

REPUBLIC OF SOUTH AFRICA

HARMFUL BUSINESS PRACTICES AMENDMENT BILL

(As introduced in the National Assembly as a section 76 Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B 138—98]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP SKADELIKE SAKEPRAKTYKE

(Soos ingedien in die Nasionale Vergadering as 'n artikel 76-wetsontwerp)

(MINISTER VAN HANDEL EN NYWERHEID)

[W 138—98]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Harmful Business Practices Act, 1988, so as to harmonise the Act with provincial legislation; to amend and insert certain definitions; to reconstitute and rename the Business Practices Committee; to provide for an executive committee; to authorise an investigating officer to enter any premises with a search warrant; to provide for appeals against decisions of competent authorities in the provinces; to phase out the existing special courts and to replace them with a permanent special court; to provide for the staying of civil proceedings; to extend the application of the Act throughout the Republic; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 71 of 1988, as amended by section 1 of Act 33 of 1993

1. Section 1 of the Harmful Business Practices Act, 1988 (in this Act referred to as the principal Act), is hereby amended— 5
- (a) by the insertion before the definition of “benefit” of the following definition: 5
“ ‘arrangement’ means, except in paragraph (a) of the definition of ‘business practice’, an arrangement or undertaking negotiated by the committee;”;
 - (b) by the substitution for the definition of “business” of the following definition: 10
“ ‘business’ means any business, undertaking or person who—
 - (a) offers, supplies, or makes available any commodity;
 - (b) solicits or receives any investment or to whom any investment is 15
supplied or made available;”;
 - (c) by the substitution for the definition of “business practice” of the following definition:
“ ‘business practice’ includes—
 - (a) any agreement, accord, arrangement, [or] understanding or under- 20
taking, whether legally enforceable or not, between two or more persons;
 - (b) any scheme, practice or method of trading, including any method of marketing or distribution;
 - (c) any advertising, [or] type of advertising or any other manner of 25
soliciting business;

- (d) any act or omission on the part of any person, whether acting independently or in concert with any other person;
- (e) any situation arising out of the activities of any person or class or group of persons,
but does not include a practice which in the opinion of the Minister is a restrictive practice, an acquisition or a monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979);”;
- (d) by the substitution for the definition of “chairman” of the following definition:
“[‘**chairman**’] ‘chairperson’ means the [**chairman**] chairperson referred to in section 2(2);”;
- (e) by the substitution for the definition of “committee” of the following definition:
“‘committee’ means the [**Business Practices**] Consumer Affairs Committee established by section 2;”;
- (f) by the substitution for the definition of “commodity” of the following definition:
“‘commodity’ means any property, whether corporeal or incorporeal and whether movable or immovable, and also any make or brand of any commodity and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service, but does not include service in terms of a contract of employment;”;
- (g) by the insertion after the definition of “commodity” of the following definition:
“‘competent authority’ means a competent authority responsible for business practices or consumer protection in the provincial sphere of government in terms of provincial legislation;”;
- (h) by the substitution for the definition of “consumer” of the following definition:
“‘consumer’ means [**a**] —
(a) any natural person to whom any commodity is offered, supplied or made available;
(b) any natural person from whom any investment is solicited or who supplies or makes available any investment;
(c) any other person who the Minister with the concurrence of the committee declares to be a consumer by notice in the *Gazette*;
(d) any person who is a consumer for the purposes of this Act in terms of any other law;”;
- (i) by the deletion of the definition of “harmful business practice”;
- (j) by the insertion after the definition of “investigating officer” of the following definitions:
“‘investment’ means—
(a) any money or other property; or
(b) any facility,
intended for utilisation in connection with any venture or scheme for the acquisition of gain or purported to be so intended;
“‘magistrate’ means the Magistrate: Pretoria or the magistrate of the district where the investigation is to be carried out;”;
- (k) by the substitution for the definition of “Minister” of the following definition:
“‘Minister’ means the Minister of [**Economic Affairs and Technology**] Trade and Industry;”;
- (l) by the insertion after the definition of “trade coupon” of the following definition:
“‘unfair business practice’ means any business practice which, directly or indirectly, has or is likely to have the effect of—
(a) harming the relations between businesses and consumers;
(b) unreasonably prejudicing any consumer;
(c) deceiving any consumer; or
(d) unfairly affecting any consumer.”.

