



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Opera Interactive
Information Provider (IP):	MobiMedia
Service Type:	Competition
Source of Complaints:	Public
Complaint Number:	7103
Code Version (CoC):	Code of Conduct 7.4
Date of Adjudication:	15 January 2010

Complaint

1. On the 21st July 2009 a complaint was lodged with the WASPA secretariat by a journalist relating to short code 41933 which is operated by Opera Interactive in which the complainant indicated that s54 of the Lotteries Act 57 of 1997 (hereinafter the “Lotteries Act”) has been contravened in that the premium SMS used by Avusa in the Times Newspaper was in contravention of the Lotteries Act.
2. In addition the complainant indicated that the “promotional competition” as defined in the Lotteries Act did not promote anything. A copy of the advertisement is attached hereto as Annexure A.

SP Response

3. On the 29th July 2009 a representative of the SP replied on behalf of both it and the IP in this matter. In the reply the writer dealt with complaints 7103, 7104 and 7105 as they turned on the same facts in the SP’s opinion.
4. In the reply the SP indicated that it was unclear which portions of the WASPA code of conduct (CoC) had been breached in that the specific clause of the CoC was not quoted

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by the complainant.

5. However assuming that the complainant was indicating that the competition in question was an illegal lottery, the SP indicated the following:
 - 5.1. The competitions are promotional competitions in line with the Lotteries Act promoting publications and/or other mobi-sites;
 - 5.2. That WASPA adjudicators are not in a position to judge whether a competition is or is not an illegal lottery;
 - 5.3. Complaints about the service in question have already “been through the National Lotteries Board”; and
 - 5.4. The cost of entry to the promotional competition was not excessive and all other WASPA rules relating to competitions were adhered to.
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Complainant Response

6. The Complainant then responded to the SP’s response above and indicated that:
 - 6.1. While the CoC does not spell out the rules regarding the Lotteries Act and other acts, there was nonetheless an advisory that was issued by the WASPA secretariat which dealt with illegal lotteries;
 - 6.2. In his opinion the WASPA advisory notice contradicts the SP’s statement that the competition is a promotional competition in terms of the Lotteries Act;
 - 6.3. The Complainant undertook to follow up with the National Lotteries Board in order to establish what the outcome was in terms of that complaint;
 - 6.4. The point was not whether the public were paying too much for entry into the competition but rather whether there was an “entrance fee” which the complainant said the SP had admitted in its reply (i.e. a premium rated SMS);
 - 6.5. The purpose of the complaint was not to establish whether the Lotteries Act had been contravened, but rather whether the WASPA advisory had been contravened.
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Request to WASPA secretariat

7. As a result of the Complainant's allegation relating to a WASPA advisory, the adjudicator requested that the WASPA secretariat provide the adjudicator with the WASPA advisory in question.
 8. The WASPA secretariat responded by providing a WASPA notice (attached hereto as Annexure B) as well as a WASPA advisory (attached hereto as Annexure C) and referring to the WASPA Advisory web page which can be found at <http://waspa.org.za/code/advisory-notices.shtml>.
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Portions of the Code of Conduct (version 7.4) considered:

9. **3.1.2.** Members are committed to lawful conduct at all times.
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Decision

10. This adjudication is the first in a series of complaints by the same complainant dealing with a breach of the Lotteries Act. Before dealing with this complaint specifically it is useful to consider several procedural questions in general before returning to this specific complaint.

WHETHER WASPA MEMBERS ARE BOUND BY WASPA ADVISORIES

11. The Complainant alleges that WASPA members are bound by WASPA advisories. In order for this statement to be true the CoC must indicate that any advisories sent out by the WASPA secretariat are binding on members. A brief glance at the CoC will indicate that the WASPA advisories are not mentioned and as such are not binding on the WASPA members in terms of the CoC. Indeed further support for this position can be found in the WASPA advisory itself (see Annexure C) which indicates that the advisory is not legal advice (or binding on the WASPA members).
12. This of course does not mean that the WASPA advisories do not serve a useful purpose.

