

# **REPORT OF THE ADJUDICATOR**

| Complaint reference number:        | #7163                 |
|------------------------------------|-----------------------|
| WASPA member(s):                   | MyBeat Interactive    |
| Membership number(s):              | 0036                  |
| Complainant:                       | Public                |
| Type of complaint:                 | Unlawful Lottery      |
| Date complaint was lodged:         | 2009-07-28            |
| Date of the alleged offence:       | 2009-07-27            |
| Relevant version of the Code:      | 7.4                   |
| Clauses considered:                | 3.1.2, 13.1.6, 13.3.8 |
| Relevant version of the Ad. Rules: | Not applicable        |
| Clauses considered:                | Not applicable        |
| Related cases considered:          | 7103-7105             |

## Complaint

 On the 28 July 2009 a complaint was submitted to the WASPA secretariat by a journalist relating to short code 35800 which is operated by Mybeat Interactive in which the complainant indicated that the SP had contravened the Lotteries Act 57 of 1997 (hereinafter the "Lotteries Act") by running a "Michael Jackson" competition on Algoa FM.

### **SP Response**

2. On the 01st August 2009 a representative of the SP replied in which it denied that the Lotteries Act had been contravened and attached an opinion from Pagdens Attorneys in support of the opinion that the Lotteries Act had not been contravened.

### **Complainant Response**

3. The Complainant then responded to the SP's response above and indicated that he had forwarded his complaint to the Lotteries Board and that, in addition, it was clear that a WASPA directive had been contravened by the SP in the matter.

## **Request for Further Information**

4. The adjudicator then on 15 February 2010 requested further information from the SP in question in order to obtain the original advertisement.

#### **SP Response**

5. The SP replied on by indicating that it requested a postponement of the complaint pending the Appeal decision in the matters of complaints 7103, 7104 and 7105 which was dealing with the exact same issue. In consultation with the WASPA secretariat this postponement was duly granted by the adjudicator.

Complaint #7163

## Outcome of Appeal in complaints 7103, 7104 and 7105

6. The appeal in the above complaints was duly delivered on the 04 January 2011. Within the appeal it was duly found that WASPA adjudicators do not have the right to make a finding on the lawfulness or otherwise of WASPA members' conduct. As the merits of this argument were fully traversed within that adjudication which is easily available on the WASPA web site they are not repeated here.

## **Complainant Dies**

7. Thereafter on the 09 June 2011 the WASPA secretariat was informed by the complainant's wife that the complainant had passed away and further that she wished to close all complaints lodged by her husband.

# Portions of the Code of Conduct (version 7.4) considered:

- 8. **3.1.2.** Members are committed to lawful conduct at all times.
- 9. **13.1.6**. The secretariat may initiate a complaint against a member on behalf of WASPA, should it become aware of an apparent breach of the Code.
- 10. **13.3.8**. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

## Decision

- 11. From the above facts it is clear that whether there has or has not been a breach of the Lotteries Act is irrelevant for the purposes of this adjudication as WASPA adjudicators do not have the jurisdiction to make a finding on this issue.
- 12. While the above conclusion essentially concludes this adjudication, three additional questions are of somewhat academic interest, which are:
  - 12.1. In the event that the complainant withdraws the complaint must the adjudicator abandon the complaint? and

- Report of the AdjudicatorComplaint #716312.2.Should this complaint be referred to the Lotteries Board for further<br/>investigation?
- 12.3. Does a delay in the adjudication of a matter influence the outcome of the adjudication?
- 13. In answer to the first question it is clear from the Code of Conduct that the Adjudicator has the power to advise the SP of any additional potential breaches of the Code of Conduct that he/she may discover (in section 13.3.8) and, after putting these to the SP/IP in question has the power to make a finding on whether the identified portions of the code of conduct have been breached. In addition the WASPA secretariat itself has the power to (section 13.1.6) lodge a complaint against a member. As a result it is clear that the withdrawal of a complaint by the complainant may result in the complaint being withdrawn, but this need not invariably be the case and once the matter is before the adjudicator the matter may still continue notwithstanding the withdrawal of the complaint by the complainant (or in this case by his executor).
- 14. As the complainant has already referred the above complaint to the Lotteries Board this question is moot. However bearing in mind the fact that s54 of the Lotteries Act has, during the delay caused by the Appeal process in complaint 7103-7105, been repealed and replace by s36 of the Consumer Protection Act no. 68 of 2008, and furthermore that the concept of promotional competitions is now (arguably) within the ambit of the National Consumer Commission, there would seem be little point to the referral of this complaint.
- 15. Finally the WASPA code of conduct is silent on the effect of time on a complaint. As such it is submitted that there is a certain amount of discretion that must be exercised by the adjudicator when dealing with these matters. Bearing in mind a great deal of the delay in this matter was caused by the WASPA appeal process which was not within the control of the SP in this matter it is not unreasonable to conclude that the SP may have been prejudiced by the significant delay in this matter (especially with regard to obtaining necessary evidence from the IP) and as a result this would be a factor to consider when deciding on whether a section of the Code of Conduct had been breached and/or an appropriate sanction.
- 16. For the above reasons the complaint is dismissed.

