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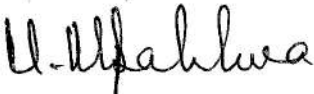
GENERAL NOTICES

NOTICE 2971 OF 2004

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Mandisi Mpahlwa, 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 2136 of 2004 as published in Government Gazette 26832 dated 23 September 2004, as set out in the Schedule.



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 115

**An investigation in terms of section 8(1)(b) of the
Consumer Affairs (Unfair Business Practices) Act, 71 of 1988,
into the marketing of speculative software**

THE MARKETING OF SPECULATIVE SOFTWARE

1. THE CONSUMER AFFAIRS COMMITTEE

The Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the Act), is administered by the Consumer Affairs Committee (the Committee), a statutory body in the Department of Trade and Industry (*the dti*). The Act is enabling and not prescriptive. The main body of the Act deals with 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 deemed necessary by the Committee are undertaken by the Consumer Investigations Directorate of the Corporate and Consumer Regulatory Division of *the dti*.

The vast majority of the investigations are into unfair business practices as applied by individuals or specific business entities. These investigations are undertaken in terms of section 4(1)(c) or section 8(1)(a) of the Act. In terms of section 8(1)(b) of the Act, the Committee may also make such investigation as it may consider necessary into any type of business practice in general. These are business practices that are commonly applied by several or many business entities in a particular industry.

Should the Committee, after a section 8(1)(b) investigation, find that an unfair business practice(s)⁽¹⁾ exists, it recommends corrective action to the Minister to ensure the discontinuance of that practice.⁽²⁾ Should the Minister accept the recommendation of the Committee, the order is published in the *Government Gazette*. An infringement of an order by the Minister is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both a fine and imprisonment.

2. COMPLAINTS RECEIVED REGARDING SPECULATIVE SOFTWARE

The following are representative of the type of complaints the Committee received from consumers. The complainants bought software packages from various sellers who claimed that the software would help the buyers understand securities and exchanges and thus enable them to trade profitably in securities on exchanges. The software packages usually include a technical analysis which give buy and sell indicators for trading on securities exchanges as well as a share portfolio management and records system. The Committee is not in a position to express an opinion on the effectiveness of any software package, but will concentrate on the marketing of this type of software.

2.1 A salesman⁽³⁾ of PRS (acronym of the entity) visited a consumer at her place of employment after he made an appointment. He informed her that:

- (a) it would cost R165 per month to buy shares,

(1) An unfair business practice is 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.

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

(3) To make for easier reading, the word "alleged" will not be used.

- (b) the payments of the PRS clients are "pooled" and the entity then buys shares on the Johannesburg Securities Exchange (JSE),
- (c) the return on these shares are between 40 and 80 percent per annum and a minimum return of 40 percent was "guaranteed".

She was skeptical about the presentation and asked the salesman how PRS earned an income, whereupon he informed her that it takes 5 per cent of the profit. The salesman further informed her that she could cancel the contract "at any time".

On 13 August 2003 she signed a contract to pay R165 monthly for 36 months. She was under the impression that her credit card would be debited monthly with R165. On 14 August 2003 she established that the bank authorised a payment to PRS and that her credit card budget account was debited with R5 200. She called the bank but was unsuccessful in her attempts to cancel the payment of R5 200.

She contacted PRS and she was informed that she had bought a software package which she could use "... to make money on the JSE". She alleged that five of her colleagues were also misled. She wrote: "Please help us because we lost money that we don't even have. They deducted it from our budget accounts so now we have to pay interest also on that money." An investigating official called the complainant and it was clear that she knew very little about shares. She did not receive the software.

The owner of PRS said that the salesman, who no longer worked for PRS, did not act on instructions from PRS. The South African Police Services confirmed that they were attempting to trace the salesman in connection with a charge of fraud.

2.2 Another consumer wrote (directly translated from Afrikaans): "I received a call at my workplace from PRS stating that I could make a lot of money. I suggested that they meet me at my workplace and explain their offer to myself. Subsequently one of the representatives met with myself and explained the product to myself which I found to be totally misleading. Not being knowledgeable with this type of product, I signed a contract blindly, when with further insight I decided to withdraw and submitted a fax to the company in order to cancel and withdraw the contract."

