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GENERAL NOTICES

NOTICE 1320 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 investigations made by the Committee pursuant to General Notice 2232 of 2001 as published in Government Gazette No. 22826 dated 9 November 2001 and General Notice 2233 of 2001 as published in Government Gazette No. 22827 dated 9 November 2001, as set out in the Schedule.

A ERWIN

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

CONSUMER AFFAIRS COMMITTEE

**REPORT IN TERMS OF SECTION 10(1) OF THE CONSUMER AFFAIRS
(UNFAIR BUSINESS PRACTICES) ACT, 1988 (ACT NO 71 OF 1988)**

REPORT NO 103

Investigation in terms of section 8(1) (a) of the Consumer Affairs (Unfair Business Practices) Act, 1988, into the business practices of Jan van Jaarsveldt Management Consultants CC, Mr JWF van Jaarsveldt, Foster Financial Services CC and Mr P S Welgemoed

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 certain 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 of Trade and Industry (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) investigation² or a "formal" section 8(1)(a) investigation³. 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. Notice of a 4(1)(c) investigation is not published in the *Government Gazette* details of the investigation are not made public. However, if the Committee is of the view that there is evidence of an unfair business practice and it decides to investigate the matter further, notice of the 8 (1) (a) investigation is published in the *Government Gazette*.⁴ The Minister is not empowered to make any decisions about the discontinuance of a particular business practice on the strength of a 4(1)(c) investigation. He may do so following an 8(1)(a) investigation.

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 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 to the Minister to ensure the discontinuance of that practice.⁵ 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.

2. Events leading to the investigation

An official of a financial institution, who worked as an attorney and a co-ordinator of a consumer affairs desk, approached the Committee regarding the business practices of certain businesses which she believed might be misleading and harmful to consumers. The Committee requested these businesses, including Jan van Jaarsveldt Management Consultants CC (JvJ) and Foster Financial Services CC to explain their business activities.

3. Preliminary investigations

JvJ forwarded certain "background information" to the Committee. One pamphlet read as follows:

"WE INVESTIGATE THE ADMINISTRATION OF ALL MICRO LOANS AND RECLAIM THE AMOUNT THAT YOU HAD PROBABLY OVERPAID OR THAT YOU REPAY THE CORRECT AMOUNT.

To force them to supply us with the necessary requested information, we assist you to suspend the deduction from you(sic) salaries (which is in any case being done in an illegal manner.)"

Attached to the pamphlet was *inter alia* a "power of attorney" and a form which had to be handed to the person responsible for paying the client's salary (paymaster) in order

⁵ The powers of the Minister are set out in section 12

to stop any deductions.⁶ The client was required to pay an administration fee of R 171 "as soon as possible". The power of attorney authorized JWF van Jaarsveldt as the agent of the borrower / consumer to "cancel the debit orders in favour of micro lenders". The form the employee had to hand to his or her paymaster read as follows:

"I, the undersigned,hereby instruct the accounting authority of the Department to, with immediate effect stop the benefit deductions on my salary and specifically relating the following instances:...."

Following the receipt of this information, a letter was forwarded to JvJ informing it that the Committee was of the view that JvJ was possibly contravening two different prohibitions published by the Minister namely (1) Notice 2422⁷ which prohibits an interest re-calculator from receiving any money from a consumer before the recalculation service has been fully performed and (2) Notice 777⁸ which prohibits a loan intermediary from receiving any money from a person applying for a loan unless the fee is recovered from the loan amount.

The Committee also received a letter from Foster Financial Services CC (Foster) complaining that financial institutions do not respond to its request for information. In the letter, Foster explained that it is working in "close association" with JvJ. Attached to the letter were letters which had been sent to financial institutions. In one of the letters, Foster stated as a fact that its client's deductions had been stopped by the paymaster. This corresponds with the form JvJ uses to instruct the paymaster to stop so-called "illegal deductions" from salaries. As in the case of JvJ, a letter was also forwarded to Foster informing it that the Committee was of the view that Foster might be operating in contravention of the abovementioned prohibitions.