Amendment of section 2 of Act 71 of 1988, as amended by section 1 of Act 64 of 1991 and section 2 of Act 33 of 1993

2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 5
 “(1) There is hereby established a committee to be known as the
[Business Practices] Consumer Affairs Committee.”;
- (b) by the substitution for paragraph (a) of subsection (2) of the following paragraphs: 10
 “(a) The committee shall consist of nine members appointed by the
 Minister on the grounds of having special knowledge or experience of
 consumer advocacy, economics, industry, commerce or law, of whom the
 Minister shall designate one as chairperson and one as vice-chairperson.
 (aA) The chairperson shall be— 15
 (i) a retired judge of the High Court; or
 (ii) an attorney, advocate, lecturer in law at a university or retired
 magistrate.
 (aB) In order to assist and to ensure effective co-operation between the
 committee and a competent authority, the head of consumer affairs in
 every provincial sphere of government shall be invited to, and may,
 participate in all meetings of the committee but shall not have the right to
 vote at such meetings.”; 20
- (c) by the substitution for paragraph (a) of subsection (7) of the following paragraph: 25
 “(a) The chairperson—
 (i) shall determine the times when and places at which the
 meetings of the committee shall be held; and
 (ii) may determine that a meeting other than a meeting convened
 for purposes of investigations under section 5, takes place
 through any method of telecommunication.”; 30
- (d) by the insertion after paragraph (d) of subsection (7) of the following paragraph: 35
 “(e) The quorum for the meetings of the committee shall be—
 (i) the chairperson or vice-chairperson; and
 (ii) four other members of the committee.”.

Substitution of section 3 of Act 71 of 1988

3. The following section is hereby substituted for section 3 of the principal Act:

“Executive committee

- 3. (1) The committee shall, with the consent of the Minister, appoint an executive committee, consisting of at least—** 40
 (a) the chairperson or vice-chairperson; and
 (b) two other members of the committee.
- (2) The committee— 45
 (a) shall determine the quorum for and the procedure at meetings of the executive committee;
 (b) may delegate any power conferred or duty imposed on the committee by this Act to the executive committee, either in general or in a particular case or in cases of a particular nature.
- (3) The executive committee must exercise any power or duty that has been delegated to it in terms of subsection (2)(b) subject to the conditions the committee considers necessary. 50
- (4) Any delegation in terms of subsection (2)(b)— 55
 (a) must be in writing;
 (b) does not prevent the committee from exercising the power or performing the duty itself;
 (c) may at any time be withdrawn in writing by the committee.”.

Repeal of section 3A of Act 71 of 1988, as inserted by section 3 of Act 33 of 1993

4. Section 3A of the principal Act is hereby repealed.

Amendment of section 4 of Act 71 of 1988, as amended by section 2 of Act 64 of 1991 and section 4 of Act 33 of 1993

5. Section 4 of the principal Act is hereby amended—
- (a) by the insertion after paragraph (b) of subsection (1) of the following paragraph: 5
“(bA) shall receive and dispose of particulars of the result of any investigation made by a competent authority in relation to any matter with which the committee may deal in terms of this Act;”;
- (b) by the deletion of “and” at the end of paragraph (c); and
- (c) by the insertion after paragraph (d) of subsection (1) of the following paragraph: 10
“(e) may assign any preliminary investigation or investigation in terms of this Act, or part thereof, to a competent authority.”.

