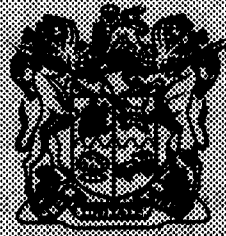


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NOTICE 1138 OF 1999

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

1, Alexander Erwin, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Business Practices Committee on the result of an investigation made by the Committee pursuant to General Notice 432 of 1999 as published in Government Gazette No. 19836 dated 19 March 1999, as set out in the Schedule.

A ERWIN
MINISTER OF TRADE AND INDUSTRY

KENNISGEWING 1 138 VAN 1999**DEPARTMENT VAN HANDEL EN NYWERHEID****WET OP VERBRUIKERSAKE (ONBILLIKE SAKEPRAKTYKE), 1988**

Ek, Alexander Erwin, Minister van Handel en Nywerheid, publiseer hiermee, kragtens artikel 10(3) van die Wet op Verbruikersake (Onbillike Sakepraktyke), 1988 (Wet No. 71 van 1988), die verslag van die Sakepraktykekomitee oor die uitslag van die ondersoek deur die Komitee gedoen kragtens Algemene Kennisgewing No 432 van 1999 soos gepubliseer in Staatskoerant No. 19836, gedateer 19 Maart 1999, soos in die Bylae uiteengesit.

A ERWIN

MINISTER VAN HANDEL EN NYWERHEID

SCHEDULE • BYLAE

BUSINESS PRACTICES COMMITTEE

**REPORT
IN TERMS OF SECTION 10(1) OF THE
HARMFUL BUSINESS PRACTICES ACT, 1988
(ACT No. 71 OF 1988)**

Report No.74

**SIMPLY BELLISSIMO CC,
JOHN KENNETH KILIAN AND
JANET ALISON KILIAN**

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1. Introduction

The Business Practices Committee (the Committee) was established in terms of section 2 of the Harmful Business Practices Act, 71 of 1988 (“the Act”). The purpose of the Act is to provide for the prohibition or control of harmful business practices and for matters connected with this. A “harmful business practice” is any business practice that, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer or deceiving any consumer. The Committee reports to the Minister of Trade and Industry (the Minister).

In terms of the Act the Committee could undertake a section 4(1)(c) or a section 8(1)(a) investigation into the business practices of a particular entity or individual. A section 4(1)(c) investigation enables the Committee to make such preliminary investigation as it may consider necessary. The Committee can also confer with any interested party in connection with any harmful business practice which allegedly exists or may come into existence. Notices of section 4(1)(c) investigations are not published in the Government Gazette as opposed to section 8(1)(a) investigations. The purpose of section 4(1)(c) investigation is to enable the Committee to make a more informed decision as to whether a section “8(1)(a) investigation is called for.

After undertaking a section 4(1)(c) investigation the Committee had reason to believe that Simply **Bellissimo** CC (96/31346/23) and its members, John Kenneth **Kilian (Kilian)** and Janet **Alison Kilian (Ms Kilian)** might be involved in a harmful business practice. They marketed a “franchise opportunity”. The notice of the section 8(1)(a) investigation was announced by Notice No. 432 in Government Gazette No. 19836 published on 19 March 1999.

2. The business opportunity

Kilian advertised in “The Argus” and “Die **Burger**”, daily newspapers in Cape Town. In the advertisements an invitation was extended to purchase a “business

opportunity". Those who responded could acquire **the right** to market and sell **coffee** machines and related products, such as ground coffee and coffee beans.

The following is **directly** translated from the Afrikaans version of one of these advertisements:

SIMPLY BELLISSIMO

*Begin your own business by selling cappuccino and espresso coffee machines.
•Restaurants** Coffee shops• Businesses (offices, factories, etc.)• Functions *•
Homes, clubs, etc.*

This business opportunity was nominated by ABSA Bank at the 1996 International Franchise Exhibition as the best business opportunity in selected areas throughout South Africa, sales on a continuous basis and complete support which will ensure a monthly income of more than R20 000.

*Stock and advertising costs are included
R49 000 assures you an exclusive area.*

Money back guarantee

Tel (021) 790-5925

J Kilian, 7 Gibraltar Street, Houtbay.

Kilian allegedly invited consumers who responded to the advertisement to presentations of the "business opportunity". **Kilian** and his brother conducted these presentations. **Kilian** alleged that he was looking for growth opportunities and wanted people to assist him because he "... could not cope" with the demand.

The following advantages of the "business opportunity" were allegedly put forward by **Kilian** during the presentations:

- (a) the sole and exclusive selling and marketing rights in each area would be guaranteed;
- (b) a "money back guarantee" in terms of which a franchisee could at any time **give** notice that he or she wanted to terminate the agreement. **Kilian** indicated that he would resell a franchisee's area and refund the money paid; and
- (c) the business was **well-established**, with an existent client base that merely needed to be serviced.

Potential franchisees were required to pay **R49 000** for a franchise. **Kilian** required a deposit of **R6000**. On payment of the remaining **R43 000**, franchisees were to have received 30 per cent of the promised stock. The potential franchisees were handed a document in which it was stated:

What do you get???

**Sole exclusivity*

**National and International Support*

**Advertising*

** Promotions*

** Shows*

** Full business setup eg Business cards, pamphlets, catalogues etc*

**No royalties*

** Training and backup (ongoing)*

** Corporate assistance*

** 30% stock*

All included!!!

Television coverage has already taken place and we will endeavour to support national events where television coverage will continue.

3. The complaints received

The Committee received a number of complaints against **Kilian**. The following are some matters raised by them:

- (a) they did not receive the 30 percent stock as promised,
- (b) **Kilian** avoided many attempts by them to meet him,
- (c) the owner of a coffee shop informed a franchisee that **Kilian** gave him (the owner) the right to also sell the same coffee products and coffee machines in the area that the franchisee bought, and
- (d) it appeared that no franchisee had "sole exclusivity" in any area and other franchisees were at liberty to distribute the products to wherever they choose.

Eventually, when **Kilian** was approached by the franchisees about the **infringement** on the "sole exclusivity", he said that it "... slipped his mind" to

inform his **"previous" client** base to refrain from selling in **the** areas of the new franchisees. He **said that the** previous client base could **do so if** they had the franchisee's **permission**, but then had to pay the franchisee a commission.

It appeared that his brother was the sole importer of the products and not **Kilian**, as he led the franchisees to believe. The brother admitted to a franchisee that he held the master franchise and he could grant franchises as he saw fit. He said that the franchises granted by him overrode any franchise sold by **Kilian**.

Two of the franchisees decided that they no longer wished to market the products and requested **Kilian** to cancel the agreement. They also demanded that he **honour** his "money back guarantee". He assured the franchisees that he would do everything in his power to resell their areas and refund their investments. He nevertheless handed a **cheque** of **R5 000** to one of the franchisees. It was alleged by a franchisee that the bank did not **honour** this **cheque** because **Kilian** stopped payment of it.

The aggrieved franchisees called a meeting of all Simply **Bellissimo** franchisees to establish whether they were experiencing similar problems with **Kilian**. During the meeting it became known that this was the case. **Several** franchisees indicated that they had paid for the same area. Not once did he refund an "original" franchisee when he resold an area. **Kilian** allegedly told a complainant that he "... made mistakes" and "... let things get out of hand".

4. The investigation

Officials of the Committee held discussions with several aggrieved franchisees. They experienced similar problems. During discussions with **Kilian** and **Ms Kilian** in **Houtbay**, **Kilian** told the **officials** that he marketed the coffee machines while his brother imported the products. At the conclusion of the meeting **Kilian** was requested to provide the Committee with:

- (a) The latest financial statements of Simply **Bellissimo** CC. These statements should have included the income statement and balance sheet, and had to be certified by a **chartered** accountant. The Committee reserved the right to **verify** these statements by referring to the document sources, such as invoices, order forms, bank statements, **cheque** books, cashbooks and all other relevant books of account and documents.
- (b) Copies of all advertisements placed by Simply **Bellissimo** since it **started** business.

- (c) A written undertaking that he will immediately refrain from placing advertisements quoting exaggerated claims of earnings.
- (d) A list of the franchises sold by him. This list should have contained the names, addresses and telephone numbers of the franchisees and the amounts paid by each.
- (e) The import documents of the stock sold and a list of stock on hand.

The requested documentation was not forthcoming and the officials arranged to have a meeting with the bookkeeper of Kilian. Kilian and Ms Kilian attended this meeting. Simply Bellissimo's did not write up any accounting books. Not even the rudiments of a cash book existed. Officials were handed a number of paid cheques returned by the bank. Kilian was asked to explain some of the expenses paid. He could either "... not remember" or was vague about the details. No supporting documents to authorise the many payments, existed. It appeared that the affairs and funds of the Kilians and Simply Bellissimo were commingled. The financial records were incomplete and in some respects possibly nonexistent. This chaotic state of affairs prevented a conclusive assessment of Simply Bellissimo's financial position.

The bookkeeper drew up a trial balance, but it was inconsequential because of the lack of documentation as set out above. The bookkeeper admitted this. The Kilians were again requested that the financial statements of Simply Bellissimo be certified by a chartered accountant. These statements were not received.

Kilian denied all the allegations made by the franchisees and did not refrain from placing advertisements containing exaggerated claims of earnings. The Committee received an advertisement that appeared in the Rapport that read as follows (directly translated from Afrikaans):

MAKE BIG MONEY

from any business or person

** individual * agencies * companies * businessmen*

EVEN YOU CAN DO IT!

Any person who can follow instructions would easily learn how to manage this **uncomplicated business.** You will be brought to our head office in Cape Town and taught these **easy skills.**

BIG MONEY

How **will you like it to** earn millions, while you assist **all types of businesses and people to** be more successful by using **our product?**

THE SECRET IS OUT

There has never been a greater demand for our product as NOW. This product scarcely needs any introduction because the media, TV, radio and newspapers, all talk about it daily, but no-one does anything about it, inept us. We are prepared to share all our secrets with you should you phone us now.

GUARANTEED SUCCESS

Should you follow our instructions meticulously, YOU WILL BE SUCCESSFUL

YOU ONLY NEED R75 000 to start your way to success.

FOR A CONFIDENTIAL INTERVIEW PHONE (021) 462-0064

JOHN 083-777-7000

TYRONE083- 788-0007

PA UL083- 788-8008

An official called **Kilian** because he previously undertook not to sell any more franchises. He said that he did not know that his name appeared in the **advertisement** in the Rapport and that he did not place the advertisement.

Kilian was repeatedly afforded opportunities to provide evidence that he could meet his promises to the franchisees. **Officials**, while again in Cape Town on other investigations, again invited **Kilian** to provide such evidence to refute the allegations by the franchisees. Although he promised to meet the **officials**, he failed to turn up for the meeting. He was also invited to address the Committee. He failed to do so.

5. Conclusion

The Committee receives many complaints from franchisees against franchisers. **Often** the goodwill, products and services, marketing procedures, **expertise**, systems and support facilities of the "**franchisor**" are nonexistent. Many consumers are apparently of the opinion that when they buy any "franchise", they are assured of success and financial freedom. These franchises often fail and result in financial hardship.

It should not be **overlooked** that consumers also have a part to play. They must become fully conversant with their rights and obligations as they are set out in any relevant contract and should obtain legal advice before entering into franchise contracts.

The Committee afforded **Kilian** many **opportunities** to provide evidence that his promises could **materialise**. He could not provide such evidence. **Kilian** could not even prove that he had the exclusive **rights** to any product. He misled franchisees by selling **rights** that he did not have. He also sold the "rights" of one area to more than one "franchisee".

Simply **Bellissimo's** accounting records and financial affairs were in complete disarray. The total absence of an operational accounting system and commingling of the affairs and funds of Simply **Bellissimo** and **Kilian** and **Ms Kilian** meant that the management of Simply **Bellissimo** had no means of understanding and appreciating the financial state of the firm. These factors were prejudicial to all the "franchisees".

Whether by design or accident, the business practices of **Kilian** and **Ms Kilian**, trading as Simply **Bellissimo**, constitute harmful business practices. There are no grounds justifying the practices in the public interest.

6. Recommendations

The Committee accordingly recommends that the Minister under section 12(1)(b) of the Act declares unlawful the business practice whereby **John Kenneth Kilian** and **Janet Alison Kilian**, in any way whatsoever, and any employee, agent or representative of a business in which the above-mentioned parties have an interest, in the course of business sell or offer for sale any type of franchise business to the public or receive funds from potential franchisees.

This prohibition by the Minister will not apply should **John Kenneth Kilian** and **Janet Alison Kilian**, or any employee, agent or representative of a business in which the mentioned parties have an interest, in the course of business sell or offer for sale any type of franchise business while complying with the conditions of full membership or associate membership of the Franchising Association of South Africa.

LOUISE A TAGER

CHAIRMAN : BUSINESS PRACTICES COMMITTEE

22 April 1999

NOTICE 1139 OF **1999**

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

1, Alexander **Erwin**, Minister of Trade and Industry, after having considered a report by the Business Practices Committee in relation to an investigation of which notice was given in Notice 432 of 1999 published in Government Gazette No. 19836 of 19 March 1999, which report was published in Notice 1138 in Government Gazette No. 20171 of 10/6/99, and being of the opinion that a harmful business practice exists which is not justified in the public interest, do hereby exercise my powers in terms of section 12(1)(b) and (c) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), as set out in the Schedule.

A ERWIN

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

In this notice, unless the context indicates **otherwise** -

“harmful business practice” means -

- (a) directly or indirectly inviting the public to buy franchises; or
- (b) receiving funds from franchisees

unless the parties comply with the conditions of full membership or associate membership of the Franchising Association of South Africa.

“the parties” means Simply **Bellissimo** CC (96/31 346/23) and its members, John Kenneth **Kilian** and Janet **Alison Kilian**, and any employee, agent or representative of any of the above-mentioned.

1. The harmful business practice is hereby declared unlawful in respect of the parties.
2. The parties are hereby directed to -
 - (a) refrain from applying the harmful business practice;
 - (b) cease to have any interest in a business or type of business which applies the harmful business practice or to derive any income there from;
 - (c) refrain from at any time applying the harmful business practice; and
 - (d) refrain from at any time obtaining any interest in or deriving any income from a business or type of business applying the harmful business practice.
3. This notice shall come into operation upon the date of publication hereof.

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