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The WASPA management committee has a responsibility to keep its members up to date with changes to the legislative climate as well as inform them of the ways in which the WASPA Code of Conduct has been interpreted by adjudicators and the WASPA appeal panels. Essentially the purpose – broadly speaking - of a WASPA advisory is to draw the attention of the WASPA members to an important issue which would affect them and, if appropriate, suggest that care be taken when approaching this issue. As the administrative body tasked with facilitating the adjudications process it would be inappropriate for the WASPA secretariat to act as both the adjudicator and the neutral third party administering the adjudication.

13. Thus it is possible, but hopefully unlikely, that a WASPA advisory could be held to be completely incorrect by a WASPA adjudicator and it would be this adjudication - rather than the WASPA advisory – which would be binding on the WASPA members.
14. As a final comment on WASPA advisories, it is worth noting that the action of ignoring a WASPA advisory by a WASPA member could well be taken into account by the adjudicator as an aggravating factor when considering the sanction to impose, but the breach or failure to abide by a WASPA advisory is not – on its own – a breach of the WASPA Code of Conduct and is not liable to be sanctioned by an adjudicator. Rather it is the portion of the CoC that the WASPA advisory alluded to which would be breached.

COMPLIANCE WITH WASPA ADVISORY BY SP AND IP

15. Turning back to this specific complaint it can be seen from the above that a failure by a WASPA member to comply with a WASPA Advisory would not be considered to be a breach of the WASPA CoC and as such this complaint against the SP and IP is dismissed.
16. It should be noted, however, that the WASPA secretariat was unable to find any WASPA advisory that pre-dated the complaint by the Complainant¹ and so it is not entirely clear which advisory the Complainant was referring to.
17. However the WASPA secretariat was able to find a notice that was provided to WASPA members (see Annexure B). Although this is not a WASPA advisory it would appear to be more than likely that the complainant is referring to this particular notice.

WHETHER AN ALLEGATION OF SPECIFIC BREACH OF CLAUSE OF THE COC IS REQUIRED

18. The SP in this matter alleged that there had been no clear indication of what clause of the CoC had been breached. Unsurprisingly the failure to inform a defendant or respondent of the clause/s of the CoC which have been breached would normally be seen as breaching the right of the defendant to know the charge that has been put against it. In this respect I am indebted to the adjudicator in complaint 0411 who sets out the argument relating to this question as a point *in limine*. This adjudication in turn refers to appeal panel decisions of complaints 0001, 0002, 0011, 0026, 0037 and 0058.
19. In the said adjudication the adjudicator took the position that the complaint need not refer to the specific clause that has been breached, but must indicate with sufficient specificity from the complaint what the breach would be. From this specific complaint it is clear that the complainant was referring to the fact that the competition was unlawful and the SP responded to that allegation in its reply. As a result I find that the SP and/or IP have not suffered any prejudice from the failure to specify the exact clause number.

ADJUDICATOR ABILITY TO PRONOUNCE ON LAWFULNESS OF CONDUCT (3.1.2)

20. Turning to the question of lawful conduct, the SP and IP in question indicate that the WASPA adjudicator is not in a position to determine the lawfulness or not of a specific service or action. As such - it can be inferred - the SP is of the opinion that until such time as the SP in question has been found to have contravened the laws of the Republic of South Africa by a court of law, the WASPA adjudicator would be unable to make a finding that clause 3.1.2 of the CoC has been breached.
21. This question has been dealt with in several past WASPA adjudications, including more notably in complaint 0067 in January 2006. In this adjudication the adjudicator notes that the WASPA adjudicators are of course not judges in criminal cases, but rather are confined to the ambit of the WASPA Code of Conduct.
22. Notwithstanding this, however, he notes:

1 Please refer to clause 8 (above) and Annexure C. Annexure C is dated the 26th November 2009 and post-dates the complaint by several months.

