
GENERAL NOTICE

NOTICE 107 OF 2006**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, the Act), publish the report of the Consumer Affairs Committee on ~~the result of~~ an investigation made by the Committee pursuant to a General Notice 574 of 2005 as published in the Government Gazette No. 27473 dated 8 April 2005, as set out in the Schedule.


M B M MPAHLWA
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, 71 OF 1988**

REPORT No. 122

**AN INVESTIGATION INTO THE UTILIZATION OF QUASI LEGAL
COMMUNICATIONS AND DOCUMENTS, WHICH SIMULATE
LEGAL OR JUDICIAL PROCESSES**

A FURTHER INVESTIGATION INTO THE UTILIZATION OF QUASI LEGAL COMMUNICATIONS AND DOCUMENTS, WHICH SIMULATE LEGAL OR JUDICIAL PROCESSES

1. The Consumer Affairs Committee

The Consumer Affairs Committee (the Committee) was established in terms of section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988 ("the Act"). The purpose of the Act is to provide for the prohibition or control of unfair business practices and for matters connected therewith. An 'unfair business practice', is any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer or natural person. The *raison d'être* of the Committee, and the Act, is thus the interests of consumers and specifically consumers who are likely to be unfairly affected by any business practice.

The Act confers wide investigative powers on the Committee. The Committee can undertake two broad types of investigations, namely particular and general investigations. A particular investigation conducted in terms of section 8(1)(a) focuses on a particular individual(s) or business entity(ies). The subsequent order of the Minister will only be applicable to that particular individual(s) or business entity(ies). A general investigation conducted in terms of section 8(1)(b) focuses on a business practice which is commonly applied within the business community and which may constitute an unfair business practice. The subsequent order of the Minister will be applicable to all individuals and entities utilising those particular business practices.

In March 2001 the Committee,¹ published its intention to investigate the practice of using quasi legal documents which simulate legal or judicial processes, by debt recovery agents, attorneys and other entities. These documents are used by such entities in order to collect outstanding debts from consumers.²

¹ See Notice 622 of 2001 *Government Gazette* 22140 of 16 March 2001

² The investigation was conducted in terms of s8(1) (b)

2. *Report 91*

Following the investigation, the Committee published a report.³ The subsequent order of the Minister was published on 1 November 2002.⁴ This order states that it is an unfair business practice for any entity to issue a letter of demand which simulates a summons or a draft summons of uses the word 'summons' or 'draft summons' in the title or subtitles of a letter of demand. However it is not an unfair business practice to state in the text of the letter of demand that a summons will be issued unless the outstanding amount is paid. Unfortunately the prohibition focussed on letters of demand which simulated summonses or draft summonses only and it was brought to the Committee's attention, following an article in a Sunday newspaper, that a firm of attorneys was using draft warrants of execution and draft notices of attachment of furniture.⁵ The newspaper article reproduced two documents. The titles of these documents were: *Draft Warrant of Execution against Property* and *Notice of Attachment of Furniture*. The *Notice of Attachment of Furniture* read as follows:

As a result of your failure to keep to your repayment for your arrear XYZ account, action has been instituted against you.

Instituted Legal Action in terms of Act 32 of 1944, may result in the Sheriff of the Court coming to your home to make an inventory of your furniture which may be sold on a public auction, which money will be used towards the repayment of this debt

To stop this action you must call ???-123-4567 on or before (date), to confirm payment and your arrangement

Your reference number: 1234567890".

3. *Committee resolutions re quasi legal documents*

The Committee resolved at its meeting of 20/21 May 2004 that the Magistrates' Court Committee of the Law Society of South Africa and the various law societies should be approached for their views on the use of quasi legal documents by attorneys.

³ Report 91 The utilization of quasi legal communications and documents, which simulate legal or judicial processes, 22 March 2002 Notice 405 Government Gazette 23259

⁴ Notice 2771 in Government Gazette 2002.

⁵ The journalist made the comment that the Minister's order seemed to have had little effect

All the Law Societies that responded were in favour of a *further investigation* but did not *stipulate* which documents should be included in the investigation. The Committee also contacted the Black Sash, the Black Lawyers Association and the National Association of Democratic Lawyers to canvass their views as to *what types of quasi legal documents should be included in such an investigation*. Unfortunately, despite a number of requests these organisations did not respond. The Committee decided to proceed with a further investigation and at its meeting on 17 March 2005 the Committee resolved to publish the following notice in the Government Gazette:

In terms of the provisions of section 8(4) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Ad No 71 of 1988), notice is hereby given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(b) of the said Act into the utilization of communications and documents, which simulate legal or judicial processes, by attorneys and other entities (other than debt collectors), in attempting to collect claims for outstanding debt.

