



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Celerity Systems (BulkSMS)
Information Provider (IP):	Payprofit
Service Type:	Competition
Source of Complaints:	Public
Complaint Number:	7180
Code Version (CoC):	Code of Conduct 7.4
Date of Adjudication:	15 February 2010

Complaint

1. On the 29th July 2009 a complaint was lodged with the WASPA secretariat by a journalist relating to short code 34010 which is operated by Celerity Systems which dealt with the Ukunceda competition (see Annexure A) in which the complainant indicated that the Lotteries Act 57 of 1997 (hereinafter the “Lotteries Act”) has been contravened.
2. More specifically the complainant indicated that, in order to qualify as a “society lottery” in terms of the Lotteries Act, it needs to be authorised to collect contributions from the public in terms of the Fund-raising Act No. 107 of 1978.
3. Moreover the society is required to be registered to run a society lottery in terms of s41 of the Lotteries Act.

Preamble to Complaint

4. The complaint followed several relatively lengthy email conversations between the complainant and the organiser of the competition, only known as “Donna” wherein she initially indicated that she was not running a “lottery” (notwithstanding the text of Annexure A) and that she was “fully aware of all the legal requirements for fund raising”.

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5. However in the emails she concedes that not all the funds collected go to the prize or charity (or in other words a portion is used to allay costs).
 6. The emails themselves are not worth repeating as they contain numerous references to the type of charitable work and the reason for which it is performed – all of which is not relevant for the purposes of this adjudication.
 7. However on the 15th July 2009 Donna goes on to indicate that the “competition” was conducted in terms of s54 of the Lotteries Act which section provides the rules for Promotional Competitions (as opposed to Society Lotteries, which is regulated by s53 of the Lotteries Act). In this same email she admits that she made “small errors that I have learned from”.
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SP Response

8. The SP responded to the complaint on the 07th August 2009 (see Annexure B) in which it indicated that:
 - 8.1. the WASPA adjudicator does not have the right to adjudicate on whether a lottery is illegal or not.
 - 8.2. the prize had in fact been awarded.
 - 8.3. 1133 SMS’ were sent out generating a total income of R796.48 for the Ukunceda competition.
 - 8.4. it intentionally used the R2.00 premium-rated SMS to ensure that “payouts” remain modest and that the “client cannot exploit the SMS line to finance a prize”.
 - 8.5. their terms and conditions prohibited unlawful conduct and were available at:
 - 8.6. http://bulksms.2way.co.za/w/terms_and_conditions.htm
 - 8.7. http://bulksms.2way.co.za/w/psms_terms_and_conditions.htm(In the above links there is a clear reference to the use of the BulkSMS service for lawful means only.)
 - 8.8. no action had been taken by it as it deemed any action to be unwarranted in the circumstances.

Complainant Response

9. The Complainant then responded to the comments by the SP (above) where he pointed out that:

9.1. The WASPA member is responsible for the conduct of the short-code user in terms of clause 3.5.2 of the WASPA Code of Conduct (CoC);

9.2. The competition breached the Lotteries Act in that it did not promote “feeding township people” and as such was not a promotional competition; and

9.3. Not all monies from the competition were used for charitable purposes.

10. The Complainant then goes on to threaten to report the SP for “wantonly contracted a possible illegal lottery” but indicates that he will not report Donna to the Lotteries Board.

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

11. **3.1.2.** Members are committed to lawful conduct at all times.

12. **3.5.** Content control

3.5.1. Members must not knowingly transmit or publish illegal content.

3.5.2. If a member becomes aware of illegal content under that member’s control, the member must immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.

Decision

13. This adjudication is another 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

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useful to consider several procedural questions in general before returning to this specific complaint. It should be noted that a great deal of the decision in complaint 7103 is repeated here as the issues are identical.

WHETHER WASPA MEMBERS ARE BOUND BY WASPA ADVISORIES

14. 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).
15. This of course does not mean that the WASPA advisories do not serve a useful purpose. 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.
16. 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.
17. 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

18. 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 is dismissed.
19. However the WASPA secretariat was able to find a notice that was provided to WASPA members (see Annexure D and E). Although this is not a WASPA advisory it would appear to be more than likely that the complainant is referring to this particular notice.

ADJUDICATOR ABILITY TO PRONOUNCE ON LAWFULNESS OF CONDUCT (3.1.2)

20. Turning to the question of lawful conduct, the SP in question indicates 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:
- 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*

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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. Moreover it is this test which is used to determine whether any other clause in the CoC has been breached.
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 as set out in Annexure A 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, 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 clients¹. FRB argued that by failing to levy any fee or subscription it was thus

¹ See s63 of the Lotteries Act.

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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 Act².

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

² 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).

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competitions/lotteries in terms of the Lotteries Act)³. 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

(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

³ The other types of competitions that are allowed are: Society Lotteries, private lotteries, entertainment lotteries and promotional competitions. For the purposes of this complaint the only types of lotteries that are applicable are promotional competitions and society lotteries.

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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);

35.5. Be for the benefit of the entity that normally produces the goods or services⁴;

⁴ 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

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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 services⁵ 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 promoted⁶. 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.

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:

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”.

⁵ See s54(1)(c) of the Lotteries Act.

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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."*⁷

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."*⁸

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 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*

⁷ See Annexure D.

⁸ See Annexure E.

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 CoC⁹.

42. Finally reference can be made to the s54 of the Lotteries Act as well as the associated regulations¹⁰. While the regulations do not assist us in determining the answer to this question, s54(1)(b)(iii)¹¹ 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 UKUNCEDA COMPETITION IS A PROMOTIONAL COMPETITION

44. The Complainant also alleged that the competition was not connected to any good or service. In contrast to complaint 7103 I must agree with this contention as it would appear that the competition was created in order to promote the Ukunceda Project rather than promoting the goods of the Koega Computer Clinic. Indeed there was no need to do anything (such as purchase a flyer or visit the store) which would promote the Koega Computer Clinic. The Ukunceda project clearly does not have goods or services it is promoting in the competition. As a result - and in keeping with the finding in the Winikhaya case above - the promoter and by extension the SP did not comply with the

⁹ See further complaints 0070, 0079 and 0411.

¹⁰ Published under Government Notice R672 in Government Gazette 24874 of 16 May 2003.

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requirement of s54(1)(c) of the Lotteries Act.

45. Further 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. It is as irrelevant that the Ukunceda Competition was for the benefit of a charity (which in turn is not registered as such). 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. Moreover the total funds recovered also point towards mitigation of sentence rather than whether or not South African law was transgressed. As a result the SP's contention that R2.00 per SMS did not allow the money to be used to fund the prize is only relevant to the question of mitigation.

WHETHER THE UKUNCEDA COMPETITION IS A SOCIETY LOTTERY

48. Although there was no persistence with the claim that the Ukunceda Competition was a society lottery, it is worth noting that the failure to register with the Lotteries Board (amongst several other requirements) as admitted by Donna resulted in the Ukunceda Competition being unable to be classed as a Society Lottery in terms of the Lotteries Act.

DUTY TO REPORT IN TERMS OF CLAUSE 3.5.2

49. While it would appear that there is an illegal lottery the question remains as to whether there was a duty on the part of the SP to report this to the Lotteries Board. A quick look over the Lotteries Act makes it clear that there is no legal duty to report this behaviour

¹¹ See clause 34 above.

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on the part of the SP. Indeed as the SP was enabling what appears to be an illegal lottery it too would have the right not to incriminate itself which is one of the fundamental principles of justice in South Africa. It should be noted that this is in contrast to various other pieces of legislation which do place a positive duty on the SP to report, the most notable of being for child pornography for example in terms of the Film and Publications Act.

