given what is now clear about respondent, the non-disclosure of commission earned, lack of record keeping and non-compliance with the FAIS Act there is

every likelihood that respondent intentionally misled 1st complainant. The contraventions of the FAIS Act are however so egregious that it is not even necessary for me to make a finding on whether 1st complainant was intentionally misled.

[50] It remains for me to deal with the 149 427 preference shares in Gardener-Ross, being a conversion from the original Jansk shares (see paragraph 15) which were supposed to be redeemed on the 28th February 2007.

[51] These shares were however never redeemed but instead converted into ordinary shares in Acc-Ross. Whilst the original advice to invest in Jansk was rendered well before the inception of the FAIS Act and outside the FAIS Ombuds' jurisdiction, the conversion occurred in early 2007 which if as originally believed had occurred as an act by the respondent, would have brought this within the jurisdiction of the FAIS Ombud.

[52] However extensive enquires by the Office eventually led to the conclusion that Acc-Ross/Gardener-Ross had carried out the conversion without authority from either 1st complainant or respondent.

[53] Certainly attempts to obtain a copy of any such document were ignored by Arcay Client Support, whom the Office had been referred to by Computershare.

- [54] The Office addressed e-mails to a Ms Cidalina Rodrigues, Assistant Company Secretary at Arcay client support on the 22nd April 2010 and a Ms Krastanov also of Arcay on the 12 April 2010 and despite following up no actual assistance was received.
- [55] In a letter from Acc-Ross dated 13th February 2006 addressed to whom it may concern and confirming the role played by Arcay I note the following paragraph 'Acc-Ross is being introduced to the Altx by designated advisor Arcay Corporate Services. Michelle Krastanov of Arcay Corporate Services concluded,' ...
- [56] In a letter of 14 July 2010 Computershare stated that 'there were 157 preference shareholders within Gardener Ross Holdings Limited, who elected to take up shares in Acc-Ross Holdings through redemption of their preference shares in lieu of cash and it appears that Mr van der Merwe was included in this transaction.' Computershare went on to state that they never received copies of the application forms but only received a register from the issuer.
- [57] In short respondent's claim in paragraph 33.7 that Acc-Ross Holdings share certificates were sent to all Jansk members even if they did not apply for the conversion appears to be correct.

E. CONCLUSION

[58] Respondent fails to understand his role as provider, namely that of ensuring appropriate advice. It was his advice that led directly to the investments made by 1st and 2nd complainants. That this advice was both questionable and contrary to every provision of the FAIS Act is irrefutable.

[59] In fact it should come as no surprise to learn that respondent was never authorised in terms of section 7 (1) of the FAIS Act to sell shares in the first place.

In the premises I make the following:

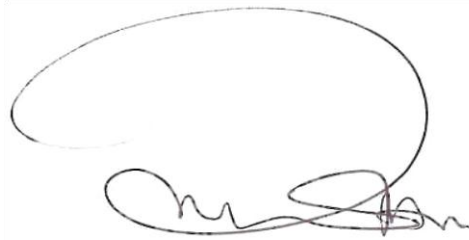
ORDER

1. The complaint is upheld;
2. Respondent is order to pay complainants as follows;
 - 2.1 1st Complainant in the sum of R360 000,00 plus interest thereon at the rate of 15.5% from the 28th November 2005 to date of final payment;
 - 2.2 2nd Complainant in the sum of R100 000.00 plus interest thereon at the rate of 15.5% from the 30th November 2004 to date of final payment;
3. Respondent is to pay a case fee of R1000,00 to this office within 30 days of the date of this order.

Upon compliance with the order, the share certificates are to be tendered to

respondents according to payment.

DATED AT PRETORIA ON THIS THE 30th DAY OF MARCH 2012.

A handwritten signature in black ink, consisting of a large, rounded loop at the top and a series of smaller, connected loops below it, all contained within a thin black rectangular border.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS