IN THE PROCEEDINGS BEFORE THE ENFORCEMENT COMMITTEE ESTABLISHED IN TERMS OF SECTION 10(3) OF THE FINANCIAL SERVICES BOARD ACT, NO 97 OF 1990

CASE NO: **06/2011**

In the matter of:

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS Applicant

and

CATSICADELLIS, GEORGE First Respondent

BOTHA, MONICA Second Respondent

DECISION OF THE ENFORCEMENT COMMITTEE

Before The Hon Mr Justice C F Eloff, Adv JFM Henning SC, Adv TJ Golden and RJG Barrow.

A. INTRODUCTORY

1. This Committee is required, by virtue of a direction made by the Registrar of Financial Institutions in terms of section 6B(1)(a) of the Financial Institutions (Protection of Funds) Act, No 28 of 2001, to consider and adjudicate on a number of charges brought against the two Respondents, G Catsicadellis and M Botha. A notice of referral, including formulation of the charges, together with supporting

affidavits, transcripts of various interviews and copies of documents, were served on the two Respondents.

The First Respondent filed an answering affidavit, to which replying affidavits were filed. The Second Respondent did not file an answering affidavit, and contented herself with submitting a letter. Nor did she appear at any of the hearings. The matter was ultimately argued. These are our reasons for the decisions made.

10

2. The charges against the First Respondent relate mainly to his activities in regard to the shares of a company styled Platfields Limited. His right to market shares was acquired by the grant to him "*trading as Investcare*" on 9 December 2008, of a licence as financial services provider (FSP). The licence authorises him to render advice and intermediary services in respect of financial products under the securities of "*Securities and Instruments: Shares and Debentures and Secured Debts*". The First Respondent, according to the
20 affidavits, considered himself to be the owner and manager of the affairs of Investcare and that he had "*sole control and ownership*" thereof (his words). He set up his business at 19 Beach Road, Melkbosstrand, Cape Town, which he described as his call centre. A number of persons were

appointed at "*telemarketers*". One of them was the Second Respondent. The First Respondent provided facilities for them to conduct the business of Investcare. He conducted his affairs as FSP, but in 2010 the Applicant in this matter, in consequence of the lodging of a number of complaints, withdrew the licence. The First Respondent lodged an appeal against the decision, but withdrew it before the appeal could be heard.

3. The Second Respondent worked for Investcare as a telemarketer.

4. In his founding affidavit the Applicant, after summarising the contraventions alleged, motivates his decision to launch these proceedings on the basis:

> "*There is however a critical need to take substantial punitive action against the Respondents to deter them and others from such unlawful activities.*"

5. We infer from the answering affidavit from the First Respondent that he acquired 1 million Platfields shares in May 2008, for which he paid 80cps. "*This was the first of numerous purchases by me of Platfields Limited shares*". He also acquired right from other owners of Platfields shares to market them. He was paid a commission therefor. During his

interrogation he is recorded to have said "... *the product that I am solely marketing is a product called Platfields. It is a platinum and gold mine*". He describes these shares as his "*stock in trade*". In his affidavit the First Respondent says that 736 persons purchased Platfields shares through Investcare. During his interrogation the First Respondent said that he estimates that since June 2008 he sold R7 million worth of Platfields shares. It appears that he fairly consistently sold the shares at R3.00 per share.

10

The fact, as found later herein, that within days after the listing of Platfields shares, shares in the company were at best selling at 7cps, goes far to show how misguided the 736 persons were, and that an investment in Platfields was highly speculative.

B. **COUNT 1**

6. The essence of the first charge against the Respondents is
20 that they set about flogging Platfields shares in a deceitful manner for amounts well in excess of their intrinsic value, and that they touted for clients in an improper manner.

7. We now briefly set out the nature of the evidence adduced to substantiate the first charge. We find it convenient to discuss separately under two heads (i) improper conduct in attaining contact and communication with potential buyers of Platfields shares ("*cold calling*"); and (ii) misrepresentation to potential clients regarding the alleged merits of investing in Platfields shares.

8. Cold calling: The strategy of attaining communication with potential clients, unsolicitedly and by random selection, is said by the witness Fraser and the Applicant to be named "*cold calling*" and to operate what is termed "*boiler rooms*".

The practice of maintaining boiler rooms is generally condemned. We refer to a publication by the United States Securities and Exchange Commission –

"*Dishonest brokers set up 'boiler rooms' where a small army of high pressure salespeople use banks or telephones to make cold calls to as many potential investors as possible ... boiler rooms operators typically sell thinly traded stocks of microcap companies ...*".

Typically, a boiler room is –

"*A place where high pressure salespeople use banks or telephones to call lists of potential investors (known as sucker lists) in order to peddle speculative, even fraudulent, securities. A boiler room is called as such because of the high pressure selling*".

Also relevant is a dictum in the judgment of an English court in the prosecution of Mason and Sinclair –

> "*Share fraudsters usually contact people by telephone to con investors into buying non tradable, overpriced or even non-existent shares ... in the vast majority of cases, investors lose all their money*".

9. Proof thereof that the practice of cold calling was employed by Investcare emanates from various sources:

(a) We were handed the affidavits of a number of individuals who were persuaded by Investcare to purchase Platfields shares. The dependents are RJ du Plessis; JC Smit; MJ Greyling; JR Albertyn; SI Engelbrecht; O Los; P Hamman; B Kotze; G Mars; J Swanepoel; S Bekker; MJ dos Santos; and P Naidoo. They all testify that they were approached telephonically by someone from Investcare. The calls were unsolicited; none of them had any previous contact with Investcare, and they were never on a data base of Investcare. The callers urged them to buy Platfields shares for amounts varying from R2.80 to R3.00 per share, but mainly at R3.00.

