



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	#7519
<b>WASPA member(s):</b>	CellSmart Technologies / Foshini
<b>Membership number(s):</b>	
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Unlawful Lottery / Pricing
<b>Date complaint was lodged:</b>	2009-09-04
<b>Date of the alleged offence:</b>	2009-09
<b>Relevant version of the Code:</b>	7.4
<b>Clauses considered:</b>	3.1.2, 3.9.1, 3.9.2, 4.1.1, 4.1.10, 4.1.11, 6.1.1, 6.2.5, 9.1.1
<b>Relevant version of the Ad. Rules:</b>	2.3
<b>Clauses considered:</b>	5.2.1.2, 8.2.2
<b>Related cases considered:</b>	7103, 7104, 7105, 7289, 7317, 7734

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### Complaint

1. On 04 September 2009 a complaint was submitted to the WASPA secretariat by a journalist relating to short code 33429 which is operated by Cellsmart (the SP) in which the complainant indicated that:
  - 1.1. the SP had contravened the Lotteries Act 57 of 1997 (hereinafter the “Lotteries Act”) and offered a prize which did not promote the promoter as required by the Lotteries Act;
  - 1.2. Clauses 3.9.1, 3.9.2, 4.1.1, 4.1.10, 4.1.11, 6.1.1, 6.2.5, 9.1.1 were breached;
  - 1.3. There were “several” breaches of the Advertising Rules.

**SP Response**

2. The SP was asked to respond by the WASPA secretariat on the 04 September 2011 and reminded again to reply on the 15 September 2011. Notwithstanding the notice and the reminder no reply from the SP was forthcoming.
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**WASPA Secretariat request**

3. The WASPA secretariat contacted the adjudicator and requested that this matter be put on hold pending the outcome of the appeal in the matter of complaints 7103, 7104 and 7105. The adjudicator duly agreed to this postponement as the appeal in the said matters dealt with the issue of the unlawfulness of promotional competitions.
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**Outcome of Appeal in complaints 7103, 7104 and 7105**

4. 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.
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**Complainant Dies**

5. 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.
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**Portions of the Code of Conduct (version 7.4) considered:**

6. **3.1.2.** Members are committed to lawful conduct at all times.
7. **3.9.1.** Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of

#7519

Conduct.

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8. **3.9.2.** The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
9. **4.1.1.** Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.
10. **4.1.10.** Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.
11. **4.1.11.** Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.
12. **6.1.1.** In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.
13. **6.2.5.** The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.
14. **9.1.1.** Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

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**Decision**

15. 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.
16. There is a bald allegation that the SP in this matter has not bound the IP to the WASPA code. As the SP has not responded and there is no evidence supporting this allegation no finding can be made on this allegation.
17. It is unclear as to how the SP is supposed to have contravened clause 3.9.2 of the

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WASPA Code of Conduct. It should be noted that this clause indicates that SP's "may" terminate or suspend the services of the IP. Bearing in mind that no finding has been made regarding the compliance with the WASPA Code of Conduct by the IP it is not clear why this clause has been invoked by the complainant.

18. Clause 4.1.1 is also referred to by the complainant but no elaboration on this clause is provided. Unfortunately, as is often the case in adjudications, the quality of the advertisement provided by the complainant is so poor as to be illegible. Certainly there appears to have been an advertisement but whether the WASPA Code of Conduct was complied with in terms of the requirements relating to pricing is impossible to determine with the material provided. As such no finding on this aspect of the WASPA Code of Conduct can be made. The same applies to clause 4.1.10 of the WASPA Code of Conduct.
19. In contrast to the above issues, the reproduction of the SP's web site by the complainant is much clearer and clearly indicates a failure by the SP to refer to the WASPA code of conduct on its web site as required by clause 4.1.11. Indeed the SP still has not provided a link to the WASPA web site and/or the WASPA Code of Conduct, notwithstanding that it does, on some pages, provide an image of the WASPA logo (which is notably not hyperlinked to the WASPA web site). As such the SP is found to have breached clause 4.1.11 and continues to do so approximately two years after this complaint was first made.
20. Unfortunately the issue of pricing falls to be dealt with in a similar way as provided above in that the advertisement is illegible and as such no finding in terms of clauses 6.1.1, 6.2.5 and 9.1.1 can be made. Clearly no finding on any Advertising Rules relating to pricing can be made in this regard as well.
21. While the above conclusions essentially conclude the adjudication, three additional questions are of somewhat academic interest, which are:
  - 21.1. In the event that the complainant withdraws the complaint must the adjudicator abandon the complaint?
  - 21.2. Should this complaint be referred to the Lotteries Board for further investigation?
  - 21.3. Does a delay in the adjudication of a matter influence the outcome of the

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adjudication?