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22.1. *“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.”*

23. I respectfully concur with this approach.

24. Taking this question one step further, it would appear to be appropriate to approach the question of the lawfulness of a WASPA member’s conduct using the test of “on the balance of probabilities” rather than the traditional test for lawfulness for criminal actions which is “beyond reasonable doubt”. The reason behind this would be that a finding by a WASPA adjudicator can never be held to be a criminal sanction (although it could possibly be used in a criminal case) as the WASPA adjudicator is not empowered by the necessary legislation to make such a determination.

25. As a result I find that a WASPA adjudicator is able to make a finding of the lawfulness of a service and indeed this has been done several times in past WASPA adjudications.

ILLEGAL LOTTERIES – THE CONCEPT OF A “SUBSCRIPTION” TO A COMPETITION

26. As a result of the conclusion regarding lawfulness reached above, it is necessary to consider whether the competition as enabled by the SP and IP for the Times newspaper is lawful or not.

27. One of the leading cases when dealing with this issue is *FirstRand Bank v National Lotteries Board* [2008] 3 All SA 121 (SCA). In this matter First Rand Bank (hereinafter “FRB”) ran a competition which encouraged people to deposit their money in a 32-day fixed deposit FRB bank account. If an account holder did deposit money during that period then he would qualify to win one or more prizes which were randomly allocated,

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the largest of which was one million rand.

28. The South African Supreme Court of Appeal (SCA) held that the competition was a “lottery” as defined in the Lotteries Act 57 of 1997. However the competition would be exempted from the ambit of the Lotteries Act if there was no “subscription” or payment by FRB’s clients². FRB argued that by failing to levy any fee or subscription it was thus not running an illegal lottery. The SCA disagreed with this and indicated that the mere fact that FRB was able to garner additional interest in the period during which it held the public’s money could be classed as a “subscription”. It is important to note that there was never any allegation in this case that this competition qualified as a “promotional competition” in terms of the Lotteries Act and as such this aspect was not canvassed in this decision.
29. A second leading case when dealing with this issue is National Lotteries Board v Bruss NO and others [2009] 2 All SA 164 (SCA) or the so-called “Winikhaya” case. In this case a Trust (as represented by Bruss and others *nomine officii*) operated a competition for the benefit of well known charities in South Africa. The National Lotteries Board sought to declare the competition an illegal lottery in terms of the Lotteries Act.
30. In its defence Bruss NO relied firstly on the argument that a lottery where there was no “subscription” (or fee paid) and thus the competition was not subject to the Lotteries Act in terms of s63 which reads:
- 30.1. *“Nothing in this Act shall apply in relation to any lottery, sports pool or competition in respect of which there is **no subscription**” (my emphasis).*
31. Harms JA rebutted the contention by the Trust operating the Winikhaya competition that there was no “subscription” to the competition as defined, as a premium rated SMS which cost R7.50 was required to enter into the competition. The learned judge went one step further to indicate that the mere delivery of a postcard as an alternative means to enter the competition was also considered to be a “subscription” in terms of the Lotteries Act³.

² See s63 of the Lotteries Act.

³ It should be noted that this decision is consistent with the decision of FirstRand Bank v National Lotteries Board [2008] 3 All SA 121 (SCA).

32. ILLEGAL LOTTERIES – PROMOTIONAL COMPETITIONS

33. The learned judge in the Winikhaya matter then went on to consider whether the competition was a “promotional competition” (which is one of several permitted competitions/lotteries in terms of the Lotteries Act)⁴. In order for a competition to qualify as a “promotional competition” the competition has to satisfy several requirements which are set out in s54(1) of the Lotteries Act and these requirements are sufficiently important to bear reproduction here:

34. 54. *Promotional competitions*

*(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, excluding discounts, 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

⁴ The other types of competitions that are allowed are: Society Lotteries, private lotteries, entertainment lotteries and promotional competitions. For the purposes of this complain the only type of lottery that is applicable is a promotional competition.

