

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 0195/10-11/08 WC (1)

In the matter between:

A B BOWEN

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 NO. 37 OF 2002 ('FAIS ACT')**

A. THE PARTIES

[1] The Complainant is Andrew Brian Bowen, a self-employed male residing at Lagoon Beach, Milnerton in the 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 Catscadellis 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 Catscadellis applied as the key individual was rejected by the registrar of the Financial Services Board ('FSB'). The rejection was based on the fact that Catscadellis 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.

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

- [8] This report concluded 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.
- [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 Government Gazette No 31877 of 20th February 2009 lists iBear as being deregistered, the iBear website is still up and running and the last e-mail communication from Rabie to complainant's attorney dated October 2011 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

- [14] In 2005 complainant made an initial investment on the recommendation of

Antoinette Beattie ('Beattie') a representative, of Blue Platinum into Blue Platinum after he was introduced to it by his father. Although suspicious of the proffered returns he invested R10 000, 00 for a year. Upon maturity it paid out on time and with what complainant calls, a decent return.

[15] Complainant again met with Beattie and invested R100 000, 00 on 17th January 2006 in Merlin's Diamond Trading Fund. The Diamond Trading Fund appears to be a sub-fund of the Merlin's Private Equity Fund based on documentation which states 'Merlin's Private Equity Fund established a Diamond Trading Fund.'

[16] A facsimile from Antoinette Beattie dated 17th January 2006 confirms: 'your investment into Merlin's Diamond Trading Fund for 20 000 shares @ 500 cps for the total amount of R100 000.00.'

[17] According to complainant, every few months he was e-mailed or facsimiled statements which indicated that the investment was performing as expected.

[18] At the end of 2006 complainant was contacted by Beattie and asked whether he wished to reinvest the monies which at the end of the term amounted to R133 533.04.

[19] Complainant agreed thereto and a Blue Platinum form was signed by complainant on the 1st February 2007. This form contains the name Merlin's Diamond Trading Fund but importantly reflects the bank deposit account as

being in the name of Blue Platinum. The indicated amount is R133 533.04.

[20] At this point complainant requested that Rabie personally sign a document headed Merlin's Private Equity Fund and directly below Merlin's Diamond Trading Fund. The signed document which lists Rabie as a director was faxed through to complainant by Beattie on the same day.

[21] In this document under the heading 'Guarantee on Capital' it states 'the investment capital is guaranteed with a minimum gross return of 16% per investment cycle'. A cycle in this document is stated as being six months. Under 'Return on Investment' it states, 'The potential growth on the investment is a gross minimum of 16% on sales, to between 22.5% - 30% per cycle'

[22] The guarantee ties in with earlier correspondence from Rabie to complainant dated 16th January 2006 and headed Merlin's Diamond Trading Guarantee; wherein Rabie states, 'Not only does the investor enjoy a capital guarantee but also a minimum return on the investment funds which is achieved through the value adding of the cutting and polishing process.' This was on a letterhead of IBear Global Investment Strategists (Pty) Ltd ('IBear') listing Rabie as a director.

[23] According to complainant early in 2008 he received a facsimile from Catsicadellis of Blue Platinum informing him that IBear will undertake all clerical work relating to his 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.'

[24] Complainant states that because of the guarantee he never kept a close eye on the investment but noticed that he stopped receiving statements after 31st January 2009. After contacting Beattie around September/October 2009 he received a facsimile from Merlin's Private Equity Fund stating that there had been a negative return of 15.85% over the cycle ending 31st May 2009.

[25] On the understanding that he had a guarantee, given the correspondence referred to in paragraphs 27 and 28, complainant took up the matter with Beattie, IBear and Rabie in particular. As part of this correspondence, Complainant requested that his shares be sold and the funds deposited into his account. He also requested a statement.

[26] Despite various correspondence, neither the money nor the statement was ever received. Part of Rabie's explanation was that the matter was in dispute over the investment guarantee. Rabie contended that only the original capital was guaranteed as opposed to guaranteeing the returns going forward.

[27] Eventually in an attempt to resolve the matter, complainant addressed an e-mail to Rabie on 24th March 2010 wherein he agreed to accept the negative return in order to receive payment.

[28] To date and despite going to the trouble of contracting an attorney, who also

engaged in correspondence and discussions with Rabie, no funds have ever been received. This despite an e-mail from Rabie advising that the investment will be terminated on the 31st January 2011 and will reflect in complainants account 10-15 working days later.

[29] Instead various excuses were proffered ranging from FICA to the diamonds having been purchased by a foreign buyer.