The complainant asserted that he was pressurized into signing the contract and that he was informed by the salesman that should he want to cancel the contract within six months he would be refunded any money paid by him. He understood that the cost of the product was R300 per month, yet his budget account was debited the day after signing the contract with R7 410 and the total cost, including interest, would be approximately R10 800.

2.3. "On 23 April 2003 I signed a contract to enter a course. This after they contacted me and really talked a lot of things into my head. Later that same day I was phoned by their representative to confirm the transaction. I confirmed and allowed the payment to go off on my budget credit card account.

Unfortunately unforeseen finances came up that evening. After speaking to my brother-in-law and serious consideration I phoned the next day, 24 April 2003, and spoke to 'Leonie'. I asked her to cancel the transaction. She replied there won't be a problem

and asked me to put it in writing. On 2 May 2003 I faxed them a letter to cancel the transaction. They replied by saying that they were NOT willing to cancel OR refund me!

I will very much appreciate it if this is investigated and to see that this company refund me my R6 995. These moneys are from my mom's inheritance when she died about a year ago and financially I cannot afford this".

2.4 "I shall be pleased if you could kindly assist me in my predicament with Mr ABC of SPI. Further to my dismay I have now reliably learnt that Mr ABC had been jailed for fraud in the past. He has lied to my wife and I, and, has conned us into purchasing the software package with which he has promised and guaranteed us that we would make a huge profit. This has not materialised".

The complainant attached a copy of a letter which he wrote to Mr ABC. He wrote: "Further you had clearly indicated that I will be required to pay only R270 per month for 36 months for the entire package which will immediately enable me to trade on the JSE with daily updates. But this is not so as I was informed by your support manager that there are other costs involved which you had failed to disclose to me at the time of signing the agreement. You had personally endorsed the only cost involved to be R270 x 36 months at the time of signing of the agreement for the entire package and support."⁽⁴⁾

You had also misrepresented facts by endorsing the repayment to be R270 per month over 36 months. I wish to inform you that the bank monthly instalment for the R8 500 which you so promptly debited on my card account on the 24 September 2003 is R3190 and not R270 as you assured me. This places me in a difficult financial position. You personally guaranteed us that if we do not 'make money' then you would refund us our money back. I truly expect you would honour your word".

2.5 "After careful consideration please cancel this transaction immediately. I do not wish for SPI to purchase and sell shares on my behalf". This complainant was led to believe that SPI would buy and sell shares on his behalf.

2.6 The following letter was signed by six consumers:

"We refer to your meeting with all the undersigned with regards to investing on the JSE. Your presentation of the product was very impressive and convincing in that we could invest any amount from as little as R500 and that your firm would monitor the shares and provide back up service. The following day a meeting were arranged on a one on one basis and it was on this day that Strine, Peter and Ruvee were handed the Enrolment form/Tax invoice for their personal details to be completed and signed. The details regarding Quantity, Description of Goods and Amount was left blank and only completed by you after we have signed. The amount you filled in was not at any stage either discussed nor made mention of and all of the undersigned can confirm that. When Strini and Peter found out that it was R7 500 they immediately declined as they

(4) The following was the response of Mr ABC to this statement: "The repayment of R270 per month over 36 months was an approximate figure. It was never intended to be a precise figure as we are unaware of the interest rate and finance charges each bank levies on its Budget Plans to its individual customers".

do not have money and faxes and e-mails were sent for your attention for immediate cancellation”.

SPI responded to this allegation by stating: “Our contact with the client is that of training him on how to trade on the Johannesburg Stock Exchange is that he is able to eventually trade independently. We merely educate the client in achieving same”.

SPI stated that the product comprises: “Training courses, Support training on how to trade on the JSE, Installation of the training programme, Opening of the trade account, Tax advice, support and submission, Simulate training, Daily e-mail or SMS of recommended shares and a toll free recommended share line”.

2.7 Some time ago, the Committee received complaints from consumers who bought software programs at R7 800 each which, ostensibly, could predict the outcome of horse races. The seller of these programs used the same marketing methods as the sellers of the software packages described in 2.1 to 2.6 above.

