

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 02908/08-09 KZN (1)

In the matter between:

E M NEL

Complainant

and

D S CATSICADELLIS

1st Respondent

V BADENHORST

2nd 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 Complainant is Esme Maryna Nel, a switchboard operator residing at 173 Farquhar Road, Ladysmith.
- [2] The 1st Respondent is Deolene Susan Catsicadellis, (previously

McMaster) an adult female with identity number 6510080198080, residing at No 7 Teuton, Melkbosstrand, Western Cape.

- [3] The 2nd Respondent is Verna Badenhorst, a sales consultant who provided her last contact details as care of 19 Beach Road, Melkbosstrand, Cape Town.

B. COMPLAINT

- [4] During the period March to September 2005, and acting on the advice of 2nd respondent complainant purchased 140 000 shares in Ubambo Investment Holdings Limited ('Ubambo'). At a cost of R3 per share this amounted to a sum total of R420 000.

- [5] The shares were purchased through two entities namely Equity Options CC and Blue Platinum Ventures 80 (Pty) Ltd t/a Blue Platinum Investments ('Blue Platinum'). First Respondent was the sole member of Equity Options and a director of Blue Platinum, whilst 2nd respondent was at the time employed by and represented both entities.

- [6] It would appear that both Blue Platinum and Equity Options have subsequently been deregistered. In this regard, a recent online search of the Companies and Intellectual Property Registration Office no longer shows these entities as being registered.

[7] Complainant intended to purchase immovable property, and the funds invested were for this purpose. This was conveyed to 2nd respondent who then recommended Ubambo shares on the basis that the company would list on the JSE on about March/April 2006, at which point the share price would quadruple in value from R3 to R12. Complainant would then be able to sell the shares and utilise the profits to purchase the immovable property.

[8] Second respondent's assurances, in particular that the share would increase substantially in value induced complainant to make an initial investment on the 17/3/2005 which she then followed up with additional investments. Based on 2nd respondent's advice complainant believed that she would not have to sell her existing house but could purchase the new property based on the profits.

[9] The forms were completed and the investments made as follows:

9.1. Equity Options form completed on 17/03/2005, an amount of R180 000 was invested;

9.2. Equity Options form completed on 23/06/2005, an amount of R120 000 was invested;

9.3. Blue Platinum form completed on 01/09/2005, an amount of R60 000 was invested;

9.4. Blue Platinum form completed on 06/09/2005, an amount of R60 000 was invested.

[10] In effect a sum total of R420 000 was invested.

[11] The time for the supposed listing having come and gone, complainant approached 2nd respondent, who initially advised that the listing could not take place until Ubambo got their BEE status in place and that this would take some time. Complainant's further enquiries yielded unsatisfactory answers for the delays resulting in her conducting her own investigation.

[12] Complainant learnt from a representative of Ubambo that the shares were only worth approximately 35 cents at the time she purchased them. In effect she had paid R2, 65 too much given her R3,00 purchase price.

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

C. RESPONSE

[14] The complaint was referred to respondents with a request that they address the allegations made by complainant. In particular the Office requested the following:

- 14.1. The representative's record of advice as required in terms of the FAIS Act;
- 14.2. Proof that the financial service provider or authorised representative made all material and mandatory disclosures;
- 14.3. Any other relevant documentation which demonstrates compliance with

the FAIS Act.

[15] First Respondent did not refute complainants allegations but based her defence on the following:

15.1. Blue Platinum was merely a telesales call centre, mandated by Buyers Equity Guide (Pty) Ltd ('BEG') an authorised financial services provider owned by Michael Berk.

15.2. Blue Platinum was therefore an authorised agent of BEG, who in turn retained all necessary documentation.

15.3. All marketing information emanated from BEG and investors funds were paid directly into BEG's accounts. Michael Berk himself spoke personally to investors when called upon to do so.

[16] Despite a request no documentation in support of the above assertion was furnished to the Office by 1st respondent, save for what amounted to newspaper clippings of no evidentiary value.

[17] Second Respondent is no longer employed by 1st respondent and as such replied independently. The essence thereof follows:

17.1. She confirms that she was the consultant involved in the transaction, and that recommendations provided to complainant emanated from Blue Platinum's management.

17.2. However she denies guaranteeing, the listing of Ubambo or its accompanying list price.

17.3. She asserts that it was complainant's responsibility to perform the due

diligence regarding the viability of this investment.

[18] Second respondent was specifically directed to the fact that a portion of complainant's investments had been paid directly into 1st respondent's bank account.

[19] In response thereto she stated that no monies were deposited into her personal account and therefore took no responsibility for the management or allocation of these funds.