Both JvJ and Foster replied that they were not, directly or indirectly, involved in money lending and are not therefore contravening Notice 777. Both JvJ and Foster explained in their letters that the practice of interest re-calculators differs from the investigations

⁶ These deductions were referred to as "illegal" deductions

⁷ See *Government Gazette* No19353, 23 October 1998

⁸ See *Government Gazette* No16609, 18 August 1995

done by their offices. Both explained that to understand the nature of their businesses, reference must be made to Government Notice 713 commonly known as the Exemption Notice.⁹

In the Exemption Notice, the Minister exempted a category of money lending transactions from the provisions of the Usury Act¹⁰ provided certain conditions are met. In order to qualify for an exemption a money lender is required to register with the Micro Finance Regulatory Council (MRFC). The Exemption Notice also states that a money lender is only exempted on the condition that the lender at all times complies with the Exemption Notice. Those lenders that are not registered with the MFRC, have to comply with the provisions of the Usury Act.

If, in the opinion of JvJ and Foster, the micro-lender does not comply with the Exemption Notice they bring it to the micro-lenders' attention that the interest rates prescribed by the Usury Act are applicable and that they must rectify the loans accordingly.

4. Meeting with the Committee - 14 June 2001

Mr JWF van Jaarsveldt, the only member of the close corporation, JvJ, was invited to address the Committee at its meeting held on 14 June 2001. Mr Van Jaarsveldt was assisted by an attorney, Mr PS Welgemoed. It was established that:

- (1) The business practice of Foster is the same as that of JvJ.
- (2) Mr Welgemoed acts on behalf of Foster's clients once summons has been issued (according to Mr Welgemoed he defends the clients without any further payment).
- (3) Messrs Van Jaarsveldt and Welgemoed are the two persons who are responsible for the everyday activities of JvJ and Foster respectively.

The Chairperson explained the Committee's concerns regarding:

⁹ See *Government Gazette* No 20145, 1 June 1999

¹⁰ Act 73 of 1968

(1) Upfront payments

They appear to be taking upfront payments from consumers before investigating their problems. This is a contravention of an existing ministerial notice which would mean that it is already illegal and a criminal offence.

(2) Advice to stop monthly repayments

They appear to be advising consumer's employers to stop deducting monthly repayments from salaries and paying this over to the micro lenders. The Chairperson explained that the micro lenders (usually financial institutions) will not necessarily agree with this assessment which could lead to a legal dispute. This dispute will in all probability take months to finalise and in the meantime interest is accruing on the capital sum. The Committee is of the view that there is a strong probability that consumers will find themselves in a situation where after a few months they have exorbitant repayments to make. The Committee regards this as a potential unfair business practice.

Mr Van Jaarsveldt explained to the Committee that JvJ only investigates Unibank, Saambou Bank and African Bank. These three banks are involved in the micro lending industry. The Chairperson asked Mr Van Jaarsveldt if he takes upfront money from clients to investigate claims. His answer was as follows: "Well let's put it this way. As soon as a client arrives and he has money I do take. I've got ten thousand clients at present of which 26% have paid." He further explained that he asks for a fee of R171 and that the consumers pay whenever they can afford it. Mr Van Jaarsveldt complained that consumers do not receive assistance from the Department of Trade and Industry (in respect of the Usury Act) and the Micro Financing Regulatory Council (MFRC) which is the reason why he is committed to assisting consumers who are experiencing problems with financial institutions. The Chairperson explained to Messrs Van Jaarsveldt and Welgemoed that the concerns they might have with the Usury Act or financial institutions is not something which the Committee is empowered to deal with. The Committee is however concerned about their businesses practices because they appear to be committing a criminal offence by contravening an existing notice and they

are advising consumers to stop repaying their debts. Mr Van Jaarsveldt confirmed that in order to force micro lenders to submit information to him, he advises his clients to stop their monthly repayments. The Chairperson asked Mr Van Jaarsveldt whether they had managed to finalise any matters. He informed the Committee that they are in the process of negotiating with one bank in the hopes that they will be able to settle approximately eighty (80) cases.

Mr Van Jaarsveldt was asked if he intended to continue taking upfront payments from clients (knowing the Committee's opinion in this matter). He replied "yes, I will do so and if you want to charge me, then we'll test the constitutionality of the Minister's notice in court."

When Mr Van Jaarsveldt referred to the cases which he was in the process of discussing with micro lenders, the Committee was left with the impression that their clients were the plaintiffs and that they were suing the micro lenders for overcharging interest. Following the meeting, it came to the attention of the Committee that in fact this was not the case. Mr Van Jaarsveldt was defending his clients because they had been summonsed by the financial institutions for not repaying their debts. The Committee is of the view that in many instances, the reason why they have not repaid their debts is because Mr Van Jaarsveldt and Mr Welgemoed have advised them not to.