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(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;

(i) the promotional competition is not substantially similar to any competition, game or sports pool conducted by or on behalf of the National Lottery; and

(j) 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. (my emphasis)

35. As can be seen from the above text, there are several requirements that must be met by the promoter of a competition in order to be classed as a “promotional competition” and so avoid running afoul of the Lotteries Act. To assist with an understanding of the above legislation a summary (which is necessarily less exact than the legislation quoted above) is helpful. In short to qualify as a promotional competition the competition must:

35.1. Be in South Africa;

35.2. Not demand an increased price for the goods or services for the public to enter the competition and furthermore the price of the goods must **include** the right to enter into the competition (i.e. there must be no further consideration payable in order to enter into the competition);

35.3. Have a good or service which is the purpose of the promotional competition (or in other words the competition itself is not the sole focus of the competition but rather the product or service would be the focus of the competition);

35.4. Not be contrary to existing practices that have been outlawed by the Minister or by the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) or Competition Act, 1998 (Act No. 89 of 1998);

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-
- 35.5. Be for the benefit of the entity that normally produces the goods or services⁵;
- 35.6. Not be similar to any competition run by the National Lottery;
- 35.7. Ensure that the goods or services are not increased in price as a means to invite the public to participate in the competition rather than to buy the goods or services.
36. Returning to the WiniKhaya case, Harms JA then went on to indicate that the failure by the Winikhaya competition to promote specific goods or services⁶ caused it to fall outside of the definition of a “promotional competition”. Once it was established that the Winikhaya competition was not a promotional competition it was then deemed an illegal lottery in terms of s56 of the Lotteries Act – notwithstanding that laudable objective of benefitting charities – and told to cease operations.

WHETHER PROMOTIONAL COMPETITIONS CAN REQUIRE FURTHER CONSIDERATION FROM PARTICIPANT

37. Unfortunately neither FirstRand Bank v National Lotteries Board [2008] 3 All SA 121 (SCA) nor the National Lotteries Board v Bruss NO and others [2009] 2 All SA 164 (SCA) were concerned with a promotional competition and where an entry fee (such as a premium-rated SMS) was required and where a specific product or service was promoted⁷. While the Winikhaya case was extremely similar to the facts of the current complaint, the judge was not required to indicate whether the use of a premium-rated SMS would have contravened s54 of the Lotteries Act and thus disqualify the competition from being able to be classed as a “promotional competition”. Rather the learned judge relied on the failure to promote a specific product or service as the reason the Winikhaya competition was not a promotional competition and thus an unlawful lottery.

⁵ It should be noted that this section was rejected in the Winikhaya case as a definition in the regulations was used to define the Act which was impermissible. Instead Harms JA indicated that there was no reason why goods and services of those other than those goods produced or provided by the entity running the promotional competition may be promoted within the definition of a “promotional competition”.

⁶ See s54(1)(c) of the Lotteries Act.

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38. In order to assist us with this question three sources can be of use. The first is an advisory by the National Lotteries Board (the body tasked with policing lotteries in South Africa) which released a press release to the following effect on the 02nd June 2006:

38.1. *“The National Lotteries Board is not opposed to companies promoting their goods or services through competitions, provided that all legislation is adhered to. It has come to the attention of the Board that there are some companies who, under the guise of promotional competitions, are in fact running illegal lotteries. Many of these are conducted through cellphones. Participants are charged rates higher than the normal cellphone sms rate. This is not allowed and it is the intention of the Board to clamp down on these activities. The public is advised that participation in illegal lotteries is illegal.”⁸*

39. This position was repeated in a press release on the 4th February 2009:

39.1. *“The last type of lottery is a Promotional Competition, which is used by manufacturers of products or providers of services. This type of lottery is to encourage the purchase of the goods or the use of services. However, in participating in the competition, the participant is not expected to pay more than the usual cost of the product or service. If it is required that the entry is submitted by mail or SMS, the cost of mailing or SMS should not be increased in any way.”⁹*

40. Previous WASPA adjudications are of course another reference point to determine this issue. As far back as 31 January 2006 complaint 0067 dealt with the question of requiring consideration in order to enter into a competition. In this adjudication it was stated:

40.1. *“The competition conducted by the IP may possibly be regarded as a Promotional Competition and the IP on its Internet web site attempts to create this impression, 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:*

40.1.1. *the promotional competition or any conduct under it is substantially comparable to a business practice which has been declared unlawful in terms*

⁸ See Annexure D.

⁹ See Annexure E.

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of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) [in respect of which see below];

40.1.2. *there is no discernable promotion of goods or services, despite numerous references to undisclosed "services" on the IP's web site;*

40.1.3. *consideration is payable for the opportunity to enter the competition.*

40.2. *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." (my emphasis)*

41. The adjudicator went on to find that the competition referred to in complaint 0067 was prima facie unlawful and thus breached clause 3.1.2 of the CoC¹⁰.

42. Finally reference can be made to the s54 of the Lotteries Act as well as the associated regulations¹¹. While the regulations do not assist us in determining the answer to this question, s54(1)(b)(iii)¹² deals with the question of additional consideration for the right to compete in the promotional competition and makes it clear that the only consideration that must be paid by the participant to enter into the competition must be the price of the service or good, and even the good or service itself cannot be increased in price to cater for the competition.

43. As a result of the above it is my determination that the use of premium-rated SMS in a competition would disqualify the competition from being able to be classed as a "promotional competition" and would thus result in the competition being an illegal lottery in terms of s56 and liable to prosecution under s57 of the Lotteries Act.

WHETHER THE TIMES NEWSPAPER COMPETITION IS A PROMOTIONAL COMPETITION

44. The Complainant also alleged that the competition was not connected to any good or service. I cannot agree with this contention as it would appear that the competition was created in order to promote the Times newspaper which would need to be purchased in order for the participant to know which word he/she would need to send via SMS. As a

¹⁰ See further complaints 0070, 0079 and 0411.

¹¹ Published under Government Notice R672 in Government Gazette 24874 of 16 May 2003.

¹² See clause 35 above.

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result, and unlike the finding in the Winikhaya case above, the promoter and by extension the SP and IP complied with the requirement of s54(1)(c) of the Lotteries Act.

45. It is common cause that the competition as set out in Annexure A required the participant to send a premium-rated SMS at the cost of R2.00 per SMS to the SP/IP. As a result this competition has been determined not to be a promotional competition for the purposes of the Lotteries Act and furthermore is an illegal lottery as defined in s56 of the Lotteries Act.
46. As indicated above while an adjudicator is not empowered to deliver a criminal sanction in terms of South African law, he/she is empowered and enjoined to ensure that WASPA members are engaged in lawful conduct which does not breach clause 3.1.2 of the CoC.
47. The SP's contention that the competition has already "been through the National Lotteries Board" is a bare statement that is unsupported by any proof. The fact that the National Lotteries Board has released a press statement which expressly condemns the actions the use of premium-rated SMS' for "promotional competitions" makes it difficult to credit that this statement is correct. However, even if the National Lotteries Board were to have found this competition to be an acceptable promotional competition the adjudicator would not be bound by that determination, but rather only by a like determination by a court of law. Of course a determination to that effect by the National Lotteries Board would in all likelihood have a large persuasive effect on the adjudicator.
48. Finally the question of whether or not the cost of entering into the competition was "excessive" or not is as irrelevant as the fact that the Winikhaya competition was for the benefit of charities. While this can be considered as a mitigating factor when determining a sanction, the fact that a premium-rated SMS is R2.00 per SMS or R20.00 per SMS is merely a question of degree rather than a question of whether the competition is legal or not.

Mitigation/Aggravation

AGGRAVATION

49. In aggravation of the circumstances:

- 49.1. The SP and IP had been warned by WASPA to be cognisant of the situation

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regarding promotional competitions.

49.2. Several prior WASPA decisions as far back as 2006 had indicated that the practice of charging a consideration over and above the product or service cost to enter into a promotional competition was illegal and contrary to clause 3.1.2 of the CoC.

49.3. The practice of using premium rated SMS' is widespread and pervasive in South Africa and this practice continues to flourish due to the obvious financial benefit gained by the product or service promoter, the SP and the IP involved.

