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GENERAL NOTICES

NOTICE 307 OF 2005

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

I, Mandisi Mphahla, 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 2818 of 2004 as published in Government Gazette No 27030 dated 25 November 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 118

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
Business Brokers (SA) (Pty) Ltd and JHB Kleinhans

BUSINESS BROKERS (SA) (PTY) LTD

1. 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⁽¹⁾ 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*.⁽¹⁾ 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 discontinuance of that practice.⁽¹⁾ 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

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- (1) See section 1 of the Act for the definition of an unfair business practice.
 - (2) In most cases the Committee is able to resolve the matter and it is then unnecessary to proceed with a formal investigation.
 - (3) The powers of the Minister are set out in section 12 of the Act.

R200 000 or five years imprisonment or both a fine and imprisonment.

2. Background

The business practices of Business Brokers (SA) (Pty) Ltd (BB) and its director, JHB Kleinhans (Kleinhans) came to attention of the Committee some time ago. The product involved is a "tankless geyser" which is connected to an ordinary ½ inch tap and is connected to a 16 ampere wall socket outlet. Cold water enters the "geyser" and hot water is made available. On opening the tap, the electrical current is turned on automatically. Electricity is not consumed once the tap is closed. It is alleged that the product saves up to 60 per cent of normal household water requirements and up to 80 per cent of the running cost of a conventional geyser. The "geyser" is available in configurations for a shower or sink or combinations thereof.

Towards the end of 2000, the daily Afrikaans newspaper Beeld, which is mainly distributed in Gauteng and adjacent areas, carried the following advertisement (directly translated from the Afrikaans):

"SOLE DISTRIBUTION RIGHTS (Franchise principle, but no further monthly contributions) **FOR EXCITING PRODUCT** which 70 percent of the population in South Africa must have, yet do not own. (Complies to SABS and also 2 Europac Bureaus of Standards.) A. Provincial franchise from R70 000 B. Districts (cities and town) from R15 000 (the income for provincial franchise holders own pocket.) Call managing director, 082 ... (ineligible) ... Business Brokers, Nelspruit, should you require a **GOOD AND HEALTHY BUSINESS**".

3. The business of BB

It was extremely difficult to obtain the co-operation of Kleinhans during the investigation. Some of the documentation discussed in this report was obtained after a search warrant was served on Kleinhans and documents were seized from his home in Nelspruit.

During September 2001 BB requested a quote from an Israeli entity for 75 of units of the "tankless geysers". The price was quoted as fob Bucharest, Romania and the port of destination port was Durban. BB received an invoice for 100 geysers from an entity which conducts business from Delaware, USA. It is not clear what the link is between these entities. The order confirmation was subject to the receipt of a Letter of Guarantee by the American entity. The mode of payment was to be by bank swift transfer to the Bank of Cyprus, Nicosia. It is not certain whether firm orders were placed by BB and whether the units were shipped to Durban. A pro-forma invoice 2001101 was for 100 units at US\$38.85 per unit and a delivery term was "By Air Freight". The description of goods on a bill of entry dated 24 October 2001, issued by the former Johannesburg International airport was as follows: "Other electric instantaneous or storage water heaters and immersion heaters". The "actual mass" of the 25 packages was 315 kg and this shipment could have contained the 100 units referred to in pro-forma invoice 2001101.

A potential buyer, Mr "A" saw the advertisement in the *Beeld*, contacted Kleinhans and received a 5-page fax from him on 19 December 2001. The following are some of the statements made in this document:

"This Instant Hot Water Unit has been approved by the SABS and carries a 12 (twelve) month guarantee.

The sole distributor's right is sold as a 'district sole distributorship', according to cities, towns and viable areas, and is being kept to a very affordable sum in order to facilitate the establishment of a good marketing arm throughout South Africa and neighbouring states in as short a time as possible.

Business Brokers has also been negotiating with the Government in an attempt to have this Unlimited Cheap Water System included as a standard feature in the building of economical houses! The establishment of such a market will have far reaching effects for all District Sole Distributors - as can well be imagined! Government has now passed the responsibility of Low Cost Housing to Municipality Level and this facilitates negotiations and is a far easier route to work through. The Sole Distributor is free to make contact and initiate negotiations or the same in his own area. The scope in this respect is unlimited.

Retail Prices are fixed throughout the country. No Sole Distributor will be allowed to sell in another's area.

... the only way in which a Sole Distributor can lose his capital outlay is to put no effort into promoting and selling the product. If a sole distributor so wishes, he could also decide to sell his Sole Distributor's Right to another entrepreneur.

Business Brokers (SA) (Pty) Ltd has purchased the Sole Import and the Sole Distribution Rights of the Termo 5K Instant Hot Water Systems for the Republic of South Africa and neighbouring states.