5. Publication of the notices of investigation

The following notices were published on 9 November 2001:

(1) Notice No 2232 in Government Gazette No 22826:

"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-

Foster Financial Services CC, P S Welgemoed, B Foster, L Foster and any other member, employee, agent, and/or representative of any of the

aforementioned in respect of the activities of the aforementioned.

Any person may within a period of fourteen (14) days from the date of this notice make written representations regarding the above-mentioned investigation.”.

(2) Notice No 2233 in Government Gazette No 22827:

“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-

Jan van Jaarsveldt Management Consultants CC, Jan van Jaarsveldt and any other member, employee, agent, and/or representative of any of the aforementioned in respect of the activities of the aforementioned.

Any person may within a period of fourteen (14) days from the date of this notice make written representations regarding the above-mentioned investigation.”.

6. Investigation

Two officials of the Committee visited the premises of JvJ on 25 & 26 March 2002 in Kimberley. They established that Foster had ceased to exist and all files had been handed over to JvJ. It was also established that:

- (1) Ms Diana Jacobs, Ms Cresta van Jaarsveldt and Mr Combrinck assist Mr van Jaarsveldt in JvJ.
- (2) Mr Welgemoed was the office manager of Foster.
- (3) The only member of the close corporation, Foster, is Ms B Foster, Mr Welgemoed's mother in law.
- (4) L Foster was the administration manager of Foster.

At that date JvJ had 11400 clients on its database and each client has a file. When a potential client visits the offices of JvJ, a brief discussion is held with the client during which it is explained that JvJ can assist the client by negotiating with the micro lender

on behalf of the client. The client pays JvJ a fee of R280. Initially, in April 2000, the fee was R75 but this has increased to R280. The client signs a power of attorney which gives JvJ the authority to

- (1) act as the client's agent in order to obtain all necessary documentation from the financial institution;
- (2) negotiate with the financial institution in order to obtain settlement of the debt;
- (3) appoint an attorney to institute action on behalf of the client to recover any amount due to the client;
- (4) cancel debit orders in favour of the micro lenders on the client's salary.

Following the signing of the power of attorney, JvJ writes letters to the various micro lenders asking for information. The clients sign forms instructing their particular paymasters to stop deducting monthly repayments to micro lenders from their salaries.

None of the files inspected by the investigators in the offices of JvJ have reached finalisation. The files perused by the investigators do not contain the information which JvJ needs in order to finalise the investigations. Most of the micro lenders have not yet provided the required statements of accounts of clients. Although Mr Van Jaarsveldt explained that the required information had been requested from the micro lenders, the investigators could find no record of these requests in the files.

7. Consideration

In 1997 the Business Practices Committee¹¹ conducted an investigation into the business practices of so-called interest re-calculators.¹² These re-calculators alleged that consumers are regularly overcharged by financial institutions and they undertook, for an upfront fee, to investigate consumers' accounts. In many instances consumers found that, having paid the fee, no further action was taken by the re-calculator. As

¹¹ The Business Practices Committee was the forerunner to the Consumer Affairs Committee. The Harmful Business Practices Act 71 of 1988 was amended in 1999. The Act was renamed the Consumer Affairs (Unfair Business Practices) Act and the Committee was renamed the Consumer Affairs Committee

¹² Report No 58 Government Gazette No18443, 21 November 1997

pointed out by the Committee, there is always a great risk for consumers when they pay for services yet to be rendered.¹³ The Committee found that the harmful nature of the business practice of re-calculators occurs when the re-calculator accepts money in advance to recover "overcharged" interest without having investigated whether these allegations are in fact correct. The mere fact that the re-calculator had accepted money from consumers did not necessarily mean that an investigation was conducted and the Committee received numerous complaints from consumers who had paid upfront fees. The number of re-calculators was mushrooming and the Committee was of the view that they were causing financial harm to consumers. The Committee found that the scale of abuse in South Africa was such that an upfront fee could not be justified in the public interest and recommended to the Minister that certain controls be put in place. In 1998, the Minister published, in the public interest, Notice 2422 which defines and outlaws the relevant harmful business practice.

In the Notice an **interest re-calculator** is defined as:

any business or person or any other provider of a service that revolves round a dispute on the interest payable by a debtor to a creditor, who provides any service in return for money or any other valuable consideration for the express or implied purpose of investigating fees, charges, and/or interest charged on any debtor's account(s), including accounts held at financial institutions.

The **harmful business practice** means:

the receiving of any money or other valuable consideration for the performance of any service that an interest re-calculator has agreed to perform for a consumer before such service is fully performed.

and **service fully performed** means that:

the re-calculator has fulfilled all the services offered to the debtor, and the creditor has agreed to or rejected any claim for reimbursement in writing. The creditor must agree to or reject the claim within 90 days after receiving the claim, failing which service is presumed to have been fully performed.

The Notice makes it clear that the receiving of any money or other valuable consideration for the performance of any service that an interest re-calculator has agreed to perform for a consumer before such service is fully performed, is outlawed. In other words, any person or business may act as an interest re-calculator but a fee may not be charged until the work has been done. From these definitions it is clear that JvJ and Foster are performing the services of interest re-calculators and by charging an upfront fee are acting in contravention of the Notice. Notwithstanding, the Committee is of the opinion that it is an unfair business practice for JvJ and Foster to accept money in advance in order to assist consumers without knowing whether their assessment of the situation will be accepted by the relevant financial institution. The Committee is further of the opinion that it is extremely irresponsible for JvJ and Foster to advise their clients to stop their monthly repayments as consumers might find that in a few months they have exorbitant repayments to make. This is particularly of concern with micro loans where interest rates are very high and debt can increase rapidly.

Note should also be taken of the recent Supreme Court of Appeal decision (SCA), *Absa Bank Bpk v Janse Van Rensburg* 2002(3) SA 701. Van Rensburg was sued by the bank for the alleged debit balance of his overdrawn account. This money had accrued from 1992 when his bank balance was nil. He refused to pay the money because he alleged that he had been overcharged interest before 1992 when he had unknowingly paid too much to the bank. He therefore alleged that the amount owing from 1992 - 1997 must be set off against the interest which was overpaid on a loan obtained and repaid to the bank before 1992. In his counterclaim Mr Van Rensburg insisted that the bank deliver a statement of account which reflected every interest debit entered on his bank account, debatement of the delivered account and payment of any amount found due. The bank however, denied charging more than the interest agreed upon between the parties and did not comply with the request to supply the abovementioned information.

The SCA held that there is no duty on the bank to deliver any documents to the account holder other than the monthly statements of account. The SCA further stated that unless there was some kind of contract between the parties stipulating this or a statutory duty on the bank (which there is not), the bank does not have to provide the information requested. The SCA held that if the person has overpaid then he is entitled

to reclaim the money based on unjust enrichment but there is no reason why the bank should be legally obliged to help determine the extent of the claim against it.

The Committee is of the view that JvJ and Foster are adopting the same approach as that adopted by Van Rensburg. They are creating the impression in their clients' minds that they have been overcharged even before they have the information which will prove whether or not these allegations are correct. As the financial institutions are not supplying the requested documents they advise their clients to stop repaying their debts. The SCA has held that there is not duty on such institutions to assist clients with proving their claims.

There is no doubt that if JvJ and Foster's clients have been overcharged they are entitled to reclaim that money based on unjust enrichment. However, the Committee is of the view that it is an unfair business practice for JvJ and Foster to advise their clients to stop repaying their debts in order to force the financial institutions to supply information which should be obtained from their clients. Further, the Committee is concerned that consumers may find themselves in a position similar to that of Van Rensburg. In 2002 he was ordered to repay his debt including interest on the capital sum from 1997.

The practice of taking money in advance before the service is fully performed and the practice of advising consumers to stop monthly repayments in an effort to force financial institutions to supply information, cannot be justified in the public interest.

8. Recommendation

The Committee recommends that the Minister¹⁴ declare unlawful the business practices whereby the parties known as Jan van Jaarsveldt Management Consultants CC, Mr JWF van Jaarsveldt, Foster Financial Services CC and Mr P S Welgemoed, directly or indirectly,

- (1) receive any money or valuable consideration for the performance of any service they agree to perform for a consumer where the consumer might

¹⁴ In terms of section 12(1) (b)

have a problem with a financial institution/creditor with the view to renegotiate an agreement between the consumer and the financial institution/creditor or obtain a settlement on behalf of the consumer before such service is fully performed where

“service fully performed” means that the parties have fulfilled all the services offered to the consumer, and the financial institution/creditor has agreed to or rejected any claim or request for a renegotiated agreement or settlement in writing. The financial institution/creditor must agree to or reject the claim/request within 90 days after receiving the claim/request, failing which service is presumed to have been fully performed and/or

- (b) advise consumers to stop payment to financial institutions/creditors in an effort to force the financial institutions/creditors to provide information.

Signed by

PROF T A WOKER

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE