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GENERAL NOTICES

NOTICE 1303 OF 2003

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 270 of 2002 as published in Government Gazette No. 23162 dated 22 February 2002, 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 104

Investigation in terms of section 8(1)(a) of Consumer Affairs (Unfair Business Practices) Act, 1988 into the business practices of Biz Africa 1121 (Pty) Ltd trading as The Hydroponic Farming Company of Africa and others

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 purpose of the Act is to provide for the prohibition or control of unfair business practices. An unfair business practice is defined as any business practice which could harm the relationship between businesses and consumers or which will unreasonably prejudice, deceive or unfairly affect consumers.⁽¹⁾

The Act is enabling and not prescriptive. The main body of the Act is devoted to various administrative procedures, the investigative powers of its investigating officials, the types of investigations the Committee can undertake and the powers of the Minister. The Act confers wide investigative powers on the Committee. There are two types of investigations which the Committee may undertake when examining the business practices of an individual or a particular business namely: an "informal" section 4(1)(c) investigation⁽²⁾ or a "formal" section 8(1)(a) investigation⁽³⁾. Notices of section 4(1)(c) investigations are not published in the Government Gazette, whereas formal section 8(1)(a) investigations are.

The usual procedure when the Committee receives a complaint from a consumer, is to undertake a 4(1)(c) investigation. This investigation enables the investigators to make preliminary enquiries in order to establish how the business operates. The fact that the Committee intends to embark on such an investigation is not made public. However, once the Committee is satisfied that there is evidence of an unfair business practice and that a formal investigation⁽⁴⁾ is necessary a notice is published in the *Government Gazette*.⁽⁵⁾ The Minister is not empowered to make any decisions about the discontinuance of a particular unfair business practice on the strength of a 4(1)(c) investigation. He may do so following an 8(1)(a) investigation.

(1) See section 1 for the definition of an unfair business practice

(2) These investigations are commonly referred to as 4(1) (c) investigations

(3) These investigations are commonly referred to as 8 (1) (a) investigations

(4) In terms of section 8(1) (a)

(5) In many instances the Committee is able to resolve the matter and it is not necessary for the matter to proceed to a formal investigation.

The Act does not stipulate that an 8(1)(a) investigation must be preceded by a 4(1)(c) investigation. If the Committee is of the opinion that *prima facie* evidence of an unfair business practice exists, it usually dispenses with the 4(1)(c) investigation.

Should the Committee, after an 8(1)(a) investigation, find that an unfair business practice exists, it recommends corrective action by the Minister to ensure the discontinuance of the unfair business practice. The powers of the Minister are set out in section 12. As the investigation related to a particular business or business person the Minister's order will only be applicable to the particular individual or business entity named in the notice.⁽⁶⁾ The Minister's order is published in the *Government Gazette*. An infringement of the order is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both a fine and imprisonment.

If there is evidence of an unfair business practice, but the business person concerned is prepared to work with the Committee to ensure the discontinuance of the practice he or she may negotiate with the Committee and enter into an agreement in terms of section 9.

2. The complaint

An undated Afrikaans letter of The Hydroponic Farming Company of Africa, addressed to "Dear Client" (now referred to as the Dear Client letter), came to the attention of the Committee in January 2001. This letter stated:

"Yes, you can now own your own hydroponic farm for only R6 000 plus VAT! We bought 12 ha next to the Bon Accord dam on the old Warmbaths road, on which a 10 year renewable term with your name will be registered on the title deed free of charge. Your hydroponic unit consists of 30m² with 80mm/6mm washed gravel beds, serviced by a central water/nutrient matter and cooling system with central heating in the gravel".

(6) In order for a Minister's notice to be applicable to an entire industry the Committee must undertake a general investigation in terms of section 8(1) (b)

The Committee ascertained from the letter that the plan was to grow spices for the export market. These spices would either be packed in cellophane bags filled with olive oil or exported fresh. The farmer would earn a profit of either R64 872 (for spices in olive oil) or R48 792 (for fresh spices) per annum. The letter stated that the directors were Dr GFGO De Muelenaere MB ChB MMed RadTMD (chairman) (De Muelenaere), Mr CH Myburgh BA BProc (Myburgh) and Mr PCM Cowper (Cowper). The letter also advised that:

"Financing is provided by most banks if you could provide security. If not, financing could be obtained through African Bank if you are employed and earn more than R2 000 per month. National Savings, for example, offers you a three month window (the unit takes three months to produce) before instalments need to be made. They do not insist on debit orders or stop orders, they accept moderate defaults on the instalments and even grant credit if your credit record is 'not good'".

3. The meeting of the Committee on 25 January 2001

The Committee resolved to undertake a 4(1)(c) investigation into the business practices of The Hydroponic Farming Company of Africa.

4. Preliminary enquiries

On 29 January 2001 an official of the Committee wrote to De Muelenaere explaining the functions of the Committee. De Muelenaere was requested to provide further information concerning certain statements in the letter which were not clear. These included:

- (1) further information regarding the 10 year renewable term with the name of the farmer registered free of charge on the title deed,
- (2) how the minimum prices referred to were to be determined,
- (3) how they determined the projected turnover figures and
- (4) what assumptions were applied with regard to the abovementioned figures.

The letter was faxed to De Meulenaere at the number which appeared in the Dear Client letter.

On 1 February 2001 the official spoke to Myburgh who is an attorney. Myburgh said that De Meulenaere was abroad and would be back in South Africa on 19 February 2001. Myburgh informed the official that the company had already received between R200 000 and R300 000. The money was not paid into his trust account but into an account of the company. He said that he kept an eye ("dophou") on this account and he agreed that no funds would be paid out of this account until such time as the matter had been discussed with officials of the Committee. It was pointed out to Myburgh that it appeared that the company was not yet registered with the Registrar of Companies.

5. The meeting on 22 February 2001

A meeting was held at Myburgh's offices. Messrs Myburgh, Sherratt, du Plessis, De Meulenaere and two officials of the Committee were present. Mr Sherratt (Sherratt) appeared to be the expert on hydroponics and Mr du Plessis (Du Plessis) owned some of the land on which the farm was to be developed. Myburgh had previously informed the officials that the questions contained in the Committee's letter dated 29 February 2001 were technical and that De Meulenaere was in a better position to provide answers to the questions. However, during the meeting De Meulenaere did not answer a single question asked by the officials.

The officials informed those present that the Committee would probably be concerned about certain paragraphs in the Dear Client letter for example:

- (1) the reference to the availability of finance at African Bank and National Savings

The interest charged by African Bank is approximately seven % per month and the effective interest rate, because of the relatively high administration costs, is nearer to 15% per month. The reference to consumers earning more than R2 000 per month would seem to indicate that the target market is the lower income group.⁽⁷⁾

- (2) The projected earnings on an investment of R6 000 (plus vat) were substantial and the figures quoted would appear to be extremely attractive for someone who earns just more than R2 000 per month.
- (3) The statement that investors get "... a three month window (the unit takes three months to produce) before instalments need to be made". This statement implies that investors can borrow money and before they are required to make any repayments, they will receive some income from the farm. This is misleading in circumstances where the land is only now (allegedly) being cleared.

Sherratt informed the officials about a poster which was being displayed in various shop windows and the rear windows of motor vehicles.

The poster, 590mm by 410mm, proclaimed:

"Your own hydroponic farm like this".

Immediately below these words was a colour photo of what appeared to be the inside of a lush greenhouse.

The poster further stated:

"for just R6000 plus vat

Where? The Bon Accord Dam

Growing herbs for value added export processing into
stand-up pouches Essential oils in olive oil Consumer freshpacks'.

-
- (7) This was denied by Myburgh who said that everybody who had already paid, did so by cheque. It appeared that the first undated "Dear Client" letter was replaced by a new, but also undated, "Dear Client" letter. The reference to the possible finance available from African Bank was omitted from this letter. The projected profits for the "farmer" was now R69 404 (previously R64 872, thus an increase of R4 532) and R37 932 (previously R48 792 per annum, or a decrease of R10 860) for spices in cellophane bags and fresh spices respectively.

This was followed by colour photos of (a) a stand-up pouch (b) bottles with coloured oils and (c) consumer freshpacks.

The poster proceeded:

"Wholesale price R260 kg

Herbs - fastest growing & highest prices in Europe's fresh produce sector

Organics - insatiable demand growth

Projected average profit R40,000 pa for each 30m unit (perhaps m²?)

Product price guaranteed at not less than 100% profit: Total management,
marketing & technical support

Call (011) 706-1662 or (012) 567 5277

The Hydroponic Farming Company of Africa"

Sherratt informed the officials that those consumers who responded to the poster were then forwarded the "Dear Client" letter.

In explanation of this poster, the officials were informed that:

- (1) Farms would be numbered.
Units of 30m² would be numbered so that owners could identify their patches of land.
- (2) Fresh herbs would be exported.
Sherratt said that the total produce on the farm would be exported to England and any processing would be done there.
- (3) The projected earnings made in the "Dear Client" letters obviously depended the volumes assumed as well as the prices obtained.
Sherratt said that there was no competition for the products and that the demand is insatiable. He showed the officials a picture of a bottle containing some kind of oil and said that the product sold in London for £3.99. An official put it to him that this was irrelevant. The mere fact that a particular manufacturer sold product "X" is no guarantee that other

manufacturers of the same product would be able to negotiate the same price.

- (5) There were no existing contracts to deliver certain products at certain prices at certain times and no such contracts were envisaged.

Sherratt said that such contracts do not exist in the industry. He informed the officials that he visited England on a regular basis and that he knows the industry.

