

OFFICE OF THE PRESIDENT

No. 585.

14 May 1999

NO. 23 OF 1999: HARMFUL BUSINESS PRACTICES AMENDMENT

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

No. 23 of 1999: Harmful Business Practices Amendment Act, 1 999.

GENERAL EXPLANATORY NOTE:

Words in bold type indicate omissions from existing enactments.

Words in italics indicate insertions in existing enactments.

(English text signed by the President.)

Assented to 14 April 1999.)

ACT

To amend the Harmful Business Practices Act, 1988, so as to harmonise the Act with provincial legislation; to amend and insert certain definitions; to reconstitute and rename the Business Practices Committee; to provide for an executive committee; to authorise an investigating officer to enter any premises with a search warrant; to provide for appeals against decisions of competent authorities in the provinces; to phase out the existing special courts and to replace them with a permanent special court; to provide for the staying of civil proceedings; to extend the application of the Act throughout the Republic; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 71 of 1988, as amended by section 1 of Act 33 of 1993

1. Section 1 of the Harmful Business Practices Act, 1988 (in this Act referred to as the principal Act), is hereby amended-

(a) by the insertion before the definition of "benefit" of the following definition:

"arrangement" means, except in paragraph (a) of the definition

of 'business practice', an arrangement or undertaking negotiated by the committee;";

- (b) by the substitution for the definition of "business" of the following definition:

" 'business' means any business, undertaking or person who-

(a) offers, supplies, or makes available any commodity; l

(b) solicits or receives any investment or to whom any investment is supplied or made available,"

- (c) by the substitution for the definition of "business practice" of the following definition:

"'business practice' includes-

(a) any agreement, accord, arrangement, or understanding or undertaking, whether legally enforceable or not, between two or more persons;

(b) any scheme, practice or method of trading, including any method of marketing or distribution;

(c) any advertising, or type of advertising or any other manner of soliciting business;

(d) any act or omission on the part of any person, whether acting independantly or in concert with any other person;

(e) any situation arising out of the activities of any person or class or group of persons, but does not include a practice regulated by competition law;";

- (d) by the substitution for the definition of "chairman" of the following definition:

"'chairman' 'chairperson' means the chairman chairperson referred to in section 2(2);" ;

- (e) by the substitution for the definition of "committee" of the following definition:

*"'committee' means the **Business Practices Consumer Affairs** Committee established by section 2;" ;*

- (f) by the substitution for the definition of "commodity" of the following definition:

" 'commodity' means any property, whether corporeal or incorporeal and whether movable or immovable, and also any make or brand of any

commodity and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service, *but does not include service in terms of a contract of employment;*";

(g) by the insertion after the definition of "commodity" of the following definition:

" 'competent authority' means a competent authority responsible for business practices or consumer protection in the provincial sphere of government in terms of provincial legislation;"

(h) by the substitution for the definition of "consumer" of the following definition:

"'consumer' means **a-**

(a) *any natural person to whom any commodity is offered, supplied or made available;*

(b) *any natural person from whom any investment is solicited or who supplies or makes available any investment;*

(c) *any other person who the Minister with the concurrence of the committee declares to be a consumer by notice in the Gazette;*

(d) *any person who is a consumer for the purposes of this Act in terms of any other law;"*;

(i) by the deletion of the definition of "harmful business practice";

(j) by the insertion after the definition of "investigating officer" of the following definitions:

" 'investment' means any money, property or any other facility intended for utilisation in connection with any venture or scheme for the acquisition of gain or purported to be so intended;

'magistrate' means the Magistrate: Pretoria or the magistrate of the district where the investigation is to be carried out;";

(k) by the substitution for the definition of "Minister" of the following definition:

" 'Minister' means the Minister of **Economic Affairs and Technology Trade and Industry;**" ; and

(l) by the insertion after the definition of "trade coupon" of the following definition:

" 'unfair business practice' means 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."*

Amendment of section 2 of Act 71 of 1988, as amended by section 1 of Act 64 of 1991 and section 2 of Act 33 of 1993

2. Section 2 of the principal Act is hereby amended-

(a) by the substitution for subsection (1) of the following subsection:

"(1) There is hereby established a committee to be known as the **Business Practices Consumer Affairs Committee.**";

(b) by the substitution for paragraph (a) of subsection (2) of the following paragraphs:

"(a) The committee shall consist of nine members appointed by the Minister on the grounds of having special knowledge or experience of consumer advocacy, economics, industry, commerce or law, taking into account the need to ensure equitable representation. The Minister shall designate one as chairperson and one as vice-chairperson.