Business Brokers (SA) (Pty) Ltd will maintain an interacting relationship with all Sole Distributorships, giving support in respect of marketing and service, etc, and exchanging ideas on both a personal and a practical basis where necessary".

On 28 January 2002, Mr "A" became a "Provincial Buyer" when he entered into an agreement with BB. Under the heading "Interpretation" in the contract, the term "business names" is defined as meaning and including the name INSTANT HOT WATER SYSTEMS. The area bought by Mr "A" was the "City of Tshwane Metropolitan Municipality". The selling price was R150 000, a deposit of R50 000 was to be credited to the account of LC Kleinhans (who appears to be the wife of Kleinhans) and the balance was due on 28 March 2003. The "Provincial Buyer" was allowed to sell "District Areas" and BB was to receive 20 per cent of the selling price. The minimum selling price of a "District Area" was set at R15 000. The "Provincial Buyer" was not allowed to sell any unit or product below the retail price as agreed upon between Mr "A" and BB. The "Provincial Buyer" agreed to sell five "District Areas" before

24 December 2002.

It appeared that Kleinhans and Mr "A" had a telephone discussion during April 2002 during which Mr "A" indicated that he does not wish to continue with the contract. He also asked Kleinhans for the name of a person who already bought a Sole Distributor's Right. Kleinhans gave him the name of one a Mr "B". Kleinhans also informed Mr "A" that should he (Mr "A") persist in defaulting in terms of the contract, the contract will be terminated with immediate effect and that Mr "A" will forfeit the deposit paid.

During May 2002 the Directorate received a complaint from Mr "A". The Directorate faxed a copy of this complaint to BB. Mr "A" alleged that:

After many telephone and private discussions with Kleinhans he realised that he had been misled.

The product was not unique, as alleged by BB, and that similar products could be bought at half the price of the BB geyser.

One way to market the product was via the Government Housing Department. Kleinhans informed him about progress with officials (presumably central government or provincial civil servants). He was informed by Kleinhans that a firm order of 1 200 units was received from the Secunda region. Kleinhans, however, could not furnish any evidence of this sale. Mr "A" said that he was led to believe by Kleinhans that a "deal" with the government to have the "geyser" installed as standard equipment in low-cost housing was imminent.

At its meeting held during August 2002 the Committee resolved to undertake a section 4(1)(c) investigation into the business practices of BB and Kleinhans and "... any other member, employee, agent, and/or representative of the aforementioned in respect of the activities of the aforementioned".

During November 2002 a "To whom it may concern" letter dated 29 May 2000 came to the attention of the Directorate. It was *inter alia* stated in the letter:

"We, Electo 2000 Ltd, registered in Bucharest - Romania - RC J40/24626/1994, manufacturers of electrical instant water heater - Type 'Geyser', hereby confirm that

Business Brokers (SA) (Pty) Ltd,
Located in Nelspruit South Africa,

is our Sole Agent for South Africa and neighboring countries beginning on 29 May 2000. This Sole Agency is under the condition that "Business Brokers (SA)(Pty) Ltd will order a quantity of at least 3 000 units in the first year and will increase next year's orders with at least 20% every year. The Sole Agency authorization will be prolonged at the end of each year after performance evaluation of previous year".

On 30 May 2002 BB wrote to the Israeli entity:

"... our contact in Mpumalanga is still overseas ... therefore everything is currently on hold - Frustrating!! We are having a meeting with representatives of the Netherlands Government in the first week of June 2002. They are presenting their scheme in South Africa. It is called SA Housing Association. Besides building projects, they also give R5 500 for the upliftment of existing houses belonging to the 'poorest of the poor'. This contact came to us through my newly appointed black consultant working within Government levels. During July 2002 I will travel to Nigeria to have discussions with the German Developer who has been allocated the project of the development of 50 000 houses in Nigeria! The idea is for the Managing Director to obtain shares in the new Company, to be called Business Brokers (Pty) Ltd Nigeria. This gentleman knows the President of Nigeria personally, as well as the Minister of Housing of that country. I require 90 Endline Combi Geysers, Model Combi Combination with Spectra Quality accessories. These units are to be placed on trial in the 18 Offices (Regions) of the Netherlands Government throughout South Africa at no cost".

Mr "C" signed an agreement with BB on 2 August 2002 to purchase the "Provincial Area" comprising "Free State Province excluding all farms and farm areas" at R120 000. A deposit of R25 000 was required and the balance was due not later than 18 August 2002. The "Provincial Buyer" was to sell four "District Areas" and at least 10 units per month were to be sold per "District" area.