The officials informed the directors that the content of and the photos in the poster were likely to mislead consumers. For example the statement that "the product price (is) guaranteed at not less than 100% profit" is meaningless. It is not possible to guarantee the prices of agricultural products. In the absence of marketing control boards the prices of these products are set by the market on the basis of supply and demand. The officials also stated that it is not clear why the promoters of the scheme opted for the "own your own farm concept" rather than having the participants buy shares in the company. This scheme is similar to a scheme which was developed about 15 years ago in the former Eastern Transvaal where an entrepreneur sold macadamia trees on a farm. The trees were also numbered in order for the owners to see which trees were theirs.⁽⁸⁾

It was suggested that the promoters address the Committee at its next meeting and that they provide the Committee with a submission setting out in detail the assumptions made in order to arrive at the projected profits. These assumptions had to be supported by facts. The promoters were informed that it would not be sufficient to allege that the business "will get £x per 100 gram for the product" merely because they "know" the market. It was also suggested that the submission deal with issues such as

- (1) when production will commence,
- (2) why the promoters did not consider the selling of shares to investors and
- (3) the statement "Product price guaranteed at not less than 100% profit".

(8) Lana perhaps we can have a footnote about what happened to this scheme.

6. Events following the meeting of 22 February 2001

On **26 February 2001** Myburgh was asked to call the secretary of the Committee to arrange for a time to address the Committee on 5 April 2001. He did not call and so on **8 March 2001** Myburgh was informed by letter that he and his clients could address the Committee on 5 April 2001. He did not respond to this letter. On **14 March 2001** an official called Myburgh. He was "consulting" and could not take the call. A fax was transmitted to Myburgh. He was informed that

- (a) He and his clients had been invited on three occasions to address the Committee on 5 April but that they had not responded to the invitations.
- (b) The Committee was concerned to give effect to the *audi alteram partem* principle.
- (c) The Committee would consider publishing the following notice in the *Government Gazette* at its meeting on 5 April 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 herewith given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(a) of the said Act into the business practices of -

Biz Africa 1121 (Pty) Ltd (2000/025148/07), trading as The Hydroponic Farming Company of Africa, Mr PCM Cowper, Dr GFGO De Muelenaere, Mr CH Myburgh, Mr Stan Sherratt and any director, employee, agent and/or representative of any of the aforementioned in respect of the activities of Biz Africa 1121 (Pty) Ltd.

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. (T) 012-310-9562 (F) 012-320-0579 Ms L van Zyl [Ref. H101/20/10/4(01)]".

Myburgh was given a further opportunity to call before 16h00 on 14 March 2001 to confirm that he would attend the Committee's meeting on 5 April 2000.

On **15 March 2001** the Committee received an undated letter, with the letterhead of The Hydroponic Farming Company of Africa from Sherratt a "projects consultant". Sherratt did not refer to the Committee's letter dated 14 March 2001.

He stated that "...it would serve no useful purpose whatsoever to make any representations to the committee". Sherratt further stated that he had sent a "circular" letter to the purchasers of the "farms" in which he offered them a refund of their investments. A copy of this letter was forwarded to the Committee.

On **16 March 2001** a letter responding to the points raised by Sherratt was faxed to Myburgh. The following were the main points raised in this letter.

- (a) It was not clear whether Sherratt had the authority to act on behalf of Biz Africa 1121 (Pty) Ltd, trading as The Hydroponic Farming Company of Africa (Biz Africa).
- (b) Should the Committee resolve on 5 April 2001 to undertake a section 8(1)(a) investigation into the business practices of Biz Africa, Mr PCM Cowper, Dr GFGO De Muelenaere, Mr CH Myburgh and Mr Stan Sherratt, he would be unable to argue that he and/or Biz Africa and/or any of the directors had not been given the opportunity to present their case to the Committee.
- (c) The Committee had no evidence that the "circular letter" was in fact sent to the investors.
- (d) The alleged "circular letter" contained a number of statements which deserved comment.

- (e) Sherratt stated in the "circular" letter: "This minimum has been achieved but we have not spent any of the funds and will not do so until the dispute with the Consumer Affairs Committee is resolved". Myburgh was asked how Biz Africa intended to resolve the dispute if it did not wish to discuss the matter with the Committee?

- (ii) Sherratt also alleged "... we are in the process of implementing our own 7 500m² project at Bon Accord which through internal growth is expected to reach 90,000m by the end of the first full operating year". He provided no motivation for this (1 033.33 per cent growth) and Myburgh was asked whether this allegation was an attempt to influence "purchasers" not to request a refund?

- (iii) Sherratt stated that the investigating official "... knows little or nothing about hydroponics and even less about the British fresh produce markets". Myburgh was informed that the Committee unfortunately had no evidence that the directors of Biz Africa or Sherratt or the purchasers of the "farms" knew anything more than the investigating official about these subjects.

