



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ExactMobile Cell C
Telephone Network(s)	MTN Vodacom
Information Provider (IP) (if applicable)	Paul Hattingh – Company or Business Name not Disclosed
Service Type	SMS Competition
Source of Complaints	Public
Complaint Number	#0033

Complaint

A complaint was received from a member of the public regarding an SMS competition service with misleading pricing.

The complaint revolved around SMS messages received from number 0820070590005, indicating that the recipient was nominated to receive a cell phone as a prize and needed to send an SMS message to a reply number 42220 to claim it. There was no indication of the pricing of the competition (in fact R30). An Internet web site URL was provided to get pricing information and to “opt-out” from receiving further messages.

The Secretariat conducted an investigation into the service offered by the SP, on behalf of the IP.

The following breaches of the WASPA Code of Conduct were raised:

3.1.2. Members are committed to lawful conduct at all times.

4.1. Provision of information to customers

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

6.2.3. Pricing must not contain any hidden costs.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

9. Competitions**9.1. Provision of information**

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

- (a) how and when prize-winners will be informed;
- (b) the manner in which the prizes will be awarded;

- (c) when the prizes will be awarded;
- (d) how prize-winner information may be obtained;
- (e) any criteria for judging entries;
- (f) any alternative prize that is available;
- (g) the details of any intended post-event publicity;
- (h) any supplementary rules which may apply;
- (i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

9.3. General provisions

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

Investigation

The Secretariat received a response from the SP indicating that the SP does not deliver the initial SMS message for the IP, but rather only accepts the responses on behalf of the IP. The IP sends out the initial SMS message himself through another company. In addition, the SP forwarded the response of the IP. It is significant to note that the SP did not identify the IP and the IP's response is a Microsoft Word document, unsigned and on a blank page, ostensibly from "Paul Hattingh" whose name is inserted below the response, however the document is authored by a person that appears to be the IP's attorney.

It is uncertain whether the IP's response is addressed to the SP or to the WASPA.

The response indicates:

- The competition in question is a competition initiated by the IP by way of an SMS message to a database consisting of approximately 68 000 mobile telephone numbers.

- The exact words that would appeared on the SMS message received by the complainant read as follows:

“Hi [NAME]. U've been nominated to WIN a NOKIA 6680! SMS the word CELL & your NAME to 42220. GOOD LUCK! www.smswin.zu5.net 4 cost/sms or2 opt-out”
- The wording of the terms and conditions of the competition and the costs of the SMS reply are available on the Internet as is evident from the initial SMS message itself. The IP enclosed in its submission the wording of those competition rules, referred to in the initial SMS message. They are not repeated here.
- The IP alleges that the competition rules, as they are set out on the web site, comply with Clause 9 of the WASPA Code of Conduct, although the IP concedes that it does appear that the method utilised by it in the initial SMS message does not conform to Clause 9 of the WASPA Code of Conduct. The full costs were not clearly displayed on the SMS, but rather on the Internet portal that the IP referred to, in both the initial SMS message and its submission.
- The IP confirmed (it seems to the SP, rather than to the Secretariat) that he has “not again used a similar type and style of competition and I undertake in your favour, and to the Wireless Application Service Provider Association (“WASPA”) that I will not initiate a similar competition, unless:
 - the wording of the SMS is pre-approved by yourselves and/or WASPA;
 - the wording strictly complies with the Code of Conduct.”
- The IP further confirmed that “I abide by the letter and objectives of the Code of Conduct, which I understand has been effective since 1 September 2005” and requested the SP or WASPA to “convey my apologies to the complainant and assure her that I will strictly comply with the Code of Conduct.”

The Secretariat reviewed the Internet web site referred to by the IP.

Lawfulness of Service

The provisions of the Lotteries Act, Act 57 of 1997 (the “Lotteries Act”), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the “Consumer Affairs Act”) were considered.

The Lotteries Act provides the following definitions:

(xii) “lottery” includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the <i>Gazette</i> declare to be a lottery;
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(xxii) “prize” means the prize awarded to the winner of a lottery;
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(xxiii) “promotional competition” means a lottery conducted for the purpose of promoting the sale or use of any goods or services;
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The Lotteries Act further provides, inter alia:

Promotional competitions

- 54.** (1) A promotional competition shall not be unlawful if -
- (a) it is conducted in the Republic;
 - (b) the consideration payable in respect of the purchase of goods or the use of services in respect of which that promotional competition is conducted -
 - (i) is the price usually or ordinarily paid for such or similar goods or services without the opportunity of taking part in a promotional competition;
 - (ii) is not increased by the opportunity to participate in that promotional competition;
 - and
 - (iii) is the only consideration payable for those goods or services and includes consideration for the right to compete;
 - (c) the opportunity of participating in the promotional competition is not the only or the only substantial inducement to a person to purchase or use the goods or services to which the promotional competition relates;
 - (d) the promotional competition is conducted in accordance with the regulations prescribed by the Minister in terms of subsection (2) or (3);
 - (e) the promotional competition or any conduct under it is not substantially comparable to -
 - (i) a business practice which has been declared unlawful in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988); or
 - (ii) a restrictive practice which has been declared unlawful in terms of the Competition Act, 1998 (Act no. 89 of 1998);
 - (f) the Minister has not in terms of subsection (4) declared the promotional competition unlawful;
 - (g) the goods or services manufactured, sold, supplied, distributed or delivered in connection with the right to participate in a promotional competition are usually or ordinarily manufactured, sold, supplied, distributed or delivered by the person for whose benefit the promotional competition is held;
 - (h) the promotional competition is not substantially similar to any competition, game or sports pool conducted by or on behalf of the National Lottery; and
 - (i) the consideration paid for the purchase of the goods or the use of the services promoted by a promotional competition is not increased by the opportunity to take part in that promotional competition to such an extent that that promotional competition does not mainly serve as a means, method or mechanism of promoting the relevant goods or services, but substantially as consideration for the opportunity to take part in that promotional competition.
- (2) The Minister shall, after consultation with the board, with due regard to the effect of promotional competitions on the National Lottery, lotteries incidental to an exempt entertainment and society lotteries, make regulations which are necessary for the proper conduct and regulation of promotional competitions in general.
- (3) Without derogating from the generality of subsection (2), the Minister may make regulations in respect of -
- (a) the minimum age of a person who may participate in any particular competition or category of competitions;
 - (b) the conditions or circumstances under which the board or any person designated by it may without the consent of the person who conducts the promotional competition inspect any aspect, including any process or procedure, relating to a promotional competition, including the accounting procedures and the process of identifying the winner or winners of that promotional competition;
 - (c) any matter relating to the conduct of a promotional competition which may reasonably have a negative influence on or consequence for the public or a part or group thereof;
 - (d) offences and penalties for the contravention of the regulations.
- (4) The Minister may on the recommendation of the board by notice in the *Gazette* declare a promotional competition to be unlawful.
- (5) Any person conducting a promotional competition which in terms of subsection (4)

has been declared unlawful, shall immediately cease to conduct such competition and shall immediately instruct all his or her or its agents and any other person connected with that competition to immediately terminate any action connected with the conduct of that competition, and any person who fails to comply with this subsection or an instruction thereunder is guilty of an offence.

Unlawful lotteries and competitions

56. Unless authorised by or under this Act or any other law, no person shall conduct through any newspaper, broadcasting service or any other electronic device, or in connection with any trade or business or the sale of any article to the public -

(a) any competition or lottery other than one authorised by or under this Act in which prizes are offered for forecasts of the result of either -

(i) a future event; or

(ii) a past event, the result of which has not yet been ascertained or is not yet generally known;

(b) any competition other than a promotional competition contemplated in section 54 in which success does not depend to a substantial degree on skill; or

(c) any promotional competition which is the subject of a declaration contemplated in section 54(4).

General offences

57. (1) Any person who -

(a) participates in; or

(b) conducts, facilitates, promotes or derives any benefit from a lottery, promotional competition or sports pool, shall, unless such lottery, promotional competition or sports pool is or has been authorised by or under this Act or any other law, be guilty of an offence.

(2) Any person who -

(a) contravenes or fails to comply with any provision of this Act;

(b) forges or in any other fraudulent way changes any ticket or any other document or thing pertaining to any lottery or promotional competition;

(c) knowingly sells or in any other way disposes of any forged ticket or any other document or thing pertaining to any lottery or promotional competition;

(d) with intent to defraud, alters any number or figure on any ticket or any other document or thing pertaining to any lottery or promotional competition;

(e) obtains any direct or indirect financial gain, which is not solely a share in the prize payout, by forming, conducting or in any other way promoting a syndicate for the purchase of a ticket; or

(f) sells a ticket -

(i) at a price higher than that which is printed on the ticket;

(ii) on condition that the seller of the ticket shares in the prize in the event of a ticket sold by him or her being the ticket in respect of which a prize is paid;

(iii) on any condition not provided for in the rules of the lottery concerned;

(iv) on credit or with the financial assistance in any form of the seller; or

(g) conducts, organises, promotes, devises or manages any scheme, plan, competition, arrangement, system, game or device which directly or indirectly provides for betting, wagering, gambling or any other game of risk on any outcome of any lottery unless authorised by or under this Act or any other law, shall be guilty of an offence.

