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GENERAL NOTICES

NOTICE 405 OF 2002

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Alexander Erwin, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 622 of 2001 as published in Government Gazette No. 22140 dated 16 March 2001, as set out in the Schedule.

A ERWIN

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. 91

**An investigation in terms of section 8(1)(b) of the
Consumer Affairs (Unfair Business Practices) Act, 71 of 1988,
into the utilization of quasi legal communications
and documents, which simulate legal or judicial processes**

1. The Consumer Affairs Committee

The Consumer Affairs Committee (the Committee) was established in terms of section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988 ("the Act")⁽¹⁾. The purpose of the Act is to provide for the prohibition or control of unfair business practices and for matters connected therewith. An "unfair business practice", in terms of the Act, is any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer or natural person. The *raison d'être* of the Committee, and the Act for that matter, is thus the interest of the consumer and specifically the consumer who is or is likely to be unfairly affected by any business practice.

In the pursuance of its objective, the Act confers wide investigative powers on the Committee. The Committee could undertake two broad types of investigations, namely particular and general investigations. The focal point of a section 8(1)(a) investigation in terms of the Act is any unfair business practice that exists or may come into existence and which involves a particular individual(s) or business entity(ies). The subsequent order of the Minister will be applicable to the particular individual(s) or business entity(ies). The focus of a section 8(1)(b) investigation is any business practice in general which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices. The subsequent order of the Minister will be applicable to all individuals and entities involved with those particular business practices.

2. The Consumer Code for Debt Recovery Agents

The former Business Practices Committee (BPC) was, for various reasons, in favour of a policy of "self regulation" by industries. This policy, which is at present being reconsidered by the Consumer Affairs Committee, followed the publication of Report 15: *Consumer Codes*, under Notice 444 in Government Gazette 13988, dated 18 May 1992. Since 1992 a number of consumer codes were developed by the BPC in close co-operation with various trade associations. One of these codes is the Consumer Code for Debt Recovery Agents (hereafter called the Code). The BPC was approached by the Association of Debt Recovery Agents for its **support** of the code. A "debt recovery agent" is described in the code as any person, other than the creditor or his attorney, who is directly or indirectly involved in collecting debts for others.

The Code is intended to govern the conduct of debt recovery agents. It embodies principles which are observed by the majority of members of the debt recovery industry. The Code has no legal status in the sense that a transgression thereof constitutes an offence. When the Committee receives a complaint against a particular debt recovery

(1) The former Business Practices Committee administered the Harmful Business Practices Act, 71 of 1988. Several amendments were made to the Harmful Business Practices Act during the first half of 1999. The amended act, called the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, came into operation on 14 May 1999. This act is administered by the Consumer Affairs Committee.

agent it will, however, consider the provisions of the Code in determining whether the conduct complained about constitutes an unfair business practice. The Code lists a number of unfair business practices. The Code, for example, states:

"In attempting to collect a claim a debt recovery agent shall not:

3.3 threaten to institute legal proceedings, whether civil or criminal if such a threat is not intended;

3.4 utilise a communication which simulates legal or judicial processes".

3. Complaints received

The Committee received a complaint from a Law Society in which it was alleged that a firm of attorneys, on the behalf of a quasi government agency (hereafter called the Creditor Corporation), issued draft summonses. The Council of the Law Society believes that the draft summonses, on the face of it, intend to intimidate the recipients into paying and are deceptively similar to summonses. A copy of the "draft summons" received from the Law Society is to be found on page 3.

On 19 December 2000 the Committee received a complaint from a consumer against a firm of attorneys, XYZ Inc. The consumer complained about the methods used by XYZ Inc, also acting on behalf of another quasi government agency, in the recovery of debts. He alleged that the attorneys use "... strong-arm tactics that border on coercion, if not extortion. These range from 'draft summonses' to threats of attachment of property. He alleged that this applies no matter how small the debt is. A copy of the "draft summons" issued by XYZ Inc is reproduced on page 4.

The complaints were discussed at the meeting of the Committee held on 28 February/1 March 2001. It appeared that the use of "draft" summonses were used increasingly by various entities in an attempt to collect outstanding debts. The Committee resolved at this meeting to undertake an investigation in terms of section 8(1)(b) of the Act into "...the utilization of quasi legal communications and documents by debt recovery agents, attorneys and other entities, which simulate legal or judicial processes, in an attempt to collect claims for outstanding debt."

4. Publication of the notice of the section 8(1)(b) investigation

The following was published under Notice 622 of 2001 in Government Gazette 22140 of 16 March 2001:

"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 hereby given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(b) of the said Act into the utilization of quasi legal communications and documents, which simulate legal or judicial processes, by debt recovery agents, attorneys and other entities, in attempting to collect claims for outstanding debt.