DUTY NOT TO KNOWINGLY OR INTENTIONALLY COMMIT AN ILLEGAL ACT

50. While there does appear to be a prima facie evidence that the Ukunceda Competition is an illegal lottery it is by no means clear that the SP in this matter had knowledge of this position as required in clause 3.5.1 of the CoC. On the one hand a WASPA communiqué warned that legal advice should be obtained regarding illegal lotteries and on the other the SP in its final email indicated that it was unaware that the actions taken in the Ukunceda Competition were illegal. Due to the uncertainty relating to this aspect of clause 3.5.1, the SP is not found to have breached clause 3.5.1.

51. Finally the communications by Donna in this matter show an alarming lack of appreciation for the way in which the law works and a somewhat naive approach to the legislative requirements related to charity work. While the restrictions on charitable organisations may appear to be a barrier to providing help to those in need, they also protect the public by reducing the number of fraudulent “charitable” institutions which could simply pocket the profit of any fund-raising effort. Indeed there is an admission from Donna in this matter that not all the monies collected were distributed for the benefit of the Ukunceda project. As a result the SP is cautioned – but not prohibited - from providing services to Donna in the future.

Mitigation/Aggravation

AGGRAVATION

1. In aggravation of the circumstances:

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- 1.1. The SP had been warned by WASPA to be cognisant of the situation regarding promotional competitions.
- 1.2. 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.
- 1.3. 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.

MITIGATION

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

- 2.1. The IP has made a concerted effort to communicate with WASPA regarding these matters;
- 2.2. The service has since finalised at the end of July 2009 and thus there is no ongoing illegality;
- 2.3. The amount of the premium-rated SMS exceeded the normal cost of an SMS was not overly large.
- 2.4. The SP has not been found guilty of breaching clause 3.1.2 previously.
- 2.5. 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.
- 2.6. The SP in question has a good track record with WASPA adjudications.
- 2.7. The amount of money collected in the competition was small and was ostensibly to be used for charitable purposes.

Sanction Imposed

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3. It should be noted that at the time of the offence the IP was not a member of WASPA. As a result no sanctions can be levied on the IP.
4. As a result of the breach of clause 3.1.2 of the CoC I impose the following sanctions:
 - 4.1. The SP is fined an amount of R50 000.00, all of which is suspended for a period of a year from the date of this adjudication provided that the SP is 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.
 - 4.2. The SP is hereby reprimanded for allowing the illegal competition to operate.

Appeal

Please note that should the SP 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.

D'Licious The Best of Baking



Ukunceda - Helping others

Kouga Computer Clinic

Church fundraising ideas
Church fundraising made easy! Earn quick cash for your church. (click on church fundraising)

Win a Holiday for 2
Experience Wild Africa Like Never Before! Enter Online Today. www.african.com/line.html

Free competitions online
SA's biggest competition website join now - unlimited free entries! www.gotplay.co.za/competitions

Ads by Google

Creating awareness for our beautiful rainbow nation.

Home

Basic clothing

D'Licious

Donkey

Send us

Price sponsored by
Kouga Computer Clinic

SMS and WIN
COMPUTER
Add your name to 34010
THE COMPUTER SYSTEM
THAT IS HANGING
THE BELL AND THE
BELL AND THE
www.buzzclothing.co.za - Project

Kouga Computer Clinic

[Terms and conditions](#)


SPAR

Spar Humansdorp
Main Road
Helps us out with food
helps feed a few families
Thank you Spar for being a
sponsor - we can not do it without
you.




A small community school for the ones who cannot speak




In loving memory of Baby John

Ukunceda

"To help those learn to help themselves"

Give a boy a fish he has fish for a day, teach him to fish he has fish for a life time

A project in the township of Kwanazama - Humansdorp




Imagine not having the luxury of running water straight into your bath, shower or basin. There are many who have to carry their water a few hundred meters to their house for all their basic needs, which many of us take for granted.

Food is scarce for many - some are either the very young or the very old - people who are unable to work in order to be able to provide for themselves.

You can help with some basic necessities by purchasing any of the items listed within this website.

If you would like to go into the township if you are in the Jeffery's Bay / St Francis area to help with with a hand out then drop me a line - any donations you give all go towards feeding and uplifting of as many as possible.