Prohibition of activities in Republic in relation to lottery or sports pool conducted outside Republic

59. In a prosecution arising from any thing done or not done in the Republic in connection with a lottery or sports pool, it shall not be a defence merely to prove that the management, conduct or business of or concerning the lottery or sports pool in question is or was wholly or in part carried on at a place outside the Republic.

From a review of the competition provided by the IP through the SP and the Lotteries Act (particularly those clauses indicated above) it appears that:

- The competition conducted by the IP is a lottery for the purposes of the Lotteries Act;

- Lotteries may only be conducted in South Africa in terms of a licence granted by the National Lottery Board or if they are Lotteries Incidental to Exempt Entertainment, Private Lotteries, Society Lotteries and Promotional Competitions, conducted in accordance with the Lotteries Act and the Regulations promulgated in terms of the Lotteries Act);
- The competition conducted by the IP does not fall within the definitions of Lotteries Incidental to Exempt Entertainment, Private Lotteries or Society Lotteries;
- The competition conducted by the IP may possibly be regarded as a Promotional Competition, however it does not appear to comply with the requirements in respect of Promotional Competitions as outlined in the Lotteries Act and the relevant Regulations (Regulation 672 of 2003 published in Government Gazette Number 24874) *inter alia* in the following respects:
 - the promotional competition or any conduct under it is substantially comparable to a business practice which has been declared unlawful in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) [in respect of which see below];
 - there is no promotion of goods or services;
 - consideration is payable for the opportunity to enter the competition.
- There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of the Lotteries Act and particularly the prohibition in Section 56 (b) of the Lotteries Act.

Competitions of a similar nature to that conducted by the IP have been the subject of an extensive investigation in terms of the Consumer Affairs Act. Pursuant to such investigation, General Notice 303 of 2005 was published in Government Gazette 27311 on 21 February 2005, in terms of section 12(6) of the Consumer Affairs Act. Such notice proclaims as an “unfair business practice” the business practice “whereby mail-order entities, inform consumers or potential consumers, by any means whatsoever, that they have won a sum of money or any other prize,

- (a) where the consumers have not won the money or prize mentioned in the headline; and/or
- (b) where such money or prize is subject to suspensive conditions prior to entitlement, and the suspensive conditions are not printed, immediately after the announcement of the prize, in the same letter type and size as the announcement of the prize; and
- (c) where consumers are required to send any sum of money in order to claim the prize, except such sum of money which is the purchase price for identified goods bona fide offered for purchase by the company and ordered by the consumer.”

The relevance of General Notice 303 of 2005 to the instant case is that the term “mail-order entities” is defined very broadly as “manufacturers, wholesalers or retailers who contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients. **It also includes entities who**

do not necessarily offer goods but require of consumers to forward any type of fee on order to receive a prize" (emphasis inserted). Additionally the term "prize" includes, but is not restricted to, "awards, donations, bonuses, gifts, grants, presents and rewards."

In the instant case:

- the Nokia 6680 mobile cellular telephone instrument referred to in the initial SMS message received by the complainant appears to fall within the definition of a prize in terms of General Notice 303 of 2005;
- the SMS message delivered to the complainant appears to have informed the complainant that she had won the prize (note the wording used by the IP is "been nominated to win"). The Oxford English Dictionary defines the term "nominate" as "to put forward as a candidate for [election or for] an [honour or] award." However the SMS message uses the past tense, ie "[you have] been nominated", indicating that the complainant has already been put forward as a candidate for the award and has proceeded past such stage;
- the initial SMS message seems to fall within the meaning of informing the complainant "by any means whatsoever";
- the return SMS message to the SP's short code at a cost of R30 appears to amount to a payment of a fee to the IP, collected on its behalf by the SP;
- while the IP may not be a manufacturer, wholesaler or retailer and while it may not "contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients", the IP appears to fall within the last sentence of the definition of mail-order entity in that it does "not necessarily offer goods but require of consumers to forward any type of fee on order to receive a prize".

General Notice 303 of 2005 goes further and provides that with effect from 1 May 2005, the unfair business practice (defined above) is "declared unlawful and persons are hereby directed to:

- (a) refrain from applying and/or perpetuating the unfair business practice; and
- (b) refrain at any time from applying and/or perpetuating the unfair business practice".

There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of General Notice 303 of 2005.

Decision

The Adjudicator upheld the complaint.

The Adjudicator determined that the IP had contravened the provisions of the following Clauses of the WASPA Code of Conduct:

- 4.1.1

- 4.1.2
- 5.3.1 as the SMS message constitutes spam as determined in terms of clause 5.2.1
- 6.2.3
- 6.2.4
- 6.2.5
- 6.2.6
- 9.1 (9.1.1 – 9.1.6)
- 9.3.1; and
- 9.3.3

The Adjudicator noted that neither he nor the WASPA Secretariat is a Court of Law. As such the WASPA Adjudicator cannot make a finding that competition conducted by the IP is being conducted in contravention of the Lotteries Act or in contravention of the Consumer Affairs Act (in respect of General Notice 303 of 2005). As contraventions of the Lotteries Act and the Consumer Affairs Act are criminal offences, making a finding of contravention of such legislation will require a trial to be held in accordance with South African criminal law.

Clause 3.1.2 of the WASPA Code of Conduct commits a member of WASPA, such as the SP, to lawful conduct. It is an affirmative statement requiring a positive effort on the part of the WASPA member. It is not stated in the negative (for example, "Members are committed not to participate in conduct which has been found by a court of competent jurisdiction to be unlawful and which is not the subject of an appeal"), which would obviate the need for positive effort on the part of a WASPA member.

Due to the affirmative nature of the SP's obligation in terms of Clause 3.1.2 of the WASPA Code of Conduct and the compelling *prima facie* indication of a breach of the Lotteries Act and the Consumer Affairs Act, the Adjudicator held that there was a breach of Clause 3.1.2 of the WASPA Code of Conduct.

Regarding the IP's contention that it had brought its service within the requirements of the WASPA Code of Conduct, the Adjudicator made no specific finding, as insufficient information had been provided by the IP. Nevertheless, on the facts submitted, the IP may possibly have remedied the breaches in respect of Clauses 6.2.3, 6.2.4, 6.2.5, 9.1.1 and 9.1.3 of the WASPA Code of Conduct, but had not addressed the balance of the breaches of the WASPA Code of Conduct.

In considering the sanction to be imposed arising from the numerous and egregious breaches of the WASPA Code of Conduct:

- The Adjudicator took note of the SP's submission concerning the origination of outgoing SMS messages and its role being limited to the receipt of incoming SMS messages.
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, which provides:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

- The Adjudicator had regard to the prevalence of this and similar practices and the fact that there are a number of Information Providers using WASPA members to provide services of the same or similar nature to that described in the instant complaint and General Notice 303 of 2005. Generally, when one member takes action to terminate the service, the Information Provider will move to a different WASPA member and obtain services from that member. While certain WASPA member's have been more proactive in dealing with practices of this type, no single WASPA member stands out as promoting services of this nature.

The Adjudicator imposed the following sanction:

- The SP is reprimanded for allowing the numerous and egregious breaches of the WASPA Code of Conduct by the IP.
- The SP is ordered to terminate the services of the IP.
- The SP is required to notify the Secretariat of such information as is in its possession regarding the IP, including (without limitation) the full name of the IP, the name or names of any business, partnership, company or other entity with which the IP is associated, the national identity number of the IP and the IP's full contact details, so that other WASPA members may be notified of his identity and conduct.
- The SP is ordered to pay a fine of R50 000,00.

In determining the amount of such fine the Adjudicator considered the number and egregious nature of the breaches of the WASPA Code of Conduct and the serious repercussions that contraventions of the Lotteries Act and the Consumer Affairs Act may have on the wireless applications industry as a whole. However, having regard to the SP's limited role in the practice giving rise to the complaint and the prevalence of this practice in the industry, the fine imposed is suspended for a period of twelve (12) months from date of this Report; provided that no further breach of the same or similar nature of the WASPA Code of Conduct is identified during such twelve (12) month period.

Fines are payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.