49.4. The SP has been involved in several promotional competitions and has recently been fined an amount of R600 000.00 in terms of adjudication 6858 and clearly has a torrid record with compliance with the WASPA Code of Conduct.

MITIGATION

50. In **mitigation** of the circumstances:

50.1. The IP has made an effort to communicate with WASPA regarding these matters;

50.2. The service has since finalised on the 5th June 2009 and thus there is no ongoing illegality;

50.3. The amount of the premium-rated SMS exceeded the normal cost of an SMS was not overly large.

50.4. Neither the SP nor the IP have been found guilty of breaching clause 3.1.2 previously.

50.5. To the best of my knowledge there have been no complaints relating to the actual competition or prizes awarded and both the promoter and the participants would appear to be happy to conduct and participate in the competition respectively if the competition were to be legal.

Sanction Imposed

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51. As a result of the breach of clause 3.1.2 of the CoC I impose the following sanctions:

51.1. The SP and IP are each fined an amount of R100 000.00, R90 000.00 of which is suspended for a period of a year from the date of this adjudication provided that the SP or the IP are not found guilty of charging premium-rated SMS' for a promotional competition in breach of s54 of the Lotteries Act after the date of this adjudication.

51.2. The WASPA Secretariat is ordered to notify all WASPA members of this adjudication within 5 (five) days of the date of publication of this Adjudication on the WASPA web site.

52. As a final comment it takes no particular talent to discern that “promotional competitions” have been milked by WASPA members as much as possible in order to increase their revenue. While this adjudication will undoubtedly have serious financial ramifications for the WASPA community, WASPA has a duty to uphold the laws of South Africa and the fact that criminal prosecution for illegal lotteries has, until now, been largely absent from the South African landscape cannot result in WASPA allowing illegal activities to continue by its members.

Appeal

Please note that should the SP or IP wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.6 of the Code of Conduct version 7.4.

Annexure A

PLEASE NOTE THAT SOME IDENTIFYING PERSONAL INFORMATION HAS BEEN REMOVED BY THE ADJUDICATOR DUE TO THE FACT THAT THIS ADJUDICATION WILL BE PUBLICLY AVAILABLE.

Mobi Cash Competition WIN R5 000 TODAY

Today's unique word is 'SKELETON'

There's R5 000 to be won every day for three weeks in The Times and R25 000 every week in the Sunday Times. It's so easy, simply SMS today's unique word, followed by your name to 41933. SMS costs R2. You'll automatically be entered into today's cash give-away. It pays to be on Times Mobi!

The Times

Terms & Conditions: SMS costs R2. Free SMSs do not apply. Errors billed. Entries received after 17h30 will not qualify for entry into the daily draw. Winners will be announced in the next available edition of The Times and on our mobi site <http://m.thetimes.co.za>. Employees of Avusa and Opera Interactive and their families are not eligible to enter the competition. Competition runs from 18 May to 5 June 2009. In the case of a dispute, the editor's decision is final.

Annexure B

----- Original Message -----

Subject: [WASPA] Notice Regarding Premium Rated SMS Competitions

Date: Thu, 4 Dec 2008 07:02:13 +0200

From: Leon Perlman <removed by adjudicator>

To: <removed by adjudicator>

Dear WASPA member

The Supreme Court of Appeals this week ruled in favour of the National Lotteries Board in its case against the "Winikhaya" competition.

Winikhaya primarily uses premium rated SMSs as the entry mechanism for the competition.

A copy of the judgement is attached for your attention.

While we are in discussions with some of the role players in respect of the short & long-term implications of the judgment, WASPA in the interim wishes to advise its members to immediately exercise caution in respect of both current and planned future competitions that may be affected by this judgement.

As there are many permutations of competitions, WASPA cannot at this stage give specific advice as to the current legality of specific competitions. WASPA does however note the finding by the Supreme Court of Appeal that the "Winikhaya" competition is NOT a promotional competition, which may be an issue of significance for WASPA members.