(aA) The chairperson shall be a person with suitable experience in consumer law.

(aB) In order to assist and to ensure effective co-operation between the committee and a competent authority, the head of consumer affairs in every provincial sphere of government shall be invited to, and may, participate in all meetings of the committee but shall not have the right to vote at such meetings."

(c) by the substitution for paragraph (a) of subsection (7) of the following paragraph:

"(a) The chairperson-

- (i) shall determine the times when and places at which the meetings of the committee shall be held; and*
- (ii) may determine that a meeting other than a meeting convened for purposes of investigations under section 5, takes place through any method of telecommunication."*; and

(d) by the insertion after paragraph (d) of subsection (7) of the following paragraph:

"(e) The quorum for the meetings of the committee shall be-

- (i) *the chairperson or vice-chairperson; and*
- (ii) *four other members of the committee."*

Substitution of section 3 of Act 71 of 1988

3. The following section is hereby substituted for section 3 of the principal Act:

'Executive committee

3. (1) The committee shall, with the consent of the Minister, appoint an executive committee, consisting of at least-

- (a) the chairperson or vice-chairperson; and*
- (b) two other members of the committee.*

(2) The committee, with the consent of the Minister-

- (a) shall determine the quorum for and the procedure at meetings of the executive committee;*
- (b) may delegate any power conferred or duty imposed on the committee by this Act to the executive committee, either in general or in a particular case or in cases of a particular nature.*

(3) The executive committee must exercise any power or duty that has been delegated to it in terms of subsection (2)(b) subject to the conditions the committee considers necessary.

(4) Any delegation in terms of subsection (2)(b)-

- (a) must be in writing;*
- (b) does not prevent the committee from exercising the power or performing the duty itself;*
- (c) may at any time be withdrawn in writing by the committee."*

Amendment of section 4 of Act 71 of 1988, as amended by section 2 of Act 64 of 1991 and section 4 of Act 33 of 1993

4. Section 4 of the principal Act is hereby amended-

(a) by the insertion after paragraph (h) of subsection (1) of the following paragraph:

"(bA) shall receive and dispose of particulars of the result of any investigation made by a competent authority in relation to any matter with which the committee may deal in terms of this Act;"

(b) by the deletion of "and" at the end of paragraph (c); and

(c) by the insertion after paragraph (d) of subsection (1) of the following 5 paragraph: "*(e) may assign any preliminary investigation or investigation in terms of this Act, or part thereof, to a competent authority.*".

Amendment of section 5 of Act 71 of 1988, as amended by section 3 of Act 64 of 1991

5. Section 5 of the principal Act is hereby amended by the substitution in subsection 1 O (5) for the words "provincial division of the Supreme Court of South Africa" of the words "High Court".

Amendment of section 7 of Act 71 of 1988, as amended by section 4 of Act 64 of 1991

6. Section 7 of the principal Act is hereby amended-

(a) by the substitution for the words preceding paragraph (a) of subsection (3) of 15 the following words: "In order to ascertain whether this Act is being observed by any person to whom it applies, or to obtain any information required by the committee in relation to a preliminary investigation or an investigation by it in terms of this Act, an investigating officer may, *subject to this 20 section*, at all reasonable times enter any premises on or in which any commodity, *investment*, book, statement, document or other object connected with that observation or information is or is *reasonably* suspected to be, and may-";

(b) by the substitution for paragraph (b) of subsection (3) of the following 25 paragraph: "(b) examine that commodity *or investment*, and request from the owner or person in charge of those premises, information regarding that commodity *or investment*";

(c) by the substitution for paragraph (e) of subsection (3) of the following 30 paragraph: "(e) seize against the issue of a receipt that book, statement, document or object, if it appears to provide proof of a contravention of a provision of this Act, or if he *or she* wishes to retain it from further examination or for safe custody: Provided that a person from whose 35 possession or charge that book, statement or document has been taken under this **paragraph** *section* shall, as long as it is in the possession or charge of the investigating officer concerned, at such person's request be allowed, at his *or her* own expense and under the supervision of that investigating officer, *or any other person in the 40 service of the committee*, to make copies thereof or to take extracts therefrom at any reasonable time.";

(d) by the insertion after subsection (3) of the following subsections:

"(3A) Unless the owner or person in charge of the premises concerned has consented thereto in writing, an investigating officer shall enter 45 premises and exercise any power contemplated in subsection (3) only under a search warrant issued by the magistrate if it appears to him or her from information given on oath or affirmation that there are reasonable grounds to suspect that-

(a) an unfair business practice exists or may come into existence; and

(b) a book, document or other object which may afford evidence of such an unfair business practice is on or in those premises.