(b) The First Respondent also caused sms to be sent to persons who might be interested, providing financial details, and to follow that up by telephone calls to the

addressees, urging them to buy Platfields shares. That procedure is clearly evidenced in the recorded telephone discussions that a telemarketer and Second Respondent had with potential clients.

The reliability of the deponents is cogently supported by the fact that no less than 15 independent persons testify to the same sort of *modus operandi*. None of the deponents had any connection with the others. And, as mentioned later there was no direct evidence to counter what they said.

Conspicuous by its absence is any affidavit by any marketer to explain these matters and to state what method was employed to identify the addressees of the sms. Nor does the First Respondent tell us what method was used to identify the addressees.

The First Respondent denied in his answering affidavit that he invoked the cold call technology. His unqualified denial is odd when considered in the face of the reality that the footprints of cold calling are plainly discernible in the 15 affidavits and the recorded telephone discussions. Also relevant are the comments by the First Respondent on the comment in the first report of his conduct where it is said:

"*Catsicadellis informed us that he provided contact details of prospective purchasers to his consultants*". Said contact details were sourced from a data base which Investcare, for example, bought from "*Webmail*" and only if the clients consented to receive marketing material. Furthermore Investcare acquired BPI's data base when it took over the infrastructure of BPI. In this regard, Catsicadellis emphasised that Investcare "*made use of the so-called 'cold calling' method to approach prospective investors.*"

The comment on this paragraph by First Respondent was as follows –

"*Catsicadellis legally purchased data bases from various different data providing companies. Once such example is 'Webmail' which is an exclusive marketing service provider. Another example which Catsicadellis mention in the interview of 5 August 2009 is 'Gaphne'.*"

10. We conclude that it was adequately established that members of the public who were approached by Investcare were randomly selected, possibly by the use of a telephone register, but also by marketing lists of other businesses. That was cold calling and the First Respondent with the active assistance of the Second Respondent operated a boiler room.

11.1. We wish now to deal with an issue raised by counsel for the first respondent in relation to, not only the first count, but also to other counts.

The point taken, as we understand it, is that most if not all the conduct attributed to the respondents were performed before any of the purchasers of Platfields shares from Investcare became clients. Counsel contended that the statutory provisions relied on in regard to the first count (sections 2 and 3 of the Code), apply only to the rendering of financial services to clients, and (urged counsel) the purchasers of Platfields shares from Investcare only became clients when they signed deeds of purchase.

These submissions cannot survive an analysis of the statutory provisions set out hereunder, and of the true facts.

11.2. The statutory basis underlying count 1, are sections 2 and 3 of the Code.

Section 2 goes under the heading "*General duties of Providers*":

"*(2) A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry*".

Greater detail is set out in section (3), under the heading "*Specific duties of a provider*":

"*(1) When a provider provides a financial service –*
(a) Representations made and information provided to a client by a provider –
(i) Must be factually correct;
(ii) Must ... avoid uncertainty ... and not be misleading;
(iii) Must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;
(iv) ...;
(v) ...;
(vi) ...;
(vii) ...;
(viii) ...".

11.3. These provisions must of course be interpreted in the light of the relevant provisions of the enabling Act, the FAIS Statute. First and foremost is the definition of "*financial service*", the words used in section (2) of the Code:

"*... any person, other than a representative, who as a regular feature of the business of such person –*
(a) Furnishes advice; or
(b) Furnishes advice and renders intermediary services; or
(c) Renders an intermediary service;".

What, then is "*intermediary service*"?

> *"'intermediary service' means ... 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 nay enter into ... any transaction in respect of a financial product with a product supplier; or*
> *..."*

So, "*financial services*" include any act, other than the furnishing of advice for or on behalf of a client (as defined), the result of which is that a client may enter into any transaction in respect of financial products. We consider that the acts of Investcare of touting for clients to whom Platfields shares will be offered, are plainly any acts the result of which is that the persons approached may enter into transactions in respect of financial products. These are acts which, when the definitions and section 2 of the Code are read together, are acts which have to be performed "*honestly, fairly, with due skill care and diligence*". The duty of displaying the said characteristics apply generally to the performance of any financial services as defined, and specifically to serve the interests of clients (as defined).

11.4. It is to be noted that the word "*client*" in section 2 of the Code, and in the definition of "*intermediary*

service" must be given the extended meaning of "*client*" in the FAIS Act -

> "*'client' means a specific person or group of persons, excluding the general public who is or may become the subject to whom a financial service is rendered intentionally ...*" (my underlining)

We consider that the purchasers of Platfields shares via Investcare became "*persons who may become clients*" the moment they were earmarked by Investcare with the intention of urging them to purchase Platfields shares. Counsel for the First Respondent laid emphasis on the phrase "*excluding the general public*", and submitted that the extended definition of "*client*" did not apply where members of the general public are approached. We rule that the conduct of calling on several persons to buy Platfields shares does not amount to the rendering of advice to the "*general public*". The concept of rendering advice to the general public would be, e.g., when a notice in a newspaper is published recommending the purchase of Platfields shares. That is a far cry from what happened in the present case.

11.5. We conclude that the conduct attributed to the respondents falls squarely within sections 2 and 3 of

the Code. By its definitions the legislature adequately provided for statutory protection of persons who might not fall in the ordinary concept of the word "*clients*", but are within the extended provisions.

