



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 441

Pretoria, 22 March
Maart 2002

No. 23260



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GENERAL NOTICES

NOTICE 406 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 a report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 107 of 1998 as published in Government Gazette No. 18618 dated 23 January 1998 and General Notice 1818 of 2000 in Government Gazette No 21161 of 12 May 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 88

Investigation in terms of section 8(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, into a cooling-off period in the fitness industry and the selling of life long contracts, revisited

A. Introduction

The Consumer Affairs Committee's (the Committee) Report 70: "Investigation in terms of section 8(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, into a cooling-off period in the fitness industry and the selling of life long contracts" was published for comment by interested parties on 12 May 2000 in Government Gazette 21161. After having considered the comments received on Report 70, the Committee amended its initial recommendation to the Minister of Trade and Industry. For easy reference, Report 70 is copied in section B.

B. Report 70: "Investigation in terms of section 8(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, into a cooling-off period in the fitness industry and the selling of life long contracts" of 12 May 2000.

1. Introduction

This report focuses on the fitness industry and for ease of reading a number of concepts used in this industry are defined.

"fitness centre" means a facility at which fitness services are provided, but does not include outdoor sport and recreation facilities or unsupervised activities.

"fitness industry" includes any person or business that provides a fitness service;

"fitness service" means any service relating to a pre-exercise evaluation; an individual fitness programme; a group fitness programme and the provision of fitness equipment at a fitness centre for the use of consumers.

"membership agreement" means an agreement between a supplier and a consumer for membership of a fitness centre for a specified period;

"supplier" means a person or business, other than an employee, who offers services and equipment in fitness centres.

The Business Practices Committee (the BPC)⁽¹⁾ received a number of complaints from consumers against several and well-known fitness centres. The BPC received

(1) The BPC was established in terms of section 2 of the Harmful Business Practices Act, 1988 (the former Act). Amendments to the former Act published on 15 May 1999 in the Government Gazette brought about *inter alia* that the Act is now known as the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the present Act), and that the BPC is now known as the Consumer Affairs Committee (the Committee). The purpose of the former Act was to provide for the prohibition or control of harmful business practices. A harmful business practice was any business practice which, directly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer or deceiving any consumer. The purpose of the present Act is to provide for the prohibition or control of unfair business practices. The definitions of harmful business practices and unfair business practices are the same, except that an unfair business practice also includes any business practice which has the effect of unfairly affecting any consumer.

complaints from consumers about 5, 4 and 18 fitness centres respectively, during the calendar years 1996, 1997 and 1998. In 1999, 30 complaints about six fitness centres were received. The complainants were from all walks of life and included pensioners, general practitioners, clerks, executives and secretaries.

The complaints revolved around the selling of "life" memberships by centres that operated for a few months only, high pressure sales techniques, prizes that were won but were not awarded, and promises that memberships could be cancelled and money-back guarantees that did not materialise. Most of these complaints were resolved on an *ad hoc* basis.

The following is a typical example of the complaints received from acrimonious consumers. An elderly lady alleged that she was telephoned by a gentleman who introduced himself as "X" from fitness centre "Y". He asked her why she did not turn up for "... last night's prize giving". She had no idea what he was talking about. He then told her that she had won a prize but that she should visit the fitness centre to claim the prize. They arranged to meet the following day at the fitness centre.

When she arrived at the fitness centre, "X" took her on a tour of the centre which ended in a small sales office. He then started completing a number of forms and asked her various questions about her exercising habits. He then called the "manager" and requested him to confirm the prize that she had won. The "manager" made a call to the "head office". He then requested her account number which was apparently used in the selection of a "lucky number". The person on the line then evidently said that she had won a three-year membership at the centre. Those present congratulated her on her good fortune and made a big "fuss" about the prize. She was even congratulated by the person on the telephone line. The complainant said that she was confused and it felt like winning a million rand.

After the round of congratulations she was asked whether she was always so lucky. "X" then requested her credit card. She did not have a credit card and he allegedly said that a cheque account would work as well. He then confirmed that she had won a four-year contract for the small amount of R3 060. The complainant allegedly said that she would be back the following day but they refused and informed her that the "prize" would not be available the following day. "X" said that she could arrange with her bank for an overdraft. She proceeded to write out a cash cheque for R 3 060, signed the contract and left.