- (iv) Sherratt stated that it is clear from the discussion (on 22 February 2001) that nothing they could say will make any difference and it is clear that the Consumer Affairs Committee advised by the investigating official will prevent the project from proceeding. Myburgh was asked how Sherratt could know what the Committee would decide?

- (f) Myburgh was also informed that the chairperson of the Committee may summons any person who is believed to be able to furnish any information on the subject of an investigation, to appear before the Committee. He was further informed that the chairperson may, at the meeting to be held on 5 April 2001, decide to summons any or all of the directors of Biz Africa and/or Sherratt.

(g) Myburgh was asked to provide the Committee with the following information on or before 22 March 2001.

- (i) A list, with initials and surnames, of all "purchasers" of the hydroponic farms.
- (ii) The postal addresses and telephone numbers of the purchasers in (ii).
- (iii) The amounts paid by each purchaser and the dates on which these amounts were paid.
- (iv) The full details of the bank account (bank name, bank branch and account name and number) into which the money of purchasers was deposited.
- (v) The latest copy of the bank statement of the bank account in (iv) above. The balance on this statement should of necessity correspond with the total of (iii) above. Sherratt stated in the second paragraph of his circular letter "This minimum has been achieved but we have not spent any of the funds and will not do so until the dispute with the Consumer Affairs Committee is resolved".

A copy of the letter to Myburgh was posted to De Meulenaere and another copy of the letter was delivered by hand to his office.

7. FarmGroup

It needs to be mentioned that this is not the first time that the activities of Sherratt, Myburgh and De Meulenaere have come to the attention of the Committee. In August 1991 their activities in relation to the FarmGroup were reported to the Committee⁽⁹⁾. The following is a very brief summary of the file on FarmGroup.

(9) The Committee was then known as the Business Practices Committee (BPC)

A business called the FarmGroup Partners was involved in "agroforestry - the complete farming investment". A portion of a farmer's land was to be rented to investor syndicates. FarmGroup negotiated with the investors. The investors, through FarmGroup, paid R3 750 per hectare in advance to "selected" farmers in terms of a 50 year rental agreement. FarmGroup stated that it had 30 000 ha available from Plettenberg Bay to the Northern Transvaal and the programme incorporated a 10 bedroomed guest lodge for every 750 to 1 000 ha involved. Use of this facility was free to the investors. Farmers who were interested in becoming involved in the project were required to pay an administration fee of R1 000.

"It offers potential additional income from the tourism industry in the future. The returns on agroforestry farming are exceptional. At present value, the value of 15 year old hardwoods is R67 500 per ha and we are pursuing the guaranteed purchase of this timber by sources within the processing industry" and, translated from Afrikaans "After 15 years the timber could have a value of R540 000 per hectare".

At the end of 50 years the guest lodges would become the property of the farmer. Regarding the guest houses and the rented portions of land **Sherratt** wrote:

"As a farmer, it is logical that you should regularly visit your farm and for this purpose we are providing accommodation of the standard you enjoy at home. It is a managed guest farm lodge where accommodation is free but food and drink is charged. Farming income can be expected from the second year for stock and fodder, the fourth and fifth year from fruit and from 15 years for the hardwood trees. Who are FarmGroup? We are the originators of professionally managed syndicated participation in farming, bringing people in harmony with the land. A former bank manager and investment specialist, I am in partnership with Dr **Georges de Meulenaere** of Pretoria, Chairman of the Northern Transvaal Cancer Association and our accountant Digby Laughton. Our partnership is our bond of integrity to you, so do something about your future now. This is the best pension plan you will ever get".

On **19 February 1992** the BPC received an enquiry about the FarmGroup from the then South African Police, Bloemfontein.

On **4 March 1992** Sherratt informed the BPC that all matters relating to FarmGroup must be addressed to **Myburgh** and Van Wyk attorneys.

On **29 June 1992** the Beeld carried the following report:

"Many questions about farming scheme

Farmgroup man explains plan, but can not guarantee that it will work"

On **1 September 1992** the BPC again received an enquiry from the Commercial Branch of the SAP in Johannesburg about FarmGroup and possible fraud.

The BPC received an affidavit from a farmer who said that he was visited by a person who explained the FarmGroup concept to him. He paid a registration fee of R2 780. By May 1992 he had not received any money from FarmGroup.

In undated Newsletter No 2 Sherratt stated:

"If nothing else, we have learnt patience and perseverance. Not always the case with some of our farmers - we are under the constant harassment of the Business Practices Committee. Any farmer who thinks our original fee of R1 000 was either expensive or not justified, does not deserve any help. When the needs of our present members have been satisfied, it will cost newcomers at least R10 000 in advance to participate".