If you would like to donate then you can contact me for further details - we are not yet a registered fundraiser (all proceeds go to the project) - we will be soon.

Price sponsored by
Kouga Computer Clinic

<http://www.buzzclothing.co.za/projectukunceda.htm>

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Home

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SPAC

This is purely for advertising and promotions to create awareness of the needs of the townships as well as advertising both the computer company and Buzz Clothing. In the process of getting a fund raising number so this is not yet a fund raiser but I do hope to create awareness so that more people can help where ever they can. Whether you go into the townships or help out a charity that does - a little goes a long way. We all need to stand together and help our neighbours uplift themselves instead of always standing in judgement of others because of their situation they find them selves in.

SMS and WIN COMPUTER
34010

WIN COMPUTER SYSTEMS
WIN THE VIRTUAL WORLD
FROM 2000 TO 2010
WINNER 2000
www.buzzclothing.com - project

SMS COMPUTER to 34010
and stand a chance to win this computer.

A portion of all profits generated from anything in this website go toward uplifting the disadvantaged in a community in Humansdorp.

We try create awareness to the basic needs of the disadvantaged - like the basic need for food and water.

At the school we need things like ink for our printer to print out our daily work books.

The booklets are designed for children who cannot speak and so need to learn sign language to be able to communicate their basic needs.

competition open to SA residents only
smcs cost R2

If we manage to raise enough money we will continue running small competitions and when we have a fund raising number then we will run fund raisers and pledges as well.

If you are in the area you are welcome to join us on an outreach where you will be entertained.

We will be starting the tours soon, which will include dancing, a meal and entertainment as well as an experience of what it is like when you are poor - we hope to make people more aware and less judgemental.

We are also hoping that by raising some funds we are able to create employment for a couple of people involved in the tours - using their talents as entertainers or crafts men and women. Our vision is to eventually have a safe home for abused children, which will be also funded by the various projects.

website designed by Donna J-C and powered by *Koaga* Computer Clinic

Annexure B

From: <removed by adjudicator>,
To: <removed by adjudicator>,
Date: Fri, 7 Aug 2009 15:12:58 +0200
Organization: Celerity Systems (Pty) Ltd

Dear <removed by adjudicator>,

Please see below for Celerity Systems' response to complaint #7180:

We have had difficulty in responding to this complaint as it unclear which section of the code of conduct has actually been breached.

There appear to be three allegations in the complaint:

1. An illegal lottery took place.
2. No prize was allocated.
3. The funds generated were used for a township project.

We have the following comments on the allegations respectively:

1. We do not believe that we have a right to adjudicate on whether something is an illegal lottery or not and therefore don't believe we are able to respond to this. Our view is that the complainant should follow up with the Lotteries Board if he would like to lodge a complaint in this regard.
2. We have confirmation in writing that the prize has been awarded.
3. We are really not sure how to respond here.

Despite the lack of clarity on what exactly the complaint is, we have investigated the promotion and have the following information:

1. The parties

A. Celerity Systems', a Cape Town based messaging aggregator in the wireless applications service provide industry, and longstanding WASPA member which has given input into the development of WASPA regulations.

B. Payprofit - a Celerity Systems' client who rented the shared shortcode (the keyword "Computer" associated with the shortcode 34010). Payprofit is represented by <removed by adjudicator>. Payprofit is a reseller of premium rate services and Celerity Systems has, earlier this month prior to this complaint, requested that Payprofit become a WASPA Affiliate Member by 1 September 2009. Payprofit has in the last two days been confirmed as a WASPA Affiliate Member.

C. Donna J-C - the client of Payprofit who ran the SMS promotion to create awareness of Project Ukunceda, a social development initiative to provide food and material support to the disadvantaged Kwanomzamo community in Humansdorp. Donna J-C is an emerging entrepreneur with a small clothing business (Buzz Clothing). Her husband runs Koega Computer Clinic in Jefferys Bay. Donna J-C has entered in communications with Lottery's Board to determine the nature of the promotion.