(3B) A search warrant referred to in subsection (3A) shall-

(a) authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising 55 any power contemplated in subsection (3);

(b) be executed by day, unless the magistrate authorises the execution thereof at night;

(c) be of force until-

(i) it is executed;

(ii) it is cancelled by the magistrate; or

(iii) a period of one month from the date of issue has expired, whichever occurs first."; and

(e) by the substitution for subsection (4) of the following subsection:

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

(a) show that person his or her certificate of appointment; and

(b) hand to that person a copy of the warrant.".

Amendment of section 8 of Act 71 of 1988, as amended by section 1 of Act 43 of 1990 and section 6 of Act 33 of 1993

7. Section 8 of the principal Act is hereby amended-

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) into any business practice or type of business practice, in general or in relation to a particular commodity or

investment or any class or kind of commodity *or investment* or a particular business or any class or type of business or a particular area, which in the opinion of the committee or the Minister, as the case may be, is commonly applied for the purposes of or in connection with the creation or maintenance of **harmful** *unfair* business practices;"; and

(b) by the addition to subsection (1) of the following paragraph:

"(d) into any unfair business practice referred to the committee in terms of any other law."

Amendment of section 12 of Act 71 of 1988, as amended by section 3 of Act 43 of 1990 and section 8 of Act 33 of 1993

8. Section 12 of the principal Act is hereby amended in paragraph (c) of subsection (2)-

(a) by the substitution for the words "division of the Supreme Court of South Africa" of the words "High Court"; and

(b) by the substitution for the words "State Expenditure" of the word "Finance".

Amendment of section 13 of Act 71 of 1988, as amended by section 9 of Act 33 of 1993

9. Section 13 of the principal Act is hereby amended-

(a) by the substitution for the heading of the following heading: "Appeals";

(b) by the substitution for subsections (1) to (3) of the following subsections:

"(1) There shall be a right of appeal by any person affected by-

(a) a notice under section 8(5), or 12(1)(b), (c) or (d); or

(b) *any notice, direction or measure of a competent authority in terms of such provisions of provincial legislation as have been designated for the purposes of this paragraph by the Minister by notice in the Gazette, to a special court.*

(2)(a) *In this subsection 'fixed date' means the date on which the Harmful Business Practices Amendment Act, 1998, comes into operation.*

(b) *The President may by proclamation in the Gazette establish a permanent special court with a permanent registrar, operating on an ad hoc basis, with jurisdiction in the area of jurisdiction of a High Court.*

(c) The President may by proclamation in the Gazette determine the date of dissolution of a special court established before the fixed date;

(d) Until a special court contemplated in paragraph (c) is dissolved, any reference to a 'special court' in this Act shall be construed as a reference to such a court.

(e) Any application or matter referred to the special court referred to in paragraph (c) before the fixed date and which has not been disposed of on that date, shall be continued and disposed of by that special court.

(3) A special court shall consist of-

(a) a president, who shall be a judge of a High Court designated by the Chief Justice; and

(b) two other members appointed by the President by proclamation in the Gazette from the nominees contemplated in subsection (3C).

(3A) The Minister shall invite interested parties, by notice in the Gazette and an advertisement in the media regarded by the Minister as appropriate, to nominate candidates who have special knowledge or experience of consumer advocacy, economics, or industrial, commercial or financial matters, within 21 days after the publication of such notice, for consideration as members of the court.

(3B) The names of the nominees shall thereafter be published in the Gazette and media contemplated in subsection (3A) for comment.

(3C) The Minister may-

(a) interview the nominees referred to in subsection (3B) and such interviews shall be open to the public; and

(b) compile a final list of nominees for consideration by the President.

