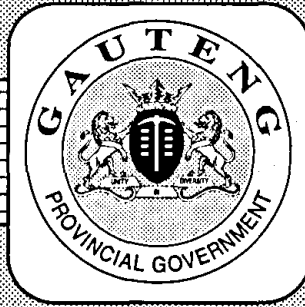


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No. 356

PREMIER'S NOTICE

OFFICE OF THE PREMIER

No. 18

16 May 1997

Due to an administrative error an incorrect version of the Consumer Affairs (Unfair Business Practices) Bill was published in *Provincial Gazette* No. 280 of 27 September 1996 under Proclamation No. 49 of 1996. The correct version of the Bill as passed by the Gauteng Provincial Legislature on 22 April 1997 is hereby published and replaces the incorrect version.

No. 7 of 1996: Consumer Affairs (Unfair Business Practices) Act

ACT

To provide for the investigation, prohibition and control of unfair business practices in the interest of the protection of consumers, and for that purpose to establish an Office for the Investigation of Unfair Business Practices and a Consumer Affairs Court; to amend the Local Government Ordinance, 1939, so as to authorise local authorities to establish consumer advice offices; and to provide for matters connected therewith

(English text signed by the Premier)

(Assented to 6 May 1997)

PREAMBLE

Whereas people have the right not to be exploited as consumers;

And whereas in our modern society and in the light of the common law, people are inadequately protected against consumer abuse;

Now, therefore:—

BE IT ENACTED by the Provincial Legislature of Gauteng, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

- (i) “**arrangement**” means an arrangement or undertaking negotiated and concluded by the office under section 11;
- (ii) “**business**” means—
 - (a) offering, supplying or making available any commodity; or
 - (b) soliciting or receiving any investment;
- (iii) “**business practice**” includes—
 - (a) any agreement, accord or undertaking in connection with business, whether legally enforceable or not, between two or more persons;
 - (b) any scheme, practice or method of trading in connection with business, including any method of marketing or distribution;
 - (c) any advertising, type or advertising or any other manner of soliciting business;
 - (d) any act or omission in connection with business on the part of any person, whether acting independently or in concert with any other person; and

- (e) any situation in connection with the business activities or any person or group of persons, but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979);
- (iv) **"committee"** means the Standing Committee of the Provincial Legislature responsible for consumer affairs;
- (v) **"commodity"** means—
 - (a) any property, whether corporeal or incorporeal and whether movable or immovable, including any make or brand of commodity;
 - (b) any service, excluding service due in terms of a contract of employment;
- (vi) **"consumer"** means any person envisaged by section 2(1);
- (vii) **"Consumer Protector"** means the person appointed in terms of section 4(1)(a);
- (viii) **"court"** means the administrative body established by section 13 and known as the Consumer Affairs Court;
- (ix) **"investigating officer"** means an investigating officer appointed under section 9(1) or deemed in terms of section 9(2) to have been so appointed;
- (x) **"investment"** means any money or other property, or any facility, intended for use in connection with any venture or scheme for profit, or purported to be so intended;
- (xi) **"office"** means the Office for the Investigation of Unfair business practices established by section 3;
- (xii) **"prescribed"** means prescribed by regulation;
- (xiii) **"regulation"** means a regulation made under section 29;
- (xiv) **"responsible Member"** means the Member of the Executive Council of the Province responsible for economic affairs and finance;
- (xv) **"this Act"** includes the regulations;
- (xvi) **"unfair business practice"** means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer;

Consumers

- 2. (1) The following shall be consumers for purposes of this Act—
 - (a) any natural person to whom any commodity is offered, supplied or made available where that person does not intend to apply the commodity for the purposes of resale, lease, the provision of services or the manufacture of goods for gain;

- (b) any natural person from whom is solicited, or who supplies or makes available, any investment;
- (c) any other person who the responsible Member declares to be a consumer in terms of subsection (2).

(2) The responsible Member may, with the concurrence of the committee, declare any person to be a consumer by notice in the *Provincial Gazette* and may withdraw, vary or amend any such notice.

Establishment of Office for the Investigation of Unfair business practices

3. (1) There is hereby established, in the Department of Finance and Economic Affairs of the Province, an office called the Office for the Investigation of Unfair business practices.

(2) The functions of the office shall be performed by the Consumer Protector.

Consumer Protector and staff of office

4. (1) Subject to the laws governing the public service, the responsible Member—

- (a) shall appoint a person as Consumer Protector;
- (b) may from time to time appoint an acting Consumer Protector, to discharge the duties of the Consumer Protector whenever the Consumer Protector is for any reason unable to perform those duties or while the appointment of a person as Consumer Protector is pending; and
- (c) may appoint one or more persons to assist with the performance of the functions of the office, subject to the control and directions of the Consumer Protector.

