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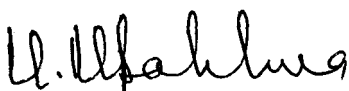
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GENERAL NOTICES

NOTICE 2967 OF 2004

DEPARTMENT OF TRADE AND INDUSTRY CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Mandisi Mpahlwa, MP, 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 Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 1639 of 2002 as published in Government Gazette No 23793 dated 30 August **2004**, as set out in the Schedule.



M B M MPAHLWA

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

CONSUMER AFFAIRS COMMITTEE

REPORT IN TERMS OF SECTION 10(1) OF THE
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988
(ACT NO. 71 OF 1988)

Report No 116

An investigation in terms of section 8(1)(a) of the
Consumer Affairs (Unfair Business Practices) Act, 71 of 1988,
into the business practices of
Prism Management Financial Services (Pty) Ltd and/or
Merces Cura Asset and Investment Management (Pty) Ltd

PRISM MANAGEMENT FINANCIAL SERVICES (PTY) LTD AND/OR MERCES CURA ASSET AND INVESTMENT MANAGEMENT (PTY) LTD

1. The report of Deloitte and Touche(1)

The Financial Services Board conducted an investigation into the activities of Prism Management Financial Services (Pty) Ltd and/or Mercedes Cura Asset and Investment Management (Pty) Ltd prior to investigation by Deloitte. The report compiled by the Financial Services Board contained *inter alia* the following comments:

- “Mercedes Cura is accepting deposits from the public and as such is contravening the provisions of the Banks Act.”
- “It appears as if the manner in which the client’s funds are pooled into one account on which interest is earned and from which the forex profits are gained may be in contravention of the Unit Trust Control Act.”
- “The danger of soliciting this type of guaranteed product to the general public is that should the income derived from the forex trading fall short of satisfying the profit guarantee, the investors’ capital may be used to pay out monthly ‘profits’.”

Despite the fact that Prism Management Financial Services (Pty) Ltd and/or Mercedes Cura Asset and Investment Management (Pty) Ltd were ~~two~~ different legal entities, Mr Johannes Lodewyk Coetzee, also known as Johann Coetzee (Coetzee), explained that they were *de facto* the same entity. Coetzee explained as follows:

- Prism was a company involved in extensive, and in some instances high profile, sponsorships⁽²⁾;
- Due to the fact that the name “Prism” was commonly used, it was decided to change the name of the company to a unique name, namely, “Mercedes Cura” with a view to obtain maximum benefit from the high profile sponsorships;
- It was also decided to expand the company and to get involved in other areas of business and for this reason it was decided to set up a new company with different divisions.

For purposes of this section of the report, Prism and Mercedes Cura are hereinafter referred to as “Mercedes”.

The directors indicated on the letterhead of Mercedes differed from the records of the Registrar of Companies. The directors on the letterhead of Mercedes Cura were: Coetzee, L Swart, AG Richardson, AP Moloi, MM Buthelezi, B Coetzee, and R Richardson. In their discussions with Mercedes Cura, Deloitte mainly dealt with Coetzee and Leonie Swart (Swart). In July 2002 Deloitte was introduced to Bennie De Bruin (De Bruin). De Bruin was the CEO, and Coetzee and Swart became the President and Vice-president of the company respectively.

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- (1) Officials of Deloitte and Touche (Deloitte) were appointed on 4 April 2002 by the South African Reserve Bank as temporary inspectors in terms of the South African Reserve Bank Act (Act no 90 of 1989). The appointment was to inspect the affairs of Prism Management Financial Services (Pty) Ltd and/or Mercedes Cura Asset and Investment Management (Pty) Ltd. This section is based exclusively on the Deloitte report.
 - (2) Sponsorships included the Falcons Rugby Union as well as individual sportsmen and sportswomen.

Merces had its head office in Springs. It also operated four branches at Groblersdal, Jane Furse (a rural village close to Groblersdal), Polokwane and Nelspruit.