2. The SMS promotion

The shortcode 34010 used for this SMS promotion is in the R2.00 band.

The SMS promotion was run on the Buzz Clothing website as per the link:

<http://www.buzzclothing.co.za/projectukunceda.htm>

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The pricing of R2.00 was clearly indicated on the advert.

The closing date was shown in the competition terms and conditions on the Koega Computer Clinic website.

The aim of this promotion was to create awareness for Project Ukunceda.

It was, according to Donna J-C, was not run for material gain.

This SMS competition ran from 10 June 2009 and closed at the end of July 2009.

The prize of the computer has been awarded.

As at 28 July 2009, 1133 SMS's sent to the shortcode on the keyword "Computer". This means that the client stands to receive the sum of R796.48 in revenue from this shortcode campaign.

3. Terms and conditions

Celerity Systems' has a policy of only allowing clients to use a R2.00 or less cost band for promotional and competition SMS lines. This policy aims to ensure that payouts remain modest and that a client cannot exploit the SMS line to finance a prize.

Celerity System's client all agreed to its terms and conditions of service which indicate that all clients are subject to WASPA's regulations.

Clients using a premium rate service are required to sign a further specific agreement. Both these terms and conditions of service are available electronically:

http://bulksms.2way.co.za/w/terms_and_conditions.htm

http://bulksms.2way.co.za/w/psms_terms_and_conditions.htm

Payprofit as a client of Celerity Systems has agreed to these terms and conditions of service. Donna J, as Payprofit's client, has also agreed to these terms and conditions of service and is well informed about the WASPA Code of Conduct.

At this time we have taken no action against the client as we do not believe any is necessary. Should the WASPA Adjudicator believe otherwise, we will take steps as required.

If you require any further information, please do not hesitate to contact us.

Kind regards

<removed by adjudicator>

Director

BulkSMS.com

A division of Celerity Systems (Pty) Ltd.

<removed by adjudicator>

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Annexure C

Date: Tue, 11 Aug 2009 13:09:14 +0200 (SAST)
From: <removed by adjudicator>
To: <removed by adjudicator>
User-Agent: SquirrelMail/1.4.15
MIME-Version: 1.0
X-Priority: 3 (Normal)
Importance: Normal
X-Original-Subject: Complaint Celerity Systems Short Code 34010 Complaint 7180

Helo,

Herewith my response to the reasons given to you by Celerity.

Firstly, section 3.5.2 of your Code of Conduct states that the SP takes full responsibility for the action of the short code user. Should such user contravene the Lotteries Act it is bound by contract with yourselves to suspend such an illegal promotion and report the case to the proper authorities. I maintain that the ISP was aware of this and did not act to this section of the code. A WASPA advisory also clearly warns members that pleading innocence for the actions of their clients will just not cut it.

The possible contravention of the Lottery Act relevant here that requires action by WASPA in terms of breaching 3.5.2 is:

The Lotteries Act states that the promotor of the competition must award a prize that he is promoting. In this case the computer prize is irrelevant as it does not promote the stated use of the funds, namely to feed township people.

The user admits to using some of the income stream for itself.

A participant may not use a premium rated sms to enter a competition. The sender of the sms is participating in an illegal lottery as defined by WASPA, (therefore WASPA as well could be held liable should they know of any illegal practises by their members?) This would then breach another code of WASPA that no actions should undermine and bring them disrepute!

I have no intention of reporting the user to the Lotteries Board, but reporting Celerity that wantonly contracted a possible illegal lottery.

What the user's motive is for raising funds, this is not the proper means and way to raise charity funds. The Lottery legislation clearly spells out how to proceed running a lottery for charitable purposes.

I would appreciate your adjudication soonest.

<removed by adjudicator>,

Annexure D

----- 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 E

----- 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 NLBs 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 FPRESS 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.

---ends---

Annexure G

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

ISSUED BY: National Lotteries Board (NLB)
CONTACT: Sershan Naidoo – NLB Spokesperson
TEL: 012-432 1303
EMAIL: sershan@nlb.org.za
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.

---**Ends**---