D. DETERMINATION

[20] Complainant's version of events, in particular that advice was rendered and a recommendation made was never disputed by 1st respondent. Instead she elected to base her defence on the claim that Blue Platinum/Equity Options and therefore herself was a representative of BEG, operating under BEG's license, instructions and guidance. As such according to 1st respondent BEG is the accountable party.

[21] Second respondent confirmed that she was employed by Blue Platinum/Equity options and made no mention of BEG. She did however assert that the onus was on complainant to carry out a proper due diligence.

[22] However given that S 7.(1) of the FAIS Act requires 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,' it behoves me to first consider this aspect.

[23] Neither Equity Options nor Blue Platinum was ever an authorised financial service provider in their own right, Equity Options never applied and the license application of Blue Platinum, in which 1st respondent applied as the key individual was rejected by the registrar of the Financial Services Board ('FSB'). The rejection was based on the fact that 1st respondent did not comply with the requirements in respect of personal character, honesty, integrity, competence and operational ability.

[24] In so far as the relationship with BEG was concerned, 1st respondent was requested to provide evidence substantiating her claims. However none was forthcoming and instead 1st respondent claimed that all documentation was in the possession of BEG.

[25] Accordingly 1st respondent's allegations were referred to BEG who's attorney responded as follows:

'We are instructed that Deolene McMaster is married to Advocate George Catsicadellis and it is apparent from the letter included with the documents from Advocate Catsicadellis he is claiming to act on behalf of Blue Platinum and alleging that Blue Platinum was only a telesales call centre.' 'We are instructed that it is incorrect to allege that Blue Platinum was merely conducting a telesales call centre. It was in fact purchasing

shares directly from our client and on-selling them to members of the public as our client subsequently became aware.'

[26] Section 5 of the General Code of Conduct For Authorised Financial Services Providers and Representatives, Board Notice 80 of 2003 (General Code) requires full disclosure of the concise legal and contractual status of the representative to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the representative.

[27] In simple terms the FAIS Act requires that had Blue Platinum, and therefore respondents acted as a representative as claimed by 1st respondent, this contractual status coupled with the contact details of the represented entity must be disclosed.

[28] Upon considering the actual documentation provided to complainant I note no such disclosure document, and neither the Blue Platinum nor Equity Options application forms, nor subsequent confirmation of investment facsimiles contain any mention of BEG. Instead they refer only to Equity Options and Blue Platinum and clearly confirm that that these entities are in fact the broker of record.

[29] Second Respondent herself confirmed that she acted on behalf of Blue Platinum/Equity Options, without making any reference to BEG.

[30] At this point it is pertinent to make mention of the fact that the Financial

Services Board carried out an inspection into Blue Platinum and Associated Institutions ('FSB report'). This was conducted in terms of section 3 of the Inspection of Financial Institutions Act No. 80 of 1998.

[31] The issue of whether Blue Platinum acted as a representative of BEG was considered in detail therein. Under summary of findings is contained the following:

31.1. 'BPI's alleged appointment as representative of BEG and Bitline was not possible as McMaster did not comply with the Fit and Proper Requirements for FSP's relating to the minimum qualifications required to provide financial services with reference to Category 1 – Securities and Instruments'

31.2. 'BPI did not have the necessary operational capability to act as BEG and Bitline's representative.'

31.3. 'BEG failed to comply with its license conditions in that it failed to inform the Registrar within the required timeframe of BPI's appointment / removal as BEG's representative.'

[32] The report goes on to deal with the events surrounding the supposed appointment of Blue Platinum and 1st respondent as a representative of BEG.

[33] It states that the only formal agreement entered into was concluded in June 2006. Prior to this agreement there was only an e-mail wherein 1st respondent's role as representative was set out. Whilst there is a letter on

a BEG letterhead stating that Blue Platinum had been mandated to market their products since July 2005 this letter is undated.

[34] Unsurprisingly in a latter part of the FSB report I noted the following comment: 'McMasters's contention that BPI provided financial services to her clients as a duly appointed representative of BEG and Bitline was a deliberate attempt on McMaster's part (assisted by BEG and Bitline) to mislead the Registrar in order to evade compliance with the FAIS Act.'

[35] Quite simply on the evidence Blue Platinum/Equity Options could not have acted as a representative of BEG. As such neither the respondents nor Blue Platinum/Equity Options were authorised to provide advice in terms of section 7 of the FAIS Act.

[36] I have previously noted that 1st respondent was the sole member of Equity Options and a director of Blue Platinum and in this regard the FSB report found that:

'McMaster is the person responsible for managing and overseeing BPI's activities on a day-to-day basis.'