"I realised what happened when I arrived home and immediately phoned 'X'". She explained to him that she could not really afford to pay the R3 060 and requested the return of her cheque. He said that this could not be done because the cheque was already processed in the system. She tried in vain to discuss the matter the following day with the management and owners of the fitness centre and then resolved to stop payment of the cheque at the bank. "I heard nothing from the fitness centre. Three months later I received a summons to pay the R3 060 plus legal costs". It would seem that the whole affair was merely a ruse in order to attract the unsuspecting party to the fitness centre in order for her to sign up as a member.

The unfortunate liquidation, in the late nineties, of two major groups that owned fitness centres located in the major cities impacted heavily and negatively on many consumers

that were members of these centres. The BPC consequently resolved to undertake a section 8(1)(b) investigation in terms of the Act into the business practices of fitness centres.

The BPC [and now the Consumer Affairs Committee (the Committee)] could conduct two types of formal investigations. *Firstly*, in terms of section 8 of the Act, the BPC and Committee may on its own initiative, and shall on the directions of the Minister of Trade and Industry (the Minister), make such investigation as it may consider necessary into any harmful business practice of a particular entity which the BPC has reason to believe exists or may come into existence. *Secondly*, the BPC could make such investigation into any business practice in general which is commonly applied by entities for the purposes of creating or maintaining a harmful business practice. The first type of investigation is known as a section 8(1)(a) investigation in terms of the Act and the second is called a section 8(1)(b) investigation.

The BPC has to report to the Minister on the result of any investigation made by it in terms of section 8. If the BPC, after an investigation, is of the opinion that a harmful business practice exists, or may come into existence and is not satisfied that the harmful business practice is justified in the public interest, the BPC in its report recommends to the Minister the action that should be taken to ensure the discontinuance of the harmful business practice. The powers of the Minister are set out in section 12 of the Act. The ultimate power of the Minister is to close down an entity. The orders of the Minister are published in the Government Gazette. A contravention of such an order is a criminal offence.

The following Notice, No 107 was published in Government Gazette No 16816 dated 23 January 1998.

"In terms of the provisions of section 8(4) of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), notice is herewith given that the Business Practices Committee intends to undertake an investigation in terms of section 8(1)(b) of the said Act into the possible imposing of a cooling-off period when a contract is entered into between gymnasiums and/or health clubs and members of the public; which cooling-off period would allow the member to cancel the contract, within the specified time frame. The investigation will also focus on the possible prohibition of so called lifelong contracts entered into between such gymnasiums and/or health clubs and members, especially where a once off payment is required to obtain membership".

Publication of the notice resulted in the BPC receiving a deluge of further complaints. Most of these complaints were also resolved on an *ad hoc* basis.

2. The Investigation

It is not known how many fitness centres operate in South Africa. Industry guesstimates place the number at more than 400. They range from small one-man businesses operated from the owner's home to fitness centres with sizeable memberships. Some of those with extended memberships provide fitness assessments, exercise programmes, diet consultation, swimming pools, sporting facilities, personal training

and child care. The fitness industry is not subject to industry-specific regulation. It is characterised by its reliance on prepaid membership arrangements. Casual membership which is paid on a month to month basis exists, but such cases are extremely rare. Fees for twelve month fitness centre memberships are typically in the range of R800 to R1 600.

The industry has a number of bodies or associations which represent the interests of various interest groups. While each body apparently endeavours to improve standards within the industry, they do not have the statutory backing that could enable them to effectively address consumer protection issues in the industry.

It was found that the majority of fitness centres sold "life memberships" or memberships for periods exceeding three years. In many cases the membership "lifespan" exceeded the duration of the fitness centres' lease agreements with their landlords. The implication was that the landlords might not have extended the leases, thus putting consumers with "long" memberships at financial risk. The impact of fitness centre closures on consumers, and the high pressure selling tactics were the primary issues of concern to the BPC.