(Continued on page 9)

The Creditor Corporation**DRAFT SUMMONS TO BE SERVED BY SHERIFF**

You must within FIVE (5) days of receipt of this document pay the claim of **R807.00** (comprising of Fees, Penalties and Tracing fees) owing to the creditor, into: **Attorney & Associates Trust Account (Creditor) No 1234567890 at Best Bank Limited, Suburb, quoting your reference number: A0987.**

Should you pay this amount immediately, you will not be liable for any legal costs.

Amount Due **R807.00**

Plaintiff Attorney's Reference Number: **11223344**

166725

Mr J Citizen

Postbox, Cape Town, 8001

Notice of intention to issue Summons Commencing Action

Attorneys for the Creditor:

Attorney & Associates

3rd Floor, Court House
corner of Queens Road and Raleigh Street, Durban

Postal Address:

Postbox, Durban 3000

Tel (001) 0012265

Fax (001) 0012266

Attorneys: Attorney & Associates

DATE: 14 February 2001

Action SHALL be instituted in the Magistrate's Court should the amount owing not be paid

The parties shall be
THE CREDITOR CORPORATION (Plaintiff)
and
J Citizen (Defendant)

TO: J Citizen, whose full and further particulars are to the Plaintiff unknown of Postbox, Cape Town, 8001
You are hereby informed that if you do not within FIVE (5) days of receipt of this document, pay the claim of **THE CREDITOR CORPORATION** with principal place of business at Creditor House, Johannesburg, to the above attorneys, a summons will be issued by the clerk of the aforesaid court and served on you by the sheriff, whereafter you will be liable for costs in addition to the amounts claimed.

Particulars

Plaintiffs claim against Defendant shall be for:

CLAIM 1: Payment of the sum of **R872.00** for and in respect of the prescribed fees payable and penalties charged in terms of the provisions of the Act, together with interest on the aforesaid sum at the rate of 15,5% per annum *a tempore morae* as well as costs of suit.

CLAIM 2: Payment of the sum of **R135.00** for and in respect of the Plaintiffs claim for tracing fees.

It will be alleged the whole cause of action arose within the jurisdiction of this Magistrate's Court
Wherefore the Plaintiff shall pray for judgement against the Defendant for the said sums, interest and costs.

Costs, if the action is undefended, will be as follows:	Summons	Judgement
Attorney's charges	R	Costs will be charged
Court fees	R	in accordance with
Sheriff's fees	R	the applicable tariff
Sheriff's fees on re-issue	R	
Plus: Value Added Tax in terms of rule 33(23)	R	
Total	R	

YOU MUST PRESENT THIS DOCUMENT AT THE BANK WHEN MAKING PAYMENT, AND MUST ENTER YOUR REFERENCE NO 611627 ON THE DEPOSIT SLIP FAILING WHICH YOUR PAYMENT MAY NOT BE IDENTIFIABLE AND YOU WILL BE LIABLE FOR ALL LEGAL COSTS INCURRED IN THE SUMMONS, WHICH WILL BE ISSUED AGAINST YOU.

XYZ Inc

DRAFT SUMMONS TO BE ISSUED AND SERVED

MR MM COMPLAINANT
PO BOX 2468
NOTTING
9999

You must pay the amount of R 404-09
(inclusive of interest) within 5 days of receipt of this
document for credit: M13D-ABC Trust Account,
Account Number: 5555555555 held at ABC
Randburg, Branch Code AA-BB-CC, quoting your
reference number: 1122334455.

Should you pay this amount you will not be liable
for any costs appearing below on this document.

Plaintiff Attorney's Reference

**AAAAAA BBBB BB CCCCCC INC,
Attorneys Notaries Conveyancers**

Registration No. 00/123456001
Executive Offices, 2nd & 3rd Floor
The Place, cnr Kings Road and
Queen Avenue Randburg
D o c a x A99 R a n d b u r g
Private Bag, RANDBURG 2125
Tel. (0 11) 643-0006/Fax 011-167-6789

Date of Document - 19-Aug-2000

In the Magistrate's Court for the District of RANDBURG held at RANDBURG
Between

ABC SA LIMITED

plaintiff

and

Mr MM Complainant

Defendent

**To: MR MM COMPLAINANT, whose full and further particulars, are to the Plaintiff unknown of
PO BOX 2468, NOTTING, 9999**

You are hereby informed that you do within FIVE (6) days of receipt of this document, pay the claim of
ABC SA LIMITED, a company duly incorporated with limited liability and registered according to the
company laws of the Republic of South Africa, with principal place of business situated at ABC Galleries,
37 Owl Avenue, Braamfontein, or a summons will be issued by the clerk of the aforesaid court and
served on you by the sheriff, whereafter you will be liable for the costs appearing hereon-

(1) Particulars

Plaintiff's claim against Defendant is for payment of the sum of R404.09 for services rendered by the
Plaintiff to the Defendant at the latter's special instance and request, which amount is at present due and
payable by the Defendant to the Plaintiff and which amount Defendant refuses to pay, notwithstanding
demand.

Plaintiff furthermore claims interest on the aforesaid amount at the rate of 15.5% per annum from date
of default to date of Settlement.

It payment has been made in the last 21 days, please disregard this letter and contact our call centre to
confirm payment particulars.

You will be liable for the following costs in the event of non-payment or failure to make an arrangement
for payment.

Costs will be as follows:

Costs similar to the draft summons of The Creditor Corporation (see page 7).

Any person may within a period of thirty (30) days from the date of this notice make written representations regarding the above-mentioned investigation to: The Secretary, Consumer Affairs Committee, Private Bag X84, PRETORIA, 0001. Tel: 012-310-9562, Fax: 012-320-0579. Ms L van Zyl".

On 14 March 2001 the Directors of the Law Societies of the Northern Provinces, Cape of Good Hope, Natal and the Free State were informed about the impending publication of the notice of the investigation. The entities/attorneys against whom the Committee received complaints were also informed thereof. The vice-chairperson of the Committee issued a press statement on 22 March 2001 about the investigation

5. Justification for using the draft summons

Creditor Corporation and XYZ Inc justified the use of the draft summonses issued by them. Neither of them commented on the general investigation into the utilization of quasi legal communications and documents, which simulate legal or judicial processes.

5.1 Creditor Corporation

The complaint against Creditor Corporation was referred to the Legal Advisor of the entity. He was informed about the provisions of the Code referred to above and that, when considering complaints, the Committee will take the provisions of the Code into account in determining whether the conduct complained about, constitutes an unfair business practice in terms of the Act.

The Creditor Corporation replied that, because the outstanding amounts are often less than R500, it is seldom cost effective to institute legal action to recover the outstanding debts. The Legal Advisor also stated that:

- (a) "... our attorneys were compelled to devise an innovative and cost-effective method to procure payment of outstanding fees from clients hence the birth of a letter of demand with the heading 'Draft Summons to be served by the Sheriff'".
- (b) The wording and the format of the draft summons have been changed to avoid the document creating the impression that it is a real and/or proper summons.
 - (i) The heading of the document states that it is a draft summons.
 - (ii) The draft summons states as follows: 'You are hereby **informed** that you do within FIVE (5) days of **receipt** of this **document** pay the claim of ...'. In contrast to these words, a real summons would have read: 'You are hereby **summoned** that you do within FIVE (5) days of the **service** of this **summons** (our highlighting) pay the claim...'. In other words, the Legal Adviser argued, the substitution of the words 'informed' for 'summonsed', 'receipt' for

'service' and 'document' for 'summons' is sufficient for a recipient of the document to understand that it is not a summons.

- (iii) The draft summons furthermore states: "... or a summons will be issued by the clerk of the aforesaid court and served on you by the sheriff, whereafter you will be liable for the costs appearing hereon". The Legal Adviser argued that this phrase does not appear in a real summons and that "... this phrase clearly implies that the Draft Summons is not a real summons, that it has not been issued, that it has not been served by the sheriff and furthermore that the recipient will only be liable for the costs appearing thereon in the event that a summons is in fact issued and served due to the recipient's non-payment".
- (iv) In addition, the Legal Adviser wrote, the wording of the draft summons has specifically been phrased in the future tense in order to indicate that the issuing and the service of a summons are events that will take place in the future. The happening of the events is also conditional upon the recipient's non-payment of the claim amount. The Creditor Corporation found it difficult to accept that any person with an average ability of comprehension will be confused by the draft summons and consequently induced to believe that it is a real summons under circumstances where the draft summons clearly states that a summons will be issued and will be served should the recipient fail to pay the claim amount.
- (c) The amount of time and energy expended in drawing the draft summons is the same as in the case of drawing a real summons. However, by using the draft summons the gravity, the legal consequences and the cost implications of the debtors' non-payment are visually brought to their attention. The debtors' attention is specifically drawn to the fact that they will be liable for the costs as set out in the draft summons in the event of non-payment. They are thereby afforded the final opportunity to affect payment of the amount mentioned in the draft summons before a real summons is issued which will only result in the debtor having to pay the additional legal costs.
- (d) The Legal Adviser wrote that their attorneys have in the last year posted hundreds of thousands of draft summonses. He said that it is common cause that the country's courts are overburdened and inundated with work and that the issuing of an additional 100 000 summonses would have a disastrous effect on the courts' ability to cope with the workload and hence, the efficiency of South Africa's legal system.
- (e) In light of the aforesaid, it was the Creditor Corporation's view that the use of the draft summons is in the interest of the general public and in the interest of South Africa's legal system.