Amendment of section 5 of Act 71 of 1988, as amended by section 3 of Act 64 of 1991

6. Section 5 of the principal Act is hereby amended by the substitution in subsection (5) for the words “provincial division of the Supreme Court of South Africa” of the words “High Court”. 15

Amendment of section 7 of Act 71 of 1988, as amended by section 4 of Act 64 of 1991

7. Section 7 of the principal Act is hereby amended—
- (a) by the substitution for the words preceding paragraph (a) of subsection (3) of the following words: 20
“In order to ascertain whether this Act is being observed by any person to whom it applies, or to obtain any information required by the committee in relation to a preliminary investigation or an investigation by it in terms of this Act, an investigating officer may, subject to this section, at all reasonable times enter any premises on or in which any commodity, investment, book, statement, document or other object connected with that observation or information is or is reasonably suspected to be, and may—”;
- (b) by the substitution for paragraph (b) of subsection (3) of the following paragraph: 25
“(b) examine that commodity or investment, and request from the owner or person in charge of those premises, information regarding that commodity or investment;”;
- (c) by the substitution for paragraph (e) of subsection (3) of the following paragraph: 35
“(e) seize against the issue of a receipt that book, statement, document or object, if it appears to provide proof of a contravention of a provision of this Act, or if he or she wishes to retain it from further examination or for safe custody: Provided that a person from whose possession or charge that book, statement or document has been taken under this [paragraph] section shall, as long as it is in the possession or charge of the investigating officer concerned, at such person’s request be allowed, at his or her own expense and under the supervision of that investigating officer, or any other person in the service of the committee, to make copies thereof or to take extracts therefrom at any reasonable time.”; 40
- (d) by the insertion after subsection (3) of the following subsections: 45
“(3A) Unless the owner or person in charge of the premises concerned has consented thereto in writing, an investigating officer shall enter premises and exercise any power contemplated in subsection (3) only under a search warrant issued by the magistrate if it appears to him or her from information given on oath or affirmation that there are reasonable grounds to suspect that— 50
(a) an unfair business practice exists or may come into existence; and
(b) a book, document or other object which may afford evidence of such an unfair business practice is on or in those premises. 55

- (3B) A search warrant referred to in subsection (3A) shall—
- (a) authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising any power contemplated in subsection (3);
 - (b) be executed by day, unless the magistrate authorises the execution thereof at night;
 - (c) be of force until—
 - (i) it is executed;
 - (ii) it is cancelled by the magistrate; or
 - (iii) a period of one month from the date of issue has expired, whichever occurs first.”; and
 - (e) by the substitution for subsection (4) of the following subsections, respectively:
 - “(4) An investigating officer executing a search warrant shall, before such execution, upon demand by any person whose rights may be affected—
 - (a) show that person his or her certificate of appointment; and
 - (b) hand to that person a copy of the warrant.
 - (4A) A person from whom information or an explanation has been requested in terms of this section shall not be entitled to refuse to answer any question or to produce any book, statement, document or object on the ground that he or she would thereby be exposed to a criminal charge.
 - (4B) If such answer, book, statement, document or object exposes the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial for an offence referred to in subsection (5).”.

Amendment of section 8 of Act 71 of 1988, as amended by section 1 of Act 43 of 1990 and section 6 of Act 33 of 1993

8. Section 8 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:
 - “(b) into any business practice or type of business practice, in general or in relation to a particular commodity or investment or any class or kind of commodity or investment or a particular business or any class or type of business or a particular area, which in the opinion of the committee or the Minister, as the case may be, is commonly applied for the purposes of or in connection with the creation or maintenance of [harmful] unfair business practices;”; and
 - (b) by the addition to subsection (1) of the following paragraph:
 - “(d) into any unfair business practice referred to the committee in terms of any other law.”.

Amendment of section 12 of Act 71 of 1988, as amended by section 3 of Act 43 of 1990 and section 8 of Act 33 of 1993

9. Section 12 of the principal Act is hereby amended in paragraph (c) of subsection (2)—
- (a) by the substitution for the words “division of the Supreme Court of South Africa” of the words “High Court”; and
 - (b) by the substitution for the words “State Expenditure” of the word “Finance”.