Documents showed that the person who visited the farmer was also the contact person involved in the administration of the scheme. She was a member of Finansiële Uitkoms CC. The registered address, and telephone number, of this CC was that of **Myburgh** and Van Wyk attorneys.⁽¹⁰⁾

8. Letters of protest because of the Committee's involvement in Biz Africa

On 22 March 2001 the Committee received nine identical Afrikaans faxes from Biz Africa investors. The signatories stated that they:

- (a) were informed that the Committee is endeavouring to stop their participation in the project,
- (b) were not ill-informed and unsophisticated investors influenced by high returns,
- (c) do not want the Committee to interfere with their business decisions,
- (d) found the arguments by "your personnel" (the investigating officials) to be unfounded,
- (e) would consider taking the necessary steps against the Committee.

A suitable reply was formulated and a copy of the reply was faxed to Myburgh and De Meulenaere.

9. The Committee meeting of 5 April 2001

The directors of Biz Africa addressed the Committee on 5 April 2001. Some investors also accompanied the directors. The investors made it clear to the Committee that they were aware of the risks that they were taking and that the Committee should not be involved. The Committee resolved that a section 9 undertaking be drawn up. On 15 June 2001 Biz Africa was informed that the Committee on 13/14 June 2001 took note that Biz Africa undertook to unconditionally accept the conditions laid down by the Committee. The Committee's decision was minuted as follows:

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- (10) It appears that the partnership of Myburgh and Van Wyk was later terminated and Myburgh now operates as an attorney on his own.

The Committee resolved that a section 9 undertaking be drawn up. In the letter, The Hydroponic Farming Co of Africa must be informed to comply with the following:

- (a) stop the advertisements;
- (b) stop making promises of exaggerated earnings;
- (c) give a copy of the letter, expressing the Committee's concerns, to every future investor and keep a record of this.

The Committee also stated that it would send a letter setting out its concerns to all the investors on the list which had been provided and that should it come to the attention of the Committee that they had failed to inform new investors of the Committee's concerns, the Committee would immediately continue with an 8(1)(a) investigation."

In a letter to the investors the Committee informed them that the purpose of the letter was to explain what had taken place between the representatives of Biz Africa and the Committee. The functions of the Committee were briefly explained and the investors were informed that a preliminary investigation had been undertaken by the Committee. It was also mentioned that the Committee does not give any publicity to preliminary investigations but that Biz Africa had apparently chosen to inform its investors of the Committee's investigation. One consequence thereof was that the Committee had received a number of identical letters from Biz Africa investors. The Committee therefore assumed that the letters had been drafted by one person who had then submitted them to the investors for their signatures. In the letters the investors confirmed that they did not want the Committee to intervene. The Committee's letter further informed the investors that Myburgh and Sherrat of Biz Africa and Messrs Nico Vorster, Frans Vorster and Corrie Vermaak, on behalf of the investors, had had a discussion with the Committee. The Committee was informed that the existing investors were given the opportunity to be refunded.

The Committee's letter made it clear that the Committee was of the opinion that:

- (1) The brochure/advertisement of Biz Africa was, in various aspects, misleading.
(Biz Africa indicated that they will cease distributing the brochure/

advertisement. A written undertaking from Biz Africa to keep to this agreement had been received. Some of the investors present stated that the brochure was in no way misleading).

- (2) The projected profits are based on selling prices which cannot be guaranteed.

(Biz Africa indicated that they will stop making exaggerated claim. A written undertaking from Biz Africa to keep to this agreement had been received).

- (3) The people who invested money in the scheme, did not obtain shares in the company. The investors consequently do not have any claim on the profits of the company and do not have any title, claim or right to the units of 30m². The Committee came to the conclusion, and this was agreed to by Mr Sherrat, that investors buy for all practical purposes a steel framework of 30 x 1meter.

The Committee pointed out that although it had serious doubts about the project it had decided not to continue with the investigation. The reasons for withdrawing were because there was a "money pay-back" offer, the participants themselves felt that they were adequately informed and objected to the Committee's involvement and there was an undertaking by Sherrat that the project would commence within two months.

The Committee also resolved that the above letter should be addressed to all the existing buyers and it should be made available to all new participants. New participants must sign an undertaking that they received the letter. The signed undertaking must be kept by Biz Africa. The Committee was of the view that the existing participants were aware of the Committee's limited involvement and that new participants must also have the same information at their disposal before making a decision to invest.

10. Subsequent events

Two officials visited the farm on Monday, 5 September 2001 based on an earlier invitation from Myburgh. The "shade net" ordered approximately four months earlier from Isreal had not yet been installed and it was very clear that the spices planted were only planted the week before the officials' visit. Two persons had made holes in the beds where the rest of the spices were to be planted.⁽¹¹⁾

On 22 October 2001, a consumer requested some assistance from an investigating official. He informed the official that he had visited the farm following a discussion on the radio. On 15 October 2001 he was given a document wherein it was stated that he could realise a profit of more than 100% on his original purchase price and that the selling of lettuce would mean a profit of R19 200 per year on his unit. He paid R 7 980 on 15 October 2001 but he only received the contract that he had to sign six days later. Attached to the contract was the letter from the Committee wherein the Committee's concerns were spelled out.