Complaint #7163

## **Mitigation/Aggravation**

17. This is not relevant to this matter.

### **Sanction Imposed**

18. No sanction is imposed.

## Appeal

19. As the complaint was dismissed no appeal of the adjudication is possible as an appeal is only possible by a WASPA member as set out in clause 13.6. 1.

<u>Annexures</u>

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

----- Original Message -----From: "WASPA Complaints <PERSONAL INFORMATION REMOVED BY ADJUDICATOR> Sent: Tuesday, July 28, 2009 1:05 PM Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint Ref:#7163

Dear WASPA member,

The attached complaint has been lodged with WASPA against Mybeat Interactive. This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

< template notice snipped by Bretton

--- A copy of the complaint follows below ----

Complaint #7163 (lodged via the WASPA website):

Full\_Name: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Cellular: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Alternate\_Contact\_Number: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Email: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

P<PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Affiliations: I am not employed by, or otherwise associated with one of WASPA\'s member companies

Affiliation Information:

Name\_WASP: MyBeat

OtherID: Short Code 35800 As used by Algo Fm Radio

Code\_Breached: Advisory on Lotteries Act

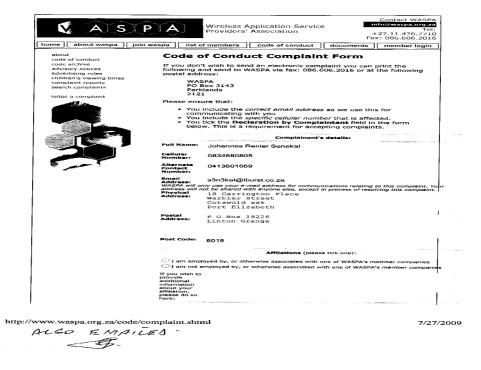
Detailed\_Description\_Complaint: The IP ran a competion called the Michael Jackson competition which offered a Prize to a MJ show in London.See details attached.

The SP is contracted to ensure that the Lotteries Act is not contravened.

Tick\_as\_appropriate: I have not contacted the service provider and believe this matter requires WASPA\'s attention

Declaration\_Good\_Faith: Information provided is true and correct and provided in good faith

27/07 2009 14:43 FAX Code of Conduct Complaint ⊠001 Pagelof3



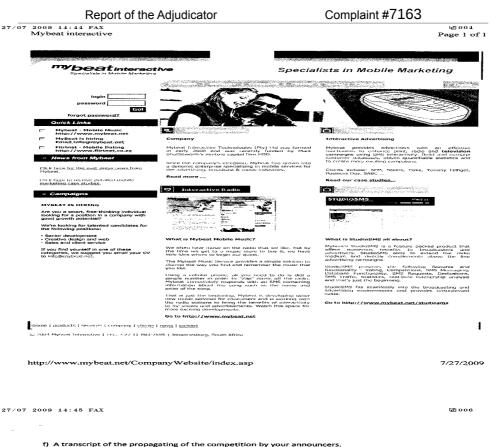
### Wireless Application Service Provider Association