Amendment of section 13 of Act 71 of 1988, as amended by section 9 of Act 33 of 1993

10. Section 13 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading:
 - “**Appeals**”;
 - (b) by the substitution for subsections (1) to (3) of the following subsections:

- “(1) There shall be a right of appeal by any person affected by—
- (a) a notice under section 8(5), or 12(1)(b), (c) or (d); or
- (b) any notice, direction or measure of a competent authority in terms of such provisions of provincial legislation as have been designated for the purposes of this paragraph by the Minister by notice in the *Gazette*,
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to a special court.
- (2)(a) In this subsection ‘fixed date’ means the date on which the Harmful Business Practices Amendment Act, 1998, comes into operation.
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- (b) The President may by proclamation in the *Gazette* establish a permanent special court with a permanent registrar, operating on an *ad hoc* basis, with jurisdiction in the area of jurisdiction of a High Court.
- (c) The President may by proclamation in the *Gazette* determine the date of dissolution of a special court established before the fixed date;
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- (d) Until a special court contemplated in paragraph (c) is dissolved, any reference to a ‘special court’ in this Act shall be construed as a reference to such a court.
- (e) Any application or matter referred to the special court referred to in paragraph (c) before the fixed date and which has not been disposed of on that date, shall be continued and disposed of by that special court.
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- (3) A special court shall consist of—
- (a) a president, who shall be a judge of a High Court designated by the Chief Justice; and
- (b) two other members appointed by the President by proclamation in the *Gazette* from the nominees contemplated in subsection (3C).
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- (3A) The Minister shall invite interested parties, by notice in the *Gazette* and an advertisement in the media regarded by the Minister as appropriate, to nominate candidates who have special knowledge or experience of consumer advocacy, economics, or industrial, commercial or financial matters, within 21 days after the publication of such notice, for consideration as members of the court.
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- (3B) The names of the nominees shall thereafter be published in the *Gazette* and media contemplated in subsection (3A) for comment.
- (3C) The Minister may—
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- (a) interview the nominees referred to in subsection (3B) and such interviews shall be open to the public; and
- (b) compile a final list of nominees for consideration by the President.
- (3D) No person shall be appointed or remain a member of the court if he or she—
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- (a) is not a fit and proper person;
- (b) is not a citizen of the Republic resident in the Republic;
- (c) is a public servant;
- (d) at the relevant time is, or during the preceding 12 months was, an office bearer or employee of any party, movement, organization or body of a party political nature;
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- (e) is an unrehabilitated insolvent;
- (f) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under this Act or the Corruption Act, 1992 (Act No. 94 of 1992), or any offence involving dishonesty; or
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- (g) has at any time been removed from an office of trust on account of misconduct or dishonourable conduct.
- (3E) No person shall remain a member of the court if he or she fails to disclose an interest which would require him or her to be recused.”;
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- (c) by the substitution in subsection (4) for the words “State President”, wherever they occur, of the word “President”;

- (d) by the substitution for paragraph (a) of subsection (5) of the following paragraph:
 “(a) An appeal in terms of this section shall be lodged with the Minister in writing within six weeks after the date of publication of the notice, direction or measure to which the appeal relates or, if no notice is published, the date of the order of a court dealing with consumer matters and established by provincial legislation and shall set forth the grounds on which the appeal is based.”;
- (e) by the substitution for subsections (10) and (11) of the following subsections, respectively:
 “(10) A special court may after consideration of an appeal, confirm or set aside the notice, direction or measure to which the appeal relates or, if no notice is published, the date of the order of the court contemplated in subsection (5)(a), or amend it in such manner as it may deem equitable, and may make such orders as to costs as it may deem just.
 (11) The decision of [a] the majority of the members of [a] the special court shall be the decision of the court [but the president alone shall decide any question of law, and whether any matter constitutes a question of law or a question of fact, and for that purpose he shall sit alone].”;
- (f) by the substitution for the words “division of the Supreme Court of South Africa” in subsection (12) of the words “High Court”; and
- (g) by the substitution for subsection (14) of the following subsection:
 “(14) An order of a special court confirming, setting aside or amending the notice, direction or measure to which the order relates, shall be made known by the Minister by notice in the *Gazette*, and any amendment made to a notice, direction or measure by such an order shall have effect as if it were—
 (a) an amendment made under section 12(4)(d); or
 (b) a notice, direction or measure made under provincial legislation that has been designated for the purposes of subsection (1)(b) by the Minister by notice in the *Gazette*.”.

Amendment of section 14 of Act 71 of 1988

11. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) No person shall, except—
 (a) for the purposes of—
 (i) the performance of his or her functions in terms of this Act; or
 (ii) legal proceedings under this Act;
 (b) when required to do so by a court of law or under a law; or
 (c) with the permission of the chairperson,
 disclose to any other person any information acquired by him or her in the performance of his or her functions in terms of this Act and relating to the business or affairs of any other person.”.

Amendment of section 19 of Act 71 of 1988

12. Section 19 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

- “(2) If any person seeks to rely on an alleged unfair business practice in any civil proceedings, the court concerned may, on the application of any party to those proceedings, stay those proceedings in the interests of justice until such time as the Minister or the special court has made a decision in respect of the alleged unfair business practice in terms of this Act.”.

Substitution of words “chairman”, in the English text, and “harmful business practice” in Act 71 of 1988

13. (1) The English text of the principal Act is hereby amended by the substitution for the word “chairman”, wherever it occurs, of the word “chairperson”.

(2) The principal Act is hereby amended by the substitution for the words “harmful business practice”, wherever they occur, of the words “unfair business practice”. 5

Substitution of section 21 of Act 71 of 1988

14. The following section is hereby substituted for section 21 of the principal Act:

“Short title

21. This Act shall be called the Consumer Affairs (Unfair Business Practices) Act, 1988.” 10

Application of Act 71 of 1988 throughout Republic

15. The principal Act applies throughout the Republic.

Short title

16. This Act is called the Harmful Business Practices Amendment Act, 1998. 15

MEMORANDUM ON THE OBJECTS OF THE HARMFUL BUSINESS PRACTICES AMENDMENT BILL, 1998

1. PURPOSE OF BILL

The purpose of the Bill is to harmonise the national and provincial legislation and to change the object of the principal Act from prohibiting and controlling harmful business practices to prohibiting and controlling unfair business practices.

2. MAIN ELEMENTS OF BILL

2.1 In terms of the principal Act, a consumer includes both natural and legal persons. The Bill intends to, as a rule, limit the scope of consumers to natural persons but the Minister may declare any person (including a legal person) to be a consumer.

2.2 The Business Practices Committee is reconstituted and renamed the Consumer Affairs Committee ("the Committee"). Provision is made for a maximum of nine persons having special knowledge or experience of consumer advocacy, economics, industry, commerce or law to serve on the Committee. To allow provincial representation and to ensure effective co-operation between the Committee and the competent authorities in the provinces, provision is made for the heads of the provincial consumer affairs governmental offices to be invited to participate in the meetings of the Committee. The Committee is enabled to hold meetings by means of any telecommunications method.

2.3 To ensure co-ordinated consumer protection, provision is made for the referral of investigations and the disposal of representations by the Committee to the competent authorities in the provinces.

2.4 The investigating officers are given the power to enter premises to search and seize documents with the consent of the owner or a search warrant issued by a magistrate. No person may refuse to answer questions put to him or her on the ground that the answer might expose him or her to a criminal charge.

2.5 The existing special courts are to be phased out and a reconstituted permanent special court, with a permanent registrar, operating on an *ad hoc* basis, is to be established. Provision is made that the existing special courts will finalise all the cases lodged with it. Furthermore all appeals against decisions of a competent authority in the provinces are to be lodged at the special court envisaged in the Bill.

2.6 Due to the secrecy section in the principal Act, the Committee cannot disclose any information to any other institutions if it becomes aware of contraventions that may be dealt with by them and that, in the interest of the public, should be reported. Consequently the secrecy section is amended to allow a member of the Committee to disclose information with the permission of the chairperson should it be necessary.

2.7 Provision is made for the staying of civil proceedings upon application by any party to that proceedings until a decision is made in terms of the principal Act.

2.8 The other amendments in the Bill are of a consequential nature.

3. PERSONS AND BODIES CONSULTED

The following persons and bodies were consulted:

- (a) All provincial departments of economic affairs;
- (b) Business Practices Committee; and
- (c) Various interested persons and parties.

4. PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that the Bill must be dealt with by Parliament in accordance with the procedure established by section 76(1) or (2) of the Constitution of the Republic of South Africa, 1996, since it falls within the functional area of "Consumer protection" listed in Schedule 4 to the Constitution.