12. We turn now to the content of some of the misrepresentations. The founding affidavit of Fraser sets them out fully in paragraphs 12.1 and 12.2 of her affidavit. *Inter alia* the deponents to the supporting affidavits were told that Platfields would secure a listing on the JSE in November 2009 at R4.00 per share; that Platfields would list in two months from March 2009 at R6.00 and R8.00 per share; that Platfields was going to list at a listing price of R10.00 per share; that the listing price was R8.00; that the share price would increase after two years to R27.00 and R35.00; and so on.

In the recorded telephone discussions that one Adams (a telemarketer) and the Second Respondent had with potential clients, they held out that listing would occur at the end of July 2009; that Platfields had requested Investcare to sell shares at R2.60 to investors whom Investcare had contacted; that capital invested in Platfields shares was 100% guaranteed; Second Respondent told Willem Grobler

on 14 July 2009 that the listing would be approved the following week; Second Respondent told Johan Greyling that the listing would be approved before the end of July2009, and that they (Investcare) had "*inside information*" that the listing would be at between R6.00 and R8.00 per share; and so on.

13.1 The fact that such misrepresentations were made is established by the numerous supporting affidavits filed on behalf of the Applicant. They include the 15 affidavits discussed in the context of cold calling, and a few others. Most of the affidavits state that the misrepresentations were made by telemarketers of Investcare. Not a single affidavit to counter these affidavits was made by any of the erstwhile telemarketers. The only supporting affidavits which attained the distinction of specific comment by the First Respondent were the following:

13.2 RJ du Plessis, one of the 15 abovementioned deponents only attracted a comment by First Respondent by raising an argument, but no contrasting evidence was led. We deal later with this argument and reject it.

13.3 Michael Falk, who testified that the First Respondent, who was an acquaintance of his, told him in November 2010 that a listing of Platfields shares would take place soon at a listing price R2.80 per share and that Platfields preference shares were available at a special price of R1.45 each.

In his answering affidavit the First Respondent denied that he dealt with Falk at the time alleged. He seeks support in the fact that he paid to telemarketers commission for securing a sale to Falk.

We consider that strong support for the version of Falk is that he is an independent person with no reason to prevaricate and in the fact that statements of the sort deposed to by Falk were in disputably made by First Respondent in *inter alia* the leaflets. The probabilities are plainly in favour of Falk's version.

13.4 Erika Lee Venske, who testified in her affidavit that she met the First Respondent in August 2008. He then told her (said the deponent) that she could buy Platfields shares at R2.40 per share, and that the market price of

the shares will double if not more after being listed by the JSE in January 2009.

In his answering affidavit the First Respondent does not deny that he spoke to Venske at the time alleged. Significantly, he does not deny that he told her that a listing would be granted in January 2009 at a listing price of R2.40 per share. He only denies that he assured her that the share price will double after the listing. He also denies that he told her that he represented Platfields. Overall we consider that the comments of the First Respondent do not lessen the impact of her testimony.

13.5 Oene Los testified that he was contacted by an Investcare representative, who told him that his organisation was offering him Platfields shares at R1.00 per share, as the owner was in trouble. He added that Platfields shares would be listed at a listing price of R8.50 per share. He did not then (May 2010) purchase Platfields shares but he did so later on.

The First Respondent answers these averments by saying simply that in May 2010 "*I was not selling*

Platfields shares". This is an altogether inadequate answer to the statement that a representative from Investcare made the unsolicited phone call. Again no direct evidence from a telemarketer to deal with the affidavit was produced.

13.6 Mr Pierre Hamman testified that during the period June to October 2008 he received unsolicited phone calls from representatives of Investcare offering him Platfields shares which were then "*in the last minutes of the listing procedures of the JSE*". He also then met with and was told by the First Respondent that Platfields shares were being sold at R3.20 per share and that they would list at R3.50 and R4.50 per share. He fell for it, and purchased Platfields shares. In January 2010 a representative of Investcare told him that Platfields shares would be listed in February 2010. He then purchased Platfields shares via Investcare and from the First Respondent directly. His last purchase was after he had received an sms from First Respondent informing him that Platfields would list at a listing price of R1.80 per share. He then again purchased a number of Platfields shares.

In his answering affidavit the First Respondent admits that he had dealings with Mr Hamman, but he denies that he told him that Platfields shares would be listed at R3.50 and R4.50 per share. He states that shortly before the listing he sold Mr Hamman 1 million Platfields shares at R1.00 per share. "*I sold them at this low price because of the fact that we became friends*". Significantly the First Respondent does not present an answering affidavit by the telemarketer who told Mr Hamman in 2008 that "*Platfields is in the last minute of a listing*", and in January 2010, that "*Platfields would list in the following month*". That was in line with what the First Respondent held out in the leaflets discussed in regard to the second charge. It is also not unlikely that the First Respondent said that the listing would be at R3.50 and R4.50.

13.7 Gerrit Mars testified in his supporting affidavit that after receiving an unsolicited phone call from someone of Investcare offering him Platfields shares, he received an e-mail from one Nigel Adams using the letterhead of Investcare in which he said (my translation) "*As you have seen the company will at any time now obtain a JSE listing, and we expect that it will list at R3.15 per*

share, but in two years the share price will be between R27.00 and R35.00".

