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GENERAL NOTICES

NOTICE 262 OF 2002

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Alexander Erwin, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 4068 of 2000 as published in Government Gazette No. 21655 dated 20 October 2000, 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 94

**MM BRICKS AND
MR P TLHABANYANE AND MR W TLHABANYANE**

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 relation between business and consumers, unreasonably prejudicing or deceiving any consumer or unfairly affecting any consumer.

The Act is enabling and not prescriptive. The main body of the Act is devoted to various administrative procedures, the investigative powers of the investigating officials, the types of investigations the Committee could undertake and the powers of the Minister. In the pursuance of its objective, 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 "informal" section 4(1)(c) investigations or "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 a fine and imprisonment.

2. Provincial Consumer Affairs

At the provincial level, various provincial consumer affairs acts provide for the establishment of Consumer Courts. The Courts evaluate the cases and make final rulings or orders or prohibition. The ruling of a Consumer Court is restricted to the specific province. Not all the provinces, including Northwest Province, have established Consumer Courts. However, a matter under investigation by a province may be brought to the attention of the Committee and the province may require the Committee to investigate it. In order to assist and to ensure effective co-operation between the Committee and the various provincial consumer affairs offices, section 2(aB) of the Act provides for the heads of consumer affairs in every provincial government to be invited to all meetings of the Committee.

The Committee received complaints from the Northwest Consumer Affairs Office on behalf of C Kagiso (Kagiso), ME Keepile (Keepile), NP Kepadisa (Kepadisa), E Kgomo (Kgomo), M Le Grance (Le Grance), D Moeng (Moeng), TE Mokgethi (Mokgethi), T Ntlatseng (Ntlatseng) and S Phamane (Phamane) against M M Bricks (Pty) Ltd (MMB) and Mr P Tlhabanyane and Mr W Tlhabanyane (Messrs Tlhabanyane). It was later established that MMB was not registered as a private company.

The complainants alleged that they bought building materials such as bricks, river sand, cement and plastering sand from MMB. Although they paid for these building materials, they were not delivered, despite promises made by Messrs Tlhabanyane.

On 21 July 2000 the Committee resolved to institute a preliminary investigation in terms of section 4(1)(c) of the Act into the business practice of MMB, Messrs Tlhabanyane and any director, employee, agent and/or representative of the afore-mentioned parties.

3. The investigation

The investigating officials (officials) visited the premises of MMB in Mafikeng and met with Messrs Tlhabanyane on a number of occasions. The parties involved consented in writing to the officials entering and searching the premises (section 7(3)(a)) and it was not necessary for the officials to apply for a search warrant.

The officials established that Messrs Tlhabanyane were "directors" of MMB and All in One Construction (AOC). MMB was a sole proprietorship and Mr P Tlhabanyane was the owner and self-styled director. Mr W Tlhabanyane was the "director" of AOC. MMB operated from Mafikeng, in the North West Province, only. AOC operated from the same premises as MMB. AOC had been involved in the business of building and renovating houses for consumers. MMB's business was to manufacture and sell bricks as well as other materials such as plastering sands, river sands, and cement. The building materials were sold for cash and on lay-by. The materials that were bought for cash by the consumers from MMB were delivered only if available. A deposit was paid for materials bought on lay-by and the balance became payable over an unspecified period which could be three months to two years. Upon payment of the balance, the materials were then delivered.

MMB accepted payments for, and did not deliver as promised, building materials purchased by the complainants, because they allegedly experienced "financial problems". MMB also experienced cash flow problems which originated allegedly because MMB was not paid for the materials supplied to the provincial government and other contractors. However, it appeared to the officials that no effort was made by MMB and/or Messrs Tlhabanyane to recover the outstanding payments from the debtors. Messrs Tlhabanyane continued to take payments for materials despite the fact that they could not supply them.

During the investigation, Messrs Tlhabanyane undertook to deliver the complainants' materials, failing which they would be refunded. Messrs Tlhabanyane also agreed to cease accepting payments for building materials unless the materials were available in stock and could be delivered.