(2) The Consumer Protector may in the performance of his or her functions also be assisted by any person or body whose service is obtained by him or her for the purpose of a particular investigation.

(3) A person contemplated in subsection (2) may be paid such remuneration, allowances and expenses as the Consumer Protector, with the concurrence of the responsible Member, may determine.

Functions of office

5. (1) The office shall—

- (a) receive and investigate complaints of alleged unfair business practices which have been lodged with the office as contemplated in section 6, and dispose of such complaints in terms of this Act; and
- (b) perform the other functions assigned to it by or under this Act.

(2) (a) The office shall as soon as practicable after 31 December in each year submit to the responsible Member a report on its functions during the year ending on that date.

(b) The responsible Member shall lay a copy of the annual report submitted in terms of subsection (1) upon the table in the Provincial Legislature within 14 days after its receipt if the Legislature is then sitting or, if the Legislature is not then sitting, within 14 days after the commencement of its next ensuing ordinary sitting.

Lodging of complaints with office

6. (1) Any person may lodge a complaint with the office regarding an alleged unfair business practice.

(2) A complaint contemplated in subsection (1) which is not in writing shall be reduced to writing by the office.

Investigations by office

7. (1) The office may, where no complaint has been lodged, institute such investigation as may be necessary into—

- (a) any unfair business practice which there is reason to suspect exists or may come into existence;
- (b) any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any class or type of business or a particular area, and which there is reason to suspect is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.

(2) If the responsible Member refers a matter contemplated in subsection (1) to the office, the office shall conduct an investigation into that matter.

(3) The office may by notice in the *Provincial Gazette* make known any investigation which it is conducting, and that any person may within a period specified in the notice make written representations regarding the investigation to the office.

(4) The office may, for the purposes of an investigation, have regard to any investigation, finding or measure taken by the Business Practices Committee established by section 2 of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), or the Minister of Trade and Industry in terms of that Act, or by any other competent authority, including an authority in another province.

(5) If the Consumer Protector is of the opinion that a complaint may more appropriately be dealt with by another competent authority, he or she may at any time refer any investigation or aspect thereof to such other authority, including an authority in another province: Provided that the office may at any time resume the investigation in relation to that matter.

Summoning and questioning of persons and production of books and documents

8. (1) For the purposes of an investigation, the Consumer Protector or a person in the service of the office authorised by him or her may—

- (a) summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before a person in the service of the office at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and

- (b) question that person, under oath or affirmation administered by the Consumer Protector or another person in the service of the office authorised by the Consumer Protector, and examine or retain for further information or for safe custody such a book, document or other object.
- (2) A summons referred to in subsection (1)(a) shall—
- (a) be in the prescribed form;
 - (b) contain particulars of the matter in connection with which the person concerned is required to appear;
 - (c) be signed by the Consumer Protector or another person in the service of the office authorised by the Consumer Protector; and
 - (d) be served in the prescribed manner.
- (3) A person appearing by virtue of subsection (1)(a)—
- (a) may be assisted at the examination by any person of his or her choice;
 - (b) shall be entitled to the prescribed witness fees.
- (4) A person shall be guilty of an offence if he or she, having been summoned in terms of this section—
- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings or until he or she has been excused from further attendance;
 - (b) refuses to take the oath or make an affirmation;
 - (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;
 - (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce; or
 - (e) makes a false statement to the Consumer Protector or other person in the service of the office designated by the Consumer Protector, knowing such statement to be false or not knowing or believing it to be true.
- (5) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (4)(c) to (e), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

Investigating officers

9. (1) The Consumer Protector may appoint persons in the service of the office or any other suitable persons as investigating officers.

(2) The Consumer Protector shall be deemed to have been appointed as an investigating officer under subsection (1).

(3) An investigating officer who is not in the full-time service of the State shall be appointed on such conditions and at such remuneration as may be prescribed.

(4) An investigating officer shall be provided with a certificate of appointment signed by or on behalf of the Consumer Protector and in which it is stated that he or she is an investigating officer appointed in terms of this Act.

(5) An investigating officer shall, when performing any function in terms of this Act, have his or her certificate of appointment in his or her possession.

Search and seizure

10. (1) In order to obtain any information required by the office in relation to an investigation, an investigating officer may, subject to the provisions of this section, enter any premises on or in which any book, document or other object connected with that investigation is or is suspected to be, and may—

- (a) inspect or search those premises, and there make such inquiries as may be necessary for the purpose of obtaining any such information;
- (b) examine any object found on or in the premises which has or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
- (c) make copies of or extracts from any book or document found on or in the premises which has or might have a bearing on the investigation in question, and request from any person who is suspected of having the necessary information, an explanation of any entry therein;
- (d) seize, against the issue of a receipt, anything on or in the premises which has or might have a bearing on the investigation in question, if the investigating officer needs to retain it for further examination or for safe custody.