- (f) Creditor Corporation sought legal advice from their attorneys who advised it that the use of the draft summons does not contravene any of the provisions of any specific legislation or business practice or any other Act for that matter.

The Creditor Corporation missed the point. The substitution of certain words does not mean that a recipient of the "draft summonses" would not regard the document as a threat to institute legal proceedings. The document produced by the Creditor Corporation and its attorneys remain a communication which simulates legal or judicial processes. These constitute unfair business practices in terms of the Act because consumers are misled into believing that summonses have been served on them.

Creditor Corporation said that it sought legal advice from their attorneys and that they were informed that the use of the Draft Summons does not contravene any of the provisions of any specific legislation or business practice or any other Act for that matter. Unfortunately, Creditor Corporation was not informed by its attorneys that the use of the Draft Summons could perhaps be regarded as an unfair business practice by the Committee and that the Committee could recommend to the Minister of Trade and Industry that he declare this business practice of the Creditor Corporation to be unlawful.

5.2 XYZ Inc

The complaint against XYZ Inc was referred to the entity for comment. One of the main arguments of XYZ Inc was that the Committee used the provisions of the Consumer Code for Debt Recovery Agents as its point of departure in formulating "... its objection" against the use of the draft summons. XYZ Inc referred to the definition of a debt recovery agent in the code and to the fact that attorneys were excluded from the definition. Furthermore, XYZ Inc argued, "... it is not the intention of the Code to regulate the conduct of an attorney who is, in any event, subject to his/her own profession's code of conduct". The argument of XYZ Inc misses the point. The Code has no legal status and should the former BPC or the Consumer Affairs Committee have had reason to investigate the business practices of a debt recovery agent, or an attorney, it would have done so in terms of section 8 of the Act. The provisions in the Code serve as guidelines only. The argument that attorneys are subject to their own profession's code of conduct is valid. It is also true that attorneys are not above the law and also they should not mislead consumers.

XYZ Inc also stated that "A clear distinction should be made between an attorney who uses the draft summons for the purpose of collecting a claim and a debt recovery agent who uses the draft summons for the purpose of collecting a claim". This argument is clearly untenable. An unfair business practice is an unfair business practice and it makes no difference whatsoever who carries out the practice.

XYZ further argued that its draft summons "... is nothing more than a letter of demand, i.e. demand to pay failing which legal action will be instituted. ... A letter of demand is by its very nature a demand for payment and a notification that legal action will be

instituted in the event of non-payment. Should the Committee find that the use of a letter of demand is equivalent to a threat to institute legal action ... then and in that event thousands of attorneys will make themselves guilty of committing an unfair business practice when addressing a letter of demand to an alleged debtor. We respectfully submit, and we trust you will agree that such a view flies in the face of established legal principles".

For the sake of completeness the rest of XYZ Inc's letter is quoted:

"The question following upon the aforesaid is whether an attorney may only make use a certain format when sending out a letter of demand or whether an attorney may by means of the letter of demand disclose to a debtor the format that the summons to be issued will take. We are of the opinion that the current format of the Draft summons presents the debtor with a visual example of the summons to be issued, should he fail to pay. By using the draft summons, the gravity, the legal consequences and the costs implications of the debtor's non-payment are visibly brought to the debtors attention. We are furthermore of the opinion that a reasonable man with a reasonable amount of insight will not be intimidated by the contents thereof and will not pay the outstanding amount under duress. On the contrary, we know, and this knowledge has been gained from experience, that the reasonable man with a reasonable amount of insight fully understands that the draft summons is not a real summons but merely a letter of demand and that a summons is about to be issued should he fail to pay.

We are furthermore of the respectful opinion that a draft summons does not simulate a legal or judicial process. The format and the wording of the document have specifically been changed in order to avoid that the document creates the impression that it is a real summons.

In one has regard to the Unfair Business Practices Act ('the Act'), an unfair business practice is defined as any business practice which, directly or indirectly, has or is likely to have the effect of: -

- (a) harming the relations between businesses and consumers;
- (b) unreasonably prejudicing any consumer;
- (c) deceiving any consumer; or
- (d) unfairly affecting any consumer.

As you are aware, the Act furthermore provides that the Committee, after investigation, is of the opinion that an unfair business practice, as defined in the act, exists; is not satisfied that the unfair business practice is justified in the public interest and has not made an arrangement with the party concerned, the committee shall in its report make certain recommendations to the Minister regarding the action to be taken. The Minister may in turn, upon the recommendation of the Committee, declare a practice an unlawful practice if he is of the opinion that an unfair business practice exists or may come into existence and if he is not satisfied that an unfair business practice exists or may come into existence and if he is not satisfied that the unfair business practice is justified in the public interest.

We are of the respectful opinion that the use of the Draft summons does not fall within the definition of an unfair business practice as defined in the act. The use of the Draft summons does not harm the relations between businesses and consumers nor does it unreasonably prejudice any consumer. It is furthermore difficult to conceive how

consumer are deceived or how they are unfairly affected by the use of the Draft summons, as the Draft summons is merely a letter of demand in another format.

Even if the use of the Draft summons does fall within the ambit of the definition of an unfair business practice, we strongly believe that the use of the Draft summons is justified by public interest in that

- (a) The amount of time and energy expended in drawing the draft summons is the same as in the case of drawing a real summons. However, by suing the draft summons the gravity, the legal consequences and the costs implications of the debtor's non-payment are visually brought to the debtor's attention. The debtor's attention is specifically drawn to the fact that he/she will be liable for the costs as set out in the Draft Summons in the event of non-payment. The debtor is thereby afforded the final opportunity to effect payment of the amount mentioned in the Draft summons before a real summons is issued which will only result in the debtor having to pay the additional legal costs.
- (b) It is common knowledge that the general public no longer has any faith in the cost effectiveness of the legal collection process. Besides the risk that the Plaintiff may be unable to recover the legal costs from a debtor, the costs that a plaintiff can recover from a debtor, ie the party and party costs are substantially less than the attorney own client costs. It is therefore, in most case, no longer cost effective for our client to cause a summons to be issued against debtor. The aforesaid has forced us to find new and innovative ways of procuring payment from debtors, which are cost effective for our client. The use of the Draft summons is cost effective. Our client does not have to pay stamp duty and Sheriff fees and our fees for drawing and posting a draft summons is substantially less than our fees would have been had we been compelled to cause a summons to be issued and served.
- (c) It is also common knowledge that our courts are presently overburdened and inundated with work. It is sad but true that our court can hardly cope with their present workload. One can just imagine the disastrous effect of the issuing of an additional 1 000 000 summonses would have had on the courts' ability to cope with the workload and hence, the efficiency of our legal system. At the risk of sounding like the prophet of doom, the issuing of an additional 1 000 000 summonses could well cause the whole legal system to grind to a halt.

Be that as it may, should the Committee persist with its view that the use of the Draft summons in its present format constitutes an unfair business practice, we would then in that event be eager to enter into an arrangement with the Committee, as provided for in the Act, in terms whereof we agree to desist from the use of the Draft summons in its present format and after consultation with representatives of the Committee, to make use of a "Draft summons" in a format that is agreeable to the Committee".

Many of the issues raised by XYZ Inc were similar to those raised by Creditor Corporation and are broached in section 6 below.

6. The meeting of the Committee on 24 January 2001

Employees and legal representatives of Creditor Corporation addressed the Committee at its meeting held on 24 January 2001. The following is a summary of the statements, arguments and counter arguments made by members of the Committee and the representatives of Creditor Corporation.

The Committee is not concerned with legal definitions. The Committee's concern is with unfair business practices. What Creditor Corporation and other entities are doing, is sending out letters of demand. That is what they should do, and they should not make a letter of demand look like a summons. If this were to be allowed or condoned, then everybody will use the same arguments advanced by Creditor Corporation. Many consumers will end up being "summonsed", or so they will be misled into believing. Although the Committee understands the problems of creditors, the fact is that there are legitimate legal documents which have a particular standing. They are serious documents with serious consequences. They are there for a very serious purpose and it not correct for all types of entities to use them for their own purposes. It is misleading to change the wording here and there to make the "draft" summons look slightly different from a real summons.

Creditor Corporation said that it will have to go back to the shareholder (the Government) for additional funds. This is not in the public interest⁽²⁾. If the use of the draft summons is indeed an unfair business practice then we are protecting the interests and the rights of a small portion of people relatively speaking who is in any case on the other side of the law to start off with. That in itself will then impact on our ability to deliver services to the public. Creditor Corporation said that should it follow the full-blown legal route, it will soon drain Creditor Corporation's cash resources and that it would create havoc in the legal system because it would not be able to cope with the number of cases.

The Committee does not have problems with innovative approaches in letters of demand, but it does have a problem where recognized legal documents are used which is used in a court of law for a very serious purpose. The draft summons is almost demeaning a summons. If consumers receive summonses, they know they are in trouble. The Committee understands that debtors are on the other side of the law. Any ordinary person will think that the draft summons is a summons. Only the educated will realize what it is and they will throw it away and wait for the real summons. Creditor Corporation has the right to send out the letters of demand and take debtors to court. The Committee only concern is that the existing letter of Creditor Corporation simulates a real summons.

(2) In terms of section 10(2) of the Act, if the Committee, after an investigation in terms of section 8(1)(a) is of the opinion that an unfair business practice exists, or may come into existence and is not satisfied that the unfair business practice is justified in the public interest, it shall in its report recommend to the Minister that such action be taken under section 12 as it may consider necessary. The implication is therefore that if an unfair business practice exists, but that it could be considered as being in the public interest, the practice could be "condoned".

Creditor Corporation argued that the Committee should differentiate between a statutory obligation to pay an amount and a contractual obligation to pay a debt. Creditor Corporation said that the Committee was concerned about consumers receiving the draft summons, reading through it and "... getting this very serious demand to pay". It conceded that it was serious but argued that this was exactly the point. It wants to prevent the consumers from going to court. Should real summonses be served and the consumers are in arrears, the courts will rule against them and they will have to pay the arrears and costs. It tries to protect its clients by saying this is a serious matter. "If you are not going to pay, Creditor Corporation will take the next step. It's not an idle threat. It is a reality".

The Committee contended that what Creditor Corporation actually asks of the Committee is to recognize fake legal documents. It is a fake legal document, whatever Creditor Corporation calls it. The whole intention of the document is to create the impression that the consumer is being summoned to court. It goes beyond a letter of demand. The Committee cannot recognize fake documents that are there to simulate recognized legal proceedings. Similarly the Committee could not recognize, for example, Creditor Corporation setting up its own court, arresting people and taking them to this court. The next step would be to seize the debtors' assets. The draft summons is the start of such a process.

Creditor Corporation said that its arguments are based on legal principles rather than a feeling of fairness. It argued that one cannot base everything on a feeling of what is fair and move away from what the law says. The law is based on sound legal principles and is not based on equity although some statutes may be based on equity and employ terms such as fairness and unreasonable. Creditor Corporation said that it has a legal argument as well as an argument based on equity, namely, what is in the public interest. It submitted that if it did not utilize the procedure of the draft summons, it would prejudice the consumer far worse than what it is doing at present because the alternative is a real summons. Creditor Corporation further stated that approximately 99 per cent of its clients have received a normal letter of demand. Should some clients not respond to the letter of demand, the next step is to convince them about the serious nature of the non-payment. The alternative is to issue a summons. It is as simple for an attorney to issue a summons as sending out a draft summons. There is no real difference and the data remains the same. Therefore, it makes no difference whether they serve a real summons or a draft summons. In the end the consumers will have to pay, whether a real summons or a draft summons is served on them.

The Committee said that a real summons does not undermine an existing legal process because then one follows the proper correct legal route.

Credit Corporation next argued that should they follow the legal route, consumers may not receive the summonses, because sheriffs will service summonses by affixing during the day. It alleged that 70 per cent of summonses are served by attachment or affixing. People work during the day and they will not get the summons. Attorneys will then go ahead and they will obtain judgments by default against the debtors. Consumers will have judgments against their name for the non-payment of relatively small amounts which they perhaps would have paid perhaps if they receive the draft

summons. This worsens the situation. Therefore, if one deals with the argument of what is in the public interest, then the Committee has to have regard for the individual consumer because that is who Credit Corporation allegedly tries to protect.

The Committee stated that it is unfortunate if consumers do not pay their debts and they end up with judgments against them. However, the Committee cannot recognize a procedure that undermines the existing legal process. This is not in the public interest.

Creditor Corporation argued that it is not undermining the legal process but that it followed the legal process. To their mind they send out a letter of demand and they asked whether there was a strict format that a letter of demand has to comply with. If one considers the draft summons, Creditor Corporation asserted, it has been changed substantially and does not look like a real summons. Furthermore, the response to the draft summons is far superior to a normal letter of demand and because they have done both methods, they knew for a fact that their collections have increased by using the draft summons rather than sending a normal letter of demand.

The Committee maintained that the document in question does create the impression in the minds of consumers that it is a court paper and Credit Corporation had said this is not their intention. Creditor Corporation wishes to properly inform consumers in a dramatic way what the consequences of their actions are. The Committee is concerned that the document, contrary to Credit Corporation's intentions, appears like a court paper. It is therefore misleading. The principle is that nobody, not even Government, must purport to act as if they are court officers. This is a serious matter which must be reserved to the proper authorities. Consider, for example, the consequences should the South African Revenue Services be authorized to circumvent the proper authorities in the collection of tax. The collection of taxes is certainly in the public interest.

