

CONSUMER PROTECTION ACT, 1998

No. 21



of 1998

ARRANGEMENT OF SECTIONS

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An Act to provide for the establishment of a Consumer Protection Office; to provide for the protection of the interests of consumers by means of investigation, prohibition and control of unfair business practice; to disseminate consumer-related information; and to provide for matters connected with and incidental to the foregoing.

Date of Assent: 21.12.98.

Date of Commencement: On Notice.

ENACTED by the Parliament of Botswana.

PART I — *Preliminary*

Short title and
commence-
ment

1. This Act may be cited as the Consumer Protection Act, 1998, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —

“arrangement” means an arrangement or undertaking negotiated and concluded by the Office under section 11;

“business” includes —

(a) offering, supplying or making available any commodity or services for a stated consideration; or

(b) soliciting or receiving any investment;

“business practice” includes —

(a) any agreement, accord or undertaking of a business nature;

(b) any scheme, practice or method of trading, including any method of marketing or distribution; or

(c) any advertising, type of advertising, or any other manner of soliciting business;

“commodity” means —

(a) any property, whether corporeal or incorporeal and whether fixed or movable, including any make or brand of commodity; or

(b) any service, excluding service due in terms of a contract of employment;

“consumer” means any person or non profit making organisation —

(a) to whom or to which any commodity is offered, supplied or made available, where such person or organisation does not intend to apply the commodity for the purposes of resale, lease, rendering services or the manufacture of goods for gain;

(b) from whom or from which is solicited or whom or which supplies or makes available any investment;

“curator” means a person or body of persons appointed by the court under section 16 to manage such business affairs, as the court may determine, of any person found responsible for practising unfair business practices in terms of this Act, so as to reimburse or compensate, as far as it is possible, any person that may have been defrauded thereto;

“Director” means the Director of the Office appointed under section 4;

“identity card” means an identity card issued to an investigating officer under section 6;

“investigating officer” means an investigating officer appointed under section 6;

“investment” means any money or other property, or any facility intended for use in connexion with any venture or scheme for profit, or purported to be so intended;

“Office” means the Consumer Protection Office established under section 3;

“unfair business practice” means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer;

PART II — *Consumer Protection Office*

3. There shall be established, in accordance with the laws governing the public service, an Office to be known as the Consumer Protection Office.

Establishment
of Consumer
Protection

4. (1) Subject to the laws governing the public service there shall be appointed —

Appointment
of Director
and other
staff

(a) a public officer to be the Director of the Consumer Protection Office; and

(b) such number of public officers as may be deemed necessary, to work in the Office under the supervision of the Director.

(2) The Director shall hold such qualifications and experience, relevant to consumer protection, as the department responsible for public service management may determine.

5. (1) The Office shall, subject to the control of the Minister, be responsible for the administration of this Act.

Functions of
Office

(2) Without derogating from the generality of subsection (1) the functions of the Office shall be to —

(a) conduct research on consumer protection policies, laws and regulations and make recommendations to the Minister on improvements required thereon;

(b) disseminate information to enable consumers to acquire knowledge of basic consumer rights and obligations and the skills needed to make informed choices about goods and services;

(c) formulate and implement consumer education programmes;

(d) conduct comprehensive surveys on consumer behaviour, consumption patterns, market prices, size and quality of products, unfair business practices and any other related matter, and publish reports on the findings of the surveys;

(e) collect and analyse information on harmful and unsafe products, publish reports on the findings and make recommendations on safety standards to the Government;

(f) receive and investigate complaints of unfair business practices;

(g) obtain warrants to search, seize and cause the testing, where necessary, of products on the market to ensure that specifications, performance, quality and safety standards, as may be determined by the Office under section 8, are met;

(h) preside over disputes of unfair business practices with the objective of assisting the parties to the dispute to reach settlement;

(i) assist a consumer or class of consumers to initiate civil or criminal proceedings arising from an unfair business practice; and

(j) do all such other things as may be necessary to protect consumers from purchasing or otherwise acquiring substandard goods or services or from being otherwise exploited.

(3) Subject to the provisions of this Act, the Director may, in the performance of the functions of the Office, permit and consider representations made by any consumer organisation or movement on any matter of consumer protection.

Investigating
officers

6. (1) The Director may designate such number of persons in the service of the Office as investigating officers, as it may be deemed necessary after consultation with the Director of the department responsible for public service management.

(2) An investigating officer shall hold such qualifications as the Director of the department responsible for public service management may direct.