The seller of this program “guaranteed” that if the program, correctly used, failed to show a cumulative profit for at least 52 consecutive approved Saturdays, it would refund to the purchaser any loss sustained from the initial investment sum of R1 000. The glossy brochure also stated “R83 451.40 12 months clear profit”.

One of the complainants, a pensioner, operated the program for nine weeks and lost his “investment” of R1 000. Another complainant alleged that the program often tipped different horses to win the same race. The vendor was called and he explained that the differences were due to the program being updated. Another punter had two wins in 31 races and won R137.70. In the other races he lost R727.30.

3. THE RESOLUTION OF THE COMPLAINTS

The above complaints were referred to the sellers and in a number of cases the complainants were reimbursed. Some complainants were reimbursed, some accepted offers of settlement (less than the amount paid) and some were not refunded at all. In these latter cases the sellers contended that legitimate contracts were signed to which the buyers were bound.

It is clear from the complaints received that consumers were, directly or indirectly, unreasonably prejudiced and/or deceived by the business practices of the sellers of speculative software.

4. SECTION 8(1)(b) NOTICE IN THE GG

At its meeting on 5 August 2004 the Committee resolved that *ad hoc* investigations in terms of the Act into complaints about speculative software were unproductive and that a general investigation in terms of section 8(1)(b) of the Act into the marketing of speculative software was called for. The Committee also resolved that the following notice be published in the Government Gazette:

"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 marketing of speculative software. **"Speculative software"** means software which claim to assist consumers to understand securities and exchanges and to trade profitably in securities on exchanges and/or software which claims to predict the outcome of horse races. This software is available on stiffies (3½-inch floppy disks), CD ROM disks (compact disks: read only memory) or via the internet through paystations.

Any person may within a period of twenty-one (21) days from the date of this notice make written representations and proposals regarding the above-mentioned investigation to: The Director, Consumer Investigations Directorate, Private Bag X84, Pretoria, 0001. Tel: 012-394-1542, Fax: 012-394-2542. Enquiries: Mr E Mohamed".

Notice of the investigation was published under Notice 2136 in Government Gazette 26832 dated 23 September 2004. Notice of the investigation was also brought to the attention of a number of vendors of speculative software.

6. RECOMMENDATION

There can be no doubt that the marketing practices of some sellers of speculative software⁽⁵⁾, through their marketing efforts, harm the relations between themselves and many of their clients; prejudice some of their customers, mislead others; and unfairly affect yet others. This is not in the public interest.

It is necessary to ensure that consumers are protected from inappropriate marketing activities and in particular high pressure sales techniques at the point of sale by salespersons. In this case a practical solution would be to introduce a cooling-off period. The prejudice and/or deception could most probably be reduced if allowance is made for such a cooling-off period.

It is accordingly recommended that the Minister, in terms of section 12(6) of the Act, declares unlawful the business practice of offering and selling speculative software to consumers⁽⁶⁾ **unless** the following conditions apply:

The following statements must be included, without alteration, in an agreement entered into between a buyer and a seller⁽⁷⁾:

-
- (5) **"Speculative software"** means software which claim to assist consumers to understand securities and exchanges and to trade profitably in securities on exchanges or software which claim to assist consumers to make money by placing bets on horse races. This software is available on stiffies (3½-inch floppy disks), CD ROM disks (compact disks: read only memory) or via the internet through a paystation.
 - (6) **"Consumer"** means any natural person to whom speculative software is offered, supplied or made available.
 - (7) **"Sellers"** include agents, distributors, individuals, retailers and/or wholesalers, but exclude the Johannesburg Securities Exchange.

(a) "I, (initials and surname of the buyer) understand that I am entitled to cancel this contract within five days of the date on which I signed this contract, excluding the day of signature as well as Saturdays, Sundays and public holidays. This cancellation must be conveyed in writing by me and must be received by the seller or any employee of the seller, within the five-day period, at the physical address of the seller. "In writing" includes the use of any electronic means to transmit messages, provided a hard copy of the message can be reproduced without alteration by the seller.