Coetzee explained that Merces was a business involved in an array of activities. For this purpose it was divided into a number of different business divisions. The biggest division, "Asset and Investment Management", was responsible for trading on the world's foreign exchange markets utilising trader accounts provided by Global Forex Trading (GFT) in the United States of America. Other divisions were the following: Merces Property (an estate agency in Springs), Merces Motors (a second hand car dealership also in Springs), Meres Cura Finance (apparently involved with the financing of the vehicles sold through Merces Motors), Merces Construction (involved in various construction projects in and around Springs). Mr Johannes Lodewyk Coetzee, also known as Boet Coetzee and the grandfather of Coetzee, managed Merces Construction. Throughout the Deloitte investigation it became apparent that the Merces Construction division was responsible for the construction and building activities at several of the premises occupied by Merces.

The analysis of the bank accounts and other records of Merces, discussions with the directors and a scrutiny of the company website, revealed that the company was also involved in various other activities, such as a liquor store, restaurant, sports bar, third party assessment and funeral and life insurance.

It later became clear that Merces derived very little income from these divisions and activities. In fact, the cash flow analysis indicated that the divisions and other activities consumed more than R19 million of investors' money. The few divisions which generated income, operated at a loss.

It was clear that Merces actively solicited investments claiming that impressive returns were possible through its involvement in the foreign exchange market. Promotional material received from Coetzee emphasised the company's involvement in forex trading. In the promotional material it was stated:

"Our main speciality is investments in the Foreign Exchange market. Our investment approach is based on fundamental daily research and analysis to identify those currencies that will deliver the highest daily, weekly and monthly return".

"At first glance it seems quite impossible to achieve the results as set out in the tables below, but take a closer look at the facts. In January 2001 the South African Rand was R7.42 to the U.S. Dollar. At the end of September 2001 it was R9.38. A difference of R1.96. This means an investment of R10 000 rendered a return of R19 600."

Merces also had a website which emphasised that:

"Our main objective is to hold the capital placed at our disposal and invest it with the greatest of care and security in the foreign exchange market oriented towards profit, in order to obtain optimum returns for our clients. The strict application of our business philosophy and the trading concept that has risen from it allows us to attain the highest return."

Merces followed a formal advertising campaign by marketing their investments in various magazines such as the AA magazine "Die Motoris" and the Nedbank million

dollar promotional magazine. Agents also solicited investments by using pamphlets printed and provided by Mercus.

Mercus utilised at least 53 agents to solicit investments from the general public. No evidence was found that anybody was excluded from investing with the entity. The agents operated from the head office in Springs as well as from the four branches. The agents received a commission of 10 per cent on the capital invested and the minimum investment was R10 000. Investors had two investment options. One option was a so-called "pure investment", also known as the "Prosperity Fund" and the other was a "monthly income", also known as the "Income Fund". Both of these options provided investors with a compound growth of 79 per cent per year. Investors were led to believe that an investment of R10 000 with the Prosperity Fund would provide a return of R17 958.56 after a year. Coetzee explained that this compound growth rate was based on a return of five per cent per month on the capital investment. The investor had the option, after one year to either withdraw the capital and return or to make a new investment. The Income Fund provided an annual return of 32 per cent as well as monthly return of three per cent. An investment of R10 000 with the Income Fund would have given an annual return of R13 194.80 (32 per cent) and a monthly income of R300. Investors could also withdraw ("loan") from their investments at a rate of 30 per cent interest per annum.

At the end of April 2002 at least 1 706 individuals and organisations invested with Mercus. The Income Fund had 778 investors and the Prosperity Fund 928 investors. The public invested at least R55 million with Mercus. The Income Fund totaled nearly R32 million and the Prosperity Fund contained the remaining R23 million. It paid just over R14 million to investors. R20 plus million was solicited by the branches, with nearly R13 million coming from the Jane Furse branch. Affidavits obtained from investors confirmed that the investors understood that Mercus was able to realise the impressive returns because of its activities on the foreign exchange market.

Mercus pooled all the investments in its local account before commencing with forex trading. Through Standard Corporate and Merchant Bank it had a business relationship with GFT. It did not open individual forex trading account for each individual investor. In addition, GFT does not accept third party deposits (that is where the name of the local bank account and the name of the GFT trading account differ). Mercus's system operated as follows:

- All investments received were pooled in the local Mercus account;
- Mercus had 6 forex traders and each trader had a trade account with GFT in his/her own name and each trader had an account with ABSA;
- Money was then transferred from the Mercus account to the traders' local account from where it was transferred to each traders' GFT trading account;
- The transfers were only done once the necessary South African Revenue Service and the South African Reserve Bank approval have been obtained for each trader.

Interviews were conducted with the traders and affidavits were taken from two traders. Both individuals declared that they had no or limited experience in forex trading when they joined Mercus.

The Deloitte analysis indicated that **R1,6** million was transferred between March and September **2001** to the GFT accounts abroad. Deloitte was informed that there were no transfers from the trade accounts back to the local bank accounts. The traders and Coetzee explained that there were no transfers back as they were building "equity" to be used for future forex transactions. However, the Exchange Control Department of the South African Reserve Bank informed Deloitte that approximately **R90 000** was transferred back. The returns investors received were not generated by forex trading - investor "A" was repaid with investor "B"'s money. This was confirmed by the Deloitte analysis as well as Coetzee, Swart and De Bruin.

Coetzee also explained that some of the investments received were used to invest in their other business divisions and to fund the monthly operating costs of these businesses and investments were also used to repay investors whose investments reached maturity and to pay the monthly returns to investors who opted for the so-called "Income Fund".

Merces did not keep a proper set of accounts. When Deloitte attended their first meeting with the directors, the directors could not present accounting records as required by the Companies Act. They could not provide annual financial statements for the financial years ending **28 February 2000, 2001 and 2002**.

During the period January **1999** to **28 February 2002** Merces did not generate any significant external income, other than interest received of **R10 509** and income of **R676 283** from the Falcons Nest Sports Bar. On **23 July 2002** Coetzee informed Deloitte that the construction and motors divisions were generating income, but that they were primarily funded with amounts received from investors. Merces and its divisions did not appear to be self-sustainable businesses and therefore depended on new deposits to enable them to serve their obligations.

A significant amount of the deposits paid into the Merces bank accounts were used for expenses. During the period January **1999** to **28 February 2002** Merces incurred expenses of **R19.7** million. The three major expenses were the construction division (**R9.3** million), head office (**R8.8** million) and Sports Bar (**R1** million). The **R8.8** million incurred at the head office included salaries to Coetzee, Swart, personnel and family members as well as commissions amounting to **R4.6** million and sponsorships amounting to **R1.6** million.

Loan accounts amounted to **R3.08** million. The majority of these loan accounts refer to Coetzee, Swart and family members of Coetzee. Included in the amounts to Coetzee and Swart were payments for two vehicles as well as a payment for a town house. At a meeting on **23 July 2002** Coetzee, Swart and De Bruin informed Deloitte that the majority of amounts paid to the above family members are not recoverable and will have to be written off.

Merces purchased motor vehicles, equipment, buildings and furniture amounting to **R3** million. The motor vehicles purchased include motor vehicles amounting to **R1.3** million, a boat of **R41 724** and a trailer for **R5 100**. The buildings purchased include the head office (**R471 342**) as well as deposits of **R72 000** for the acquisition of **5** stands at the then recently developed Oubaai residential golf estate, situated near Heroldsbay.

Merces transferred **R1 632 000** overseas to the Forex broker accounts. An analysis revealed a number of transfers to the forex trading accounts. The first transfer was on **23 March 2001** with the last being **21 September 2001**.

In summary, the main business of Mercus centred on the accepting of investments from investors on a regular basis. The analysis revealed that, except for the sales from the sports bar, Mercus did not have any significant income. Mercus insisted that they generate significant returns on the Forex market to repay investors their capital amount and the returns, but the Deloitte investigation revealed that none (or very little) of these returns were transferred back from the trader accounts.