(3) Each investigating officer shall be issued with an identity card, in a form to be prescribed, and shall have such identity card in his possession when performing any function under this Act.

PART III — *Complaints and Investigations*

Lodging of
complaint

7. (1) Any consumer may lodge a complaint against an alleged unfair business practice with the Office.

(2) The Director shall cause a complainant to be assisted, where necessary, to submit a written complaint.

(3) The Director shall cause a preliminary analysis of a complaint received to be made and a report to be drawn up containing recommendations as to whether there are sufficient grounds to warrant the alleged unfair business practice to be investigated.

Investigations
initiated by the
Office or
Minister

8. (1) The Minister may instruct the Office, in writing, to investigate any allegation of unfair business practice.

(2) The Office may, where it deems it necessary, institute investigations into any form of business to determine whether the business is operating in accordance with set standards of practice.

(3) To determine the set standards of practice for any particular business, the Office may consult such organisations as may regulate the particular type of business under investigation or as may provide similar products or services at a standard recognised nationally or internationally.

Power to
summon and
question

9. (1) The Office may summon any person who is able to furnish any information on the subject of an investigation or who has in his possession or under his control any document, book or other object relating to such subject, to appear before the Office to be questioned or to produce the document, book or other object.

(2) A person summoned under subsection (1) shall be questioned under oath or affirmation.

(3) A summons referred to under subsection (1) shall —

- (a) be in the prescribed form;
- (b) contain particulars of the subject of the investigation;
- (c) be signed by the Director or other authorised officer of the Office; and
- (d) be served in the prescribed manner.

(4) A person appearing before the Office under subsection (1) —

- (a) may be assisted at the hearing by any person who is reasonably acquainted with the facts of the subject of the investigation; and
- (b) shall be entitled to the prescribed witness fees.

(5) A person summoned to appear before the Office under this section shall not be entitled to refuse to answer any question or to produce any book, document or other object on the grounds that such answer, document, book or other object would incriminate him.

(6) Subject to subsection (7) incriminating evidence, arising out of the answers, a person may give to the Office in answer to questions posed by the Office, shall not be admissible in any criminal trial against that person.

(7) A person who has been summoned in accordance with this section, who —

- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings or until excused from further attendance;
- (b) refuses to take oath or make affirmation;
- (c) fails to produce, when requested, any document, book or other object in his possession or under his control; or
- (d) knowingly makes a false statement;

shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding P2 000 or to imprisonment for a term not exceeding 12 months, or to both.

10. (1) Subject to subsection (2) the Director or an investigating officer may, if he or she considers that a document, book or other object connected to any investigation under this Part is being concealed within specified premises, enter the premises to conduct a search and seize any item found within the premises.

Search and
seizure

(2) The Director or an investigating officer shall not enter, conduct a search or seize any item in terms of subsection (1) unless he or she has obtained —

- (a) the consent of the owner of the premises or the person in charge of the premises; or
- (b) a search warrant.

(3) The court shall grant the application for a search warrant if it appears, on information given on oath or affirmation, that there are reasonable grounds to suspect that —

- (a) an unfair business practice exists or may come into existence; or
- (b) a document, book or other object which may afford evidence of such unfair business practice is within those premises.

(4) Where a Magistrate is satisfied from information given on oath or affirmation by the Office, that urgent action by the Office is required to obtain evidence pertaining to the contravention of the provisions of this Act, which evidence is likely to be concealed or destroyed, the Magistrate may dispense with any procedural requirements and grant a search warrant to the Office at such time and place and under such conditions as the urgency of the matter may require.

(5) A search warrant granted by the court shall —

- (a) authorise the Director or an investigating officer mentioned in the warrant to enter the premises identified in the warrant to conduct searches, examinations, take extracts or copies, seize any item or to do any other thing that may assist with the investigation;
- (b) be executed by day, unless the court authorises its execution by night; and
- (c) be in force until it is executed, cancelled by the court or a period of one month from the day of its issue expires, whichever occurs first.

(6) The Director or an investigating officer executing a search warrant under this section shall, before such execution or upon demand by any person whose rights may be affected -

- (a) present his identification card; and
- (b) hand to such person a copy of the warrant.

(7) The Director or an investigating officer shall not seize any item found within the premises being searched in accordance with the provisions of this section unless he or she has handed the person from whose possession or charge the item is being seized, a receipt of the seizure in the prescribed form.

(8) A person from whose possession or charge a document, book or other object has been seized shall, as long as it is in the possession or charge of the investigating officer concerned or the Office, be allowed on request to make copies or to take extracts from it at any reasonable time at his or her own expense and under the supervision of that investigating officer or other authorised person in the service of the Office.

(9) A person shall not be entitled to refuse to answer any question or to produce any document, book or other object on the ground that such answer, document, book or other object would incriminate him.

(10) Subject to subsection (11) incriminating evidence, arising out of any answer, a person may give to an investigating officer in answer to an enquiry made by the investigating officer, shall not be admissible in any criminal trial against that person.

(11) Any person who —

- (a) obstructs or hinders the Director or an investigating officer in the performance of his functions in terms of this section; or
- (b) knowingly makes a false statement or gives a false answer to any enquiry;

shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding P2 000 or to imprisonment for a term not exceeding 12 months, or to both.

11. (1) The Office may negotiate with any person and conclude an arrangement for —

Arrangements
to discontinue
unfair practice

- (a) the discontinuance or avoidance of an unfair business practice or any aspect of it;
- (b) the reimbursement, with interest, if any, to affected consumers; or
- (c) any matter relating to the unfair business practice.

(2) An arrangement —

- (a) shall be in writing and signed by the parties thereto; and
- (b) may be concluded at any time after the institution of an investigation, but before the institution of court proceedings, if any.

PART IV — *Court Proceedings*

12. (1) Upon the completion of an investigation, or where the Office has failed to resolve a complaint of unfair business practice through an arrangement as provided for under section 11, the Office may cause civil proceedings to be instituted so as to obtain —

Institution of
court
proceedings

- (a) an order preventing the continuation of an unfair business practice, and where necessary, compensation and damages against any person alleged to be responsible for the unfair business practice; or
- (b) a declaratory judgement with a view to prohibiting any business practice or any type of business practice, in general or in relation to a particular commodity or investment which is commonly applied for the purposes of or in connexion with the creation or maintenance of unfair business practices.

(2) A declaratory order made in terms of subsection (1) (b) may be published by notice in the Gazette.

13. (1) Where a court is satisfied from information placed before it by the Office that circumstances relating to a particular matter, which matter is a subject of an investigation under this Act, render that matter urgent in that irreparable prejudice would be caused to a consumer or any group or class of consumers if the matter were to be dealt with by the court at proceedings in due course, the court may issue a provisional order —

Urgent
provisional
orders

- (a) prohibiting any person mentioned in the order from performing any act connected with the subject of the investigation;
- (b) attaching any money, other property or assets of whatever nature, held by any person;
- (c) preventing, in any other way, the prejudice in question; or
- (d) authorising the Office to take any action specified in the order.
- (2) A provisional order issued under subsection (1) —
- (a) may be amended or withdrawn by the court on application by the Office or by a person affected by such order;
- (b) shall remain in force for such period or extended period as the court may from time to time determine; and
- (c) shall, unless withdrawn or lapsed, remain in force until the proceedings are finalised.

(3) A provisional order issued under subsection (1), and any amendment, withdrawal or extension thereof shall, where the court so directs, be published in the Gazette and in such other media as the Court may deem appropriate.

Declaration of
certain
business
practices to be
unlawful

14. (1) Where in proceedings instituted in terms of this Act the court is satisfied that it is in the public interest that any particular business practice which is the subject of proceedings before the court should be declared unlawful, the court may —

- (a) declare the business practice or type of business practice concerned to be unlawful either in relation to a particular area of the business or generally as may be supported by the evidence presented;
- (b) declare any agreement, accord, undertaking or terms thereof to be void;
- (c) prohibit, subject to subsection (2), any person from —
 - (i) entering into or being or continuing to be a party to an agreement, arrangement or undertaking;
 - (ii) using advertising; or
 - (iii) applying a scheme, practice or method of trading.

(2) The court, may on application by any person and after hearing the Director, and any other interested person, grant exemption from a provision, condition or requirement contemplated in subsection (1), to such extent, for such period and subject to such conditions as may be specified in the exemption.

Order
prohibiting
unfair
practice

15. (1) Where a court, pursuant to proceedings instituted in the court under this Part, is satisfied that an unfair business practice exists or may come into existence, the court may issue such order as may be necessary to prevent the continuation of the unfair business practice, and such order may, without prejudice to the generality of the foregoing, direct —

- (a) any person practising the unfair business practice to take such action, including steps for the dissolution of any body, incorporate or unincorporated, or the severance of any connexion or association between two or more persons, necessary for the discontinuance of the unfair business practice; or

(b) any person who is or was party to an act or omission which has led, in whatever manner, to the practice and perpetuation of an unfair business practice to cease committing such act or omission.