(b) (i) I prefer to pay the purchase price in a once-off payment, whether by cash, cheque or a debit on my credit card.

(ii) I prefer to make monthly repayments on my credit card. I understand that should I select this option, the seller will be credited with the full purchase price, and that I will have to make monthly repayments, including interest at the prevailing interest rates, to the bank.

(delete the option which is not applicable)

(c) The terms, conditions and costs involved for both options were explained to me and a copy of the contract, which include the statements above as well as the signed statement by the seller that I will be refunded the money paid by me should I cancel this contract within five days, was handed to me.

.....
(Signature of the buyer)

I have not made any verbal promises to the buyer which are not printed in any official literature of the firm. Upon termination of the contract by the buyer as set out above, I shall, within five days as defined above, refund all payments made by the buyer or reverse any credit transaction.

.....
(Signature of the seller or authorised agent)"

It is further recommended that this report be published in the Government Gazette for comment. In terms of section 12(6)(c) of the Act the Minister may, on the recommendation of the Committee, in a particular case, in writing grant exemption from a prohibition promulgated in terms of section 12(6)(a) of the Act.


.....
PROFESSOR T A WOKER
CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

11 November 2004

NOTICE 2972 OF 2004

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

I, Mandisi Mpahlwa, 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 within a month from date of publication.

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

I, Mandisi Mpahlwa, 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 2136 of 2004 published in *Government Gazette* No 26832 dated 23 September 2004, which report was published in Notice 2971 in *Government Gazette* No 27127 of 20-12-2004, and being of the opinion that an unfair business practice exists which is not in the public interest, promulgate the notice in the Schedule.

SCHEDULE

In this notice, unless the context indicates otherwise -

1. "Unfair business practice" means the business practice of offering and selling speculative software to consumers **unless** the following conditions apply. The following statements must be included, without alteration, in an agreement entered between a buyer and a seller:
 - (a) "I, (initials and surname of the buyer) understand that I am entitled to cancel this contract within five days of the date on which I signed this contract, excluding the day of signature as well as Saturdays, Sundays and public holidays. This cancellation must be conveyed in writing by me and must be received by the seller or any employee of the seller, within the five-day period, at the physical address of the seller. "In writing" includes the use of any electronic means to transmit messages, provided a hard copy of the message can be reproduced without alteration by the seller.
 - (b)
 - (i) I prefer to pay the purchase price in a once-off payment, whether by cash, cheque or a debit on my credit card.
 - (ii) I prefer to make monthly repayments on my debit card. I understand that should I select this option, the seller will be credited with the full purchase price, and that I will have to make monthly repayments, including interest at the prevailing interest rates, to the bank.

(delete the option which is not applicable)

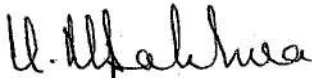
- (c) The terms, conditions and costs involved for both options were explained to me and a copy of the contract, which include the statements above as well as the signed statement by the seller that I will be refunded the money paid by me should I cancel this contract within five days, was handed to me.

.....
(Signature of the buyer)

I have not made any verbal promises to the buyer which are not printed in any official literature of the firm. Upon termination of the contract by the buyer as set out above, I shall, within five days as defined above, refund all payments made by the buyer or reverse any credit transaction.

.....
(Signature of the seller or authorised agent)"

2. **"Speculative software"** means software which claim to assist consumers to understand securities and exchanges and to trade profitably in securities on exchanges and/or software which claims to predict the outcome of horse races. This software is available on stiffies (3½-inch floppy disks), CD ROM disks (compact disks: read only memory) or via the internet through paystations.
3. **"Sellers"** include agents, distributors, individuals, retailers and/or wholesalers, but exclude the Johannesburg Securities Exchange.
4. **"Consumer"** means any natural person to whom speculative software is offered, supplied or made available.
5. On the recommendation of the Consumer Affairs Committee I may, in a particular case, in terms of section 12(6)(c) of the Act, grant exemption from a condition or requirement contemplated in this notice to such extent and for such period and subject to such conditions as may be specified in the exception. Such applications for exemption must be directed to: The Director, Consumer Affairs Committee, Private Bag X84, PRETORIA 0001 [For attention: Ms D Dube, (T) 012-394-1543,(F) 012-394-2543, e-mail: dinki@thedti.gov.za]