[30] Additionally some of this correspondence even contained implied threats. I quote from an e-mail from Rabie to complainant's attorney dated 12th October 2011 wherein he states, 'It is my instructions that the other parties involved are extremely upset as some of them are sitting in Iraq (sic) and Afghanistan and perceive this very negatively. Some of them have already indicated the propensity for civil action should they be disadvantaged. This will drag out matters to ridiculous time frames. **Others my take the matter far more personally.**' (my emphasis)

[31] All of this in response to complainants simple attempts to get his money out of Rabie.

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

D. RESPONSE

[33] 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. Additionally they were required to provide copies of their complete file of papers relating to the rendering of financial services herein, B.

[34] As part of our request that Blue Platinum/Catsicadellis provide evidence of compliance with the FAIS Act their attention was specifically draw to complainant's allegation that he was not properly advised at the time that the financial services were rendered.

[35] 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.

[36] Neither respondent replied.

E. DETERMINATION

[37] Now as already stated, none of these corporate entities continue to exist, that is even when they did so in the first place.

[38] 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. This

is the reason which saw Catsicadellis and Blue Platinum precluded from approval as an authorised financial services provider.

[39] 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.

[40] It is for this very reason they themselves are the parties cited in this determination.

[41] 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 between Rabie and complainant there is a fair degree of complaint related correspondence which adequately ventilates the issues between them.

[42] 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'.

[43] 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.

[44] 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.

[45] As mentioned in paragraph 22 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.

[46] This intermingling of funds is also noted in the FSB report, which reads:-

'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.'

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

[48] Despite this no reply was received, which of course means that no documentation evidencing any compliance with the FAIS Act was provided.

- [49] This comes as no surprise. I must therefore conclude that there was indeed an infringement of the FAIS Act. Complainant was induced to invest into an unapproved and unregistered entity by Beattie a representative of Blue Platinum, itself unapproved.
- [50] 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 Beattie's conduct in recommending it was clearly inappropriate.
- [51] Beattie at all times acted under the direct control of Catsicadellis.
- [52] As for Rabie, whilst he did not render advice he clearly rendered an intermediary service. The correspondence from iBear dated 16th January 2006, as well as that from Merlin's Private Equity Fund forwarded on 1st February 2007 are both signed by Rabie personally. Both relate to the security and return on investment which induced complainant to invest.
- [53] The facsimile referred to in para 29 confirms that iBear had managed and controlled the investment since the inception of the agreement with complainant.
- [54] None of the documentation provided by complainant and forwarded to respondents has been placed in dispute.

[55] In the instance there can be no question that Rabie provided an intermediary service being, 'any act other than the furnishing of advice performed by a person for or on behalf of a client or product supplier-

a) 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

b) with a view to-

i) buying, selling or otherwise dealing in (whether on a discretionary or non- discretionary basis), managing administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;'

[56] The last statement received by complainant is for January 2009. Despite numerous attempts by complainant neither the updated statements nor the promised funds have materialised.

[57] Instead as referred to in paragraphs 30 and 31 complainant has only received a litany of excuses.

[58] 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;'

[59] 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;'

[60] Clearly the requirements of section 20 were ignored. This is a breach of the General Code which continues till today.

F. CONCLUSION

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

[62] Complainant was led to believe that he was investing in a fund with a guaranteed return. In fact he specifically requested that Rabie himself sign a document reflecting the guarantee. This document was facsimiled to him by Beattie.

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

[64] Respondents must therefore be held jointly accountable for the loss.

[65] As for the quantum, the Blue Platinum reinvestment form signed on the 1st February 2007 reflects an amount of R133 533-04 being deposited in Blue Platinum's bank account.

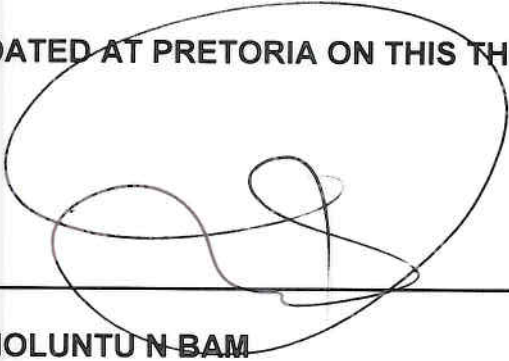
[66] I have no hesitation in stating that this reinvestment should not have occurred. It was at this point that complainant's funds were placed in jeopardy. Not only has complainant lost his capital but any interest which he might have earned from this point had the money been invested in a legitimate investment.

Accordingly I make the following order:

G. ORDER

1. The complaint succeeds;
2. Respondents are ordered to pay, jointly and severally, the one paying the other to be absolved, the sum of R133 533-04 plus interest thereon from 1st February 2007.
3. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per cent per annum to date of final payment;
4. Respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

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

A handwritten signature in black ink, consisting of several loops and curves, is written over a horizontal line. The signature is partially enclosed by a large, hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