(2) Unless the owner or person in charge of the premises concerned has consented thereto in writing, an investigating officer shall enter premises and exercise any power contemplated in subsection (1), only under a search warrant, which may only be issued by the Consumer Affairs Court if it appears to that court from information given to the court on oath or solemn affirmation that there are reasonable grounds to suspect—

- (a) that an unfair practice exists or may come into existence; and
- (b) that a book, document or other object which may afford evidence of such unfair business practice is on or on those premises.

(3) A search warrant contemplated in subsection (2) shall—

- (a) authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising any power contemplated in subsection (1);
- (b) be executed by day, unless the court authorises the execution thereof by night;
- (c) be of force until it is executed, cancelled by the court, or a period of one month from the day of its issue expires, whichever occurs first.

(4) An investigating officer executing a search warrant under this section shall, before such execution, upon demand by any person whose rights may be affected—

- (a) show that person his or her certificate of appointment;
- (b) hand to that person a copy of the warrant.

(5) A person from whose possession or charge a book or document has been taken under this section shall, as long as it is in the possession or charge of the investigating officer concerned or of the office, be allowed on request to make copies thereof or to take extracts therefrom at any reasonable time at his or her own expense and under the supervision of that investigating officer or a person in the service of the office.

(6) A person shall be guilty of an offence if he or she—

- (a) obstructs or hinders an investigating officer in the performance of his or her functions in terms of this section;
- (b) enquiry after having been made of him or her under subsection (1)(a), or having been requested for information or an explanation under subsection 1(b) or (c)—
 - (i) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, such enquiry or request for information; or
 - (ii) gives an answer or information or an explanation which is false or misleading, knowing it to be false or misleading.

(7) A person from whom information or an explanation has been requested in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where the person stands trial on a charge contemplated in subsection (6)(b).

Negotiation of arrangements to discontinue unfair business practice

11. (1) The office may negotiate and conclude an arrangement with any person for—

- (a) the discontinuance or avoidance of an unfair business practice;
- (b) the reimbursement, with interest, to affected consumers;
- (c) the discontinuance or avoidance of any aspect of an unfair business practice; or
- (d) any other matter relating to the unfair business practice.

(2) An arrangement—

- (a) may be concluded at any time after the institution of an investigation, but before the making of a final order by the court;
- (b) shall be in writing and signed by the parties thereto; and
- (c) shall be subject to confirmation by the court in accordance with section 21.

Institution of proceedings after completion of investigation

12. (1) Upon completion of an investigation, the Consumer Protector may institute proceedings in the court of the area concerned—

- (a) against the person alleged to be responsible for the unfair business practice in question; and/or
- (b) generally, with a view to the prohibition of any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any type of business or a particular area, and which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.

(2) If the office decides not to institute proceedings, the Consumer Protector shall inform the complainant.

Establishment of Consumer Affairs Court

13. (1) The responsible Member shall, by notice in the *Provincial Gazette*, establish one or more Consumer Affairs Courts for the Province.

(2) The court shall be established for an area defined in such notice.

(3) The responsible Member may, in like manner—

- (a) vary any such area;
- (b) withdraw such a notice and abolish any such court.

(4) The seat or seats of the court shall be at such place or places as the responsible Member may from time to time determine in general or in relation to particular proceedings.

Appointment of court

14. (1) Members of the court shall be appointed by the responsible Member in concurrence with the committee.

(2) The court shall consist of five persons, namely—

- (a) a chairperson, who shall be—
 - (i) a retired judge of the Supreme Court; or
 - (ii) an attorney, advocate, retired magistrate or lecturer in law at a university, with not less than 10 years' cumulative experience in one or more such capacities;
- (b) four additional members having special knowledge or experience of consumer advocacy, economics, industry or commerce.

(3) The responsible Member may appoint an alternate member for every member of the court.

(4) The responsible Member shall invite interested parties, by notice in the *Provincial Gazette* and an advertisement in the print media regarded as appropriate by the responsible Member, to nominate candidates, within 21 days of the publication of such notice, for consideration as members of the court.

(5) The names of the nominees shall thereafter be published in the said *Gazette* and print media for comment.

(6) Interviews of nominees shall be open to the public.

(7) A member and alternate member of the court shall, before assuming office, make and subscribe an oath or solemn affirmation in the prescribed form before the responsible Member.

(8) A member and alternate member of the court shall be appointed for such period and paid such remuneration and allowances as the responsible Member may determine, and different remuneration and allowances may be determined in respect of different members and alternate members.

