



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ExactMobile
	Cell C
Telephone Network(s)	MTN
	Vodacom
Information Provider (IP) (if applicable)	J Kotze – Company or business name not disclosed
Service Type	SMS Competition
Source of Complaints	Public
Complaint Number	#0079

Complaint

A complaint was received from a member of the public regarding an unsolicited SMS message indicating that the recipient had already won a prize.

The text of the SMS message, as supplied by the complainant, reads:

U won 6 nights in Mauritius+meals ref no 1975.Just sms 1975 to 42220 to claim your prize sms/R30=3Dtrip@Mauritius that's cheap.SMS is proof of win.

The complainant responded to this message as indicated and received a further SMS message in response, indicating:

Thank you! Now just SMS the word MAURITIUS followed by your name and postal address to 42220 (R30/SMS)

It does not appear from the complaint that the complainant persisted with the entry process, as he perceived the service to be "...completely misleading as the first sms informed me of winning the competition and so I had no problem paying R30 to claim my prize, but the fact that I had to send another sms back to them at a further cost of R30 is very deceptive. One doesn't know how many times this process will keep on going back and forth."

The Secretariat conducted an investigation into the service offered by the SP, on behalf of the IP. From such investigation it appeared that this complaint relates to the same service referred to in Complaint #0070. As such, this report does not repeat those matters already contained in the report in respect of Complaint #0070.

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.

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

4.1.6. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

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.

6.2.2. All advertisements for services must include the full retail price of that service.

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.

SP Response

- The SP response and that of the IP are the same as the response in Complaint #0070. They were considered, however are not repeated here.
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Lawfulness of Service

The key element of the complaint is a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting “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.” Clause 9.1.6(d) of the WASPA Code of Conduct was drafted having regard to 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”). While the key determination of this report concerns Clause 9.1.6(d) of the WASPA Code of Conduct, national law was also considered to ascertain the possible contravention of Clause 3.1.2 of the WASPA Code of Conduct as well as any extenuating or exacerbating circumstances regarding a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct.

Decision

The Adjudicator upheld the complaint in regard to the unsolicited SMS message and the competition promoted therein.

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

- 4.1.1 and 4.1.2 as pricing is unclear. There is no indication that multiple SMS message responses will be required. In addition, there is no indication that air-fair and airport taxes are not included.
- 5.3.1 as the SMS message constitutes spam as determined in terms of clause 5.2.1.
- 6.2.2 in that initial SMS message is an advertisement and does not include the full retail price.
- 6.2.4
- 6.2.6.
- 9.1 (9.1.1 – 9.1.6) and specifically:
 - Clause 9.1.6(a) of the WASPA Code of Conduct in that the word “win” is used to describe an item, which by the IP’s own admission, is intended to be provided to each and every participant;
 - Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for

competitions from suggesting “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.” The initial SMS message from the IP to the complainant and transmitted by the SP falls squarely within this prohibition.

The Adjudicator noted that neither he nor the WASPA Secretariat is a Court of Law empowered to consider possible violations of national law. Although there may be overlap between certain national laws and the WASPA Code of Conduct, any findings and sanctions referred to in this Adjudication are founded purely on any infringements of the WASPA Code of Conduct. 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 9.1.6(d) of the WASPA Code of Conduct overlaps to some extent the national law referred to above and the Adjudicator is empowered by the WASPA Code of Conduct to find breaches thereof and to impose sanctions in respect of breaches found.

The Adjudicator was concerned by the IP’s question as to why the SP did not indicate that there was or may be a problem with the competition service offered by the IP through the SP, or that the initial SMS message may be misleading. Clause 3.9 of the WASPA Code of Conduct, 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.

Clause 3.9 of the WASPA Code of Conduct does not impose an obligation on the SP to inspect or supervise the activities of its information providers, however the SP cannot absolve itself of its responsibilities for compliance with the WASPA Code of Conduct simply because a service is provided by an information provider. The SP has indicated significant and substantial steps to inform and assist information providers such as the IP to bring their services within the ambit of the WASPA Code of Conduct. While the IP’s question is noted, the SP’s submission indicates the degree of care expected of a member of the WASPA regarding its information providers.

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.

Sanction

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

- The Adjudicator took note of the sanctions imposed on the SP and other SPs in complaints of a similar nature, in particular Complaint #0070.
- The Adjudicator considered the significant and appropriate steps taken by the SP to ensure compliance with the WASPA Code of Conduct by its information providers.
- The Adjudicator took note of the fact that this complaint is distinguishable from certain of the other complaints in that SP was responsible for transmitting the initial solicitation SMS message to the complainant.
- The Adjudicator considered Clause 3.9 of the WASPA 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 had regard to the fact that this is the second breach of the Code of Conduct found in respect of the SP in respect of a substantially similar service, which appears to be provided by a different information provider.
- The Adjudicator considered the fine imposed on the SP in respect of a previous complaint, the fact that such fine was suspended on certain conditions and the conditions of such suspension. In particular, the Adjudicator recognised that the fine was imposed on the SP after the instant complaint was submitted.

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 refund the complainant the amounts expended by him in respect of this service, being a "reasonable and valid claim[s] for compensation" in terms of Clause 13.4.1(d) of the WASPA Code of Conduct.
- The fine of R25 000,00 imposed in Complaint #0070 shall apply in respect of this .complaint and no further fine was imposed in respect of this complaint.

This finding and the sanctions imposed shall not impact on the suspension of the fine in respect of Complaint #0033, as the instant complaint was submitted prior to the finding in Complaint #0033 being notified to the SP.

Clause 13.3.13 of the WASPA Code of Conduct indicates that the SP "must, within five working days, comply with any sanction imposed, or notify the secretariat that it wishes to appeal against the decision of the adjudicator.