All members who are engaged in competitions are thus strongly urged to immediately consult their legal advisors to determine the legality of competitions they run or facilitate. Please also consult the Lotteries Act as amended and associated regulations (attached).

Further, if you are aggregating on behalf of others, you are strongly advised to immediately send a copy of the judgement to them and to also advise them to immediately consult their legal advisors.

WASPA notes the stated intention of the beneficiaries of the "Winikhaya" competition to challenge certain issues regarding this judgement with the Constitutional Court. We will update you as the events unfold.

Warm Regards, & Seasons Greetings
The WASPA Mancom

Annexure C

----- Original Message -----

Subject: [WASPA] Lotteries Board & SMS Competitions Update

Date: Thu, 26 Nov 2009 14:04:07 +0200

To: <removed by adjudicator>

Dear WASPA Member

We wish we bring to your attention again issues surrounding using PSMS for entering competitions. Please see attached a letter being sent by the Lotteries Board to some WASPs in this respect.

To summarise the issues around competitions referred to in the attached NLB letter:

1. If there is no company being promoted in a competition advertisement and the competition is simply based on an advertisement to win, for example, a car or cash, and the competition uses PSMS for entry, then the competition would probably be considered an illegal competition by the NLB and possibly be subject to criminal sanctions.
2. If a competition is specifically to promote a specific brand or company and the competition is incidental to this, then you can ONLY charge standard rate for the competition entry. In other words, neither the promoter nor the WASP/IP cannot make any profit (that is, any revenue share) from the competition entry. To be clear, in the NLB's opinion, you may not use any PSMS rate bands for entering promotional competitions. Anyone contravening this rule may possibly be subject to criminal sanctions.

WASPAs Code Of Conduct Competition rules are also in effect.

Note that this reminder from WASPA is not legal advice. As before, all parties are strongly advised to contact an attorney and the NLB before devising and launching any competitions. You should also forward the contents of this email to your clients who may have queries regarding SMS-based competitions.

Regards
WASPA

Annexure DPRESS RELEASES

2/6/2006

Illegal Lotteries

PRESS RELEASE

ISSUED BY: National Lotteries Board

CONTACT: Sershan Naidoo – Manager Player Services & Media Liaison

TEL: 012-394 3468

FAX: 012-394 4468

DATE: Thursday, February 3rd 2006

ILLEGAL LOTTERIES

As the industry watchdog, the National Lotteries Board is becoming aware of more and more illegal lotteries, many of which are conducted through cellphones.

All lotteries in South Africa are governed by the Lotteries Act (No. 57 of 1997) and related Regulations. It is the duty of the National Lotteries Board to ensure that all who conduct such lotteries do so within the ambit of the legislations.

The Lotteries Act identifies the following different types of lotteries:

1. The National Lottery
2. Society Lotteries
3. Private Lotteries
4. Lotteries Incidental to Exempt Entertainment
5. Promotional Competitions

A lottery is a competition in which prizes are distributed by lot or chance, normally where there is a winner drawn.

The National Lottery is currently operated under Licence by Uthingo Management. The Board is in the process of evaluating bids for the next Lottery Licence, which will commence in March 2007. The Lotteries Act allows the Minister of Trade & Industry to issue only one licence at a time.

Society lotteries are lotteries conducted by non-profit organisations in order to raise funds for the organisation. These take the form of raffles. All lotteries where the more than R10,000.00 will be raised through the sale of tickets must be registered with the Board.

Private lotteries are lotteries conducted amongst a group of individuals who reside or work together or amongst members of a sport or social club. Ticket sales must not exceed R10,000.00 and the cost of a ticket must not exceed R10.00. There must be no advertising or sale of tickets outside the club, residence or premises.

Lotteries incidental to exempt entertainment are lotteries conducted at bazaars, fairs, fetes,

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dinners, dances or similar events. Tickets sale should not generate more than R10,000.00. The cost of each ticket should not exceed R10.00. The cost of the prize is limited to a maximum of R5,000.00.

Promotional competitions are lotteries conducted in a manner that will promote the use or sale of goods or services. However, participants should not pay more than normal cost of the item or service in order to participate.