Persons disqualified from being members of court

15. (1) No person shall be appointed or remain a member of the court if he or she is not a fit and proper person or—

- (a) is not a citizen of the Republic resident in the Province;
- (b) is a public servant;
- (c) at the relevant time is, or during the preceding 12 months was, an office bearer or employee of any party, movement, organisation or body of a party political nature;
- (d) is an unrehabilitated insolvent;
- (e) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under this Act or the Corruption Act, 1992 (Act No. 94 of 1992), or any offence involving dishonesty;
- (f) has at any time been removed from an office of trust on account of misconduct.

(2) No person shall remain a member of the court if he or she fails to disclose an interest which would require him or her to be recused.

Constitution of court

16. (1) Subject to subsection (4), the quorum of the court shall be three members.

(2) Except where otherwise provided, a decision of the majority of members of the court present shall be the decision of the court.

(3) A member of the court shall recuse himself or herself from proceedings on the grounds of any interest or association likely to affect his or her impartial consideration of the matter, or which is likely to be seen to do so.

(4) If at any stage during the proceedings before the court—

- (a) the chairperson becomes incapable of acting or is absent, the proceedings shall begin afresh;
- (b) any other member becomes incapable of acting or is absent, the proceedings shall continue before the remaining members;

- (c) two or more other members become incapable of acting or are absent, the proceedings shall begin afresh unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of remaining members.

(5) In the event that the proceedings continue before an even number of members and there is a split decision the chairperson's decision shall be decisive.

Functions, powers and duties of court

17. The court—

- (a) shall hear, consider and make a decision on any matter which is before it by virtue of proceedings envisaged by this Act;
- (b) may award costs, on a scale to be prescribed or in an amount determined by the court, against any person found to have conducted the unfair business practice concerned and who is found to have acted fraudulently or grossly unreasonably;
- (c) may generally deal with all matters necessary or incidental to the performance of its functions under this Act;
- (d) shall exercise any other powers and perform the functions and duties assigned to it by this Act.

(2) Process of the court shall run throughout the Province and orders of the court shall have force throughout the Province.

(3) The responsible Member shall, subject to the laws governing in the public service, appoint—

- (a) a clerk of the court to perform the administrative work incidental to the functions of the court; and
- (b) such other persons to assist the clerk of the court as may be necessary.

Proceedings of court

18. (1) Proceedings before the court shall, except in cases contemplated in sections 12 and 20, be initiated by summons in the prescribed form which shall be served on the person concerned in any manner as may be prescribed, which may include service outside the Province.

(2) All proceedings of the court shall, subject to the provisions of subsection (3), be open to the public.

(3) The court may direct that the public or any member thereof may not attend any proceedings of the court or any portion thereof, if this is justified in the interests of—

- (a) the conduct of the proceedings or the consideration of the matter in question; or
- (b) the protection of the privacy of any person alleged to be involved in the unfair business practice in question or of the confidentiality of any information relating to that person.

(4) Proceedings before the court shall be prosecuted by the office, who may be represented or assisted by an advocate, attorney, or any other person approved by the responsible Member.

(5) Any person who may be adversely affected by the proceedings shall be entitled to participate in the proceedings.

(6) Any person against whom proceedings are instituted or who may be adversely affected by such proceedings may appear in person or be represented or assisted by an advocate, attorney or any other person.

(7) The court shall keep a record of its proceedings.

Summoning of witnesses and production of documents

19. (1) For the purpose of ascertaining any matter relating to proceedings before the court, the court may—

- (a) by summons addressed to any person, including the person alleged to have performed the unfair business practice, in the prescribed form under the hand of the clerk to the court, and served in the prescribed manner, require such person to appear before the court at a time and place specified in such summons, to give evidence and to produce any book, document or object in the possession or custody or under the control of such person and which may be reasonably necessary, material and relevant in connection with those proceedings;
- (b) require such person to take an oath or make an affirmation; and
- (c) question such person and examine any book, document or object which he or she has been required to produce.

(2) A person shall be guilty of an offence if he or she, having been summoned in terms of this section—

- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings or until he or she has been excused by the court from further attendance;
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;
- (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she required to produce;
- (e) makes a false statement before the court knowing such statement to be false or not knowing or believing it to be true.

(3) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (2)(c) to (e), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(4) A person who has attended the proceedings of the court as a witness shall be entitled to the prescribed witness fee.

Urgent temporary orders

20. (1) The Court may, if it is satisfied from information placed before it by the office that circumstances relating to a particular matter which is the subject of an investigation render that matter urgent in that irreparable prejudice would be caused to a consumer on any group or class of consumers if the matter were only to be dealt with by the court at proceedings in due course, issue a temporary order—

- (a) prohibiting any person mentioned in the order from performing any act connected with the unfair business practice in question;
- (b) attaching any money or other property or assets, whether corporeal or incorporeal, movable or immovable, held by any person;
- (c) making any other order that may be necessary to prevent the prejudice in question;
- (d) authorising any investigating officer or person in the service of the office to take any action specified in the order.