| Report of the Ac                              | ljudicator  | Complaint #7163   |                  |
|---|---|---|------------------|
| 7 2009 14:44 FAX<br>Code of Conduct Complaint |   | ଅ ୦୦<br>Page 2  |                  |
| 1   |   | Details of Complaint  |                  |
|   | Name of the<br>service<br>provider<br>(if known): | • MyBeat Interactive  |                  |
|   | WASPA can c<br>list of WASPA                      | nly process complaints lodged against members of WASPA. You can find a com,<br>members bace   | plete            |
|   | Other<br>Identifying<br>Information               | Short Code 35800 As used by Algo Fm Radio   |                  |
|   | Section of<br>the Code of<br>Conduct<br>breached: | Advisory on Lotteries Act   |                  |
|   | If you are ab<br>breached by                      | e to identify the section of the WASPA Code of Conduct that you believe has be<br>the service provider, this will greatly facilitate the handling of your compleint.  | en               |
|   | You can find                                      | a copy of the WASPA Code of Conduct here.<br>Determine was a second of the Complaint:   |                  |
|   | Details:  | The IP ran a compotion called the Michael Jackson<br>competition which offered a Frize to a MJ show in<br>London.See details attached.<br>The SP is contracted to ensure that the Lotteries<br>Act is not contravened.  | 1                |
|   | Very Importa<br>must include                      | nt: If your complaint involves a service provided to a specific mobile phone, you<br>the phone number of that phone in your complaint.  |                  |
|   | Please provid                                     | e us with as much information about your complaint as possible in this section,<br>a relevant dates wherever possible.  | This             |
|   |   | nplaining about a print, radio or television advertisement, please include the da<br>r the date and time of broadcast. Without this information, WASPA may not be   | ite o<br>able    |
|   | If you wish<br>complaint p<br>your compla         | to send additional supporting documents to WASPA to support your<br>lease used them to the following email address after you have submittee<br>int.   | ы                |
|   |   | complaints@waspa.org.za   |                  |
|   |   | Please Tick, as appropriate:  |                  |
|   | O I am unat                                       | early contacted the service provider concerned regarding this complaint, but the<br>ler has not resolved the complaint to time satisfaction.<br>Let determine who the service provider is<br>determine who the service provider, and material and and WSRA's attantion. |                  |
|   |   | Declaration by Complainant  | Read of the Tail |
|   |   | I hereby declare that the information provided above is to my knowledge true<br>correct, and that I am submitting this complaint in good faith.   | and              |
|   | Where did<br>you hear<br>about                    | Internet  |                  |
|   | WASPA7  | send react  |                  |
|   |   |   |                  |
| http://www.waspa.org.za/code/co               | omplaint.sht                                      | ml 7/27/2   | 200              |
| 7 2009 14:44 FAX<br>Code of Conduct Complaint |   | izio<br>Pace :  |                  |

Disclaimer Contact This document was last modified on: Monday. 05-Jan-2009 08:31:37 SAST

http://www.waspa.org.za/code/complaint.shtml

7/27/2009



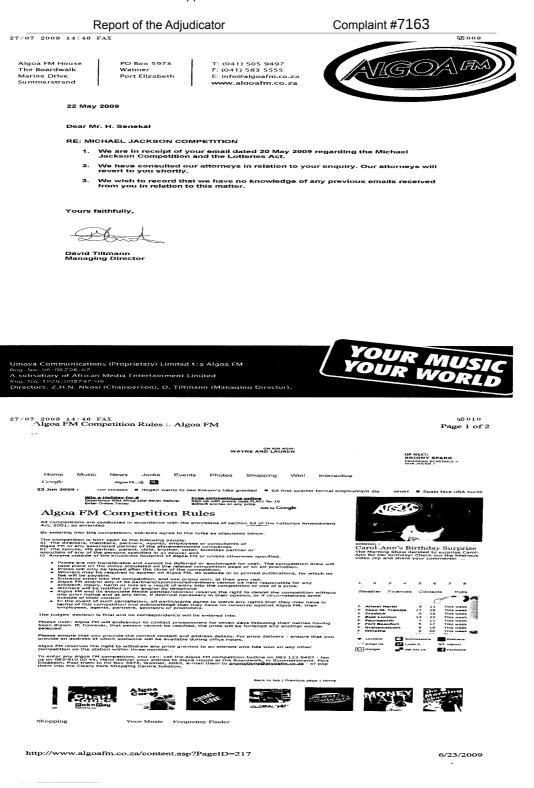
f) A transcript of the propagating of the competition by your announcers.
g) The rules of the Competition.
h) Due to the death of Michael Jackson, how are you going to proceed further?