Debt collectors are excluded from the investigation because their use of communications which simulate legal or judicial processes are prohibited by R.663 published in Government Gazette 24867 dated 16 May 2003

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 Director, Consumer Investigations Directorate, Private Bag X84, PRETORIA, 0001. Tel: 012-394-1542, Fax: 012-394-2542/0156, E-mail: ebimo@thedti.gov.za.⁶

The Committee's decision was brought to the attention of the Magistrates' Court Committee of the Law Society of South Africa, the various Provincial Law Societies, the Black Sash, the Black Lawyers Association, the National Association of Democratic Lawyers and the firm of attorneys that appeared to be making extensive use of documents which simulate legal or judicial processes. The respondents were asked to comment by 29 April 2005.

⁶Notice of the investigation was published under Notice 574 in Government Gazette 27473 dated 8 April 2005.

4. Responses received by the Committee

4.7 The Kwazulu-Natal Law Society

The Law Society of KwaZulu-Natal informed the Directorate on 25 April 2005 as follows:

My Council considered your letter dated 23 March 2005 and they support the initiative taken by you. They would be too happy to make comment once the draft proposals become available. My Council is in principle against simulated legal or judicial processes, whether they are used by attorneys or by debt collectors or by anyone else.

4.2 The Law Society of the Northern Provinces

The Law Society of the Northern Provinces informed the Directorate on 13 April 2005 that:

The Law Society of the Northern Provinces does not approve of communication and documents which simulate legal or judicial processes, especially having regard to the fact that such documents often only refer to some aspects in the process and that it does not generally contain a detailed indication of the entire process involved.

4.3 The Law Society of Free State

The Law Society of Free State informed the Committee on 24 March 2005 that it had previously resolved that the use of communications which simulate legal or judicial processes by attorneys will be regarded as unprofessional behaviour.⁷

4.4 The Cape Law society

The Cape Law Society, in their letter date 27 September 2004, informed the Committee that they are against the use of quasi - legal documents and agreed that the practice should be revisited. They further requested the Committee to forward the names of any attorney involved in the above practice to the disciplinary departments of the relevant provincial law societies.

⁷ The Society was also of the view that debt collectors should be included in the investigation. Debt collectors are, however, excluded from the investigation because their use of such communications is already prohibited. See R.663 published in *Government Gazette* 24867 16 May 2003.

4.5 *The Magistrates' Court Committee of the Law Society of South Africa*

The Law Society of South Africa informed the Committee on 24 March 2005 that it supports the investigation.

4.6 **JM Attorneys**

JM Attorneys addressed the Committee at its meeting on the 22nd of June 2005 and further prepared a written submission which was delivered on the 12th of July 2005. In their submission they stated that they do not support the utilization of communications and documents that simulate legal or judicial processes as contemplated in Notice 574 of 2005. However, they believe that the relevant documents and communications should be clearly specified in order to avoid an unnecessarily wide limitation on communications and documents which attorneys are entitled to address to defaulting consumers. They attached a list of recognised legal documents used in the Magistrates' and High Court of South Africa. Some of the concerns raised by JM Attorneys included the following:⁸

1. What are quasi-legal documents

- 1.1. A specified and exhaustive list of legal or judicial process exist in South African law and we respectfully submit that only communications and documents which strictly simulate these, should be considered in the Consumer Affairs Committee's investigation.
- 1.2. Accordingly, only if a communication and document reproduce the appearance, character or condition of the legal or judicial process as described above, can it constitute simulation of legal process.⁹

2. Attorneys take instructions from clients

- 2.1. Attorneys are instructed by their clients to collect debt from defaulting consumers, which instructions often include specific directions as to the format which such communications and documents to defaulting consumers must take.
- 2.2. Accordingly, provided that a client's instructions are lawful, attorneys are obliged to follow same when communicating with defaulting consumers.¹⁰

⁸ For the sake of completeness, this section has been reproduced from the submission sent to the Committee by JM Attorneys. The Committee's response to these submissions is contained in the footnotes and in the discussion below.

⁹ The Committee declined to follow this approach, see discussion below.

¹⁰ Clients would obviously have to take into consideration any Ministerial notice

3. Savings in legal costs

- 3.1. Communications and documents to a defaulting consumer preceding actual legal process, forewarn him of the impending legal process with its concomitant adverse costs implications, often on the scale as between attorney and own client¹¹
- 3.2. ~~Such~~ communications and ~~documents~~ afford a defaulting consumer an opportunity of avoiding further legal costs, which would be unavoidable ~~were~~ such communications ~~and~~ documents not to be addressed to him.
- 3.3. ~~By~~ the same token, if attorneys were to be prohibited from ~~utilising~~ certain communications and documents to defaulting consumers, it would ultimately increase the legal costs for which a defaulting consumer would be liable, as he would not be afforded the aforesaid opportunity of avoiding further legal costs. This would, in addition, negatively impact upon the cost of credit for non-defaulting consumers¹².
- 3.4. Accordingly, it is imperative that only communications and documentation which strictly simulate legal or judicial process, should form the subject of the investigation by the Consumer Affairs Committee.
- 3.5. Attorneys addressing a communication or document to a person does not:
 - 3.5.1. Offer, supply or make available a commodity to that person as contemplated in section 1(a) of the Ad;
 - 3.5.2. Solicit an investment or supply or make available any investment to that person as contemplated in section; 1(b) of the Ad;
- 3.6. In our view, the definitions in sections 1(c) and (d) of the Act are not relevant of purposes of this investigation.
- 3.7. Accordingly, it is submitted that the relationship between an attorney and a debtor of the attorney's client, is not a relationship between an attorney and a 'consumer' as defined in Section 1 of the Act.

¹¹ This is the purpose of a letter of demand

¹² The committee is of the view that it cannot recognize fake legal documents. For further discussion see below

3.8. Accordingly, the utilisation by attorneys of communications and documents which may or may not simulate legal or judicial process may not constitute a business practice which can be investigated by the Consumer Affairs Committee in terms of section 8(1)(b) of the Act, unless:

3.8.1. The Minister, with the concurrence of the Consumer Affairs Committee, declares a recipient of communications and documents which simulate legal or judicial process, to be a consumer by notice in the Gazette as contemplated in section 1 (c) of the Act;

3.8.2. Any other law stipulates that a recipient of communications and documents which simulate legal or judicial process is a consumer under the Act as contemplated in section 1(d) of the Act.¹³

4. Content of letters of demand

Currently, the content of a letter of demand is not prescribed by law. Accordingly, as long as the content are lawful, attorneys and clients are free to choose the letter's appearance, character and conditions.¹⁴

5. Freedom of trade

5.1. Too wide an interpretation of 'simulate' may infringe on attorneys' right to freedom of trade, which may be unconstitutional. Section 22 of the Constitution reads as follows:

22 Freedom of trade, occupation and profession
Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.¹⁵

¹³ The committee does not accept this approach as debt collection entities are acting on behalf of creditors who have outstanding debts with consumers

¹⁴ The important point to note is that the letter of demand must comply with the law and must accordingly take into consideration any Ministerial notice

¹⁵ Section 22 clearly states that the practice of a trade, occupation or profession may be regulated by law. In addition the Committee is not attempting to prevent attorneys from performing a debt collecting function.

6. Forced legal action

- 6.1. Attorneys institute proceedings at a defaulting consumer's *domicilium* address, being the consumer's chosen physical address in his contract with a credit grantor. The defaulting consumer may have relocated and have no knowledge of the legal process being served upon his *domicilium*. Subsequently, judgment by default is granted and a writ of execution served upon the defaulting consumer's *domicilium*. The sheriff delivers a return of non-service, after which the defaulting consumer is traced and the writ of execution re-served upon his correct physical address.¹⁶
- 6.2. Only at this stage does the defaulting consumer find out about the judgment granted against him, including an order for legal costs and interest.
- 6.3. The above legal process results in a prohibitive costs order against the defaulting consumer and liquidation of the claim normally takes place in sequence of costs, interest and then only capital.
- 6.4. In the context of the above, it should also be borne in mind that attorneys are fee driven and that it is not always in their interest to make every endeavour to recover debt from defaulting consumers in the quickest, most efficient way and before legal proceedings are issued.¹⁷ Accordingly, attorneys often institute legal proceedings forthwith with its above mentioned adverse consequences, without first properly utilising communications and documents, affording a defaulting consumer the opportunity of repaying his debt before legal proceedings are instituted.
- 6.5. We accordingly respectfully reiterate that the Consumer Affairs Committee should be circumspect in their investigation and ensure that it focuses its investigation only on communications and documentation which strictly simulate actual legal or judicial process, so as to minimally limit the pre-legal proceedings process of debt collection from defaulting consumers.

¹⁶ This problem is not solved by allowing attorneys to use fake documents

¹⁷ The Committee is of the view that this does not justify the use of fake documents

7. Conclusion

- 7.1. We completely support the Consumer Affairs Committee's investigation into communications and documentation which simulate legal or judicial process, but respectfully submit that its investigation should focus on and be limited to communications and documentation which simulate the legal and judicial process as annexed hereto marked 'A', 'B' and 'C'.
- 7.2. The focus should be on educating consumers how to manage their finances, how to avoid going into default, the adverse costs implications thereof, sustainable credit control and rehabilitation.

4.7 *Other organisations invited to comment*

The Directorate did not receive a response from the Cape Law Society, the Black Sash, the Black Lawyers Association and the National Association of Democratic Lawyers.

5. *The Committee's view on the use of quasi legal documents*¹⁸

After careful consideration of the responses received the Committee reiterates the approach adopted in its previous investigation into draft summonses. It is part of the function of debt collecting entities, including attorneys, to send out letters of demand to defaulting consumers but they must not make these letters look like quasi legal communications. Such documents will mislead many consumers into believing that a proper court process has been followed. Although the Committee understands the problems of creditors, the fact is that these are legitimate legal documents that have a particular standing. They are serious documents with serious consequences. It is misleading to construct 'draft' legal documents in order to create the impression that certain court processes have been followed when in fact they have not. This also undermines the proper legal process and makes a mockery of the legal system.

If the practice of allowing fake summonses, fake warrants of execution, fake warrants of attachment and the like is to continue unchallenged the Committee is of the view that this may lead to a situation where consumers regard all such documents as fake. They may not be able to distinguish between a 'real' legal document and a fake one and may then ignore the problem when served with a 'real' legal document. This would have extremely serious consequences for consumers and it is therefore not in the public interest to allow debt collecting entities to draft their own fake documents to suit their own purposes.

¹⁸ See also Report 91

The Committee accepts that creditors may wish to use an innovative approach when drafting a letter of demand, but it does not accept that a recognized legal document used in a court of law for a very serious purpose can be simulated in order to mislead consumers. It also does not accept the argument that creditors can draft their own legal documents which, although they are different to those used in the Magistrates' or High Court, are intended to create the impression that they are recognized legal documents. Consumers are not educated as to the appearance of a formal legal document and will be misled when receiving a document that purports to be something that it is not. The Committee is of the view that creditors are actually asking the Committee to recognize fake legal documents. The use of such documents is intended to mislead consumers and this goes beyond a fetter of demand. The Committee cannot recognize fake documents that are there to simulate recognized legal processes. Similarly the Committee cannot recognize, for example, creditors setting up their own courts, arresting people and taking them to these courts.

It has been argued that to follow the proper legal route will increase costs for consumers as defaulting debtors will have to pay collection costs as well as their outstanding debts. This is an unfortunate consequence of consumers failing to pay their debts however, the Committee does not accept that this justifies the recognition of a procedure that undermines existing legal processes. This is not in the public interest.

6. *The Consumer Code for Debt Recovery Agents*

A number of consumer codes were developed by the former Business Practices Committee (BPC) in close co-operation with various trade associations. One of these codes was the Consumer Code for Debt Recovery Agents (hereafter called the Code) A "debt recovery agent" is described in the code as any person, other than the creditor or his attorney, who is directly or indirectly involved in collecting debts for others.

The Code is intended to govern the conduct of debt recovery agents. It embodies principles that are observed by the majority of members of the debt recovery industry. The Code lists a number of unfair business practices and states that:

In attempting to collect a claim a debt recovery agent shall not:

- 3.3 threaten to institute legal proceedings, whether civil or criminal if such a threat is not intended;
- 3.4 utilise a communication which simulates legal or judicial processes

Although a code has no legal standing and it is the responsibility of an association to police its members, this particular code has now become part of a regulation promulgated in terms of the Debt Collectors Act.¹⁹ The responsible Department is Justice and Constitutional Development." This is a code of conduct for debt collectors and is policed by the Council for Debt Collection.

Section 5 (3) states that a debt collector shall not utilise a communication which simulates legal or judicial processes and section 6 states that debt collector shall at all times comply with the Act and other laws of the Republic and shall adhere to all codes and regulations made in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), or any other law, where the contents of such a law, code or regulation determines the relationship between a creditor, debt collector and any debtor.

7. Further documents brought to the attention of the Committee

The following document, dated 13 September 2004, was mailed by an attorney to a lady from Tshiwelo.

WARNING!

Intention To Attach Your furniture

As a result of your failure to keep your repayment for your arrear XYZ (Pty) Ltd account, action has been instituted against you,

Instituting Legal Action in terms of Act 32 of 1944, may result in the Sheriff of the Court coming to your home to make an inventory of your furniture which may be sold on a public auction, which money would be used towards payment of this debt.

To stop this action you must call (000) 1234 56789 on or before 30 September 2004, to confirm payment and your arrangement

PLEASE NOTE THAT THE AMOUNT QUOTED IN THIS LETTER IS NOT A FULL AND FINAL SETTLEMENT AMOUNT.

¹⁹ ACT No 114 of 1998

²⁰ See R663 Government Gazette 24867 dated 16 May 2003.

The Committee is of the view that the intention of this letter is to mislead the consumer into believing that a proper legal process has been followed and that she is about to have her furniture attached. The letter also states:

As a result of your failure to keep your repayment for your arrear XYZ (Pty) Ltd account, action has been instituted against you? .

In this case action had not been instituted against the debtor, and this is clear from the following document, dated 19 November 2004. This letter was mailed by the same attorney to the same debtor.

Letter dated 19 November 2004

NOTICE OF INTENTION TO ATTACH

Surely you don't want to be without any furniture, car or house(holds) during this **Festive Season**. It's a time to celebrate & not a time to be sad.

Our client XYZ (Pty) Ltd has instructed us to proceed with the above, therefore we want to give you a last opportunity to rectify this by paying your account.

Phone (000) 1234 56789 on or before 15 December 2004 to make an arrangement in terms of OPTION 1 or OPTION 2 as explained below.

Failure to enter into an arrangement for the repayment of this debt will lead to a sad **Festive Season**.

This action might result in the Sheriff of the Court coming to your home to make an inventory of your goods, which may be sold on public auction, the proceeds of which will be used towards payment of this debt,

The heading of this document is misleading. The word 'NOTICE is associated with legal documents and the Committee is of the view that many consumers will assume that they have received a formal legal document. The same applies to the word 'ATTACH', as set out above. The heading is also misleading if there is no intention at this stage to attach. Again the creditor is misleading consumers

Although the sentence:

'This action might result in the Sheriff of the Court coming to your home to make an inventory of your goods, which may be sold on public auction, the proceeds of which will be used towards payment of this debt'

is in itself not misleading, read with the rest of the letter of demand, a consumer could interpret the letter as a formal legal document.

8. Consideration

The Committee's concern is with unfair business practices. Quasi legal documents *deceive* consumers and the Committee is of the view that the utilisation of such documents constitutes an unfair business practice. Businesses that operate as debt collectors are governed by regulation and the Committee is of the view that the same rules should apply to any person who is attempting to collect an outstanding debt. No entity that sends a letter of demand should create the impression that such a letter is something which it is not. The Committee cannot recognize a procedure that undermines the existing legal process. This is not in the public interest.

9. Recommendation

Letters of demand for the purposes of collecting claims of whatever nature and which have the appearance of legal documents, constitute unfair business practices. There are no grounds justifying such a practice in the public interest. The Committee accordingly recommends that the Minister declares the business practice unlawful in terms of section 12(1)(b) of the Act whereby, in the course of business an attorney or other entity utilises a communication:

which *simulates* a legal or judicial process

or

which is designed to create the impression that it is a legal or judicial process

or

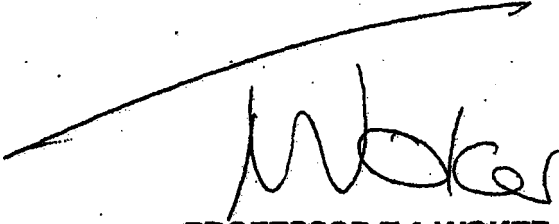
which is designed to create the impression that there is the intention to institute legal proceedings, whether civil or criminal, if there is no intention to carry out such a threat.

It is not however an unfair business practice for a debt collecting entity to send a letter of demand which spells out the steps that will be followed should a debtor fail to pay outstanding debts.²¹

²¹ The Committee is of the view that such a letter of demand would serve to educate consumers regarding the consequences of failing to pay debts.

It is recommended that the Minister:

1. declare unlawful the unfair business practice and
2. direct persons to -
 - (a) refrain from applying the unfair business practice;
 - (b) refrain at any time from applying the unfair business practice.



PROFESSOR T A WOKER
CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE
9 September 2005