(3D) No person shall be appointed or remain a member of the court if he or she-

(a) is not a citizen of the Republic resident in the Republic;

(b) is a public servant;

(c) at the relevant time is, or during the preceding 12 months was, an office bearer, serving public representative or

employee of any party, movement, organization or body of a party-political nature;

(d) is an unrehabilitated insolvent;

(e) has before the commencement of this Act been convicted of an offence for which he or she has been sentenced to imprisonment without the option of a fine, unless the President, having due regard to the nature of the offence and the circumstances of the case, is satisfied on reasonable ground that such person is fit and proper to be so appointed;

(f) has at any time been removed from an office of trust on account of misconduct or dishonourable conduct;

(g) is of unsound mind; or

(h) is a member of a competent authority.

(3E) No person shall remain a member of the court if he or she fails to disclose an interest or an interest of his or her spouse, immediate family member, business partner or associate or employer which would require him or her to be recused.

(3F) If at any stage during the hearing of an appeal, one of the members of the special court dies or becomes otherwise incapable of acting, the hearing shall be adjourned and commenced de novo before a newly constituted special court.";

(c) by the substitution in subsection (4) for the words "State President", wherever they occur, of the word "President";

(d) by the substitution for paragraph (a) of subsection (5) of the following paragraph:

"(a) An appeal in terms of this section shall be lodged with the Minister in writing within six weeks after the date of publication of the notice, *direction or measure* to which the appeal relates or, *if no notice is published, the date of the order of a court dealing with consumer matters and established by provincial legislation* and shall set forth the grounds on which the appeal is based.";

(e) by the substitution for subsections (10) and (11) of the following subsections, respectively:

"(10) A special court may after consideration of an appeal, confirm or set aside the notice, *direction or measure* to which the appeal relates or, *if no notice is published, the date of the order of the court contemplated in subsection (5)(a)*, or amend it in such manner as it may deem equitable, and may make such orders as to costs as it may deem just.

(11) The decision of **a** *the* majority of the members of **a** *the* special court shall be the decision of the court but the president alone shall decide any question of law, and whether any matter constitutes a question of law or a question of fact, and for that purpose he *or she* shall sit alone.";

(f) by the substitution for the words "division of the Supreme Court of South Africa" in subsection (12) of the words "High Court"; and

(g) by the substitution for subsection (14) of the following subsection:

"(14) An order of a special court confirming, setting aside or amending the notice, *direction or measure* to which the order relates, shall be made known by the Minister by notice in the Gazette, and any amendment made to a notice, *direction or measure* by such an order shall have effect as if it were-

(a) an amendment made under section 12(4)(d); or

(b) *a notice, direction or measure made under provincial legislation that has been designated for the purposes of subsection (1)(b) by the Minister by notice in the Gazette.*".

Amendment of section 14 of Act 71 of 1988

10. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) *No person shall, except-*

(a) *for the purposes of*

(i) *the performance of his or her functions in terms of this Act; or*

(ii) *legal proceedings under this Act;*

(b) *when required to do so by a court of law or under a law; or (c) with the permission of the chairperson, disclose to any other person any information acquired by him or her in the performance of his or her functions in terms of this Act and relating to the business or affairs of any other person.*".

Amendment of section 19 of Act 71 of 1988

11. Section 19 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

"(2) *If any person seeks to rely on an alleged unfair business practice in any civil proceedings, the court concerned may, on the*

application of any party to those proceedings, stay those proceedings in the interests of justice until such time as the Minister or the special court has made a decision in respect of the alleged unfair business practice in terms of this Act."

Substitution of words "chairman", in the English text, and "harmful business practice" in Act 71 of 1988

12. (1) The English text of the principal Act is hereby amended by the substitution for the word "chairman", wherever it occurs, of the word "chairperson".

(2) The principal Act is hereby amended by the substitution for the words "harmful business practice", wherever they occur, of the words "unfair business practice".

Substitution of section 21 of Act 71 of 1988

13. The following section is hereby substituted for section 21 of the principal Act:

Short title

21. This Act shall be called the Consumer Affairs (Unfair Business Practices) Act, 1988."

Application of Act 71 of 1988 throughout Republic

14. The principal Act applies throughout the Republic.

Short title

15. This Act is called the Harmful Business Practices Amendment Act, 1999.