[37] First respondent's modus operandi is not new to this Office, given that over the years a number of complaints have been lodged against her and her entities. These have as a whole been resolved after intervention from this Office. Both from these matters as well as the evidence in the present

matter coupled with the FSB report I have no hesitation in finding that 1st respondent was the key individual and driving force in both Equity Options and Blue Platinum. As key individual 1st respondent is accountable in terms of the FAIS Act. In effect she controlled these entities.

[38] Nowhere is this more evident than in the fact that of the R420 000 invested, R300 000 was deposited into the personal account of 1st respondent. Whilst the bank account details on the Equity Options form is headed Equity Options the actual account number was in reality in 1st respondent's personal name.

[39] When complainant realised this she queried this with 2nd respondent and was advised that this was only a temporary arrangement until an account was opened in the name of Blue Platinum.

[40] 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.'

[41] Turning to the advice aspect I note that it was never disputed by either respondent that advice was rendered. Clearly there was direct infringement of the FAIS Act.

[42] Of course while 1st respondent does not dispute complainant's version, 2nd respondent places the responsibility on complainant and avers that she gave no assurances as to listing date or the listing price. However 2nd respondent offers no explanation as to why complainant would invest R420 000 through her. The only possible answer is that complainant was provided with information that induced her to make the investment.

[43] This information clearly emanated from 2nd respondent. The FAIS Act has very specific requirements such as an advice record, needs analysis and disclosure documentation. Requirements in terms of sections 7,8,9 and 11 of the General Code that protect both the adviser and client, and yet in the present instance there is not a shred of evidence that any of these requirements were met. 2nd Respondent claims that all documentation remained with Blue Platinum/Equity Options when she left their employ.

[44] Yet specific requests to 1st respondent to provide a complete copy of the file revealed no documentation complying with the FAIS Act.

[45] The inescapable conclusion is that 2nd respondent's version is improbable. Her contention that it was complainant's responsibility to carry out a due

diligence runs contrary to the responsibilities imposed on providers of financial services.

[46] Quite simply complainant was induced to invest in unlisted shares by an unauthorised representative, namely the 2nd respondent. 1st respondent as mentioned was the key individual and responsible entity of the unlicensed corporate entities, in addition to channelling funds through her personal account.

[47] No cognisance was taken of complainants circumstances or how these shares would suit her needs. In a nutshell there is blatant disregard of the FAIS Act.

E. CONCLUSION

[48] In considering this matter I came across this statement on the Ubambo website:

'Whilst Ubambo is a public company, it is not listed on the Johannesburg Stock Exchange and in its present format is highly unlikely to be listed, nor has it ever represented that it will. Over the years an OTC ("Over The Counter") market emerged without Ubambo playing an active or supporting role in this development. Various Financials (sic) Advisors and / or Investment Brokers became market makers and unfortunately made representations purporting to come from Ubambo, about Ubambo's investments and

listing prospects. This led to shares traded being at over R3.00 per share. The latest audited NAV (February 2007) shows a value closer to 70 cents per share.'

[49] This statement mirrors complainant's experience. Complainant's shares were sold to her at a premium way above the real valuation either at point of sale or even currently. Ubambo is an unlisted entity, a factor which requires not only greater caution but makes the valuation thereof more difficult in that the shares are not readily tradable.

[50] I have no doubt that complainant was misled into making this investment by 2nd respondent, who at all times acted under the direct control of 1st respondent.

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

[52] In as much as the Ubambo shares clearly have value, albeit considerably less than what complaint was initially led to believe I am compelled to take this into consideration.

[53] The amount invested was R420 000.00.

[54] As such I believe that a fair order would be one in which the share certificates be returned upon payment of complainant's original

investment.

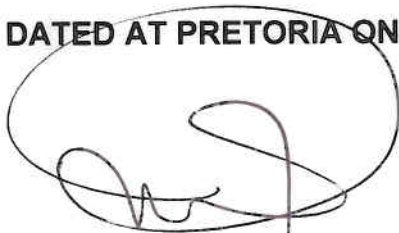
Accordingly I make the following order:

ORDER

1. The respondents are ordered to pay, jointly and severally, the one paying the other to be absolved.
 - a. The sum of R180 000 plus interest thereon from 17th March 2005;
 - b. The sum of R120 000 plus interest thereon from 23rd June 2005;
 - c. The sum of R60 000 plus interest thereon from 1st September 2005;
 - d. The sum of R60 000 plus interest thereon from 6th September 2005;
2. Interest on the aforesaid amounts shall accrue at the rate of 15.5% per cent per annum to date of final payment;
3. A case fee of R1000 to this Office.

Upon compliance with the order, the share certificates are to be tendered to respondents according to payment.

DATED AT PRETORIA ON THIS THE 17th DAY OF MARCH 2011



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS

