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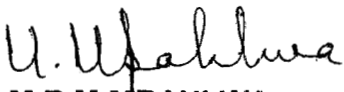
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GENERAL NOTICES

NOTICE 1761 OF 2004

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

I, Mandisi Mpahlwa, MP, 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 499 of 2002 as published in Government Gazette No. 23111 dated 2 April 2002, as set out in the Schedule.



M B M MPAHLWA

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

CONSUMER AFFAIRS COMMITTEE

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

REPORT NO 110

**Investigation in terms of section 8(1) (a) of the
Consumer Affairs (Unfair Business Practices) Act, 1988,
into the business practices of Emerald van Zyl Business Consultants and
E C van Zyl**

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 could 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 analysing 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⁾. The usual procedure when the Committee receives a complaint from a consumer, is to undertake a section 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* and 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.

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.

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

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

(3) These investigations are commonly referred to as section 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.

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

2. EVENTS LEADING TO THE INVESTIGATION

Employees of Ceres Fruit Growers Ltd and the Witzenberg Municipality requested the assistance of the Mayor of Witzenberg Municipality regarding problems they experienced with loans obtained from Saambou Bank. The Mayor of Witzenberg Municipality (the mayor) in turn requested the Minister of Trade and Industry, the Registrar: Usury Act and the Financial Services Board in December 2001 to undertake "the necessary investigation".

From the information received from the mayor, it appeared that a mass meeting was held (for employees of Ceres Fruit Growers Ltd) where an agent of Saambou Bank convinced the employees to apply for loans from the financial institution, believing the interest rate would be 24 per cent and not the 33 per cent appearing on the application form. The employees allegedly asked the agent why the application form stated 33 per cent and not 24 per cent. His reply was that it was "old forms" but that it would be corrected by the Bank. The employees also claimed that the repayment periods and the monthly instalments were not filled out on the form in their presence. The employees of the Municipality did not attend the same mass meeting, but a similar meeting held by the same agent where the same statements were allegedly made.

The mayor stated that the employees experienced problems with *inter alia* the levying of:

- interest on credit insurance policies
- an administration fee and
- interest rates higher than the rates prescribed by the Usury Act.

The mayor also stated that a group of the Municipality's employees asked, through Emerald Van Zyl Business Consultants/Mr E C van Zyl (VanZyl) that the payment of the loans should, for the following reasons, be stopped:

- the loans did not comply with the rules and requirements of the Usury Act
- no loan contracts were received by the employees
- no credit insurance policy contracts (included by the financial institution in the application forms) were received by the employees.

Concerns about the Usury Act or financial institutions are not matters which the Committee is empowered to deal with. However, the Committee viewed it necessary to investigate whether the conduct of VanZyl (to advise employees to stop payment on loans, thereby causing consumers/employees to breach their contracts with the financial institution) constituted an unfair business practice. Consumers could be unfairly affected by the actions of or advice given by VanZyl.

It needs to be mentioned that the actions of Van Zyl Business Consultants also came to the attention of the Committee in early 2001. After an "informal" section 4(1)(c) investigation, the Committee came to the conclusion that VanZyl was contravening an

existing prohibition published by the Minister namely Notice 2422⁽⁶⁾. In this Notice interest re-calculators were prohibited from receiving any money from a consumer before the recalculation service had been fully performed. The Chairperson of the Committee in October 2001 forwarded an affidavit to the Commercial Crime Unit of the South African Police Services (SAPS) to report the contravention of Notice 2422 for prosecution.

The Committee resolved at its meeting held on 14 and 15 February 2002 to undertake a formal investigation into the business practices Emerald van Zyl Business Consultants, EC van Zyl and any employee, agent and/or representative in respect of the activities of Emerald van Zyl Business Consultants and EC van Zyl based on the following:

- (1) The information received from the Mayor of Witzenberg Municipality.
- (2) The Committee's information based on the earlier investigation into the business practices of VanZyl.
- (3) A press statement issued by the Minister of Finance on 14 February 2002 with regard to the placement of Saambou Bank Limited under curatorship. In the statement the Minister of Finance specific brought it to the attention of the public "... that the placing of Saambou Bank under curatorship does not relieve those persons who have contractual obligations with the bank from punctually (own underlining) meeting with them. Accordingly, people having financial commitments in respect of mortgages, business loans, vehicle finance, micro loans etc, must continue to meet these obligations."

3. PUBLICATION OF THE NOTICE IN THE GOVERNMENT GAZETTE AND SUBSEQUENT EVENTS

On 27 March 2002 VanZyl was informed of the Committee's decision and its intention to publish notice of its investigation in the Government Gazette of 2 April 2002. VanZyl was urged to co-operate with the Committee during the investigation as his co-operation would affect the outcome of the investigation.

The following was published under Notice 499 of 2002 in Government Gazette 23111 of 2 April 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 -

(6) See *Government Gazette* No 19353 of 23 October 1998

Emerald van Zyl Business Consultants, EC van Zyl and any employee, agent and/or representative in respect of the activities of Emerald van Zyl Business Consultants and EC van Zyl.

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

On the same date, a letter was received from VanZyl providing the Committee with the name of his attorney as well as a letter from his attorney requesting the Committee not to proceed with the publication of the notice. The attorney also stated that it was not clear in the notice what the "unfair business practice" was that the Committee intended to investigate.

In reply to his letter, the investigating official informed the attorney that his client's activities were investigated by the Committee during in 2001, that the Committee viewed his client's activities to be in contravention of Notice 2422 and that the matter was reported to the SAPS.

Regarding the attorney's statement that Notice 499 of 2002 is not clear with regard to what the unfair business practice is that the Committee intends to investigate, it was brought to his attention that the intention of the Committee is precisely what is stated in the Notice, namely, to investigate the business practices of his client. Only with the finalisation of the investigation can the Committee determine whether or not his client's business practices could be deemed to be unfair business practices.

He was informed that what is expected of his client, is to explain to the Committee **exactly** what his business practices entail, including an explanation on how and when his client receives payment for the services provided by him. It is not merely to comment or react on documentation.

It was brought to the attorney's attention that VanZyl mentioned that more than 90 per cent of his business practices are providing "expert evidence" in court. He was consequently requested to furnish the Committee with the following details in this regard:

- (1) The number of all court cases in which he gave evidence (if written evidence/affidavits, copies of documents) since January 2000 as well as the outcome in respect of each court case.
- (2) Who requested him to give the evidence, that is, did he provide the evidence on request of his own clients, and if so, who and at what stage was he paid for his services/evidence. Details in the cases where he provided expert evidence, if not on behalf of his own clients, were also requested.
- (3) Does VanZyl advise his clients or members of the public to stop or cancel payments owed to financial institutions?

- (4) It is accepted that the services VanZyl says he offers to the public are based on his expert knowledge and experience. The attorney was consequently requested to provide the Committee with VanZyl's background, experience, knowledge and qualifications.

4. COMMITTEE MEETING HELD ON 5 APRIL 2002

VanZyl and his attorney met with the Committee at its meeting held on 5 April 2002. The Chairperson asked VanZyl whether he advises clients or members of the public to stop their instalments to financial institutions. His attorney answered the question:

"No he has never done that. That is my instructions. He has never done that."

When asked by the chairperson whether any of his clients stopped their repayments, the attorney answered:

"Well you must understand that Mr van Zyl don't have any control over a situation like that because basically he receives an instruction. He does an investigation and that is the end of him and the client. What the client is doing after that we don't know. There is no follow up. I mean it is not a continuing situation. Basically that client is with an attorneys firm and the attorney will obviously advise the client what to do".

When asked by the chairperson whether the attorneys advise their clients not to pay, VanZyl's attorney said:

"That I don't know but as far as my experience is concerned I would never advise a person to stop payment of a bond for instance if there is still monies outstanding. ... as far as my instructions is concerned Mr van Zyl has never advised the client to stop payment because it would be totally ridiculous to tell a person to stop payment. If he still owes two thousand Rand how can you advise the person not to pay?"

The attorney was asked by the chairperson what VanZyl advises his clients to do. The attorney responded:

"Well he ... I presume he would advise the client to approach the financial institution either himself or through his attorney. Tell them that the calculations are wrong and they should recalculate the situation and then debit the correct monthly payment. That is my instructions from him".

In those cases where the bank does not agree with VanZyl's calculations and are not prepared to recalculate the interest, the attorney said that then litigation usually follows. He stated, however, that he did not think VanZyl was involved in such a case because, as he said, VanZyl gives his report and "... that is the end of it. What happens after that is totally between that client and his attorney ..."

VanZyl informed the Committee that the Ceres Municipality approached him and he consequently had a meeting with 35 unhappy employees. They were unhappy because they did not have contracts, they did not know what they were paying for and they did not receive policies. He allegedly applied for a policy from Saambou and the policy was delivered at VanZyl's home three months later. He further stated that the Ceres Municipality informed him that "... if they refer the matter to me and ask that they have given me instructions to investigate it they will stop the payment".

VanZyl said that seven employees of the Ceres Municipality have agreed to pay his fee of R350 for administration. He answered in the affirmative when asked whether the fees were already paid to him. When pressed for an answer to a question whether the fees were paid for the services to be rendered, he denied this and said the fees were for the "... administration fee for the statements, the policies etcetera".

In answer to a question from a member of the Committee, VanZyl said:

"I can honestly tell you that I would never advise anybody to stop payment. In one matter ... (a client) stopped payment and my advice to him is if you stop payment please pay the money into a savings account. In one matter, I must just rectify myself, (a client) ... was allegedly summonsed for an amount of R46 000). ... my calculations is actually approved in another matter with Saambou Bank Actuaries and they proved it is correct, showed that the bank owed him R9 000. So I can't see any way that this client must go on paying because according to me his bond is paid off".

VanZyl was referred to a letter which he wrote to the manager of the Ceres Fruit Growers in which he stated that there will be "no problem" if the payments to Saambou were stopped for a period and he received his R350 fee. He was asked whether it was correct that in his letter he advised them to stop payment of the instalments and the confirmation of his fee of R350.

VanZyl replied:

"People from Ceres Fruit Growers contacted me, okay, after the Ceres because they know what was going on at Ceres and they said to me that I must put in writing what basically happened at Ceres. Okay? Ceres, the people, decided to stop payment. That was their decision. I had a talk with one of the Directors of Ceres Fruit Growers who said to me that he is quite able to help in that but he can't help him financially and he asked me what is the fee and I said the fee that I charge is an administration fee because I have to apply for the documentation and if you receive the documentation because the policy documentation and that per case is about ... it can be from R80 to R120 in total because they can charge R3,50 a page".

5. INVESTIGATION

Contrary to what VanZyl and his attorney told the Committee, information received indicated that VanZyl was still requesting fees and some employees who could afford it, paid fees to VanZyl before the "service has been fully provided" by him. This is in contravention of Notice 2422 and he advises consumers to stop with payments to financial institutions. In a letter from VanZyl, he states (translated from Afrikaans):

"Mr X informed me there is no problem to stop the instalments of clients to Saambou Bank for 30 days on the following conditions:

- 1) The cost of the investigation, that is R350 is payable by the client.
- 2) A report by myself will be delivered to the Personnel Department within 25 days after signing of the agreement.
- 3) Should the client fail to submit the report, payments will go ahead and the client will on own risk be in arrears for 1 month with his instalments.

Should there be criminal contraventions or fraud on the accounts of clients, I will draft the necessary documents and will refer the matter to the Police for possible prosecution of Saambou Bank. I will also give the instruction that all instalments should be stopped."

In another letter VanZyl stated that he was requested by clients to investigate their loans with Saambou Bank following various articles in the media. He referred to information requested, that is loan agreements, payment history, credit life insurance - group policies and certificates in respect of the clients' membership of the credit life insurance. He further explained that Saambou Bank, notwithstanding the provisions of the Usury Act, failed to provide the requested information within 7 days. He consequently requested the acting manager to stop the clients' payment in respect of their loans with Saambou Bank until Saambou Bank furnished the required information in terms of which it can then be determined what amount is due by the client, if any. He further stated that it is "certainly their right" as a contravention of the Usury Act is a criminal offence.

Another consumer also asked the Department of Trade and Industry to investigate his account with ABSA Bank. In his request to the Department he mentioned that he had paid VanZyl R1 000. VanZyl has thus clearly took the money before the service had been fully provided otherwise the consumer would not have asked the Department to investigate his account.

VanZyl's letter in reply to the Committee's letter requesting details about VanZyl's business practices and the cases in which he appeared as expert witness, VanZyl did not go into detail about his business practices, save for stating that he does cost calculations for developing companies, consults for clients who are experiencing problems with insurance companies, acts as an expert on instructions of attorneys and

does recalculations of financial accounts and provide reports thereon.

Regarding the number of all court cases in which he gave evidence (if written evidence/affidavits, copies of documents) since January 2000 as well as the outcome in respect of each court case, VanZyl gave a list of 32 cases but refused to give copies of his affidavits/evidence as it were, according to him, privileged information. The majority of court cases dealt with executions that were stopped after the intervention of VanZyl. Most of the cases, however, still have to be considered by the court.

Two officials of the Committee visited VanZyl at his home/office. The investigating officials wanted him to explain his business practice. He got very upset and refused to give the officials a copy of any of his advertisements. He said the officials could obtain copies from the newspapers and chased them away. The copies that the investigators managed to obtain from the media were quite misleading.

In an advertisement which appeared in "Die Burger", an Afrikaans Cape Town daily newspaper, on 2 August 2002, it is stated that Saambou is taken over by FNB, and should Saambou clients be of the opinion that there were "wrong" overcharges on their account they should contact VanZyl's website. A statement, translated from the Afrikaans, reads "... all bonds before 1999 are wrong". ("... alle verbande voor 1999 is foutiewelik"). There is no evidence to support this statement and the statement could have misled former Saambou clients.

In another advertisement in the same newspaper, on 4 April 2002, VanZyl stated: "Hundreds of millions recovered illegally" ("Honderde Miljoene onwettig verhaal"). This is an unsubstantiated claim designed by VanZyl to entice consumers to utilise his services.

6. **CONSIDERATION**

During 1997 the Business Practices Committee⁽⁷⁾ conducted an investigation into the business practices of so-called interest re-calculators⁽⁸⁾. 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-calculators. As pointed out by the Committee, consumers are always at great risk when they pay for services yet to be rendered.⁽⁹⁾

The Committee found that the harmful nature of the business practice of re-calculators

(7) 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

(8) Report No 58 Government Gazette No18443, 21 November 1997

(9) Report No 58

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 VanZyl is performing the services of an interest re-calculator and by charging an upfront fee is acting in contravention of the Notice. This notwithstanding, the Committee is of the opinion that it is an unfair business practice for VanZyl 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 of VanZyl to advise his clients to stop their monthly instalments 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 extremely high and the principal debt can increase rapidly.

Note should also be taken of a reported decision by the Supreme Court of Appeal (SCA) in the matter between Absa Bank Bpk v Janse Van Rensburg 2002(3) SA 701. Mr Van Rensburg was sued by the bank for a certain amount - 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 debt because he alleged that he had been overcharged interest from 1992 when he had unknowingly paid too much to the bank. He therefore alleged that the amount owing must be set off against the overpaid interest. 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 of course denied charging more than the interest agreed upon between the parties.

The SCA found 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 furthermore found 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 stated 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.

VanZyl claims that he only requests from the banks the information the banks are obliged to provide to the clients but that they have limited success in obtaining the requested information, hence their advice to stop repayments. However, in his own letter VanZyl stated that only once they have received the information requested, do they determine whether or not there is compliance with the legislation. It is clear that even before the financial institutions are approached by VanZyl, the impression is created that the financial institution is at fault. VanZyl requests information from financial institutions to help determine the extent of a possible claim against them. The SCA has specifically found that banks are not legally obliged to help determine the extent of a claim against it.

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.

Advertisements placed by VanZyl contained sweeping statements about interest overcharged and the frequency of the "overcharging". These statements could mislead consumers and are not in the public interest.

7. RECOMMENDATION

The Committee recommends that the Minister⁽¹⁰⁾ declare unlawful the business practices whereby the parties known as Emerald van Zyl Business Consultants, EC van Zyl directly or indirectly,

- (a) receive any money or valuable consideration for the performance of any service they agree to perform for a consumer where the consumer might 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 a consumer to stop payment to a financial institution/creditor in an effort to force the financial institution/creditor to provide information.
- (c) place advertisements in newspapers about interest charged by banks that have not been substantiated.



PROF B C DUMISA
VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE
20 May 2004

(10) In terms of section 12(1)(b) and (c)