(2) If the court finds that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent loss to such consumers, the court may order any person responsible for such loss to repay the money, with interest at the prescribed rate, to the affected consumers.

(3) Where the court is satisfied that as a direct result of an unfair business practice a consumer has suffered loss, other than monetary loss, it may order the person responsible for the loss to pay such damages as it may determine.

16. (1) Notwithstanding any action taken to compensate any consumer who may have lost money paid into an unfair business practice under section 15, the court may appoint a curator to limit or prevent any financial loss to such consumer or group of consumers.

Appointment
of curator by
court

(2) Without derogating from the generality of subsection (1) and subject to such conditions as it may impose, the court may authorise the curator to —

- (a) realise such assets of the person responsible for the unfair business practice in question which are necessary for the reimbursement of any of the consumers concerned and distribute them among the said consumers;
- (b) take control of and manage the whole or any part of the business of such a person in which event the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the court, and any other person vested with the management of the affairs of that person shall be divested thereof;
- (c) make payments, transfer property or take steps for the transfer of property of the person responsible for the unfair business practice at such time, in such order and in such manner as the curator may deem fit;
- (d) open and maintain banking or similar interest-bearing accounts;
- (e) enter into agreements on behalf of the person responsible for the unfair business practice;
- (f) convene from time to time, in such manner as he or she may deem fit, a meeting of creditors of the person responsible for the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to such creditors and for consultation with such creditors in so far as the curator deems it necessary;
- (g) negotiate with any creditor of the person responsible for the unfair business with a view to the final settlement of the affair of such creditor against that person;

- (h) make and carry out, in the course of the management by the curator of the affairs of the person responsible for the unfair business practice, any decision which in terms of the provisions of the Companies Act, would have been required to be made by way of a special resolution;
 - (i) dispose of, by public auction, tender or negotiation, any asset of the person responsible for the unfair business practice; and
 - (j) perform such further, incidental or ancillary duties or functions as may be necessary to give effect to any order of the court.
- (3) The court may at any time amend, withdraw or vary any power granted to a curator and any such amendment, withdrawal and variation may be published by notice in the Gazette.
- (4) At the appointment of a curator -
- (a) the management of the business or affairs of the person responsible for the unfair business practice shall vest in the curator, subject to the supervision of the court, and any other person vested with the management of the affairs of that person shall be divested thereof; and
 - (b) the curator shall recover and take possession of such assets of the person involved in the unfair business practice as may be necessary.
- (5) A curator who is not in the full-time service of the State shall out of the funds of the person responsible for the unfair business practice, in respect of the services rendered by him or her be paid such remuneration as may be prescribed; provided that if the funds of the person involved in the unfair business practice are insufficient to adequately compensate the curator, the curator shall be paid from public funds such further remuneration and allowances as the court may determine.
- (6) The curator shall report to the court on his or her administration of the affairs of the person responsible for the unfair business practice, and shall at the request of the court provide any other information set out in that request.
- (7) The curator shall keep a proper record of the steps taken by him or her in the performance of his or her functions and of the reasons why such steps were taken.
- (8) Any person who, in any way, obstructs, hinders or prevents the curator from discharging or performing any of the directives contained in a court order issued under this section shall be guilty of an offence and be liable upon conviction to a fine not exceeding P7 000 or to imprisonment for a term not exceeding five years or to both.

PART V — *General*

17. (1) No person shall disclose any information obtained by him or her in the exercise or performance of any powers, functions or duties under this Act, except —

- (a) in so far as may be necessary for the purpose of exercising or performing any power, function or duty under an Act of Parliament; or
- (b) by order of the court.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding P2 000 or to imprisonment for a term not exceeding 12 months, or to both.

18. Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

Excluding or
limiting
application of
Act
Regulations

19. The Minister may make regulations providing for any matter which under this Act is to be prescribed or for the better carrying out of the purposes and provisions of this Act, and without prejudice to the generality of the foregoing, such regulations may make provision for —

- (a) prescribing procedures, forms and fees;
- (b) prescribing the qualifications and training of investigating officers under this Act;
- (c) prescribing the minimum specifications, performance, quality and safety standards required for any type of commodity or service being offered to consumers;
- (d) prescribing the persons to be defined as consumers under the Act;
or
- (e) requiring any form of business to keep such records and to make such periodic and other returns as to such matters as the Minister thinks fit, and prescribing a time limit for the making of such returns.

PASSED by the National Assembly this 8th day of December, 1998.

C.T. MOMPEI,
Clerk of the National Assembly.