



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 467 Pretoria 3 May 2004 **No. 26322**




AIDS HELPLINE: 0800-0123-22 Prevention is the cure

GENERAL NOTICES

NOTICE 764 OF 2004**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 by the Consumer Affairs Committee of the investigation conducted by the Committee pursuant to the notice published in Government Gazette No 23749 of 16 August 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. 108

**Investigation in terms of section 8(1)(a) of the Consumer Affairs
(Unfair Business Practices) Act, 71 of 1988, into the business
practices of DWJ Beleggings CC trading as Investment
Consulting Realtors**

INVESTMENT CONSULTING REALTORS

1. Introduction

The Consumer Affairs (Unfair Business Practices) Act (Act No. 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, directly or indirectly, has or is likely to have the effect of harming the relations between business and consumers, unreasonably prejudicing or deceiving any consumer or unfairly affecting any consumer.

The Act is enabling and is not prescriptive. The main body of the Act is devoted to various administrative procedures to be followed, the investigative powers of the investigating officials, the types of investigations the Committee could undertake and the powers of the Minister. The Act confers wide investigative powers on the Committee. It provides for two types of investigations into the business practices of individual entities or businesses, namely a informal section 4(1)(c) investigations or a formal section 8(1)(a) investigations.

The usual procedure when the Committee receives a complaint is to undertake a section 4(1)(c) investigation which is a preliminary investigation. Notice of section 4(1)(c) investigations are not published in the Government Gazette. The Minister is not empowered to make any decisions about the discontinuance of a particular unfair business practice on the strength of a section 4(1)(c) investigation. If, after this investigation, the Committee is of the view that an unfair business exists or may come into existence it may undertake an 8(1)(a) investigation. This is a formal investigation and notice thereof is published in the Government Gazette.

Should the Committee, after a section 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 of the Act. The subsequent order of the Minister will be applicable to the particular individual(s) or business entity(ies). The order of the Minister is published in the Government Gazette. An infringement of an order by the Minister is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both the fine and the imprisonment.

2. Background

The matter involving D W J Beleggin CC trading as Investment Consulting Realtors (ICR) was brought to the attention of the Committee by the Commercial Crime Unit (CCU) of the South African Police Services. The CCU provided the Committee with a document setting out the manner in which ICR operated. In the document potential investors were urged to invest in a Guaranteed Property Investment Trust and/or Hedge Property Investment Trust. The document described ICR's business as a property syndication scheme. A group of investors combine their funds to invest in a trust or company, whose sole asset is a commercial, retail or industrial property. The investment in property syndication is made through buying shares in the trust. It is further stated in the document that the risks involved were low and that the scheme was protected from inflation. The initial investment capital was guaranteed up to maturity and hedged in a fixed asset for the duration of the investment period. The capital growth of 10% would allegedly be achieved by an increase in share value and would be realized on the sale of the investment/property. Investors were promised a return of 10% per annum on the amount invested and that the returns would be in excess of inflation and tax-free in the hands of the investor.

On 7 December 2001 David Johannes Gideon Rosseau Potgieter (DJGR) (also known as Dawie Potgieter), ICR's managing director, and ICR's attorney met with the officials of the Committee (officials) to discuss the way in which ICR operated. DJGR Potgieter explained that ICR was registered as a Close Corporation and that his father, Frederick Johannes Potgieter, was the only member. DJGR Potgieter confirmed (when asked by the officials) that he was at that stage an un-rehabilitated insolvent. This was the reason why he was not a member. ICR's business was to market and syndicate properties

and/or shares of companies through corporate broker networks or consultants.

The brokers and/or consultants were appointed to market the syndicated properties and were paid 8% to 10% commission to procure applications for the purchase of shares or units of the trusts. The brokers and/or consultants were entitled to accept payment from investors in respect of the purchase of units on behalf of ICR. The funds paid by the investors for purchase of the units were put into an attorney's trust account until payable to the seller of the property. The officials were informed that ICR has syndicated three properties, namely Centurian Park 14, Uitzicht Park and Golf Gardens Office Park and that the fourth property, Rosemary Forum was being marketed for syndication. ICR has become a member of the South African Property Owners Association.

The Committee considered the matter at its meeting on 16/17 January 2002 and resolved that an investigation in terms of section 4(1) (c) of the Act be undertaken into the business practices of DWJ Beleggings CC trading as Investment Consulting Realtors (ICR) and any other director, employee, agent and/or representative of any of the aforementioned relating to the business activities of any of the aforementioned parties.

3. Preliminary Investigation

The officials contacted one of the investors who stated that he was approached by ICR's consultant to invest in the scheme. He entered into a contract with ICR to invest because ICR guaranteed that the investment was secured and would grow while he enjoyed the interest. However, he was not certain about which of the syndications his funds were invested in. He indicated further that some people invested in long-term investments and requested that the interest received be capitalized.

The Committee resolved at a meeting on 14/15 February 2002 that ICR should provide a list of all the investors, rental contracts for the syndicated properties and proof of payment of returns to the investors. The investors should be approached to ascertain whether they understood the concept of property syndication and whether they were satisfied with the arrangements made by ICR.

DJGR Potgieter was informed about the Committee's decision and arrangements were made to meet with him on 28 March 2002. Unfortunately the meeting could not take place because he was allegedly overseas and was only expected back after six weeks. On 6 May 2002 the envisaged meeting took place at ICR's offices in Centurion. The officials were given copies of rental contracts of two of the syndicated properties. During the discussion DJGR Potgieter indicated that about 60 investors had been secured for Rosemary Forum. The property was purchased for about "R4.9 million" and was being syndicated for R6.4 million.

DJGR Potgieter was asked to explain why some lease contracts were entered into in the names of companies such as Duelco Investments 57 (Pty) Ltd & Spandera Investment CC, and not the trust companies as would be expected. He explained that this was a mistake and indicated that it would be corrected. He also confirmed that ICR was the tenant in a syndicated property, Centurian Park 16, as indicated on one of the contracts. DJGR Potgieter was requested to provide the following additional information by 10 May 2002:

- (a) valuation certificates for the syndicated properties,
- (b) copies of registration certificates of the trust companies which were formed to own the syndicated properties and
- (c) copies of options to buy the syndicated properties and to explain how ICR determined the price at which the properties were syndicated.

Following ICR's non-response and failure to submit the aforementioned information, the Committee resolved at its meeting on 16/17 May 2002 that unless the same was made available within two weeks, the Committee would consider a section 8(1) (a) investigation.

On 18 June 2002 the officials met again with DJGR Potgieter and ICR's attorney to discuss the matter. DJGR Potgieter explained that funds received from investors were deposited into the attorney's trust account in terms of section 7(8) (2A) of the Attorneys'

Act, (Act No.53 of 1979). The attorney stated that he was obliged to pay 16% of the amount invested by each investor to ICR for administrative purposes. The balance was kept in a trust account until the acquisition of property. Once the agreement for the purchase of the syndicated property was signed, funds were paid to the seller of the property. The investors become owners of the syndicated properties by being issued with trust share certificates after the formation and registration of a trust company.

DJGR Potgieter also mentioned that ICR syndicated four properties, which were Centurian Park 16, Unit 2, Golf Gardens Office Park, Unit 14, Uitzicht Park, and Rosemary Forum. The trust companies were registered to acquire the said properties were respectively, Centurian Park Trust No1, Duelco Investments 57 Trust, Spandera Bellegings Trust, and Rosemary Forum Trust. DJGR Potgieter and Rudolf Johannes Theunissen (Theunissen) were appointed trustees although Theunissen later resigned as trustee. DJGR Potgieter undertook to supply the Committee with the following:

- (a) copies of the purchase agreements and/or offers made for purchasing of all the syndicated properties,
- (b) copies of trust certificates,
- (c) a list of all shareholders indicating amounts invested and copies of investors' "trust/share unit" certificates,
- (d) all lease agreements of the syndicated properties indicating rental income, proof of change of directors,
- (e) Investment Consulting Realtors' financial statements (audited or unaudited),
- (f) Information upon which the valuation of the properties was based and
- (g) written mandate or resolution by FJP Potgieter authorizing DJGR Potgieter to act as a director or manager of ICR in view of the fact that he was declared

an un-rehabilitated insolvent.

On 1 July 2002 the Committee received the aforementioned information regarding the syndicated properties from ICR except for copies of deeds of trust, the valuation certificates of the properties and information pertaining to the financial position of both ICR & the trusts companies. On 2 July 2002, ICR informed the Committee that the outstanding information would be supplied at a later stage. Having considered the matter the Committee resolved on 18/19 July 2002 that the business practices of ICR should be investigated in terms of section 8(1)(a).