Hannes Senekal S3n3kal@iburst.co.za

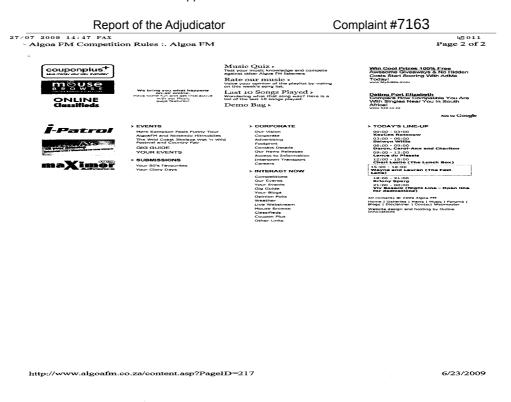
#### Wireless Application Service Provider Association

|                              | Report of the Adjudicate  | or Complaint #7   | 163           |
|------------------------------|---|---|---------------|
| 27/07 2009 1<br>9/07 2009 22 | 4:45 FAX<br>2:50 FAX  |   | ⊠ 007<br>2001 |
| ~ ~                          | ***   | **************************************                                |               |
|                              | TRANSMISSION COMPLETE   | D   |               |
|                              | TX/RX NO.<br>DESTINATION NUMBER<br>DESTINATION ID<br>ST. TIME<br>COMMUNICATION TIME<br>PAGES SENT<br>RESULT | 0155<br>0415835555<br>Mr D Tiltman<br>09/07 22:50<br>00'22<br>2<br>0K |               |

|    | PA  | GDENS ATTORNE   | EYS   |
|----|---|---|---|
| м  | r. Senekal  |   |   |
|    | ia Email: s3n3ka)@iburst.c  | <u></u>   |   |
|    | mal: Mr ME Nurse<br>mike@pagdens.co.ze  | Your Ref. Mr. Senekal   | Date: 2 June 2009   |
| D  | ear Mr. Senekal,  |   |   |
| RI | E : MICHAEL JACKSON C   | COMPETITION   | •   |
| 1. | We have been instructe<br>respond as follows.   | ed by Algoa FM in relation to your er   | nail dated 20 May to which v  |
| 2. | The section of the Lotter<br>the requirements with wh   | ries Act (the Act) relevant to your enqu<br>hich a promotional competition must co  | uiry is Section 54 which sets o<br>mply in order to be lawful.  |
|    |   |   |   |
| з. | and is lawful. There is n   | empetition compiles with all of the requires A provision in the Act which requires A der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.  | o provision in the Act which requires A   | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.  | o provision in the Act which requires A<br>der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que   | o provision in the Act which requires A<br>der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que   | o provision in the Act which requires A<br>der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
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|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que   | o provision in the Act which requires A<br>der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que   | o provision in the Act which requires A<br>der to run the Michael Jackson Comp  | looa EM to obtain the consent   |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que<br>Yours faithfully.<br>MENURSE<br>Pegdens court, 8.8<br>Tal        | Castle Hill, Central, Port Elisabeth, 6001 - PO 80x 122, Po<br>(Castle Hill, Central, Port Elisabeth, 6001 - PO 80x 122, Po<br>(Castle Hill, Central, Port Elisabeth, 6001 - PO 80x 122, Po | Igoa FM to obtain the consent<br>stitlon or any similar promotion<br>Tellsatedh, 6000                     |
|    | and is lawful. There is n<br>the Lotteries Board in or<br>competition.<br>Should you have any que<br>Yours faithfully.<br><u>ME NURSE</u><br>Pegdens Court, 18<br>Tat | io provision in the Act which requires A<br>der to run the Michael Jackson Comp<br>eries in this regard please contact me.  | Igoa FM to obtain the consent<br>stition or any similar promotion<br>•••••••••••••••••••••••••••••••••••• |



Wireless Application Service Provider Association



----- Original Message -----From: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

## To: complaints@waspa.org.za

Sent: Saturday, August 01, 2009 1:35 PM Subject: Re: [WASPA.complaints] MYBEAT ISSUE!: [formal] WASPA Code ofConduct complaint Ref:# 7163

In response to complaint #7163...

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As far as Mybeat is aware, the lotteries act has not been contravened (please see response from Pagdens Attornies representing our client AlgoaFM on page = of the attached document).

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The complaint also states "The SP is contracted to ensure that the =otteries Act is not contravened." We do whatever we can to educate =ur clients but in this case there seems to be no issue relating to the code =s there is no mention of the Lotteries Act in the Code of Conduct. The =omplainant's statement should be clarified as to who the other contracting party is otherwise.

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If there is any further dispute around the contravention of the Lotteries Act, it is =ur view that the matter should be addressed with AlgoaFM =irectly.