(2) A temporary order contemplated in subsection (1)—

- (a) may be amended or withdrawn by the court on application by the office or by a person affected thereby;
- (b) shall remain in force for such period or extended period as the court may from time to time determine;
- (c) shall, unless withdrawn or lapsed, remain in force until the proceedings are finalised.

(3) An order in terms of subsection (1), and any amendment, withdrawal or extension thereof shall, where the court so directs, be made known by notice in the *Provincial Gazette* and in such other media as the court may deem appropriate.

Confirmation of arrangements negotiated by office

21. (1) The office may apply to the court for confirmation of an arrangement concluded in terms of section 11.

(2) The court may, with due consideration of the interests of affected consumers, issue an order—

- (a) confirming the arrangement;
- (b) confirming the arrangement with such modifications as may be agreed to by the person concerned, and subject to such conditions as may be agreed to by that person, as the court may deem fit;
- (c) setting aside that arrangement if, after the persons involved in the arrangement have been given an opportunity to be heard, it is satisfied that that the arrangement will not ensure the discontinuance or avoidance of the unfair business practice in question.

(3) An order in terms of subsection (2) shall be published in the *Provincial Gazette* and shall thereupon have the same effect as an order in terms of section 22.

Order by court prohibiting unfair business practice

22. (1) If the court is satisfied that a unfair business practice exists or may come into existence, and has not confirmed an arrangement as contemplated in section 21(2)(a), the court may issue such order as may be necessary to ensure the discontinuance or prevention of the unfair business practice in question, and such order may, without prejudice to the generality of the foregoing, direct—

- (a) any person concerned in the unfair business practice to take such action, including steps for the dissolution of any body, corporate or unincorporate, or the severance of any connection or form of association between two or more persons, including such bodies, as may be necessary to ensure the discontinuance or prevention of the unfair business practice;
- (b) any person who is or was party to an agreement, understanding or omission, or who uses or has used any advertising or type of advertising, or applies or has applied a scheme, practice or method of trading, including any method of marketing or distribution, or commits or has committed an act, or brings or has brought about a situation, or has or had any interest in a business or type of business or derives or derived any income from a business or type of business which is connected with the said unfair business practice and which may be specified in the order, to—
 - (i) terminate or cease to be a party to that agreement, understanding or omission;
 - (ii) refrain from using that advertising or type of advertising;
 - (iii) refrain from applying that scheme, practice or method of trading;
 - (iv) cease to commit that act or to bring about that situation;
 - (v) cease to have any interest in that business or type of business or to derive any income therefrom;
 - (vi) refrain from at any time—
 - (aa) becoming a party to any agreement, understanding or omission;
 - (bb) using any type of advertising;
 - (cc) applying any scheme, practice or method of trading; or
 - (dd) committing any act or bringing about any situation, of a nature specified in the order and which the court is satisfied is likely to be applied for the purposes of or in connection with the creation or maintenance of any unfair business practice;
 - (vii) refrain from at any time obtaining any interest in or deriving any income from a business or type of business specified in the order.

(2) If the court finds that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent financial loss to those consumers, the court may—

- (a) order any person to repay such money to the affected consumers, together with interest at the prescribed rate;

- (b) appoint a curator to perform the functions set out in section 23;
- (c) give directions regarding any security which the curator shall furnish for the proper performance of his or her duties;
- (d) determine the powers and duties of the curator;
- (e) give directions concerning the performance of the functions of the curator, or the management of the affairs of the person concerned, or any other matter incidental thereto, as may be deemed necessary.

(3) Notwithstanding that the monies to be recovered has been received by the person involved in the unfair business practice in terms of an order of a court of law, if the court is of the opinion that such an order has the effect of enforcing an unfair business practice, it may make such order as may be necessary to restore the consumer to the position he or she would have been in if no such unfair business practice has taken place.

(4) At any time after the court has granted an order in terms of this section, the court may approve of the correction of an omission or error or the clarification of any provision in the order if such correction or clarification is necessary, and any such correction or clarification shall be made known by notice in the *Provincial Gazette*.

(5) An order of the court in terms of subsection (1)—

- (a) shall be made known by notice in the *Provincial Gazette*; and
- (b) may be made known in any other manner, including a notice in a newspaper or magazine or on the radio or television.

Functions of curator appointed by court

23. (1) A curator appointed under section 22(2) may, to the extent authorised by the court and subject to any conditions imposed by it—

- (a) realise such assets of the person involved in the unfair business practice in question which are necessary for the reimbursement of the consumers concerned, and distribute them among the said consumers;
- (b) Take control of and manage the whole or any part of the business of such a person, in which event the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the court, and any other person vested with the management of the affairs of that person shall be divested thereof;
- (c) suspend or restrict, as from the date of his or her appointment as curator or any subsequent date, the right of creditors of the person involved in the unfair business practice to claim or receive any money owing to them by that person until the due performance of the order of the court;
- (d) make payments, transfer property or take steps for the transfer of property of the person involved in the unfair business practice at such time, in such order and in such manner as the curator may deem fit;
- (e) open and maintain banking or similar interest bearing accounts;
- (f) enter into agreements on behalf of the person involved in the unfair business practice;

- (g) convene from time to time, in such manner as he may deem fit, a meeting of creditors of the person involved in the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to such creditors and for consultation with such creditors in so far as the curator deems it necessary;
- (h) negotiate with any creditor of the person involved in the unfair business practice with a view to the final settlement of the affairs of such creditor against that person;
- (i) make and carry out, in the course of the management by the curator of the affairs of the person involved in the unfair business practice, any decision which in terms of the provisions of the Companies Act, 1973 (Act No. 61 of 1973), would have been required to be made by way of a special resolution contemplated in section 199 of that Act; and
- (j) dispose of, by public auction, tender or negotiation, any asset of the person involved in the unfair business practice, including—
 - (aa) any advance or loan; or
 - (bb) any asset for the disposal of which approval is necessary in terms of section 228 of the Companies Act, 1973;
- (k) perform such further, incidental or ancillary duties or functions as may be necessary to give effect to any order of the court.

(2) The court may at any time amend, withdraw or vary any power granted to a curator and any such amendment, withdrawal and variation may be made known by notice in the *Provincial Gazette*.

(3) At the appointment of a curator—

- (a) the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the court, and any other person vested with the management of the affairs of that person shall be divested thereof; and
- (b) the curator shall recover and take possession of such assets of the person involved in the unfair business practice as may be necessary.

(4) A curator who is not in the full-time service of the State shall out of the funds of the person involved in the unfair business practice, in respect of the services rendered by him or her, be paid such remuneration as may be prescribed: provided that if the funds of the person involved in the unfair business practice are insufficient to adequately compensate the curator, the curator shall be paid from provincial funds such further remuneration and allowances as the responsible Member may determine.

(5) The curator shall report to the court on his or her administration of the affairs of the person involved in the unfair business practice, and shall at the request of the court provide any other information set out in that request.

(6) The curator shall keep a proper record of the steps taken by him or her in the performance of his or her functions and of the reasons why such steps were taken.

Declaration of certain business practices to be unlawful

24. (1) If the court, pursuant to proceedings instituted in the court in terms of section 12(1), is satisfied that it is in the public interest that any particular business practice or type of business practice which was the subject of the proceedings in question should be declared to be unlawful, it may—

- (a) declare to be unlawful the business practice or type of business practice concerned, either generally or in respect of a particular area, depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area;
- (b) declare any agreement, accord or undertaking, or term thereof to be void;
- (c) prohibit any person from entering into or being or continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or from bringing about a situation which was the subject of the proceedings, either wholly or to the extent specified by the court, or subject to a condition or exemption so specified or to an exemption contemplated in subsection (3);
- (d) regulate any business practice or type of business practice which was the subject of the proceedings, by determining conditions or requirements which must be complied with in respect thereof.

(2) A notice under subsection (1) may at any time, on application by the Consumer Protector after further investigation by the office, be withdrawn by the court or be amended by it in such manner as may be fitting.

(3) The court may, on application by any person and after hearing the Consumer Protector, and any other interested person, grant exemption from a provision, condition or requirement contemplated in subsection (1), to such extent and for such period and subject to such conditions as may be specified in the exemption.

(4) The provisions of section 22(2) shall *mutatis mutandis* apply in relation to an order, withdrawal, amendment or exemption contemplated in this section.

(5) The person or body seeking any order in terms of subsection (2) or (3) shall make their intention known by notice in the *Provincial Gazette*, and interested persons shall be invited to make objections to any such order.

Appeal

25. There shall be an appeal from any decision of the court which is final and binding to the special court established in terms of section 13 of the Harmful Business Practices Act, No. 71 of 1988.

Giving of notice to competent authorities of unfair business practices and offences

26. (1) The Consumer Protector shall, if there is reason to suspect that a unfair business practice which is or was the subject of an investigation by the office, exists or may come into existence elsewhere in the Republic than in the Province, furnish the Business Practices Committee established by section 3 of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), and any competent authority in the province concerned, with particulars of the business practice in question and any relevant information relating thereto which became known in the course of investigations by the office or of proceedings before the court.

(2) The Consumer Protector shall, if there is reason at any time during or after the completion of an investigation to suspect that there has been or is being committed, or that an attempt has been or is being made to commit—

- (a) an offence, notify the attorney-general concerned accordingly;
- (b) a serious economic offence as defined in the Investigation of Serious Economic Offences Act, 1991 (Act No. 117 of 1991), lay the matter in question before the Director of the Office for Serious Economic Offences in the manner provided in section 4 of that Act.

Confidentiality

27. No investigating officer, person in the service of the office, member of the court, curator or person contemplated by section 4(2) or 19(2) shall disclose any information acquired by him or her in the exercise or performance of any powers, functions or duties in terms of this Act, except—

- (a) in so far as may be necessary for the purpose of the due and proper exercise or performance of any power, function or duty in terms of this Act; or
- (b) on the order of a court of law.

Limitation of liability

28. No person, including the State, shall be liable in respect of anything done in good faith under this Act.

Regulations

29. (1) The responsible Member shall, with the concurrence of a committee of the Provincial Legislature with responsibility for consumer affairs and after consultation with the chairperson of the court, make regulations relating to—

- (a) the practice and proceedings of the court;
- (b) any matter which in terms of this Act is required or permitted to be prescribed;
- (c) in general, any matter which is considered necessary or expedient to prescribe for achieving the objects of this Act.

(2) The responsible Member shall, not less than one month before any regulation is made, cause the text of such regulation to be published in the *Provincial Gazette* together with a notice declaring his or her intention to make that regulation, and inviting interested persons to furnish any comments thereon or any representations which they may wish to make in regard thereto.

(3) The provisions of subsection (2) shall not apply in respect of any regulation which, after the provisions of that subsection have been complied with, has been amended by the responsible Member after consultation with the chairperson of the court in consequence of comments or representations received by the board in pursuance of such compliance.

Offences in relation to prohibited business practices

30. Any person who contravenes or fails to comply with an order of the court which has been made known by notice in the *Provincial Gazette* shall be guilty of an offence.

Penalties

31. Any person who is convicted of an offence in terms of this Act shall be liable, in the case of an offence referred to in—

- (a) section 30, to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment;
- (b) any other provision of this Act, to a fine or to imprisonment for a period not exceeding 12 months or to both that fine and that imprisonment.

State bound

32. This Act shall bind the State, except in so far as criminal liability is concerned.

Waiver of benefits

33. Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

Civil remedies

34. (1) No provision of this Act shall be construed as depriving any person of any civil remedy.

(2) If any person seeks to enforce or rely on an alleged unfair business practice in proceedings before any other civil court, that court may, on the application of any party to those proceedings, stay those proceedings in the interests of justice until such time as the court has come to a decision in terms of this Act.

Amendment of section 79 of Ordinance 17 of 1939, as amended

35. Section 79 of the Local Government Ordinance, Ordinance No. 17 of 1939, is hereby amended by the addition of the following subsection:

“(54) establish and maintain offices and facilities for the provision of advice and other services to consumers.”.

Short title and commencement

36. (1) This Act shall be called the Consumer Affairs (Unfair Business Practices) Act, 1996.

(2) This Act shall come into operation on a date determined by the Premier by proclamation in the *Provincial Gazette* and different dates may be determined for the coming into operation of different sections of this Act.

**MEMORANDUM IN TERMS OF RULE 132 OF THE STANDING RULES
OF THE PROVINCIAL LEGISLATURE
ON THE CONSUMER AFFAIRS (Unfair business practices) BILL, 1996**

(i) Introduction and reasons for the Bill

Section 126 and Schedule 6 of the Constitution state that a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional area of consumer protection.

The intention of the Bill is to provide for the investigation and prohibition of unfair business practices in the interest of the protection of consumers. For that purpose the Bill establishes an Office for the Investigation of Unfair business practices, and a Consumer Affairs Court.

The Bill can coexist with the existing Harmful Business Practices Act, 1988.

(ii) Social impact of the Bill

The Bill provides for the investigation of business practices which have, or are likely to have, the effect of deceiving or unreasonably prejudicing any consumer. The Bill provides for the establishment of an Office for the Investigation of Unfair business practices, with power to investigate the activities of persons suspected of creating or maintaining business practices which are unfair to consumers.

The Bill also provides for the establishment of one or more Consumer Affairs Courts, to hear evidence presented by the Office for the Investigation of Unfair business practices, and with power to issue orders and directions prohibiting unfair business practices.

(iii) Financial implications of the Bill

The most important financial implication of the Bill is that provision will have to be made for the remuneration of the officers of the new Office for the Investigation of Unfair business practices and its investigating officers and other assistants, and the members of the Consumer Affairs Court or Courts.