Many complainants alleged that they were disillusioned by the selling tactics employed by the sales representatives or consultants of the fitness centres. In the majority of cases the consultants were remunerated on a commission basis only. Prospective clients were called by telemarketers and told that they had won a prize. The prize could only be awarded should the prospective client report to a consultant at the centre and take out a membership of the centre.

Usually the prizes were insignificant, such as water bottles and towels, although television sets and holiday accommodation were at times held out as prizes. The major prizes were:

- (a) a discounted membership for a number of years,
- (b) an additional one to three years free membership, over and above the discounted membership and
- (c) free membership for the remaining members of the family.

Prospective clients who visited the consultants were usually informed that the discounted memberships were available on that particular day "only" and that, should they not sign the application form immediately, the "remarkable offer" would lapse. This resulted in prospective clients being harassed into signing the contracts under pressure. The prospective clients who argued that they could not afford the memberships were encouraged to pay by instalments on their credit cards. Payment by credit card was obviously to the advantage of fitness centres. They received advance payments and thus cash flows for services to be rendered over a number of years or for the natural life of a member. Unfortunately the life cycle of fitness centres appeared to be rather short. Furthermore they did not have to incur the administrative costs involved in collecting monthly membership fees, postage and the issuing of receipts and also do not have bad debts.

It was usually explained by the "sales consultants" to prospective members that their membership fees would be debited to their credit card accounts for, say x months. It would seem that prospective members understood that this procedure was similar to a monthly amount debited to an account by signing a debit order. The fact that it was on budget and the banks would debit the accounts with the total membership fee plus the applicable interest charges were usually not mentioned, nor understood by the prospective clients. Hence, many complainants were under the impression that the membership fee would be paid to the fitness centres by their banks on a monthly basis, thus not involving any interest.

Other complainants, after being pressurised into signing the agreements and having had time to reconsider the consequences, tried in vain to have their agreements cancelled. There were cases where members tried to cancel the agreements during the same day without any success. In other cases members were told that they could cancel their membership agreements whenever they wished to do so or even sell it at a "profit". There were fitness centres who sold memberships arguing that members would make a sound "investment", because the "discounted" membership could later be sold by the member at a higher price. The verbal money-back guarantees offered by the consultants, obviously on instructions from the management, did not materialise and members found it virtually impossible to sell their memberships to others.

3. Conclusion

A "harmful business practice" in terms of the former Act 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 or deceiving any consumer. The Act does not distinguish between harmful business practices that come about by accident or those that come about by design. It is clear from the complaints received that consumers were, directly or indirectly, unreasonably prejudiced and/or deceived by the business practices of fitness centres. This is not in the public interest and the prejudice and/or deception could most probably be reduced should a restriction be placed on the duration of memberships and that allowance be made for a cooling-off period. Possible solutions considered were to prohibit fitness centres from offering membership agreements for periods exceeding one year, should the centre have an existing lease agreement on the premises, that exceeds one year. A further possible solution considered was to impose a cooling-off period in the industry.

It is impossible to end fitness centre closures, but it is possible to reduce losses to consumers if such an event should occur. The Committee also considered a code of practice for the industry, but unfortunately a representative self-regulatory body within the industry to administer such a code does not exist. A system of licencing or the introduction of elaborate requirements about the operation of trust accounts may enhance consumer protection. The Committee, however, does not consider such controls to be cost-effective. A practical approach seems to be to place a restriction on the duration of memberships.

Concerns have been raised by consumers and some fitness industry service providers about the marketing activities prevailing within the industry. There appears to be a need to ensure that consumers are protected from inappropriate marketing activities and in

particular high pressure sales techniques at the point of sale by the consultants. In this case a practical solution would seem to be to introduce a cooling-off period.

It is considered that the adoption of the proposed prohibition by the Minister will reduce consumer detriment and improve service delivery in the interests of consumers and the industry.

4. Recommendation

In view of the above the Committee recommends that the Minister, in terms of section 12(6)(a) of the Act, prohibit suppliers from offering, selling or renewing membership agreements for periods exceeding:

- (a) one year, should the supplier have an existing lease agreement on the premises, that exceeds one year at the time of the signing of the membership agreement and
- (b) the term of the unexpired existing lease agreement on the premises should that term be less than one year at the time of the signing of the membership agreement.