Regards <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

----- Forwarded Message From: "WASPA Complaints (<PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Organization: Wireless Access Providers' Association Reply-To: <complaints@waspa.org.za> Date: Tue, 28 Jul 2009 13:05:58 +0200 To: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR> Cc: Complaints <complaints@waspa.org.za> Subject: [formal] WASPA Code of Conduct complaint Ref:# 7163

Dear WASPA member,

The attached complaint has been lodged with WASPA against Mybeat Interactive. This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

Accordingly:

- You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you =eem to be relevant to this complaint.
- After five working days have passed, this complaint, together with your response (if any) will be assigned to an =djudicator for review, and if upheld, determination of appropriate =anctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from =ou within this time period, it will be assumed that you do not wish =o respond.
- Your response, and any other correspondence relating to this =omplaint, must be sent to <complaints@waspa.org.za>. Correspondence sent to any other address may not be deemed to constitute a formal =esponse.
- The WASPA Secretariat will confirm receipt of your response.

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to <complaints@waspa.org.za>.

Please confirm your receipt of this message.

Warm regards, WASPA Secretariat

--- A copy of the complaint follows below ---

Complaint #7163 (lodged via the WASPA website):

#### Full\_Name: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Affiliations: I am not employed by, or otherwise associated with one of =br> WASPA\'s member companies

Affiliation\_Information:

Name\_WASP: MyBeat

Complaint #7163

OtherID: Short Code 35800 As used by Algo Fm Radio

Code\_Breached: Advisory on Lotteries Act

Detailed\_Description\_Complaint: The IP ran a competion called the Michael Jackson competition which offered a Prize to a MJ show in London.See details attached. The SP is contracted to ensure that the Lotteries Act is not =ontravened.

Tick\_as\_appropriate: I have not contacted the service provider and believe this matter requires WASPA\'s attention

Declaration\_Good\_Faith: Information provided is true and correct and =br> provided in good faith

----- End of Forwarded Message

----- Original Message -----From: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR> To: <<u>complaints@waspa.org.za</u>> Sent: Monday, August 03, 2009 3:17 PM Subject: Re: [WASPA.complaints] Resolution of complaint Ref:#7163

Hello, I see the response from Mybeat.

They maintain that the lotteries act is not cotravened because Pagdens Attorneys says so. Section 54 of the Lotteries Act clearly implies that they are contravening the Act as described in a Directive by Waspa!

According to a directive issued to all WASPA members they are explicitly warned to have and be aware of the implications should their clients contravene the Lotteries Act. According to WASPA ALL participants are bound by contracts The SP, the NP and the IP, thus all parties are to abide by the Lotteries Act. Althoug WASPA is not an adjudicator regarding the Lotteries Act they certainly have to ensure that their members do not transgress any law.

This complaint regards the fact that should Waspa deem Mybeat implicated should ANY act be transgressed they should still censure the SP. Should this censure be positive it will only indicate to the Lottery Board that WASPA is on the ball.

This complaint is already in the hands of the Lottery Board for adjudication which has nothing to do with the complaint that Mybeat may not be conforming to directives from WASPA wheter they are mentioned in the code of conduct lor not.

<PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Dear <PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

Regarding your complaint against MyBeat regarding competition on Algoa FM, we have received the following correspondence from the service provider:

[see below email response]

We would like to check that the service provider has resolved this complaint to your satisfaction. If so, we will close the complaint and notify the service provider that we have done so.

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to <<u>complaints@waspa.org.za</u>.

Warm regards, WASPA Secretariat

------ Original Message ------Subject: Re: [WASPA.complaints] MYBEAT ISSUE!: [formal] WASPA Code of Conduct complaint Ref:# 7163 Date: Sat, 1 Aug 2009 13:35:35 +0200 From: <PERSONAL INFORMATION REMOVED BY ADJUDICATOR> Reply-To: complaints@waspa.org.za <complaints@waspa.org.za To: <complaints@waspa.org.za References: <<PERSONAL INFORMATION REMOVED BY ADJUDICATOR>

In response to complaint #7163.

As far as Mybeat is aware, the lotteries act has not been contravened (please see response from Pagdens Attornies representing our client AlgoaFM on page 8 of the attached document).

The complaint also states "The SP is contracted to ensure that the Lotteries Act is not contravened." We do whatever we can to educate our clients but in this case there seems to be no issue relating to the code as there is no mention of the Lotteries Act in the Code of Conduct. The complainant's statement should be clarified as to who the other contracting party is otherwise.

If there is any further dispute around the contravention of the Lotteries Act, it is our view that the matter should be addressed with AlgoaFM directly.

Regards

<PERSONAL INFORMATION REMOVED BY ADJUDICATOR>