4. Publication of the Notice

The following was published in the Government Gazette No. 23749 of 16 August 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 hereby given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1) (a) of the said Act into the business practice as applied by

DWJ Beleggings trading as Investment Consulting Realtors, Frederick Johannes Potgieter (ID No 3806135030085), David Johannes Gideon Roseau Potgieter (ID No 6411075057086) and any other director, employee, agent and/or representative of any of the aforementioned relating to the business activities of any of the aforementioned parties.

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

5. Efforts to obtain Information

On 3 October 2002, ICR was reminded to provide the outstanding information. They were also requested to make available the new information brochure that was being

presented to the investors as well as a detailed statement explaining the business practice of ICR. On 8 October 2002 ICR's attorney indicated that the information would be supplied "soon". On 30 October 2002 the Committee received copies of trust deeds of all the syndicated properties, ICR's new information brochure, an unsigned copy of ICR's financial statements and a detailed statement explaining the standard operating procedures of ICR. A document explaining the concept of the trust deed that ICR intended to use in the future for property syndications was also attached as well as information on a new (fifth) property, Victoria Mews, that ICR was syndicating.

On 20 November 2002, ICR was reminded that only unsigned copies of ICR's financial statements were received and that the audited financial statements of the trust companies were awaited in order to conclude the investigation. On 28 November 2002 ICR's attorney advised that the auditors, whose contact details were provided, should be contacted regarding the outstanding information. The auditors indicated to the Committee that they were recently appointed and were busy with auditing the trusts for the year ended 28 February 2002.

On 19 February 2003 the auditors undertook to provide the financial statements of the trust companies by 21 February 2003. On 25 February 2003 the auditors were reminded about submitting the documentation. On 26 February 2003 the Committee received the financial statements of Centuria Park Trust, RekenTrust (Pty) Ltd, Spandera Investment Trust, Spandera Investment (Pty) Ltd, Rosemary Forum Trust and ERF 127 Lynwood CC. The valuation certificates for Erf 127 Lynwood Pretoria, Unit 14 Uitzicht office Park and "Unit 27 Schemes, SS Centuruns" were also supplied. Neither the auditors nor ICR has provided the Committee with the financial statements and the valuation certificates of Duelco Investment 57 (Pty) Ltd.

6. The Investigation

An investment in property syndication is usually made through the buying of blocks of shares in a company formed in terms of Companies Act or Share Block Control Act. The investment in ICR was made through buying trust shares in a trust company after the acquisition of syndicated property. The syndicated properties are owned by the trust

companies and controlled by trustees appointed by ICR and investors are mentioned as the beneficiaries.

Investors in property syndication schemes share the profits and losses of the property, enjoy the benefits of rental income and capital growth as may be reflected by the increased value of the shares. Investors receive income on their investments regularly in arrears from the net rentals paid by the tenants occupying the property. The net rental growth is dependent upon rises in gross rentals, offset by ancillary increases in the costs of operating the property. The investors also share in the costs of owning the property. These may include rates and taxes, commissions payable to leasing brokers, tenants installation costs on maintenance and administration fees for managing the property for the syndication.

An investor experienced problems getting ICR to pay interest due on his investment. In an affidavit to the Committee the investor confirmed that no interest was paid for the period August 2001 to February 2002. Consequently, his investment contract with ICR was cancelled and the capital investment of R264 000.00 refunded. However, ICR has not paid the outstanding capital plus R78 713.76 interest. In an affidavit the said investor also stated that he was asked by ICR to confirm his investment due to the fact that there was uncertainty as to, which of the syndications the funds were originally invested in. He alleged that ICR has on some occasion amended his contracts and investment certificates without his knowledge and consent. He further alleged that the share certificate issued to him during August 2001 showed an investment of R210 000.00 in Duelco Investment Trust whereas the total investment was R323 166.27. However, upon enquiring with ICR, a certificate for the balance of the investment in Rosemary Forum Trust was issued.

DJGR Potgieter informed the officials of the Committee that investors were moved from one syndication to the other and the original contracts were changed in the circumstances where the property has been fully subscribed. Some investors requested that the interest earned on their investment be capitalized. The capitalized interest was initially deposited into ICR's cheque account but this has since been discontinued and

investors were instead given additional certificates in a new syndication.

7. Non-disclosure of material facts

The information brochures used by ICR in promoting the property syndication scheme depicted the syndicated properties as complexes or office parks when in fact some of the properties such as Centuria Park 16, Unit 2, Golf Gardens Office Park and Unit 14, Uitzicht Park, Highveld XI, were sectional title units within those complexes or office parks. The investors were not fully informed about this material fact and no explanation was given in the information brochure. The investors were under the impression that they were investing in the whole complex or office park and not in sectional title units.

Most of the investors contacted informed the Committee that they invested in ICR and/or properties that ICR acquired. Investors appeared not to be aware about the different trust companies that were purportedly formed by ICR. The investors were not fully informed whether ICR was the promoter or acting as a principal in the scheme. The prospectus or information document inviting potential investors did not disclose the full structure of the company that was to be formed for the syndication scheme nor was there a reference to legislation governing the company structure.

FJP Potgieter issued a written mandate authorizing DJGR Potgieter to act as director of ICR in view of the fact that he was an un-rehabilitated insolvent. DJGR Potgieter and Rudolf Johannes Theunissen were appointed trustees of the various property trusts. DJGR Potgieter was an un-rehabilitated insolvent and his insolvency status, although rescinded on 12 July 2002, was not disclosed to the investors. Theunissen resigned as a trustee and was never replaced. The investors were not informed about his resignation.

8. Projections

The investors risked their capital based upon the expectation of returns promised and an understanding of the risks relating to the achievement of such returns. The determination of the syndication price is important in that any miscalculation thereof may affect the actual earnings and profits or share value of the trusts and therefore returns

may deviate significantly from expected results.

The ICR indicated that the investment model or a program written by a professor, from a local university, was used to determine the syndication price at which the properties were syndicated. The program was used to determine amongst other things the net present value (NPV), internal rate of returns (IRT) and the marketing costs of the properties. The model appears not to have been tested and the validity of the assumptions applied also appears to have been based on opinion and may not have recognized the existence of change in location and sizes of individual properties.

ICR did not use the aforementioned program to determine the syndicated price of the following properties, Centuria Park, Unit 2, Golf Gardens Office Park, Unit 14 Uitzicht Park and Rosemary Forum. DJGR Potgieter could not explain how the syndication amount for the said properties was calculated.

9. Syndicated Properties

Centuria Park 16 was purchased from Rekentrust Beslote Korporasie for R430 000, syndicated for R817 000 and leased to Investment Consulting Realtors for R7 900 per month.

Unit 2 Golf Gardens Office Park, a sectional title unit, was acquired on 8 November 2001 by purchasing of the entire issued shares capital of Duelsco Investments 57 (Pty) Ltd for R335 00.00 (R215 460.00 including loan accounts). The property was syndicated for R520 000 and leased for R4 500 per month. The insured or replacement value of the building is R281 000 or R75, 50 per square meters. A total levy of R1560 is payable every month.

Unit 14, Uitzicht Park, Highveld XI, a sectional title unit, was acquired on 3 February 1999 by purchasing of the entire issued shares capital of the company called Spandera Beleggings CC for R300 000 (including directors' loan accounts). The property was syndicated for R450 000 and leased for R4 510 per month. The insured or replacement

value of the building is R300 000 and a monthly levy of R1038 is payable.

Rosemary Forum was purchased from ERF 127 Lynwood CC (Beslote Korporasie) CKk88/02104/23 for R3 500 000. The property was syndicated for R5 992 000 and leased for R54 340.70 per month.

The properties that ICR syndicated that were not brought to the attention of the Committee are Victoria Mews and Falcon Village 1 & 2. The Victoria Mews was syndicated in October 2002 and during November 2002 ICR's option to purchase the property was cancelled and therefore Victoria Mews was never acquired by ICR. However, ICR continued to promote the property through brochures and internal documentation until it became fully subscribed. The funds collected for Victoria Mews were invested instead in another property in Centurion.

10. Valuation of the properties

The valuation certificates received from a registered valuer indicated that the valuation was done on 2 July 2002. No valuation was done on the properties prior to enactment of the syndication scheme as should have been done. The valuation certificates showed that Centuria Park 16 was valued on 2 July 2002 valued for R817 000, Golf Gardens Office Park for R520 000, Unit 14, Uitzicht Park, Highveld XI for R450 000 and Rosemary Forum for R5 992 000. Centuria Park 16, Unit 14 Uitzicht office Park and Unit 2 Golf Gardens Office Park are sectional title units within the complex or office park. It appears that the valuation was only done later to justify the syndicated values.

The rental income used by the valuer to determine the valuation of these properties was higher than the rental income stated in the lease contracts and financial statements. This has had the effect of increasing the value of the syndicated properties and therefore the properties were syndicated for more than the real value. Once the property has been syndicated, the total funds received, less the amount paid to purchase the property, are paid to the promoter, ICR. These funds are utilized by ICR for other expenses.

11. Conclusion

The direct investment in property, by acquiring shares in property-owning investment vehicles, whether in a company or close corporation, has been developed as an alternative investment concept, namely property syndication. ICR's main business can be described as property syndication in that it offered a group of investors the opportunity to pool their funds in order to directly invest in a trust and/or company whose sole asset was retail, commercial and industrial property.

There was a misrepresentation of the material facts about the syndicated properties in ICR's information brochure or prospectus. The Committee is of the view that the information that certain properties were only sectional units was deliberately withheld by ICR because it is aware that very few investors would invest in such properties. This non-disclosure has misled investors. ICR's new information brochure that the Committee received stated that ICR was accredited with the Department of Trade and Industry. This is not the case and appears to be an attempt by ICR to legitimize its operation and further mislead investors.

The investors are not being consulted by ICR regarding the control of the trust companies nor are they represented in any decisions regarding their investments. They were also not informed about the financial position of the trust companies or provided with the financial statements. ICR has failed to provide the Committee with the financial statements of Duelco Investment 57 Trust and so the Committee is of the view that such documents do not exist. One of the trustees (DJGR Potgieter) was an un-rehabilitated insolvent and the possibility exists that his decisions may have impacted negatively on the investments made. This is prejudicial or potentially prejudicial for investors who, had they been informed of his status, may have chosen not to invest with his organisation.

The investors risked their capital based upon the expected returns, given their understanding of the risks relating to the achievement of such returns. The gross rental income provided by ICR for each syndication scheme before fixed operating costs were taken into consideration, has indicated actual returns would deviate significantly from

expected results. It appeared that without using any other additional funds ICR would not have been able to pay the return on investment that the investors were promised.

An investor indicated in an affidavit that he was under the impression that his entire funds were invested in Duelco Investment Trust when this was not the case. This is a clear indication that investors were misled. A new property, Victoria Mews was also syndicated and the property was never acquired by ICR. The investors were therefore misled in that they were not informed about the failure to purchase the property and that the funds were not invested as promised.

The syndicated properties appeared to have been over-valued in that they were syndicated for more than their real value. The capital growth of 10% per annum promised to the investors may therefore not be achieved in the event that the syndication scheme should cease to operate. The investors may not be able to recoup their investments and therefore would be prejudiced.

ICR has informed the investors that their investment was hedged in fixed assets for the duration of the five- year period. This investments although hedged would be considerably be reduced in value because of the properties being over-syndicated and the true value of the assets also appears to have been misrepresented or the properties were oversubscribed.


12. Recommendation

The property syndication schemes operated by D W J Beleggings CC trading as Investment Consulting Realtors constitute unfair business practice. There are no grounds justifying these practices in the public interest. It is accordingly recommended that the Minister under section 12(1)(b) of the Act declare unlawful the business practice whereby the parties known as D W J Beleggings CC trading as Investment Consulting Realtors, Messrs Federick Johannes Potgieter (ID 3806135030085), David Johannes Gideon Roseau Potgieter (ID No 6411075057086) also known as Dawie Potgieter in the course of business, directly or indirectly,

- invite the public to make investments; and/or
- receive investment funds from investors for the management thereof or for the re-investment of such funds on behalf of the investor.

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

- (i) refrain from applying the unfair business practice;
- (ii) cease to have any interest in any business or type of business which applies the unfair business practice or to derive any income therefrom
- (iii) refrain from at anytime applying the unfair business practice; and
- (iv) refrain from at any time obtaining any interest in or deriving any income from a business or type of business applying the unfair business practice.



PROF T A WOKER

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

15/08/2003