M MPAHLWA
MINISTER OF TRADE AND INDUSTRY

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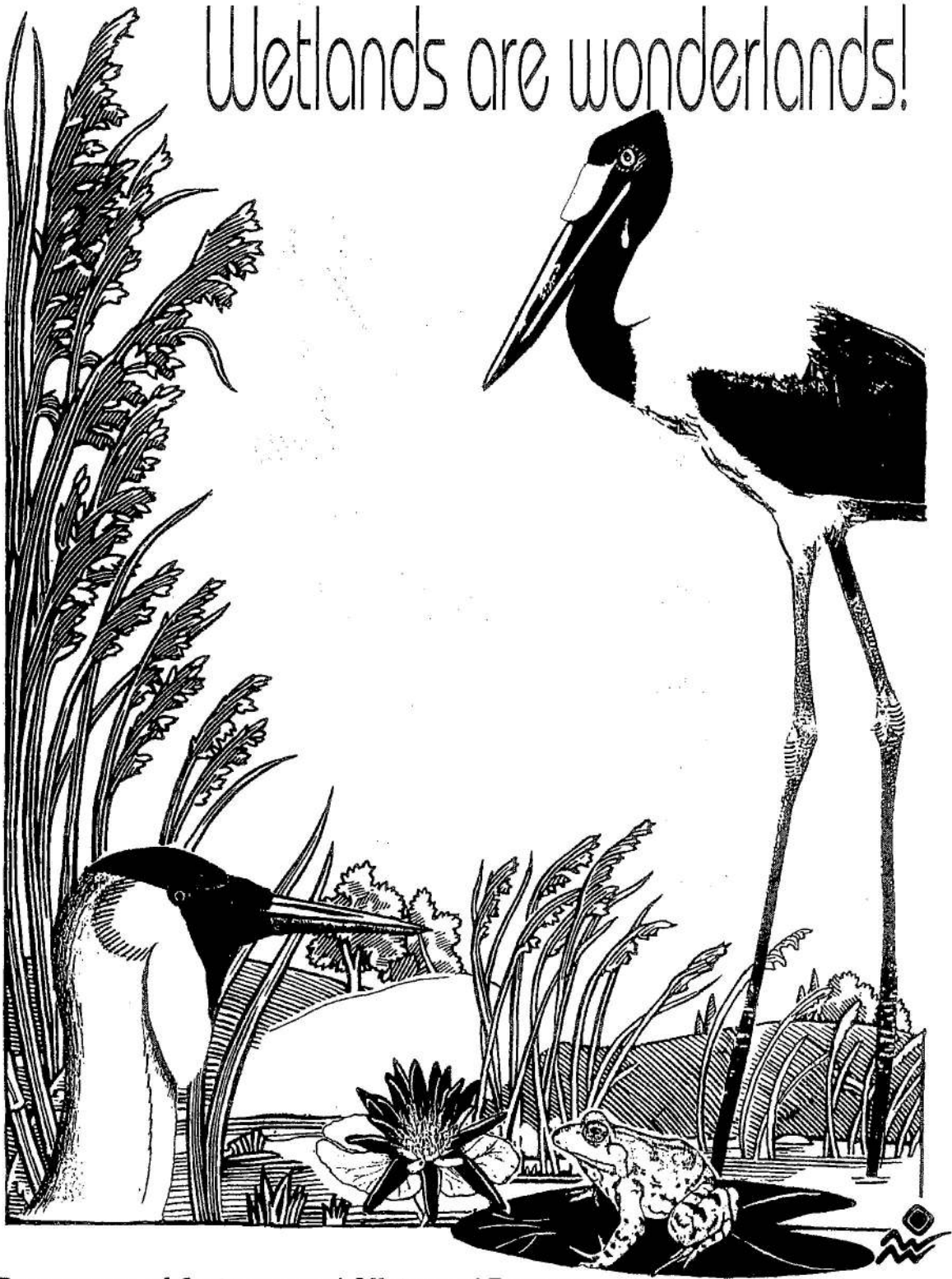
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