The Committee The proposed Debt Collectors Act states that it is improper conduct by debt collectors should they make use "... of fraudulent or misleading representations including the simulation of legal procedure". It cannot be in the spirit of the Debt Collectors Act for people that don't fall within that definition to be allowed to use simulated court documents because the whole idea is that you either use the proper thing or you don't use it at all.

7. The response of the Law Societies

7.1 The Natal Law Society

The Chairperson on behalf of the Natal Law Society commented that if it the Committee's "... intention to investigate notice by attorneys and others, which simulate summonses and other judicial documents, then my Council will certainly support such investigation. We would like the practice stamped out whereby the public is brought under the impression that they are facing Court process which is indeed not the case".

7.2 The Law Society of the Northern Provinces

This Law Society responded to the letter of the Committee dated 14 March 2001 on 31 May 2001 only. The following is a direct translation from the Afrikaans:

"The documents that were made available to us⁽³⁾ for consideration stated that the costs would be payable only should the debtor neglect to respond to the reminder or when legal action will be instituted. It appears that there is not necessarily prejudice to the debtor because it is clear that the document was not issued by a Court and the debtor is in any case entitled (English "free", Afrikaans "vry") to seek legal aid. It is clear from the language used that the document is not a summons. Various members of this Law Society expressed their concerns about the fact that debt collection is a continuous headache for businesses, especially those with big volumes of debtors and especially where the amounts owed are relatively small, because it is often uneconomical to collect such debts. Should a debtor respond to the reminder, it prevents incurring unnecessary legal costs which can often exceed the outstanding amount and it therefore holds in advantages to debtors and creditors. One has to remember that, as a rule, reminders are only mailed after the debtor ignored a number of accounts".

This Law Society also misses the point. It is certainly not clear, at least from the point of view of an ordinary consumer and not that of a university graduate who read for a law degree, from the wording that the document is not a summons. The arguments about the number of debtors and the amounts involved have been discussed above.

7.3 The Law Society of the Free State

The Chairman of the Magistrates' Court Committee of the Law Society of the Free State wrote (directly translated from the Afrikaans):

"We fully support your investigation into the utilization of documents pertaining to be legal documents. I learned that various attorneys in Gauteng as well as attorneys in Welkom issue documents simulating summonses. Other documents simulate documents which are usually issued by the Clerk of the Court when it is not the case. Even the costs of such legal documents are indicated on the documents. The Magistrates' Court Committee of the Law Society of South Africa already resolved recently that such conduct constitutes unprofessional behaviour by attorneys. There are debt collectors who are also guilty of these practices. It is not in the public interest that these practices are continued".

7.4 The Law Society of the Cape of Good Hope

The Law Society of the Cape of Good Hope wrote on 17 April 2001:

(3) The draft summonses which appear on pages 7 and 8

"We write to advise that your letter dated 14 March 2001 was referred to the CLS Magistrates' Court Committee, a committee of specialist attorneys, for consideration.

The Committee supports the Consumer Affairs Committee's investigations into quasi legal communications which are constructed to mislead the general public as to their real import.

An attorney who is found to have intentionally misled a member of the public would be guilty of unprofessional conduct and/or conduct which brings the profession into disrepute. The Society is authorised to deal with such misconduct and has the mechanisms to do so. Should your investigation identify misconduct by an attorney, we ask that you advise us thereof so that we may investigate and, where appropriate, sanction the misconduct, in the interests of the public and the attorneys' profession.

The Society cannot condone conduct by which any person who is not an attorney holds him/herself out to be an attorney. Use by non-attorneys of documents which represent court documents would form the basis of a charge of 'holding out' as such documents are peculiarly used by attorneys to whom court work is reserved.

Having condemned quasi legal communications and documents as being generally misleading and confusing as to their source, the Committee considered whether there may be a constructive use for quasi legal communications and documents; whether there may be circumstances in which the use thereof may not per se be wrong. The Committee believes that a distinction should be drawn between documents that clearly indicate that they are not legal documents eg. those documents which clearly indicate that legal proceedings will be instituted should the addressee ignore the content thereof and those documents that are calculated to deceive the public into thinking that the document is in fact a genuine legal communication. The Committee points out that the traffic authorities have for many years issued so-called "summons" while the document is actually a notice intention to summons.

We are gravely concerned that, to the extent to which quasi legal communications may serve to confuse the public, they will undermine the serious import of proper legal communications thereby impeding the legal process which is a pillar of our democracy. There is no doubt that persons who fail to respond to proper legal communications because they believe them to be no different from quasi legal communications will suffer real prejudice".

The statement that "... the traffic authorities have for many years issued so-called 'summons' while the document is actually a notice intention to summons" is not entirely correct. Traffic offences and the relevant procedures are regulated by the Road Traffic Ordinance and the spot summons is a summons itself. At other times erring motorists will get tickets notifying them that they will receive a summons.