At its meeting on 25 and 26 August 2000, the Committee took note that the information requested by the investigating officials was not forthcoming. The Committee consequently resolved to undertake a section 8(1)(a) investigation into the business practices of MMB and Messrs Tlhabanyane. It was also decided that the Commercial Crime Unit should be informed of the activities of MMB and Messrs Tlhabanyane and that the parties would be invited to a committee meeting in order to discuss their business practices.

4. The meeting of the Committee on 29 September 2000

Mr P Tlhabanyane met with the Committee on 29 September 2000. During the discussion he was informed that the Committee was concerned about the fact that MMB and/or Messrs Tlhabanyane had continued to accept payment in advance from consumers. Mr P Tlhabanyane was told that MMB cannot be referred to as a private company if the entity was not officially registered as such with the proper authorities. Mr P Tlhabanyane was requested not to request payments from consumers in advance if it was known that the goods could not be delivered. However, the Committee did not have a problem with MMB or Messrs Tlhabanyane accepting cash on delivery of the building materials. Mr P Tlhabanyane was also informed that the Committee would continue with its investigation in terms of section 8(1)(a).

6. Publication of the notice of investigation

The following was published under Notice 4068 of 2000 in Government Gazette 21655 dated 20 October 2000:

"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 practice as applied by M M Bricks (Pty) Ltd and any director, M M Bricks and any member, partner or owner (as may be applicable), Mr Peter Tlhabanyane (ID No 630202678089), Mr Walter Tlhabanyane (ID No 58111206004082) and any employee, agent and/or representative of any of the aforementioned relating to the business activities of any of the aforementioned parties".

7. Conclusion

MMB advertised and traded as a private company although it was not registered as such. The entity is a sole proprietorship and the owner is Mr P Tlhabanyane. MMB/Messrs Tlhabanyane accepted payments for building materials from consumers but failed to deliver the materials and/or refund the complainants as promised. Payments received from consumers for building materials appeared to have been used for other things than buying trading stock. They experienced cash flow problems and appeared not to have the cash to buy stock to enable them to trade.

The investigators established that not all the complainants will receive the building materials they paid for or will be refunded in full by MMB. Some of the complainants have instituted legal action against MMB. A warrant for the execution of MMB's property was issued in the magistrate's court for the district of Molopo, Mafikeng on 26 February 2001. MMB's properties that were to be sold by public auction included some brick moulds. A warrant for the execution of Mr P Tlhabanyane's house in Mmabatho was also issued by the magistrate's court following a court action brought by First National Bank against him. The possibility exists that MMB will cease to trade and the complainants will not be refunded or receive their building materials. Consumers have therefore been prejudiced by MMB and Messrs Tlhabanyane's actions.

The business practice applied by MMB and Messrs Tlhabanyane is unfair in that they receive money in advance from consumers knowing that they will be unable to supply or deliver materials.

8. Recommendation

The business practice of MMB, P Tlhabanyane and W Tlhabanyane whereby they take up-front payments or deposits from consumers for goods and services constitutes an unfair business practice in terms of the Act. There are no grounds to justify the practice in the public interest. The Committee therefore recommends that the Minister:

- (a) under section 12(1)(b) of the Act, declare unlawful the business practice whereby M M Bricks and P Tlhabanyane (ID 6302026768089) and W Tlhabanyane (5811206004082) directly or indirectly,
 - (i) take up-front payment for goods and services in any business in which they have a direct or indirect interest.
- (b) in terms of section 12(1)(c) of the Act directs P Tlhabanyane and W Tlhabanyane to refrain from applying the unfair practice.

PROF T A WOKER

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

NOTICE 266 OF 2002**DEPARTMENT OF TRADE AND INDUSTRY****CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Alexander Erwin, Minister of Trade and Industry, after having considered a report by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 4068 of 2000 published in Government Gazette No. 21655 of 20 October 2000, which report was published in Notice 262 in Government Gazette No. 23148 of 22 February 2002, and being of the opinion that an unfair business practice exists which is not justified in the public interest, do hereby exercise my powers in terms of section 12(l)(b) and (c) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), as set out in the Schedule.

A ERWIN

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

In this notice, unless the context indicates otherwise -

"the parties" means, M M Bricks and P Tlhabanyane (ID 6302026768089) and W Tlhabanyane (5811206004082),

"unfair business practice" means the business practice whereby the parties, directly or indirectly, take up-front payment for goods and services in any business in which they have a direct or indirect interest.

1. The unfair business practice is hereby declared unlawful in respect of the parties.

2. The parties are hereby directed to -
 - (a) refrain from applying the unfair business practice;
 - (b) cease to have any interest in a business or type of business which applies the unfair business practice or to derive any income therefrom; and
 - (c) refrain from at any time applying the unfair business practice.
 3. This notice shall come into operation upon the date of publication hereof.
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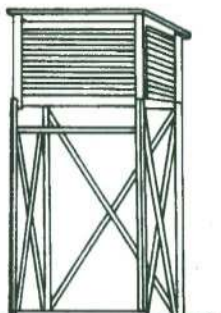
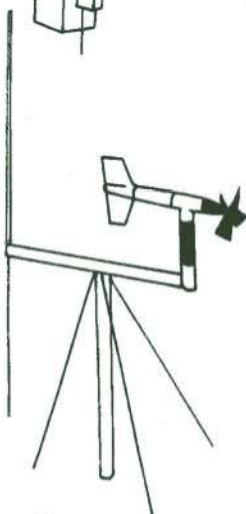
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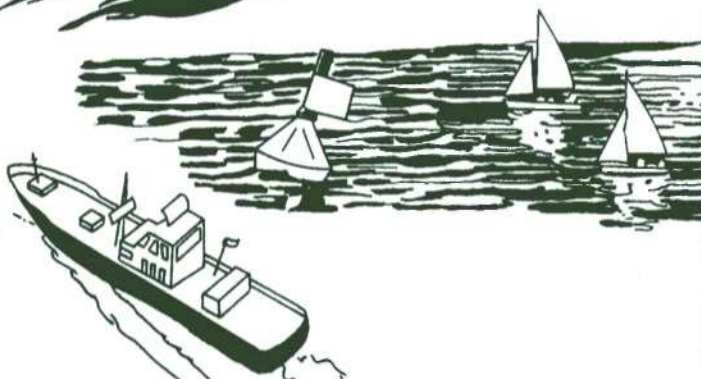
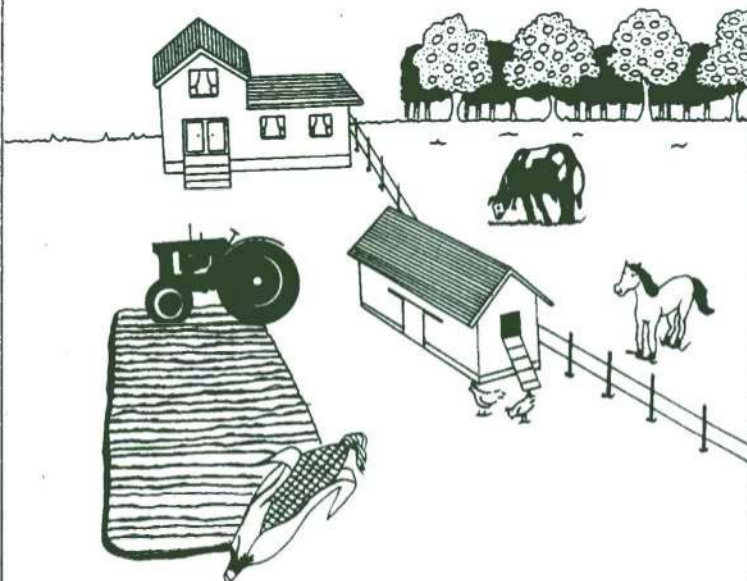
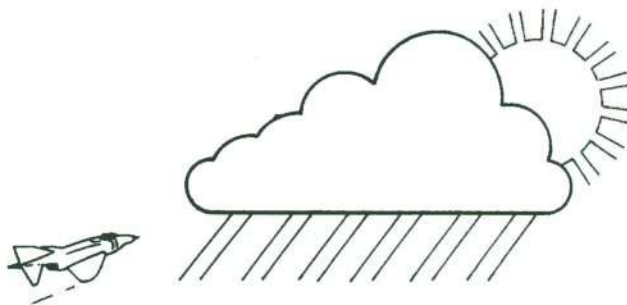
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