The National Lotteries Board is not opposed to companies promoting their goods or services through competitions, provided that all legislation is adhered to. It has come to the attention of the Board that there are some companies who, under the guise of promotional competitions, are in fact running illegal lotteries. Many of these are conducted through cellphones. Participants are charged rates higher than the normal cellphone sms rate. This is not allowed and it is the intention of the Board to clamp down on these activities. The public is advised that participation in illegal lotteries is illegal.

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Annexure E

<http://www.nlb.org.za/PressRelease040209.htm>

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DATE: 4 February 2009

WiniKhaya Competition is Unlawful

In 2003, the South African Children's Charity Trust (SACCT) initiated the WiniKhaya competition under the guise of a promotional competition. When the National Lotteries Board, the regulator of all lotteries in SA, investigated the competition, it established that the WiniKhaya competition was illegal. The Board contacted the organisers and asked them to cease and desist; failing which legal action will be taken. SACCT refused to cease and the matter went to court.

When the matter was heard in the High Court, the Court held that the Lotteries Act did not give the National Lotteries Board the authority to approach the Court. This was despite another judge in the same Court having found that the National Lotteries Board did have the requisite authority. The National Lotteries Board, accordingly, appealed to the Supreme Court of Appeal which overturned the ruling of the High Court. The Supreme Court of Appeal found that the WiniKhaya competition was unlawful. The SACCT then referred the matter to the Constitutional Court who, last week, dismissed SACCT's application for leave to appeal on the basis that the appeal had no prospects of success.

The duty of the National Lotteries Board is to ensure that all lotteries (games of chance) are conducted within the ambit of the Lotteries Act and that all due procedures are followed.

Lotteries can be divided into different categories. The first being the National Lottery, which is currently run under licence by Gidani. Gidani operates the National Lottery and related games as identified in Licence to Operate the National Lottery. NGOs who want to raise funds to support and fund their philanthropic activities may also run lotteries as laid out in regulations linked to Society Lotteries. Private Lotteries are conducted amongst a closed group of people where the income is distributed as prizes. There are also lotteries run at fairs and fetes to raise funds for philanthropic work. The regulations are clear about costs and expenses and how the funds are to be split between expenses and prizes and the actual amount that goes to the charity. The last type of lottery is a Promotional Competition, which is used by manufacturers of products or providers of services. This type of lottery is to encourage the purchase of the goods or the use of services. However, in participating in the competition, the participant is not expected to pay more than the usual cost of the product or service. If it is required that the entry is submitted by mail or SMS, the cost of mailing or SMS should not be increased in any way.

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Winikaya maintained that they were promoting their partners products and services. The NLB disagreed because entry was not linked to the purchase or use of goods or service. Participants were only required to send an SMS to the value of R7,50 in order to be entered into the draw and the partners were identified in the adverts. This is clearly a lottery and therefore illegal.

The National Lotteries Board would also like to stress that there was no regulation of this illegal lottery and also no indication of what the costs were and the actual percentage of the income that went to the identified beneficiaries. The Board also disagrees with the claim that there is a lack of funding to Charities. Since the inception of the National Lottery in 2000, more than R6 billion has gone to more than 10 000 applicants of funding. Never before has this been achieved in South Africa. Of the 4 main beneficiaries identified in the WiniKhaya competition, CHOC, Cotlands and SA Red Cross Society are also beneficiaries of National Lottery funding.

National Lottery funding is applications-based and all applicants like Cotlands, CHOC and SA Red Cross Society who meet the requirements will be considered for funding provided they submit an application within the identified timeframes. Charity organisations may also run their own competitions to raise funds for their organisations. In doing so, they have control over what they raise while following guidelines with regard to expenses. The regulations also ensure that the draws are transparent, that those who win will get their prizes and more importantly that sufficient funds are raised for the charity. The National Lotteries Board would like to emphasise that there is no objection to promotional competitions, provided they are conducted within the ambit of the law. Trying to raise funds using illegal methods will not be tolerated whether for worthy causes or otherwise.

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