Mr "D" signed an agreement with BB on 6 August 2002 to purchase the "District Area" comprising the "Old Bloemfontein Municipal Areas". The price was R30 000 and R15 000 was required as a deposit. The outstanding balance was due on 3 September 2002. It was stated in the contract that: "If balance is not paid in time, the district buyer will forfeit his deposit. This action is up to the discretion of the principal". It was required of the "District Buyer" to at all times have a minimum of six "Selling Agents".

Mr "D" and Mr "E", as the "Provincial Buyer" bought the area "Northern Cape Province excluding all farms and farm areas" from BB on 20 August 2002. The price was R35 000 and they had to sell two "District Areas".

The Israeli entity faxed a quote for the tankless geysers to BB on 30 August 2002. The fax began "I hope that finally we can conclude a real order to SA". This implies that up to 30 August 2002 no or insignificant sales were made by the Israeli, American or Romanian entities to BB.

A summons to appear before the Committee on 18 October 2002 was delivered by hand to Kleinhans on 11 October 2002. He was requested to produce the following books and documents:

- A statement explaining the nature of the business,
- A detailed list of all his clients or licensees including contact numbers and
- Evidence that he had the sole import rights for the "Tankless Geyser System" in South Africa, neighbouring states and Africa.

On 17 October 2002 Kleinhans faxed a letter to *the dti*. He stated that he could not attend the meeting of the Committee because he had other commitments. The investigating officer, accompanied by two policemen and an official from the Mpumalanga Consumer Affairs Office, visited Kleinhans at Nelspruit on 8 November 2002 and seized the agreements which BB concluded with the buyers discussed, various other documents and pro-forma invoices.

In a letter dated 31 October 2002 the South African Bureau of Standards wrote (translated from the Afrikaans):

“Instant Hot Water Systems Maitland was not registered for SABS ISO 9002, although it displays the SABS ISO logo on its pamphlet. They therefore have no authorization to display the SABS logo on any of their materials. The placement of the SABS logo on the pamphlet at issue is also misleading, because any person which sees the logo, will assume that the product placed next to it, was approved by the SABS. ISO has got nothing to do with the product because it is a management system. Instant Hot Water Systems Maitland is also not certified with the SABS for any of their products, even though they refer to international standards TEC 335-1 and IEC 335-2 in their pamphlet”.

On 20 December 2002 an arrangement in terms of section 9 of the Act was faxed to Kleinhans. He did not sign the undertaking. Due to rationalization during 2003, a number of experienced investigators were transferred from the Directorate. The Minister appointed new members to the Committee and the “former” Committee held its last meeting in August 2003. Investigations into unfair business practices in general proceeded very slowly as a direct consequence of the severe shortage of staff in the Directorate. The “new” Committee had its first meeting in May 2004.

3. Resolutions by the “new” Committee

The Committee resolved on 20/21 May 2004 to retain the item on the agenda and the official was to establish whether the business was still in operating. On 5 August 2004 the Committee noted that the matter was apparently being investigated by the South African Police Service.

4. Consequent events

An investigating officer had a long telephone discussion with Kleinhans on 6 October 2004. Following this conversation, a letter was faxed to Kleinhans. In the letter the functions of the Committee was explained to Kleinhans and the information available to the Directorate was made available to him. The following are some of the questions and facts that were put to Kleinhans and he was asked to respond thereto by 29 October 2004. He was again invited to meet with the Committee on 11 November 2004.

1. The advertisement states that the product complies to SABS and also two Europac Bureaus of Standards. This was denied by the SABS. The Directorate requires written confirmation from the SABS that the product complies with SABS specifications as well as evidence that the product complies with "2 Europac Bureaus of Standards".
2. It appears from the available information that BB imported only 100 units of the product. Is this correct? If not, the Directorate requires the necessary documentary evidence to refute the assumption.
3. The Directorate would wish to verify with whom in Government BB negotiated in an attempt to have the product included as a standard feature in the building of economical homes. The contact details of these persons are also required.
4. Are you aware that in terms of South African competition legislation it is illegal to fix retail prices?
5. It is stated that BB had purchased the sole import and the sole distribution rights for South Africa and its neighbouring states. Electro 2000 Ltd, however, stated that the sole agency is "... under the condition that Business Brokers (SA)(Pty) Ltd will order a quantity of at least 3 000 units in the first year and will increase next year's orders with at least 20% every year. The Sole Agency authorization will be prolonged at the end of each year after performance evaluation of previous year". The Committee requires written evidence that the targets set by Electro 2000 Ltd have been achieved and that BB still has the sole imports rights.
6. Will you please respond to the allegation by Mr "A" that the product is not unique and that similar products could be bought at half the price of the BB geyser.
7. The Directorate requires written evidence to confirm the order of 1 200 units from the Secunda region.
8. The Directorate requires the contact details of the "provincial and district buyers" as well as their contact details.
9. Does the sentence "I hope that finally we can conclude a real order to SA" imply that no significant sales were made by Admidor/KES/Electro 2000 to BB?
10. Does BB continue to advertise "provincial and district franchises". If so, the Directorate requires copies of the advertisements and details of the publications in which the advertisements are placed. If not, the Directorate would want to know when the last advertisement was placed by BB. A copy of the advertisement is also required.