7.5 The entities/attorneys informed on 14 March 2001 about the investigation

The entity and attorney against whom the Committee received complaints and who were informed of the investigation on 14 April 2001 did not comment on the investigation. They did, however, amend their "draft summonses" into letters of demand which the Committee considered not to be misleading.

7.6 Other comments

An attorney from Bloemfontein wrote (directly translated from the Afrikaans):

"My opinion is that attorneys, who are guilty of the type of behaviour being investigated, act unprofessionally and disgrace the profession. The activity being investigated, is designed to mislead. I am further of the opinion that should a person to whom the quasi legal documents are addressed respond thereto, the conduct of the debt recovery agent or attorney would in many cases constitute fraud or alternatively an attempt to defraud. I am therefore of the opinion that these types of documents should be declared unlawful business practices".

8. Consideration

Three of the four existing law societies are not in favour of attorneys and others issuing documents which simulate summonses and other judicial documents. It also appears that the Magistrates' Court Committee of the Law Society of South Africa has already resolved that such conduct constitutes unprofessional behaviour by attorneys.

The Committee's concern, however, is with unfair business practices. No entity which mails a letter of demand should make such a letter to look like a summons. Many consumers will end up being "summonsed", or so they will be misled into believing. It is misleading to change the wording here and there to make the "draft" summons look slightly different from a real summons. It is an unfair business practice to mislead consumers.

Creditor Corporation and XYZ Inc argued that it is in the public interest to issue the "draft summonses". The Law Society of the Northern Provinces expressed its concern that "... debt collection is a continuous headache for businesses, especially those with big volumes of debtors and especially where the amounts owed are relatively small, because it is often uneconomical to collect such debts". The Committee, however, cannot recognize ***a procedure that undermines the existing legal process. This is not in the public interest.***

9. Recommendation

A letter of demand for the purpose of collecting a claim of whatever nature and which has the appearance of a summons, constitutes an unfair business practice. There are no grounds justifying such a practice in the public interest. It is accordingly recommended that the Minister declares the unfair business practice unlawful in terms of section 12(1)(b) of the Act whereby, in the course of business any entity which issues a letter of demand for the purpose of collecting a claim of whatever nature,

- (a) simulates, what is essentially a letter of demand, to have the appearance of a summons or a draft summons and/or
- (b) use the word "summons" or "draft summons" in the title or subtitles of a letter of demand.

It would not be misleading or an unfair business practice to state in the text of the letter of demand that a summons will be issued unless the outstanding amount is paid.

PROF T A WOKER
VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

NOTICE 410 OF 2002**DEPARTMENT OF TRADE AND INDUSTRY****CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Alexander Erwin, Minister of Trade and Industry, in terms of section 12 (6) (a) (iii) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), hereby give notice that I intend publishing the following notice in the *Government Gazette*. Interested parties are hereby invited to comment on the proposed notice. These comments must be directed to the address which appears at the end of the proposed notice.

**NOTICE IN TERMS OF SECTION 12 (6) (a) (iii) OF THE
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Alexander Erwin, Minister of Trade and Industry, by virtue of the powers vested in me by section 12(6) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), and after having considered a report by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 622 of 2001 published in Government Gazette No. 22140 of 16 March 2001, which report was published in Notice No. 405 in Government Gazette No. 23259 of 22-03-2002, promulgate in the public interest the notice in the Schedule.

SCHEDULE

1. In this notice, unless the context indicates otherwise -

“unfair business practice” means

(a) whereby, in the course of business any entity which issues a letter of demand for the purpose of collecting a claim of whatever nature,

(i) simulates, what is essentially a letter of demand, to have the appearance of a summons or a draft summons and/or

(ii) uses the word “summons” or “draft summons” in the title or subtitles of a letter of demand

but

(b) it would not be misleading or an unfair business practice to state in the text of the letter of demand that a summons will be issued unless the outstanding amount is paid.

2. The unfair business practice is hereby declared unlawful and persons are hereby directed to-

(a) refrain from applying the unfair business practice;


(b) refrain at any time from applying the unfair business practice.

3. On the recommendation of the Consumer Affairs Committee I may, in a particular case, in terms of section 12 (6) (c) of the Act in writing, grant

exemption from a prohibition contemplated in this notice to such extent and for such period and subject to such conditions as may be specified in the exemption. Such applications for exemption must be directed to:

The Secretary
Consumer Affairs Committee
Private Bag X84
PRETORIA
0001
(For attention: Ms Lana van Zyl
Fax: (012) 320-0579)

A ERWIN
MINISTER OF TRADE AND INDUSTRY



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