On 23 October 2001 a letter was forwarded to Myburgh informing him that, with the information at the Committee's disposal, it appeared that Biz Africa was not keeping to the undertaking given to the Committee. It appeared that Biz Africa was accepting money before informing consumers of the Committee's concerns. Exaggerated earnings were also still being promised. The following information was requested from Biz Africa:

- (a) a list with all the names of consumers who had invested in Biz Africa since 15 June 2001,
- (b) the numbers and dates of the receipts issued to each investor and
- (a) the dates on which each investor confirmed that he/she had had sight of the Committee's letter.

(11) In April 2001 Sherrat had informed the Committee that the farm would be ready for production within 2 months.

Biz Africa was requested to provide the information by not later than 7 November 2001. They were also asked to indicate why the Committee, with the information at its disposal, should not decide to undertake a 8(1)(a) investigation. No reply was received by 12 November 2001 and a reminder was forwarded to Biz Africa requesting the required information by not later than 14 November 2001. On 13 November 2001 Myburgh replied that they had complied substantially with the Committee's "requirements". It was further explained that in most of the cases after contact is made with a purchaser, funds were paid into the company's account. Thereafter, arrangements were made for the signing of the documents. In nearly all the cases the documents were signed by the purchasers and returned to the company. Should a purchaser wish not to proceed with the transaction, the purchaser's money was immediately refunded. The fact that purchasers pay their money into the company's account before having sight of the Committee's letter, did not mean that they were parting with their money because should a purchaser not wish to proceed with the transaction, the money was refunded.

According to the information received, there were 47 new investors since 15 June 2001:

- (a) 4 (3 with the same surname) confirmed receiving the Committee's letter **before** paying their money,
- (b) 4 confirmed receiving the Committee's letter **on the same day** they paid their money,
- (c) 1 person was **refunded** and
- (d) 8 investors confirmed that they had not yet received the Committee's letter.

On 14 November 2001 De Muelenaere informed an official telephonically that Myburgh had resigned as a director approximately 2 weeks earlier and that he (De Muelenaere) had only just received the Committee's letter of 23 October 2001. He indicated that he would forward his reply "as soon as possible".

A letter was forwarded to Myburgh on 18 December 2001 informing him that De Muelenaere had informed the Committee that he had resigned as a director but that he had not mentioned whether Myburgh was still the legal representative for the company. Written confirmation was requested of his resignation stating when this was offered and

whether or not it had been accepted by the other directors. Details (names and identity numbers) of the other directors were requested as well as the details of any returns already received by the investors. The requested information was asked to be submitted by not later than 4 January 2002.

In January 2002 a telephone call was received from an investor who claimed that he had invested in the scheme, he had not yet received any return on his investment and that all the directors have resigned. The investor stated that the only director left was De Muelenaere and there was to be an application for the liquidation of the company. The investor also claimed that a hail storm had caused considerable damage to the farm.

11. The Committee meeting on 14/15 February 2002

The information requested on 18 December 2001 had not yet been received. It appeared that the claims made by the investors were true, otherwise Myburgh and/or De Muelenaere would have replied to the letter. The Committee was of the view that they were delaying their reply in order to delay a formal investigation as long as possible. It appeared that all investors would lose the money they had invested in the company.

On 14/15 February 2002, the Committee resolved to undertake a 8(1)(a) investigation into the business practices of Biz Africa 1121 (Pty) Ltd (2000/025148/07) trading as The Hydroponic Farming Company of Africa, Mr P C M Cowper, Dr G F G O de Muelenaere, Mr S Dosa, Mr M C du Plessis, attorney Mr C H Myburgh, Mr Stan Sherratt and any director, employee, agent and/or representative of any of the aforementioned in respect of the activities of Biz Africa 1121 (Pty) Ltd.

On 19 February 2002 letters were forwarded by fax to the legal representatives (old and new) of the Chairperson, the directors of Biz Africa and to the Chairperson (De Muelenaere) himself to convey the Committee's decision. The wording of the notice to be published on 22 February 2002 was given to them in order to afford them the opportunity to take legal action.

12. Publication in the Government Gazette

The following notice was published in *Government Gazette* No 23162 of 22 February 2002, Notice 270 of 2002:

"In terms of the provisions of section 8(4) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), notice is herewith given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(a) of the said Act into the business practices of -

Biz Africa 1121 (Pty) Ltd (2000/022543/07) trading as The Hydroponic Farming Company of Africa, Mr Christopher Patrick Maitland Cowper (ID 4507315003087), Dr Georges Frans Gregor Oswald de Muelenaere (ID 4003045008083), Mr Shantilal Dosa (ID 4207025098085), Mr Marthinus Christoffel du Plessis (ID 3508175044006), attorney Mr Cornelis Hendrik Myburgh (ID 4602055045008), Mr Stan Sherratt and any director, employee, agent and/or representative of any of the aforementioned in respect of the activities of Biz Africa 1121 (Pty) Ltd.