The First Respondent claims that the e-mail was not "*sent from my office but from a private e-mail address*". He said that he was not aware of the e-mail and "*I believe that Nigel Adams did this fraudulently without my knowledge*". This statement is odd in view of the fact that the First Respondent in a different context in his affidavits states that he maintained close control over what went on or emanated from Investcare, and closely monitored what the telemarketers did. We believe that the e-mail quoted earlier was sent by Adams in the course of his duties as a telemarketer.

14. It remains for us to state that there is a marked similarity in the representations attributed to the telemarketers and the First Respondent. While there are variations on the theme, the basic components of all representations were that a listing of the shares on the JSE was imminent; that the listing price was substantial; and that there were sure to be a significant increase in the share price after listing. We believe that is not feasible to question the veracity of the various deponents, who all deposed to the same style of

representations. The recorded telephone discussions also reveal the use of representations with the same basic components described in the supporting affidavits. We conclude that the representations alleged were indeed made.

15. We now set out the true facts concerning Platfields and we intend to show that they are in stark contrast to what was held out by Investcare and the respondents.

16. Firstly as to the listing date –

Platfields was engaged in precious metals exploration. At the time of the events under consideration its CEO was the witness Bongani Mbindwane (Bongani). In June 2003 the company brought an initial application for its shares to be listed on the JSE but that was abandoned. Later in 2007 the possibility of securing a listing was reconsidered. The possibility in this regard was raised at its agm held on 7 November 2008. After the meeting Bongani reported to shareholders by letter –

"*After the festive search with initially no signs so far of a market recovery, the likelihood of a listing before the year end becomes more remote; some time during the first quarter seems more likely, but we must continue to be informed by market conditions*".

Bongani added that the intention of Platfields was clearly to pace itself and to give consideration to the numerous external factors that would impact on a listing. This intention was repeated to shareholders by letter. In 2008 the company did not consider it a good time to seek listing. Shareholders (and First Respondent was one of them) were made aware thereof that an application for a listing involved taking a number of steps, such as meeting the requirements of the JSE. The JSE had set requirements, as also the Department of Mineral Resources. Compliance would take quite a time.

In March 2009 Bongani issues a facts sheet to keep shareholders properly informed. The sheet was available on the website of Platfields. It inter alia stated –

"*... the company is scheduled to list on the main board of the JSE, provided that the board of directors is satisfied that market conditions are conducive, following several months of uncertainty in PGMS (platinum and gold) sector globally*".

On 26 June 2009 another letter from the CEO informed shareholders that the company had not yet met certain prelisting requirements. The letter made it clear that Platfields was not going to secure a listing within the next few months. Even in 2010 Platfields was still engaged in preparations for a listing.

In this context the affidavit of André Visser, presently the General Manager of the Issuer Services of the JSE, is important. He states that a company seeking a listing of its shares on the JSE must meet stringent requirements. The company has amongst others, to make a SENS announcement, and further publications are required. Visser states that the JSE only received the formal application for a listing on 27 September 2010. The initial requirements of the JSE were provided on 4 October 2010. The final submission was received on 13 October 2010, and the comments of the JSE came on 18 October 2010. Only on 3 December 2010 did the JSE grant the application.

17. In his answering affidavit the First Respondent lists a number of publications which prompted him to conclude that an application for a listing would be presented well before October 2010 and which occasioned him to tell interested persons "*that a positive listing is minutes away from reality*".

We considered the sources relied on. So far from stating that a listing is imminent they emphasise that the company will only seek a listing when economic conditions are favourable. We comment specifically on the statements referred to in the heads of argument by Counsel for the First Respondent.

(a) GC7 states that a listing will be sought "*subject to prevailing market conditions and regulatory and other approvals*".

(b) GC8 "*listing – when? ... It is imperative now however that we pace ourselves very carefully according to what is happening in the PGM equities market, and leave our listing for when there are some very clear signs of recovery ... we must continue to be informed by market conditions*".

(c) GC9 "*our listing timetable has been governed both by the diligence with which we have sought the JSE listing requirements, and by the global economic crisis*".

(d) GC10 "*the company is scheduled to list on the main board of the JSE provided that the board is satisfied that market conditions are favourable*".

In our view a conscientious FSP, who has to display "due skill and diligence" and make representations that are factually correct will not advise clients on the basis of press statements and the like that may be inconsistent with the

official stance of Platfields. The predictions of Investcare and the First Respondent were in flagrant disregard of the statutory duties of the respondents. We conclude that the abovementioned representations by Investcare were false.

18. We need to emphasise that the statement by the First Respondent that his telemarketers obtained information from Platfields concerning listing date and prices was false.

19. We now discuss the evidence of the value of Platfields shares during 2007, 2008, 2009 and the first part of 2010. The best evidence of the value of the share is that of Mr J Grobbelaar and Mr Deslin Naidoo. They are both well qualified to make valuations of shares in companies. Mr Grobbelaar testified that the value of Platfields shares during 2009 was between 38cps and 45cps. In 2010 the value was between 5.87cps and 62.8cps.

Mr Naidoo takes the view that the value between 2007 and 2009 was never more than 53cps.

Strong support for their valuations lies in the stark reality that within days after their listing the market price went down to 7cps.

The First Respondent testified that he estimated the value of Platfields shares during 2007, 2008, 2009 and the first part of 2010 to be R2.80 per share. He makes no effort to explain the enormous disparity between his figure and that of 7cps a few days after the listing. Nor does he deal with or challenge the statements in the affidavits of Grobbelaar and Naidoo. We conclude that he could not honestly justify his figure. He relies on several hearsay statements which are plainly unacceptable. We will, however, comment on the reliance by the First Respondent for his valuation on a statement in an insurance claim of the supposed value of Platfields shares. It is plain that a statement in an insurance claim is usually based on considerations other than the intrinsic value of an article, and is valueless in the present case.

20. In the context of the value of Platfields shares reference is made to the "*loading price*". The evidence adduced by the applicant shows that there is no such thing as a predetermined listing price. Visser explains that the price at which trading of the shares open on a listing, is determined by the first transaction executed on the market. The JSE did require Platfields to furnish it with an indicative price regarding the value of the securities. This price is loaded

onto the JSE systems, purely for information and statistical reasons. Bongani testified that Platfields had not considered a loading price, until 48 hours before the listing, when the decision was made to state a price of R1.90 per share. On the day of listing two transactions were recorded at R1.40 per share. Eight minutes later the share price decreased to 80cps. It declined steadily thereafter and stood at 7cps at the end of December 2010. So much for the extravagant predictions of the respondents.

10

21. We now discuss the significance of the fact that sales generated by Investcare, listed in the annexure to the founding affidavit, are mostly of the order of R3.00 per share. While ordinarily the amounts at which a commodity is sold are important factors in determining its market value, in the present case that consideration is to be discounted. It is more than likely that all the sales of Platfields shares promoted by Investcare were attained by means of the strategy demonstrated in the supporting affidavits and
20 recorded telephone discussions. In this context it should be mentioned that before the advent of Investcare on the scene, shares were mainly sold by over-the-counter (OTC) purchases. The amounts of those sales, can, on the evidence, not confidently be used to determine a market

price, but in any event the average price recorded in the list prepared by the transfer secretaries, varies from R1.00 to R1.80 per share, while the sales promoted by Investcare are mainly in the region of R3.00 per share.

22. Clearly, also, the confident predictions by Investcare that on listing a substantial increase in the market price was bound to follow, was far off the mark.

23. In his answering affidavit the First Respondent claims that Bongani approved of what Investcare did. Bongani denies that, and his denial is strongly supported by what he said in his e-mail to the First Respondent on 28 January 2008 –

> "... *We are not gaining positively by your activity". "These are seen very poorly presented and information questionable on investment standards ... I will be asking our attorneys to review carefully your activities of selling Platfields shares and the method used."*

First Respondents reliance on the fact that Platfields endorsed transfer documents of sales engineered by Investcare, as an indication of acceptance of the sales figures, is groundless. So too is the suggestion in the answering affidavit that what was passed on to clients emanated from Platfields.

24. We now address the question of proof of complicity by the First Respondent in the deceitful conduct of his telemarketers. The First Respondent does not, in so many words, say that he is not responsible, vicariously or otherwise, for what his telemarketers did and said. He only makes the statement that if false statements were made it was without his knowledge. The close involvement of the First Respondent in the activities of his telemarketers, is shown by the fact that some of the supporting affidavits establish conduct on his part in line with what his telemarketers did. His predictions in the leaflets are of the same kind. As to cold calling, it is unlikely in the extreme that his telemarketers would have decided on that strategy as a frolic of their own.

In his affidavit the First Respondent claims that he familiarised himself with what his telemarketers did and that he closely monitored their doings. That statement goes far to show that the First Respondent was in continuous contact with his telemarketers, and that he knew what they were up to and what methods were employed to promote the flogging of Platfields shares. He also stated that he conveyed the true facts relating to Platfields to his telemarketers. It is more than likely that what the telemarketers conveyed to

clients, emanated from the First Respondent. The totality of the evidence clearly attracts the inference that the First Respondent throughout acted in concert with the telemarketers in their quest of marketing his Platfields shares and those of his friends at the highest attainable prices (not less than R3.00 per share), by the use of cold calling to make contact with potential clients, and misrepresentations regarding the benefit of an investment in Platfields.

25. This Committee concludes that the conduct of the First Respondent amounts to a flagrant disregard of the statutory directives of what is to be expected of an FSP. He did not obey the dictate that he should act in the interest of his clients. He acted solely in the promotion of his own interests, which were adverse to the interest of his clients. The use of misrepresentations in order to secure sales at relatively high prices for Platfields shares, amounts to a complete absence of honesty and fairness. He displayed marked lack of skill and diligence. The use of cold calling was singularly inappropriate. So, too, was the conduct of strongly urging persons sought to be made clients, to invest in what was plainly a highly speculative venture, at prices which were beyond the pale, in shares owned by the First Respondent.

What he did violated the dictate of preserving the integrity of the financial services industry.

26. We consider that the efforts of the First Respondent to operate a boiler room enterprise disguised as the business of a financial service provider, was disingenuous.

His efforts to reach the uninformed to prey on them was designed to benefit unlawfully and dishonestly from their lack of knowledge, coupled with the misrepresentations.

27.1. We need, in conclusion, to deal with a submission that a finding of dishonesty on the part of the First Respondent on paper without the use of viva voice evidence, particularly since the First Respondent testified that he acted in good faith was inappropriate. Reliance was placed in this regard on the practise in civil cases in the High Court, when litigants were taken to task for initiating litigation by motion proceedings, when they should have anticipated that irresoluble disputes of fact would arise. We consider that there are two answers to that contention.

27.2. The first is that in regard to certain matters there were no disputes. And where there were disputes, the evidence adduced by the Applicant was overwhelming and hardly answerable.

27.3. We consider that the practise in the High Court on motion proceedings is not applicable. Sections 6(A) and 6(B) of Act 28 of 2001 obliged the Applicant in this matter to initiate proceedings by presentation of affidavits. The practise in the High Court in civil proceedings was developed in the setting that a litigant had a free choice of starting off by summons or by notice of motion. For that reason the litigant who makes an erroneous choice is penalised. But where the legislature obliged the applicant to start off by the lodging of affidavits, it contemplated that a robust approach would be adopted when dealing with issues of fact. Support for this view is found in the judgment of the Appeal Board of the FSB in the matter of *Grey and another v Scot*, at p 4. And while the decision of the Appeal Board in the AH-Vest matter was given in regard to the Act as it was then worded, the following dictum is apposite:

> "*Applied to the present case, and in sofar as the old law still obtains, what s. 102(4), quoted above, means is that the standard procedure of the EC is to decide even contested factual issues on the documentation before it*".

The Act empowers an EC, when it cannot decide a matter on affidavit, to require *viva voce* evidence to be led. In our view this matter can be decided on the papers as they stand. Proof is only required on a balance of probabilities. We consider that we can resolve disputes on the papers as they stand.

28. In his affidavit the First Respondent endeavours to justify his conduct on the basis that his compliance officers were aware of his marketing efforts, and raised no objection. He mentions the names of Wynand Louw and Maree Fourie, but he does not file affidavits by them. What he says is largely hearsay. It is unlikely in the extreme that they knew that the cold calling system was employed, or that Investcare got clients to purchase Platfields shares on the strength of misrepresentations. Even if they did, that does not establish condonation or justification of what First Respondent did. It will simply mean that the compliance officers were themselves guilty of improper conduct.

29. The First Respondent also annexes to his answering affidavit copies of numerous contracts signed by purchasers of Platfields shares via Investcare. In those contracts they record that they were not given any guarantees, that they had taken independent advice, and made their own independent decision to purchase. Counsel for the First Respondent also relied on these contracts. It is not clear what point the First Respondent or his Counsel endeavour to make of these verisimilitudes of fair trading. The contracts were in all cases presented to clients for signature after they had been persuaded to buy by misrepresentations and had paid the purchase price. And it is highly unlikely that it would have occurred to any of them that the terms of the contracts signed by them might be at odds with the reality that they were grossly deceived.

We are clearly of the view that exculpatory contractual provisions of the sort now invoked by the First Respondent have not the effect of debarring the parties to the contract of nevertheless proving false representations. Such provisions merely have the effect of serving as factors to be borne in mind in considering the reliability of the party alleging misrepresentations. In the present case the overwhelming strength of the positive features completely overshadows the

significance of the exculpatory provisions. It is also clearly relevant that at no stage was contrasting evidence presented by the telemarketers of what was attributed to them.

30. The Committee determines that the First Respondent contravened sections 2 and 3 of the Code.

31. The case against the Second Respondent is on the basis that she was a representative. That word is defined as follows in section 1 of the FAIS Act –

> "... *to mean any person including a person employed or mandated by such person, who renders a financial service to a client on behalf of a financial service provider, in terms of employment or other mandate ...*"

The First Respondent was, as is pointed out in the founding affidavit, not entirely consistent on the question whether the telemarketers were his representatives. He does not set out the conditions of their appointment, but he refers to Second Respondent as "*my consultant*". We infer from all the facts that the Second Respondent was employed or mandated in terms of the above definitions, and that she rendered financial services. In her letter the Second Respondent says that the purchasers of shares from her knew exactly what they were doing. Nothing can be further from the truth. The Second Respondent was plainly an active participant in the

deceitful conduct of Investcare. She is also determined to have contravened sections 2 and 3 of the Code.

C. **ALTERNATIVE TO COUNT 1**

32. As regards the alternative to Count 1, by which the Respondents are accused of contravening sections 3(1)(a)(i), (ii) and (iii) of the abovementioned Code of Conduct, it will be seen that what is attributed to them is in essence that alluded to in the main Count. The consequence of our finding on the main first count is that the alternative count falls away.

D. **COUNT 2**

33. The second count is one of the alleged contravention of sections 14(1)(a) and (b)(i), (ii) and (iii) of the Code. The relevant portions of the sections appear under the heading – "*Advertising and direct marketing*" and it states –

> "*14(1)(a) An advertisement by any provider must – not contain any statement promise or forecast which is fraudulent, untrue or misleading;*
> *(b) If it contains –*
> *(i) performance data including awards and rankings, include reference to their source and data;*
> *(ii) illustrations and hypothetical data –*
> *(aa) contain support in the form of clearly stated basic assumptions (including but not limited to any relevant assumptions in respect of performance, returns, costs and charges) with a reasonable prospect of being met under current circumstances;*

(bb) make it clear that they are not guaranteed and provided for illustrative purposes only; and

(cc) "also contain where returns or benefits are dependent on the performance of underlying assets or other variable market factors, clear indications of such dependence;

(iii) a warning statement about risks involved in buying or selling a financial product, prominently render or display such statement; and

(iv) information about past performances, also contain a warning that past performances are not necessarily indicative of future performance, and ...".

The factual allegations were that while the respondents were rendering financial services, namely the marketing of Platfields shares, they distributed advertisements as envisaged in the Code in the form of information leaflets and fact sheets which in several respects fail to comply with section 14(a) of the Code. The main debate in the affidavits on this part of the case was whether the leaflets and other publications of the Respondents, contained false or untrue information. The First Respondent admitted that he was the author of the leaflets and publications. He stated that his telemarketers had no control over it.

34. The first relevant e-mail was sent to one Barend on 5 August 2009 in which reference is made to the Platfields enterprise in glowing terms, and in which it is stated that he (First Respondent) is selling Platfields shares at R3.20 per share. First Respondent attached a copy of a leaflet apparently sent by Investcare in which, in so many words, he said that the

proposed listing of Platfields shares was imminent and that the JSE was in the last stage of approving the listing submission. He said "*A positive listing is moment away from reality*". These statements concerning a listing were false.

35. Another leaflet dated 11 January 2010 inter alia reads –

> "*As you know Platfields shares are on the verge of listing on the JSE. I expect an announcement on the listing date very soon. I have verified with certain senior officials at the JSE that Platfields has submitted all their relevant document to the JSE's Listing Department and that such are being approved*".

These are falsehoods. As mentioned earlier Platfields only submitted its formal listing application on 27 September 2010.

36. There can be no doubt that statements of the kind alluded to contain averments which were untrue and misleading. It is also a fact that the statements distributed by the First Respondent were not accompanied by clearly stated assumptions, or a clearly indication that the hypothetical data were dependent on variable market factors, or that the stated returns were not guaranteed as required by section 14. Nor did any of the leaflets comply with the requirements of subsections (iii) and (iv).

37. In his answering affidavit the First Respondent alleges that he sent copies of his leaflets to Bongani and to PricewaterhouseCoopers for their approval. A copy of an e-mail sent to the First Respondent on 24 November 2008 shows that PricewaterhouseCoopers felt the need to remind the First Respondent that "*the JSE has not approved the listing yet*". The replying affidavit of Bongani shows that, so far from approving of the methods of the First Respondent, he strongly objected. That is evident from the letter mentioned earlier. In any event, neither Bongani nor PricewaterhouseCoopers could legitimately sanction or condone the departures by the First Respondent from the stringent dictates of section 14. In our view those departures are evident from the language used and by the omissions from those publications of what should have been said therein. We conclude that the guilt of the First Respondent on Count 2 was properly established. We determine that the First Respondent contravened sections 14(1)(a) and (b)(i), (ii) and (iii) of the Code.

38. In regard to the Second Respondent however there was no adequate proof of her involvement in any of the publications and she is acquitted.

E. **COUNT 3**

39. The third count relates only to the First Respondent. He is alleged to have contravened section 13(2)(b) of the FAIS Act which requires an FSP to "... *take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable conduct as well as other applicable laws or conduct of business*". His failure allegedly related to non-compliance with –

10

(a) Section 2 of the Code which is the section applicable to Count 1;

(b) Sections 3(1)(a)(i), (ii) and (iii) of the Code which are the provisions relied on in the alternative to Count 1;

(c) Section 3(1)(b) of the Code which states that a provider and a representative must avoid, and where this is not possible, mitigate any conflict of interest between the
20 provider and a client or the representative of a client;

(d) Section 14 of the Code which deals with the issue of leaflets;

(e) Section 15(2) which provides – "*when providing a client with advice in respect of a product a direct marketer must at the earliest reasonable opportunity – (a) make enquiries to establish whether the financial product or products will be appropriate regard being had to the client's risk profile and financial needs and circumstances ...*".

(f) Section 141 of the Companies Act.

10

40. The essence of this count is that the First Respondent failed to take reasonable steps to ensure that his telemarketers comply with the abovementioned laws. We think that it follows from the foregoing recital of the fact that, so far from ensuring compliance with the provisions of the laws of fair trading. He joined them was directly involved in high-pressure sales and techniques at odds with the applicable statutory requirements. It will be recalled that in his interrogation the First Respondent said "*The product that I am solely marketing is a product*
20 *called Platfields*". So the First Respondent was not engaged in selling a range of products to clients, and offering them sound advice on the risks involved; or of possible alternatives. He and his staff were focused on aggressively selling his Platfields shares and those of his friends at prices well in excess of their intrinsic value.

41. In regard to the component of the charge that he failed to ensure that section 141 of the Companies Act was complied with, the First Respondent denies that he or Investcare made offers of shares to the public, or that he got Investcare to do so. Clearly offers of shares in Platfields were made to a large section of the public and section 141 should have been complied with. The Committee determines that the First Respondent contravened section 13(2)(b) of the FAIS Act.

10

F. **COUNT 4**

42. Count 4 relates only to the First Respondent. He allegedly while marketing and selling Platfields shares, failed to comply with the requirements of sections 11 and 12(b) and (c) of the Code, which are to the effect that he should have resources, procedures and appropriate technologies in place that can reasonably be expected to eliminate the risk that clients will suffer financial losses through inter alia fraud, other dishonest
20 acts, or professional misconduct. We do not think that this charge should be sustained. There is marked overlapping with Count 3 and a splitting of charges is a distinct possibility. The First Respondent is acquitted on Count 4.

G. **COUNT 5**

43. This count charges the First Respondent therewith that he contravened section 15(2)(a) of the Code. That subsection requires a direct marketer when providing a client with advice in respect of a product at the first earliest opportunity, to make enquiries to establish whether the financial product or products concerned will be appropriate, regard being had to the client's risk profile and financial needs and circumstances.

In our view the plain meaning and effect of the subsection is that compliance with its provisions can only occur if the enquiries are made before the client finally and irrevocably binds himself to buy the product and has even paid the purchase price. In short, whenever a marketer enquires from a potential client whether he will buy Platfields shares at the price quoted, he should make sure (presumably by discussion with the client) that the purchase will be in the interest of the client, having regard to his risk profile, financial needs and circumstances.

44. In her affidavit Shirene Fraser says that she obtained samples of client files held by First Respondent. An analysis of those files indicate that some enquiry of the sort required

by section 15 (2)(a) was only done after the client had concluded and had paid for the shares.

45. In paragraph 70, 71 and 72 of his affidavit the First Respondent sets out his version. He states that the analysis was done in every case. He seems to assume however that compliance with the subsection can be performed even after the actual purchase. He does not in our opinion answer the charge under discussion. The Committee determines that the First Respondent contravened section 15(2)(b) of the Code.

H. **COUNT 6**

46. The last count relates solely to the First Respondent. He is alleged to contravened section 21(1) of the FIC Act, read with regulation 4(1)(a) of the Regulations made in terms of section 77 of the Act.

47. Section 21 (i) deals with the "duty to identify client". It states "*An accountable institution (which includes a financial service provider) must not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps –(a) to establish and verify the identity of the client ...*" Regulation

4(a) goes under the heading "*Verification of information concerning South African citizens and residents*". It requires an accountable institution to verify the full names, date of birth, and identity number of natural persons, by comparing those particulars, *inter alia*, with "*an identification document of the person*".

48. The charge against the First Respondent is that he sold Platfields shares, and established business relations with clients before certifying, and that he certified faxed copies of identity documents as being true copies of the original documents, without having seen the original documents.

49. Consideration of the affidavit of the First Respondent shows adequately that he established business relations with a client and sold him Platfields shares before he took the steps necessary to establish adequate identification. And then he signed certification documents without having seen the original document. The Committee determines that the First Respondent contravened section 21(1) of the FIC Act.

I. SUMMARY

50.1. The Committee determines that the First Respondent contravened:

50.2. Sections 2 and 3 of the Code; as set out in Count 1;

50.3. Sections 14(1)(a) and (b)(i), (ii) and (iii) of the Code;

50.4. Section 13(2)(b) of the FAIS Act;

50.5. Section 15(2)(a) of the Code; and

50.6. Section 21(1) of the FIC Act.

50.7. The Committee determines that the Second Respondent contravened sections 2 and 3 of the Code; as set out in Count 1.

J. ADMINISTRATIVE PENALTY

51. We first discuss the position of the First Respondent. It will be appropriate to take all the counts on which he was convicted together. In this regard we bear in mind that there

is some overlapping of the nature of some of the contraventions.

52. The contraventions were certainly very serious. Deceit was extensively practised, resulting in tremendous financial losses to hundreds of members of the public. If one considers the figure of R7 million of sales testified to by the First Respondent, and take in account that within days of the listing of Platfields shares their market value went down to 7cps, the overall financial losses were probably in excess of R6 million. The operations conducted by the First Respondent were truly predatory.

53. The First Respondent attained substantial financial gains by his venture. The calculations of Fraser show that for only part of the period covered by the charges the First Respondent made a profit of R1 585 739.

54. The contraventions were committed over a relatively extended period, from at the latest December 2008, to May 2010. It is in this regard to be noted that even when the First Respondent became aware thereof that the Applicant showed concern over his activities, he carried on therewith for another 15 months.

55. Boiler room enterprises such as that conducted by the First Respondent constitute a serious threat to the public. The reputation of the advisory industry is severely jeopardised.

56. As was held by the Appellate tribunal of the FSB, foreign and local authorities emphasise that the primary purpose of an administrative penalty is general deterrence, and to maintain the integrity of the exchange.

10

57. The First Respondent filed an affidavit on the question of the administrative penalty. He alleges that the steps conducted by the Applicant left him emotionally distraught. We take that into account. He again places reliance on the role played by his compliance officer, but he does not say that the officer was aware of the nefarious methods applied in his business.

He also makes the point that he had not conducted business as FSP "*since I handed over my FSP license*". And later he

20 says that "*I have surrendered my license*". The truth, as set out by the Applicant in his founding affidavit, is that on receipt of various complaints he withdrew the license. The First Respondent noted an appeal against the decision, but later on abandoned the appeal.

He also contends that the Applicant was dilatory in bringing these proceedings. It escapes us how that, if true, can serve as a mitigating factor.

58. The seriousness of the misconduct should be reflected in the quantum of the penalty. In the hope that the penalty in this case will have an effective deterrent effect, the penalty is fixed at R3 million.

10

59. While the misconduct of the Second Respondent is also heinous, she played a lesser role than the First Respondent; probably gained less; and she was only convicted on one count. She however had a personal duty to be honest and truthful when dealing with potential purchasers of Platfields shares. An award of R1 million will be appropriate.

K. **COSTS**

20 60. The Act empowers this Committee to make such order as to costs as it may deem suitable. We consider that the respondents should be ordered to pay the costs. The Applicant attained substantial success in this matter. Neither of the respondents admitted their guilt, and the Applicant

was plainly compelled to incur great costs in order to establish the charges.

61. We order the First Respondent to pay 4/5^{ths} of the costs, and the Second Respondent to pay the remaining 1/5th. Those costs are the cost of constituting the Enforcement Committee panel; and all expenses reasonably incurred by the Applicant in investigating the matter and attaining proof of the charges, and referring the matter to the Enforcement Committee. Excluded, however are the costs of the inspection. In the event of a dispute on any item, the taxing master of the High Court of North Gauteng is requested to rule on the matter.

Signed at **PRETORIA** on the 6th day of **NOVEMBER 2012**.

.....
C F Eloff
Chairperson of the Enforcement Committee