It is further recommended that the Minister impose a five-day cooling-off period in the industry. Each membership agreement entered into by a fitness centre and a member must contain the following provision (without alteration):

"You are entitled to terminate your membership within five days of the date on which you signed this agreement, excluding the day of signature as well as Saturdays, Sundays and public holidays. This intended termination must be conveyed in writing and must be received by any employee of the fitness centre, within the five-day period, at the physical address where the agreement was signed. "In writing" includes the use of facsimiles, telexes, telegrams or phonograms by the member. Upon termination of the agreement as set out above, the fitness centre shall, within five days as defined above, refund all payments made by the member or reverse any credit transaction".

It is further recommended that the Minister publish this report and recommendations of the Committee in the Government Gazette for comment by interested parties. The date of implementation of the proposed regulations in terms of the Act will be determined by the Minister after the Committee consulted with interested parties.

C. Comments received on Report 70 and consultations with interested parties

Report 70 was forwarded to all known role players as well as associations who alleged that they represent the industry. The report and the recommendations were also covered in the media.

The comments relating to the cooling-off period were without exception welcomed as a positive step to protect consumers from high pressure sales

techniques and unethical sales policies. The same attitude applied to the proposed prohibition on agreements exceeding the term of the unexpired existing lease agreement. The proposed prohibition on membership agreements exceeding one year was less enthusiastically received.

Officials of the Committee held discussions with the owners and/or representatives of various small to medium fitness centres to discuss their comments on report 70 and the proposed prohibitions. They were also invited to address the Committee on matters which concerned them and a number availed themselves of this opportunity.

From these discussions it emerged that fitness centres are capital intensive. A 2 000m² facility could, for example, cost a developer approximately R3 million to build and developers usually require a 10-year lease agreement. It was alleged that the equipment cost of a 2 000m² facility could amount to R1.2 million and that the overheads are high because centres are usually open from 05h00 to 20h00 and must at all times be adequately staffed.

It was alleged that developers are more inclined to finance new fitness centres when a steady cash flow was projected and secured through the existence of three-year contracts. One-year contracts would not readily attract venture capital. Over the long run this would mean that no new independent centres will be built and eventually the major groups would monopolise the market. This prospect, it was argued, would not be in the public interest. Assume, however, that venture capital was available in the absence of three-year contracts. It is then logical to assume that the cost of capital would be higher and that the membership fees would increase substantially. This will render the small to medium entities uncompetitive. The end result will also be that the major groups would monopolise the market.

It was also brought to the Committee's attention that a number of fitness centres have already signed long term lease agreements which were based on feasibility studies assuming certain upfront cash payments and certain cash flows from debit orders arising from three-year contracts. It was alleged that it would be financially disastrous for these centres to have to convert immediately to a year contract.

D. Consideration

Following these discussions the Committee concluded that a prohibition on contracts for the membership of fitness centres exceeding one year could have a negative impact on the suppliers of these services as well as the consumers who utilise these services. This is not in the public interest. However, the Committee is of the view that consumers must be given the option of monthly payments and that the increased cost of these monthly payments must be clearly explained to consumers.

E. Recommendation

In view of the above the Committee recommends that the Minister, in terms of section 12(6)(a) of the Act, prohibit suppliers from offering, selling or renewing membership agreements for periods exceeding:

- (a) a maximum of three years, should the supplier have an existing lease agreement on the premises, that exceeds three years at the time of the signing of the membership agreement and
- (b) the term of the unexpired existing lease agreement on the premises should that term be less than three years at the time of the signing of the membership agreement.

It is further recommended that the Minister impose a five-day cooling-off period in the fitness industry and impose a compulsory payment-option to be included in the membership agreement. Each membership agreement entered into by a fitness centre and a consumer must contain the following provisions (without alteration):

- (a) "You are entitled to terminate your membership within five days of the date on which you signed this agreement, excluding the day of signature as well as Saturdays, Sundays and public holidays. In exercising this right, the intended termination must be conveyed in writing and must be received by any employee of the fitness centre, within the five-day period, at the physical address where the agreement was signed. "In writing" includes the use of facsimiles, telexes, telegrams or phonograms by the member. Upon termination of the agreement as set out above, the fitness centre shall, within five days as defined above, refund all payments made by the member or reverse any credit transaction".
- (b) "You are entitled to choose, whether you prefer to pay your membership fee in advance or whether you prefer to make a monthly payment. The terms, conditions and costs involved for both options are explained in the attached addendum. You will receive a copy of this addendum."

It is further recommended that the Minister publish this report and recommendations of the Committee in the Government Gazette for comment by interested parties. The date of implementation of the proposed regulations in terms of the Act will be determined by the Minister.

Prof T A Woker

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

NOTICE 408 OF 2002**CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Alexander Erwin, Minister of Trade and Industry, in terms of section 12 (6) (a) (iii) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), hereby give notice that I intend publishing the following notice in the *Government Gazette*. Interested parties are hereby invited to comment on the proposed notice. These comments must be directed to the address which appears at the end of the proposed notice.

**NOTICE IN TERMS OF SECTION 12 (6) (a) (iii) OF THE
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Alexander Erwin, Minister of Trade and Industry, by virtue of the powers vested in me by section 12 (6) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), and after having considered reports by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 107 of 1998 in Government Gazette No. 18618, dated 23 January 1998, which reports were published in Notice No. 1815 of 12 May 2000 in Government Gazette No. 21161 and Notice No 406 of 2002 in Government Gazette No 23260, promulgate in the public interest the notice in the Schedule.

SCHEDULE

In this notice, unless the context indicates otherwise -

“fitness centre” means a facility at which fitness services are provided, but does not include outdoor sport and recreation facilities or unsupervised activities;

“fitness services” means any services relating to a pre-exercise evaluation; individual fitness programmes; group fitness programmes and the provision of

fitness equipment at fitness centres for the use of consumers;

"supplier" means a person or business, other than an employee, who offer services and equipment in fitness centres;

"harmful business practice" the offering, selling or renewal of membership agreements by suppliers for periods exceeding:

- (a) a maximum of three years, should the supplier have an existing lease agreement on the premises, that exceeds three years at the time of the signing of the membership agreement and
- (b) the term of the unexpired existing lease agreement on the premises should that term be less than three years at the time of the signing of the membership agreement.
- (c) the exclusion of the following provisions (without alteration) in the membership agreements entered into by a fitness centre and a member:
 - i) "You are entitled to terminate your membership within five days of the date on which you signed this agreement, excluding the day of signature as well as Saturdays, Sundays and public holidays. This intended termination must be conveyed in writing and must be received by any employee of the fitness centre, within the five-day period, at the physical address where the agreement was signed. "In writing" includes the use of facsimiles, telexes, telegrams or phonograms by the member. Upon termination of the agreement as set out above, the fitness centre shall, within five days as defined above, refund all payments made by the member or reverse any credit transaction".
 - (ii) "You are entitled to choose, whether you prefer to pay your membership fee in advance or whether you prefer to make a

monthly payment. The terms, conditions and costs involved for both options are explained in the attached addendum. You will receive a copy of this addendum."

"the parties" are fitness centres and suppliers as defined above.

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

2. The parties are hereby directed to-

(a) refrain from applying the harmful business practice;

(b) refrain at any time from applying the harmful business practice.

On the recommendation of the Consumer Affairs Committee I may, in a particular case, in terms of section 12 (6) (c) of the Act in writing, grant exemption from a prohibition contemplated in this notice to such extent and for such period and subject to such conditions as may be specified in the exemption. Such applications for exemption must be directed to:

The Secretary, Consumer Affairs Committee, Private Bag X84, PRETORIA
0001. (For attention: Ms Lana van Zyl) [Fax: (012) 320-0579]

A. ERWIN

Minister of Trade and Industry

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001

Publications: Tel: (012) 334-4508, 334-4509, 334-4510

Advertisements: Tel: (012) 334-4673, 334-4674, 334-4504

Subscriptions: Tel: (012) 334-4735, 334-4736, 334-4737

Cape Town Branch: Tel: (021) 465-7531

Gedruk deur en verkrygbaar by die Staatsdrukker, Bosmanstraat, Privaatsak X85, Pretoria, 0001

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