The Office for the Investigation of Unfair business practices will be established within the Department of finance and economic affairs of the Province. Its personnel will be appointed subject to the laws governing the public service, as can investigating officers attached to the Office. This will imply the creation of posts to be filled by officers and investigating officers to be attached to this Office.

The Bill also provides, if required for the purposes of any particular investigation, that persons outside the public service can be appointed to assist the Offices as investigating officers who will be paid such remuneration and allowances as the Consumer Protector may determine with the concurrent of the Member of the Executive Council responsible for finance and economic affairs.

The Consumer Affairs Court will consist of a chairperson with legal experience, and two or four additional members with appropriate knowledge and experience. Provision is made for alternate members of the court. Members and alternate members are to be paid remuneration and allowances determined by the MEC. The Bill also provides for the possibility of different Consumer Affairs Courts being established for different areas of the Province.

The costs to be incurred will need to be provided for in provincial estimates of expenditure, and in appropriations by the Provincial Legislature.

(iv) Section-by-section explanation

- s 1: Most of the definitions are self-explanatory.
- s 3: This section establishes an Office for the Investigation of Unfair business practices.
- s 4: This section provides for the appointment of the Consumer Protector and staff of the Office subject to the laws governing the public service, and makes provision for obtaining the services of other persons.
- s 5: The main function of the Office is to receive and investigate complaints of alleged unfair business practices.
- s 6: This section states that any person may lodge a complaint with the Office.
- s 7: This sets out the general powers of the Office to conduct investigations.
- s 8: This section states that the Office may summon persons to be questioned or to produce documents or objects. The section has been framed to take account of the provisions of the Constitution relating to the right to privacy and the right not to incriminate oneself.
- s 9: This section provides for the appointment of investigating officers.
- s 10: This section authorises investigating officers to enter premises and inspect or remove books and objects. An investigating officer may enter premises and exercise these powers only by virtue of a search warrant issued by the Consumer Affairs Court.
- s 11: This section authorises the Office to negotiate and conclude with any person an arrangement to discontinue any unfair business practice.
- s 12: The Office shall, on completing an investigation, furnish the responsible Member with a report on its findings, and may institute proceedings in the Consumer Affairs Court to obtain an order to prohibit the unfair business practice in question.
- s 13: This section establishes one or more Consumer Affairs Court for the Province.
- s 14: This section provides that the court shall consist of a legally qualified chairperson, and additional members with special knowledge of consumer affairs and knowledge or experience of economics, industry or commerce. Alternate members may be appointed. Members are appointed after the public have been invited to submit nominations for appointment.

- s 15: Public servants and members of legislatures or of certain other bodies are disqualified from being appointed as members of the Consumer Affairs Court.
- s 17: This section deals with the functions of the Court.
- s 18: This sets out how the proceedings of the Court will be conducted.
- s 19: This section provides for the summoning of witnesses and production of documents. This section has been framed with regard to the right to privacy and the right not to incriminate oneself as provided in the Constitution.
- s 20: This section authorises the Court to issue urgent temporary orders prohibiting unfair business practices, pending a final decision.
- s 21: The Court may confirm any arrangement concluded by the Office in terms of section 10.
- s 22: This section sets out the powers of the Court to issue orders prohibiting unfair business practices. The court may order any person to refrain from committing any specified act or omission relating to a unfair business practice. The court may also, if money was accepted from consumers, appoint a curator.
- s 23: A curator appointed by the Court takes over the management of the business concerned, realises its assets and distributes them among the consumers affected by the unfair business practice in question.
- s 24: The Court is also empowered to declare business practices to be unlawful in general.
- s 26: The Office for the Investigation of Unfair business practices may report on its findings to the Business Practices Committee established in terms of the Harmful Business Practices Act, 1988, and to the Attorneys-General concerned, and to the Office for Serious Economic Offences established in terms of the national Investigation of Serious Economic Offences Act, 1991.
- s 27: This states that no investigating officer, person in the service of the Office, member of the Court or persons performing the administrative work of the Court may disclose information acquired in the performance of their functions except to the extent necessary for the performance of those functions, or on the order of a court of law.
- s 29: The responsible Member may, with the concurrence of a committee of the Provincial Legislature with responsibility for consumer affairs and after consultation with the chairperson of the Court, make regulations relating to various matters. A draft of the regulations must be published one month beforehand with an invitation to interested persons to furnish representations thereon.
- s 26: This section states that any person who fails to comply with an order of the Court which has been published in the *Provincial Gazette* is guilty of an offence.
- s 31: This section sets out the penalties to which a person convicted of an offence shall be liable.

- s 32: The State is bound to the provisions of the Bill.
- s 24: This states that no person is deprived of any civil remedy by the provisions of the Bill.
- s 35: This section amends the Local Government Ordinance, 1939, so as to authorise local authorities to establish consumer advice offices.
- s 36: This section contains the short title.

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