On 21 October 2004 the official again had a telephone discussion with Kleinhans. He said that he was ill and experienced dizzy spells, he sleeps for most part of the day and he was extremely tired. He was not sure whether he would be able to respond to the letter of the Directorate by 29 October 2004. He did not rule out a meeting with the Committee, but 11 November 2004 did not suit him because he had to be in Bloemfontein for business on 12 November 04.

On 11 November 2004 the Directorate received a 5-page letter from Kleinhans. He did not provide any answers to the questions and statements set out in points 1 to 12 above.

5. Notice of a section 8(1)(a) investigation

The 11 November 2004 the Committee resolved to undertake a section 8(1)(a) investigation into the business practices of JHB Kleinhans and Business Brokers (SA) (Pty) Ltd. The following notice was published under Notice 2818 in Government Gazette 27030 dated 25 November 2004.

"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 -

Business Brokers (SA) (Pty) Ltd, Mr JHB Kleinhans and any other member, director, employee, agent and/or representative of any of the aforementioned in respect of the activities of SA Brokers (Pty) Ltd.

Any person may within a period of fourteen (14) days from the date of this notice make written representations regarding the above-mentioned investigation to: The Director: Consumer Investigations, Private Bag X84, Pretoria, 0001. Enquiries: Mr M Shabangu, (T) 012-394-1546 (F) 012-394-2546 and 012-394-0156, e-mail: mbongeni@thedti.gov.za."

Notice of the investigation was faxed to Kleinhans on 12 November 2004 but he did not respond thereto.

6. Conclusion

Kleinhans misled clients into believing that the "tankless geyser" carried the SABS mark and also complied with two Europac Bureaus of Standards. The clients were also misled to believe that Kleinhans was the sole importer and/or has the sole distribution rights for South Africa when it was clear that he no longer enjoyed these rights. There are no grounds justifying the practices in the public interest.

7. *Recommendation*

The Committee recommends that the Minister⁽¹⁾ declare unlawful the business practices whereby the parties, known as Business Brokers (SA) (Pty) Ltd and JHB Kleinhans, directly or indirectly,

- (1) place misleading advertisements in which it is stated that the product involved is registered with or complies with certain requirements of the SABS and that the product carries the SABS mark or any mark or specifications of the Europac Bureaus of Standards or any international standards whatsoever and
- (2) imply in any manner whatsoever that they have the sole importing and distribution rights if that is not the case.

and

directs⁽¹⁾ the parties to refrain from applying the harmful business practice.



PROF T A WOKER
CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE
9... December 2004

(4) In terms of section 12(1)(b).

(5) In terms of section 12(1)(c).

NOTICE 308 OF 2005**DEPARTMENT OF TRADE AND INDUSTRY
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Mandisi Mpahlwa, MP, Minister of Trade and Industry, after having considered a report by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 2818 of 2004 published in Government Gazette 27030 of 25 November 2004, which report was published in Notice 307 in Government Gazette No. 27315 of 21 February 2005, and being of the opinion that an unfair business practice exists which is not justified in the public interest, do hereby exercise my powers in terms of section 12 (1) (b) and 12 (1) (c) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), as set out in the Schedule.

**M B M MPAHLWA
MINISTER OF TRADE AND INDUSTRY**

SCHEDULE

In this notice, unless the context indicates otherwise -

1. "The parties" means Business Brokers (SA) (Pty) Ltd and JHB Kleinhans.
2. "Unfair business practice" means the business practice whereby the parties, directly or indirectly,
 - (a) place misleading advertisements in which it is stated that the product involved is registered with or complies with certain requirements of the SABS and that the product carries the SABS mark or any mark or specifications of the Europac Bureaus of Standards or any international standards whatsoever and
 - (b) imply in any manner whatsoever that they have the sole importing and distribution rights if that is not the case.
3. The parties are hereby directed to:
 - (a) cease to commit the unfair business practice;

- (b) refrain from at any time applying the unfair business practice;
 - (c) cease to have any interest in a business or type of business which applies the unfair business practice or derive any income therefrom;
 - (d) refrain from at any time obtaining any interest in or deriving any income from a business or type of business specified in the notice.
4. The unfair business practice is hereby declared unlawful in respect of the parties.
5. This notice shall come into operation upon the date of the publication hereof.
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