2. *The Consumer Affairs Committee*

The Consumer Affairs Committee (the Committee), a statutory body in the Department of Trade and Industry (*the dti*) administers the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the Act). The purpose of the Act is to provide for the prohibition or control of certain business practices. An unfair business practice is **defined**⁽³⁾ as any business practice which could harm the relationship between businesses and consumers or which will unreasonably prejudice, deceive or unfairly affect consumers.

The Act is enabling and not prescriptive. The main body of the Act is devoted to various administrative procedures, the investigative powers of its investigating officials, the types of investigations the Committee could undertake and the powers of the Minister of Trade and Industry (the Minister). The Act confers wide investigative powers on the Committee. The investigations are carried out by the Consumer Investigations Directorate (the Directorate) of *the dti*. There are two types of investigations which the Committee could undertake when appraising the business practices of an individual or an entity, namely: an "informal" section 4(1)(c) investigation or a "formal" section 8(1)(a) investigation.

The usual procedure when the Committee receives a complaint, is to undertake a section 4(1)(c) investigation into the business practices of the person or entity complained about. This type of investigation enables the investigators to make preliminary enquiries to establish how the business functions. **No** publicity is afforded to section 4(1)(c) investigations.

When the Committee has decided to undertake a section 4(1)(c) investigation, or has published a notice to undertake a section 8(1)(a) investigation, it may, in terms of section 9 of the Act, at any time thereafter negotiate with any person or entity, with a view to making an arrangement which in the opinion of the Committee will ensure the discontinuance of an unfair business practice which exists or may come into existence.

Should the Committee be of the opinion that there is evidence of an unfair business practice and it resolves to further investigate the matter, notice of a section 8(1)(a) investigation is published in the *Government Gazette*.⁽⁴⁾ The Minister is not empowered to make any decisions regarding the discontinuance of a particular business practice on the strength of a 4(1)(c) investigation. **He** may do **so** following an 8(1)(a) investigation.

Should the Committee, after an 8(1)(a) investigation, find that an unfair business practice exists, it recommends corrective action to the Minister to ensure the

(3) See section 1 of the Act for the definition of an unfair business practice.

(4) In most cases the Committee is able to resolve the matter and it is then unnecessary to proceed with a formal investigation.

discontinuance of that **practice**.⁽⁵⁾ The Minister's order *is* published in the *Government Gazette*. An infringement of such an order is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both a fine and imprisonment.

3. The Committee's involvement

In a submission, presented to the Committee during May 2002, it was stated that: "In marketing material of Prism Management Financial Services (Pty) Ltd (1998/022260/07) and/or Mercedes Cura Asset and Investment Management (Pty) Ltd (1979/004507/07), investors are guaranteed an annual return of 79 per cent, which is regarded as unrealistic and misleading".

At its meeting held during May 2002 the Committee resolved to undertake a section 4(1)(c) investigation in terms of the Act into Mercedes⁽⁶⁾. On 27 June 2002 investigating officials of the Committee met with Coetzee, the CEO of Mercedes. Upon arrival at his office, he informed the officials that he did not have time to discuss the matter as he was busy with "... foreign exchange trading". The officials thereupon suggested to him that he address the Committee on 19 July 2002.

Coetzee met with the Committee on 19 July 2002. It was resolved at this meeting to temporarily suspend the Committee's investigation because the entities were being investigated by Deloitte. Coetzee was requested to furnish the Committee with written answers to certain questions and to change the business practices of Mercedes.

An investigating official met with an auditor of Deloitte on 22 July 2002 and was informed that Mercedes was probably contravening the Banks Act and had been placed under liquidation. By the next meeting of the Committee during August 2002, the information requested from Coetzee was not forthcoming and the Committee resolved to undertake a section 8(1)(a) investigation into Mercedes. The notice of the section 8(1)(a) investigation was published under Notice 1639 of 2002 in Government Gazette 23793 on 30 August 2002. It read as follows:

"In terms of the provisions of section 8(4) of the Consumer Affairs (unfair Business Practices) Act, 1988 (Act No 71 of 1988), notice is herewith given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(a) of the said Act into the business practices of Prism Management and Financial Services (Pty) Ltd (1998/022260/07), Mercedes Cura Asset and Investment Management (Pty) Ltd (1979/004507/07), Johannes Lodewyk Coetzee known as Johan Coetzee (ID 730819 5240 08 0) Johannes Lodewyk Coetzee known as Boet Coetzee (ID 420328 5016 08 1) and any other director, member, employee, agent and/or representative of any of the aforementioned in respect of the activities of Prism Management and Financial Services (Pty) Ltd and Mercedes Cura Asset and Investment Management (Pty) Ltd."