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...":

13. Events following the publication in the Government Gazette

Letters were received from a number of participants in the scheme. All of them claimed that they had not received any return on their investment. A number of the participants were pensioners and saw it as an additional income after being convinced by the promoters that they would within three months receive a return on their investments. One pensioner had taken out a loan to invest in the scheme and was forced to sell his motor vehicle to repay his loan.

Confirmation was received from Myburgh that he and Du Plessis had resigned on 5 November 2001. It appeared that the resignation was mainly due to the payment of R400 000 to Du Plessis. The payment was apparently made at the insistence of Myburgh. De Muelenaere and the other directors were of the opinion that a misrepresentation of various facts led to the payment.

In a letter received on 5 April 2002 from the legal representative of De Meulenaere and Mr Dosa (Dosa), it was stated that the Committee's investigation may well have been pre-empted by the following facts.

- (1) Biz Africa was placed under provisional winding-up order in the hands of the Master of the High Court on 18 March 2002.
- (2) Mr Peter Waugh of KVR International and Mr. Nico Deysel of AN Hamman were appointed joint provisional liquidators. It was the intention of De Meulenaere and Dosa to cause an inquiry to be held in terms of Section 417 of the Companies Act, 1973 with the specific view of uncovering the dealings of Myburgh and Du Plessis in relation to the contracts concluded by them with the various investors and their handling of the company's finances, in particular the R 400 000 which was paid to Du Plessis, part of which was utilised by him for redemption of the bond held by Standard Bank over his farm.
- (3) The said inquiry would focus on the reasons for the demise of the company's operations and the responsibility therefore, if any, attaching to the management and whether or not the directors or anyone of them is to be held responsible by investors.
- (4) As the inquiry envisaged the whole history of the company since its inception, the subsequent involvement of the Committee going back to the beginning of 2001 and the developments to date of liquidation, will be thoroughly investigated with the aim of, inter alia, uncovering any transgressions of the law, "including the provisions of Act 71 of 1988" and fixing liability for losses to the company and/or investors on any responsible person or persons.

The legal representative of De Meulenaere and Dosa argued that the Committee should also not proceed with the investigation because, in terms of the Act, the Committee can only investigate where it has reason to suspect that an "unfair business practice exists or is being carried on or may come into existence". Where, as in this case, whatever the practice may or may not have been, it has in fact ceased, the Committee no longer has any powers in terms of Section 8 (l) (a). In this regard the legal representatives refer to the following statement made in the application for liquidation: "On the 4th of January 2002 a massive hailstorm damaged the structures of the Hydroponic gullies and no further work other than repair work was undertaken. Due to the fact that the Respondent (Biz Africa) had no funds whatsoever the Respondent's Hydroponic Farming operation ceased at the end of January 2002".

The legal representative further argued that:

"if regard is had to the other relevant provisions of Act 71 of 1988 (as amended) it is abundantly clear that the provisions are without exception concerned only with existing practices or practices which may be, although not existing practices, practices clearly in the offing. It is therefore submitted that the matter be not pursued by your Committee but left for the law to take its course in terms of the provisions of the Companies Act, 1973...

In the alternative, it is submitted that the investigation be postponed sine die, pending the determination of the proposed Section 417 inquiry, whereafter the desirability or otherwise, to pursue the matter further can be assessed and decided upon."

He also stated that his clients denied that they had received any benefit from their involvement with Biz Africa. It was mentioned that both clients had in fact assisted the company financially and contributed in cash to the company's resources. With the benefit of hindsight, they were of the view that "they were roped in mainly for what they could contribute financially, if required, and to afford credibility to the operation which was managed and driven by Myburg, du Plessis and Sherratt."

The Committee took note that an inquiry in terms of section 417 of the Companies Act is only a possibility. To state that the envisaged inquiry will uncover any transgression of the law, including the provisions of Act 71 of 1988, created the impression that the

legal representative does not understand that the Consumer Affairs (Unfair Business Practices) Act, 1988 is an enabling Act. The legal representative's interpretation that the Committee no longer has any powers to investigate, because of the fact that the practice ceased at the end of January 2002, is not correct. Even if the interpretation is correct, Biz Africa was only placed under a provisional winding-up order. There was also the undertaking given by his clients. On 15 June 2001 Biz Africa was informed that the Committee on 13/14 June 2001 took note that Biz Africa undertook to unconditionally accept the conditions laid down the Committee. The Committee proceeded (continued) with the investigation when it became clear that his clients were not adhering to the undertaking. The Committee resolved that the legal representatives' submission that the matter not be pursued or that the investigation be postponed pending the determination of the proposed section 417 inquiry, not be accepted. The Committee resolved to inform him that it intended to proceed with the investigation and that it was in his clients' best interests to co-operate with the Committee. The legal representative was informed of the Committee's decision.

In May 2002 the legal representative of De Meulenaere and Dosa met an official to discuss the information still not received by the Committee. On 15 May 2002 a memorandum signed by the legal representative was received. Suffice to say that the memorandum outlined the involvement of De Meulenaere and Dosa. It was, *inter alia*, stated that Sherrat had requested De Meulenaere to become Chairman of the Board. Mention was made of a previous hydroponics project Sherrat and De Meulenaere were involved in that failed "for a lack of capital." "De Meulenaere believes with hindsight that he was asked to become involved because he is a well known professional and his involvement would probably lend credibility to the Board." The memorandum further explained that De Meulenaere was not directly involved in the finances and that he was at ease with the basis on which future investors would be canvassed as at no stage or Board meeting was there any indication that the directive (the undertaking given to the Committee) would not be adhered to. Regarding Dosa's involvement, it was stated that he only attended two meetings. He had no involvement in the management or affairs of the company and did not receive any benefits. He in fact advanced about R25 000.00 towards the Company's expenses."

Under the heading "What went wrong with Company" an explanation was given of what happened after the Committee meeting of 5 April 2001. In essence, it explained that investors were informed of developments and delays, that it became clear that the company was experiencing financial constraints and that there were serious differences among the directors. It was also stated that "it should be abundantly clear that De Meulenaere and/or Dosa were not knowingly part of any irregularity or transgression of any unfair business practice or practices." It was confirmed in the memorandum that investors did not receive any returns on their investments.

14. Consideration

Biz Africa undertook to unconditionally accept the conditions laid down by the Committee following its preliminary investigation into Biz Africa's business activities. The conditions laid down by the Committee were:

- (1) Biz Africa must stop distributing misleading advertisements;
- (2) Biz Africa must stop promising exaggerated earnings;
- (3) A copy of the letter, expressing the Committee's concerns, must be given to every future investor and a record in that regard must be kept;
- (4) Biz Africa must inform all existing and future participants of the Committee's concerns. Should it come to the attention of the Committee that Biz Africa has failed to inform existing or new investors of the Committee's concerns, the Committee will immediately continue with an 8(1)(a) investigation.

Biz Africa also informed the Committee that the project would commence in June/July 2001. When the officials' visited the farm in September 2001, it was clear that this did not occur. In addition to the late commencement of the project, a request for assistance from a consumer in October 2001, together with the information received thereafter from Biz Africa, made it clear to the Committee that Biz Africa was still advertising exaggerated earnings and was accepting consumers' money before informing them of the Committee's concerns. Biz Africa did not keep to its undertaking.

By his own admission, De Meulenaere conceded that his involvement, as a well known professional, lent credibility to the Board and thus the project, well knowing that a similar project wherein he, Sherratt and Muburgh were involved, failed in 1991 due to a "lack of capital", capital they had tried to obtain from consumers (with the promise of high returns). Their business practices in the earlier venture are very similar to those adopted by Biz Africa.

From the information at the disposal of the Committee, Sherratt, Myburgh, Du Plessis and De Meulenaere were the persons mainly involved in the marketing of the project. However, all directors of Biz Africa must have known about the concerns of the Committee and the undertaking given by Biz Africa and should have ensured that these concerns were addressed. The Committee is of the opinion that the problems that arose between the various directors of Biz Africa is not the reason for the failure of the project. The project failed because of unrealistic promises made to consumers. Consumers were deceived into believing they would earn high returns on their investments. Based on the promises made by Biz Africa, some consumers obtained loans which they could not afford. Investors do not receive any returns on their investments. Consumers were consequently unreasonably prejudiced. The business practices of Biz Africa unfairly affected consumers and they cannot be justified in the public interest.

15. Recommendation

The Committee recommends that the Minister⁽¹²⁾ declare unlawful the business practices whereby the parties known as Biz Africa 1121 (Pty) Ltd (2000/022543/07) trading as The Hydroponic Farming Company of Africa, Mr Christopher Patrick Maitland Cowper (ID 4507315003087), Dr Georges Frans Gregor Oswald de Muelenaere (ID 4003045008083), Mr Shantilal Dosa (ID 4207025098085), Mr Marthinus Christoffel du Plessis (ID 3508175044006), Mr Cornelis Hendrik Myburgh (ID 4602055045008) and Mr Stan Sherratt, directly or indirectly, demand or receive any up-front fee or valuable consideration in advance, from any person with the express or implied purpose of that person becoming an owner or a participant in any business venture.

(12) In terms of section 12(1)(b) of the Act

The Committee also recommends that the Minister in terms of section 12(1)(c) of the Act direct the parties to

- (a) refrain from applying the unfair business practice,
- (b) cease to have any interest in a business or type of business which applies the unfair business practice or derive any income therefrom and
- (c) refrain from at any time applying the unfair business practice.

PROF T A WOKER

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE