

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 4935/09-10/ WC (1)

In the matter between:

N HIGHAM

Complainant

and

D S CATSICADELLIS

1st Respondent

R W L RABIE

2nd 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 Complainant is Naomi Higham, an adult female residing in Kenilworth, Western Cape.
- [2] The 1st Respondent is Deolene Susan Catsicadellis ('Catsicadellis'), previously McMaster an adult female, residing at No 7 Teuton, Melkbosstrand, Western Cape.
- [3] The 2nd Respondent is Reginald William Lynton Rabie, ('Rabie') an adult male

residing at 9 Muscadel Street, Wellington, Western Cape.

B. BACKGROUND

- [4] Relevant to this complaint is the existence of several corporate entities, namely Blue Platinum Ventures 80 (Pty) Ltd t/a Blue Platinum Investments ('Blue Platinum'), Merlin's Private Equity Fund Ltd, and iBear Global Investment Strategists (Pty) Ltd.
- [5] The role of Catsicadellis as a director of Blue Platinum has already been addressed in a prior determination¹ emanating from this Office.
- [6] Blue Platinum was never an authorised financial services provider, the license application in which Catsicadellis applied as the key individual was rejected by the registrar of the Financial Services Board ('FSB'). The rejection was based on the fact that Catsicadellis did not comply with the requirements of personal character, honesty, integrity, competence and operational ability.
- [7] In fact the Financial Services Board carried out an inspection into Blue Platinum and Associated Institutions in terms of section 3 of the Inspection of Financial Institutions Act No. 80 of 1998.
- [8] This report held that 'McMaster is the person responsible for managing and overseeing BPI's activities on a day-to-day basis.'
- [9] The Companies and Intellectual Property Registration Office no longer reflects Blue Platinum as being registered and it appears to have ceased to exist.

¹ E M Nel vs D S Catsicadellis and V Badenhorst FOC 2908/08-0 KZN 1

- [10] With regard to Merlin's Private Equity Fund Ltd, and iBear Global Investment Strategists (Pty) Ltd, documentation submitted by complainant reflects Rabie as a director '(Managing and CEO)' of the former and managing director of the latter.
- [11] Whilst National Gazette No 31877 of 20th February 2009 lists iBear as being deregistered, the iBear website is still up and running and an e-mail communication from Rabie to complainant's attorney dated October 2011 in the Bowen² determination emanates from this web address.
- [12] With regard to Merlin's Private Equity Fund, this company was never registered and despite being challenged on this, no response was received from Rabie.
- [13] Needless to say neither of these entities was ever registered as a financial services provider.

C. COMPLAINT and BACKGROUND

- [14] In January 2006 and having heard about Blue Platinum through a work colleague complainant contacted Blue Platinum and dealt with Ingrid Petersen. Petersen extolled the benefits of investing in the Diamond Trading Fund and in an e-mail on the 23rd January 2006 forwarded the 'Diamond Trading Fund information and mandate' along with Merlin's Diamond Trading Fund website address.

[15] The Diamond Trading Fund documentation promised the following benefits inter alia:

- 15.1. That the Merlin's Private Equity Fund, Diamond Trading Fund complied with all the necessary documentation, permits and tax requirements;
- 15.2. A minimum return of 10.66% per investment cycle, with the potential for as much 15 to 20% or even a 45 to 60% return over the full 12 months;
- 15.3. Three investment cycles over the 12 month period, with the possibility of a fourth.
- 15.4. Guarantee on the initial investment capital;
- 15.5. Highly liquid investment realizable within one weeks' notice.

[16] The client application form headed Blue Platinum Investments client, client application form purchase offer for Merlin's Diamond Trading Fund states as follows:

- 16.1. The offer being for a certain number of ordinary shares subject to the memorandum and articles of association of the company. Investors therein being deemed to understand the risk of private equity or unlisted investment opportunities and the suitability of the investment.
- 16.2. Blue Platinum acts only as a broker and is not responsible for the issuing of share certificates, and neither does it give any assurances as to the accuracy of the documentation.

[17] The bank account set out on the application form and into which complainant

- deposited the R5 000, 00 investment on the 10th April 2006 is that of Blue Platinum.
- [18] In early 2008 complainant received a letter from Catsicadellis at Blue Platinum informing her that iBear will undertake all clerical work relating to your investment. This went on to say that 'iBear has already managed and controlled your investment since the inception of your agreement with them and will continue to do so.
- [19] In an e-mail addressed to iBear and Merlin's Fund on 28th November 2008 complainant advised that she wished to terminate her investment and enquired as to the process. In response thereto she was advised that a month's calendar notice was required before the end of the cycle, and then 14 to 21 days before the monies reflected in her bank account.
- [20] Complainant immediately provided the requisite notice along with her banking details. However as at February 2009 no payment had been received and complainant pursued the matter only to be eventually informed that her funds had been reinvested in error. Supposedly they would now be paid out in June 2009.
- [21] Needless to say no monies were received in June and as detailed in her complaint 'after numerous phone calls and emails sent to iBear members namely: William Rabie and Elaine Meyer, I have not been paid out my investment to date. William Rabie and Elaine Meyer cannot give me an answer as to why I have not been paid out,'
- [23] Instead various promises and excuses were proffered amongst which were

the request for FICA (Financial Intelligence Centre Act) documentation. To date complainant has not received her monies.

[24] Complainant then turned to this Office with the request that the matter be investigated and her monies returned.

D. RESPONSE

[25] The Office referred the complaint and its attendant documentation to respondents with a request that they address the allegations made by complainant, in light of the requirements of the FAIS Act. In addition they were required to provide copies of their complete file of papers relating to this matter.

[26] As part of our request that Blue Platinum/Catsicadellis provide evidence of compliance with the FAIS Act they were specifically required to address the allegation that complainant had been inappropriately advised.

[27] With regards to Rabie he was additionally requested to deal with the marketing of the Merlin's Private Equity Fund or Diamond Trading Fund given that neither was registered, in terms of either the Companies or FAIS Act's.

[28] Neither respondent replied thereto.

E. DETERMINATION

[29] Now as already stated, none of these corporate entities continue to exist, that

is even when they did so in the first place.

- [30] However as detailed in the determination of E Barnes vs D Risk Insurance Consultants CC and Deeb Raymond Risk FAIS 6793/10-11/GP1(2) at paragraphs 32 to 35, it is the key individual or controlling individual in a registered entity that is responsible to satisfy the registrar that they are fit and proper. Authorization is approved through the key individual themselves.
- [31] This being the very reason which excluded Catsicadellis and Blue Platinum from approval as an authorised financial services provider in the first place.
- [32] In this case whilst Catsicadellis and Rabie were not approved as key individuals they attempted to act as such by being in control of the companies or entities such as they existed. Their contempt for the provisions of the FAIS Act and the illegality of their actions cannot allow them to escape the responsibilities that follow from attempting to assume such a position.
- [33] It is for this very reason they themselves are the parties cited in this determination.
- [34] Given that respondents were afforded an opportunity to reply and omitted to do so, I must determine the matter on the documentation presented by complainant. It bears noting that as in the Bowen determination there is also a fair degree of relevant correspondence between Rabie and complainant, none of which explains why complainant was never paid out.
- [35] As already mentioned neither of the respondents were authorised as a financial services provider as required by S 7.(1) of the FAIS Act which states that, 'a person may not act or offer to act as financial services provider unless

such person has been issued with a license under section 8.

[36] Whilst an offence in terms of section 36 (a) of the FAIS Act, section 7(2) thereof, provides for the enforceability of such a transaction entered into between a client and a financial services provider even though the provider had no authority to enter into such a transaction.

[37] Turning first to Catsicadellis I have already detailed the reasons for citing her personally, particularly given the fact that she was responsible for managing and overseeing BPI's activities on a daily basis.

[38] As mentioned in paragraph 17 complainant's funds were deposited into Blue Platinum's bank account. In this regard Blue Platinum was not authorised to accept funds in such a manner.

[39] This intermingling of funds is nothing new as evidenced by a paragraph from the FSB report which reads as follows:

'We further concluded that McMaster, in both BPI's 2nd and 3rd applications, misrepresented the fact to the Registrar that BPI had a separate bank account in which to receive client fundsall client funds were received in BPI's business account and such a separate account did not exist. This in our view constitutes fraud, alternatively contravention of section 36(b) of the FAIS Act.'

[40] Catsicadellis as the controlling force and key individual behind Blue Platinum had a responsibility to answer the allegations.

[41] Despite this no reply was received, which of course means that no

documentation evidencing any compliance with the FAIS Act was provided.

- [42] The risks inherent in the Merlin's Diamond Trading Fund or just how it suited complainant's needs were never discussed. On the evidence it is glaringly obvious that this investment and Petersen's conduct in recommending it was clearly inappropriate and a blatant disregard of the FAIS Act.
- [43] None of the specific duties of a provider as required by the General Code were complied with, not least of which included the requirement in section 3.(1) (a) (i) that representations must be factually correct. Blue Platinum, in paragraph 3 of the client application form clearly attempted to absolve itself of this when it stated that Blue Platinum 'makes no representations and gives no warranties of whatever nature in respect of the corporate documentation provided to applicants and its contents and attachments including but not limited to the accuracy or completeness of any information'
- [44] In this regard Catsicadellis ignores one of the principal requirements of the General Code that a provider act with due skill care and diligence. The application refers to the memorandum & articles of association of Merlin's Diamond Trading Fund, when no such company even existed.
- [45] This comes as no surprise given that complainant was induced to invest into this unapproved and unregistered entity by Ingrid Petersen a representative of Blue Platinum; itself unapproved. Petersen at all times acted under the direct control of Catsicadellis.
- [46] Any reputable financial services provider worth his salt would have queried how the returns per cycle could be both so lucrative and yet guaranteed. No

doubt Catsicadellis turned a blind eye to all of this in the interests of whatever commission was taken.

[47] Commission which in itself was not disclosed, in contravention of section 7. (1) (c) (vi) of the General code which requires that full and appropriate information as to 'the nature, extent and frequency of any incentive, remuneration, consideration, commission fee...' be provided.

[48] Now as for Rabie, it is his name on the Diamond Trading Fund documentation. The very same documentation that promised to guarantee capital, spectacular returns and a highly liquid investment all within a compliant environment.

[49] Section 3.(1) (a) (i) requires that representations made and information provided to a client by a provider must be factually correct. Given both the lack of reply and any accounting for the whereabouts of complainant's funds there can be no question that this documentation was intentionally misleading.

[50] Whilst he did not render advice he did render an intermediary service. The letter referred to in para 18 states that iBear had managed and controlled the investment since the inception of the agreement with complainant. None of this was disputed by Rabie. In addition statements infrequent as they were emanated from iBear.

[51] The definition of an intermediary service as contained in the FAIS Act includes 'managing, administering, keeping in safe custody, maintaining or servicing a financial product.'

[52] The numerous correspondences by complainant to iBear and Merlin's fund,

particularly those pertaining to the redemption of the investment as well as the the replies thereto are all indicative of this intermediary service.

- [53] In the instance there can be no question that Rabie provided an intermediary service.
- [54] Despite numerous attempts by complainant neither updated statements nor the promised funds have materialised. Instead as referred to in paragraphs 20 and 22 complainant has only received a litany of excuses.
- [55] iBear as already mentioned has been deregistered. The General Code of Conduct For Authorised Financial Services Providers (Board Notice 80 of 2002), provides in section 20 (a) (i) 'a provider must, subject to any contractual obligations, give immediate effect to a request of a client who voluntarily seeks to terminate any agreement with the provider or relating to a financial product or advice;'
- [56] Section 20 (b) provides that 'a provider other than a representative who ceases to operate as such, must immediately notify all affected clients accordingly and take, where reasonably necessary or appropriate in consultation with the clients and product suppliers concerned, reasonable steps to ensure that any outstanding business is completed promptly or transferred to another provider;'
- [57] Clearly the requirements of section 20 were ignored; a very material breach of the General Code which continues till today.

F. CONCLUSION

[58] Both respondents played their part in inducing complainant to invest. Whilst Petersen acted on behalf of Catsicadellis, she would have done so under the direction of Catsicadellis who controlled Blue Platinum.

[59] The documentation and its promised returns emanated from Rabie. Yet Rabie has not even attempted to explain what has happened to complainant's funds.

[60] Had complainant been made aware that none of the entities that she was dealing with were above board, and the guarantee not worth the paper it was written on; I have no doubt that she would not have made the investment.

[61] There can be no doubt that complainant was intentionally misled by both respondents, and as such they must be held jointly accountable for the loss.

[62] As for the quantum, the R5000,00 was deposited into Blue Platinum's account on the 10th April 2006. I have no hesitation in stating that this investment should not have occurred. It was at this point that complainant's funds were placed in jeopardy. Not only has complainant lost her capital but any interest which she might have earned from this point had the money been invested in a legitimate investment.

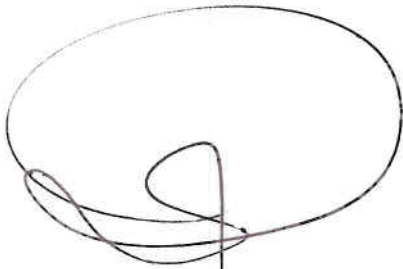
Accordingly I make the following order:

G. ORDER

1. The complaint is upheld.

2. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved the sum of R5000, 00 plus interest thereon from 10th April 2006.
3. The first and second respondents are ordered to pay the case fee of R1000, 00 to this office within thirty (30) days of date of this determination.

DATED AT PRETORIA ON THIS THE 15th DAY OF FEBRUARY 2012



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