At its meeting held on 12 September 2002 the Committee resolved to add the names of De Bruin (ID: 410929 5030 08 9) and Swart (ID: 680614 0104 08 8) to the names

(5) The powers of the Minister are set out in section 12 of the Act.

(6) It was explained above that despite the fact that Prism Management Financial Services (Pty) Ltd and/or Mercedes Cura Asset and Investment Management (Pty) Ltd were two different legal entities, they were *de facto* the same entity and *will* be referred to as Mercedes.

already listed in Notice 1639 of 2002. De Bruin and Swart were informed of the Committee's decision. Notice 1639 in any event by implication included both De Bruin and Swart because of the words "... any other director, member, employee, agent and/or representative of any of the aforementioned in respect of the activities of Prism Management and Financial Services (Pty) Ltd and Mercedes Cura Asset and Investment Management (Pty) Ltd."

The Committee resolved on 20 February 2003 that it should consider the report compiled by Deloitte. Due to rationalization in 2002 and 2003, a number of experienced investigators were transferred from the Directorate and towards the latter half of 2003 the Committee was reconstituted. Investigations into unfair business practices proceeded very slowly as a direct consequence of the severe shortage of staff in the Directorate. The position has improved since the beginning of 2004 and the Directorate has now at its disposal the services of five full-time investigators. Due to an immense backlog of work it was not possible to give much attention to the Mercedes matter. It also came to the attention of the Committee that the South African Police Services was investigating a charge of fraud against a number of former Mercedes directors.

4. Conclusion

Information at the disposal of the Committee indicates that Mercedes misled and prejudiced many consumers. There are no grounds justifying the practices of Mercedes in the public interest. Consumers (investors) lost millions of Rands in a scheme in which the promoters promised unattainable returns. Investors were led to believe that Mercedes was earning money by trading on the world's foreign exchange markets, but this was not so. It also appears that neither the directors nor the employees had experience of how to trade on these markets. The entity also derived very little income from its local activities, and these activities consumed a substantial amount of the investors' money.

By promising investors the unattainable returns, the directors and employees also violated Notice 1135 of 1999 which was published in Government Gazette 20169 on 9 June 1999. In this notice a harmful business practice was defined as the operation of or participation in a multiplication scheme offering an effective annual interest rate of 20 (twenty) per cent and more above the REPO rate determined by the South African Reserve Bank. The applicable REPO rate is the rate which applied at the date of the investment or commencement of participation.

5. Recommendation

Although some of the parties involved may be found guilty of certain criminal charges, the Committee must ensure that they do not again get involved in the types of schemes set out in this report. Section 8(1)(a) of the Act specifically states that the Committee may make such investigation as it may consider necessary into any unfair business practice which the Committee has reason to believe exists or may come into existence (Own underlining).

The Committee therefore recommends that the Minister, in terms of section 12(1)(b) and 12(1)(c) of the Act, declare unlawful the business practices whereby the parties known as Johannes Lodewyk Coetzee, also known as Johan Coetzee (ID 730819 5240 08 0), Johannes Lodewyk Coetzee, also known as Boet Coetzee (ID 420328 5016 08 1), Bennie de Bruin (ID 410929 5030 08 9) and Leonie Swart (ID 680614 0104 08 8), directly or indirectly,

- (1) invite any persons to make investments in companies or close corporations in which they are shareholders or members,
- (2) receive investment funds from investors for management or re-investment of such funds on behalf of the investors
- (3) pay interest to previous investors from monies obtained from more recent investors.



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PROFESSOR T A WOKER
CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE
11 November 2004