22. These questions have been dealt with in complaint 7289 and reference should be made to the comments made therein.
23. For the above reasons no finding is made relating to the complaint in relation to the alleged breach of clauses 3.1.2, 3.9.1, 3.9.2, 4.1.1, 4.1.10, 6.1.1, 6.2.5, 9.1.1. Clause 4.1.11 is found to have been breached by the SP.
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#### **Mitigation**

24. N/A.

#### **Aggravation**

25. The SP failed to respond to the complaint.
26. The SP failed and continues to fail to provide the required link to the WASPA web site.
27. The SP has a record of failing to respond to complaints as evidenced by complaint 7734.
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#### **Sanction Imposed**

28. The SP is fined an amount of R10 000.00, R8 000.00 of which is wholly suspended provided that the SP provides a link to the WASPA web site as required by the current WASPA Code of Conduct v.11 (clause 4.1.12) within 10 calendar days of this adjudication being sent to the SP by WASPA, which link must be located on the SP's home page.
29. The SP is warned to be aware of the requirements relating to pricing as set out in the clauses indicated within this adjudication.
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**Annexure A – Complaint**

**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: <REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>

Cc: <REMOVED BY ADJUDICATOR>

Sent: Friday, September 04, 2009 2:28 PM

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct  
complaintRef:#7519Dear WASPA member,

The attached complaint has been lodged with WASPA against Cellsmart.  
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 ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

Wasp\_Service : CellSmart

Description : See attached faxed complain

Status : Formal

Attached file : 28927858\_Cellsmart.pdf

#7519

**Annexure B – Annexure**

03/09\_2009\_22:57 FAX  
Code of Conduct Complaint

001  
Page 1 of 3

**WASPA** Wireless Application Service Providers' Association

Contact WASPA info@waspa.org.za  
Tel: +27.11.476.7710  
Fax: 086.606.2016

home | about waspa | join waspa | list of members | code of conduct | documents | member login

**Code of Conduct Complaint Form**

If you don't wish to send an electronic complaint you can print the following and send to WASPA via fax: 086.606.2016 or at the following postal address:

WASPA  
PO Box 3143  
Parklands  
2121

Please ensure that:

- You include the correct email address as we use this for communicating with you
- You include the specific cellular number that is affected.
- You tick the Declaration by Complainant field in the form below. This is a requirement for accepting complaints.

**Complainant's details:**

Full Name: Hannes Senekal  
Cellular Number: 0834680805  
Alternative Contact Number: 0413601668  
Email: s3n3kai@burst.co.za  
Address: WASPA will only use your e-mail address for communications relating to this complaint. Your address will not be shared with anyone else, except in process of resolving this complaint.  
Physical Address: Warbler Street, 18 Caxton Place, Cotswold Est, Port Elizabeth, 6025  
Postal Address: As above  
Post Code:

**Affiliations (please tick one):**

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

If you wish to provide additional information about your affiliation, please do so here:

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

9/3/2009

03/09\_2009\_22:58 FAX  
Code of Conduct Complaint

002  
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**Details of Complaint**

Name of the service provider (if known): CellSmart Technologies

WASPA can only process complaints lodged against members of WASPA. You can find a complete list of WASPA members here.

Other Identifying Information: PRSMS 33429 Fochini Club Mag Sept09 Page 53

Section of the Code of Conduct breached: See addendum

If you are able to identify the section of the WASPA Code of Conduct that you believe has been breached by the service provider, this will greatly facilitate the handling of your complaint. You can find a copy of the WASPA Code of Conduct here.

**Detailed Description of the Complaint:**

Details: Knowing that their short code is being used in illegal lottery. Several Breaches of COC and Adv. Rules

Very important: if your complaint involves a service provided to a specific mobile phone, you must include the phone number of that phone in your complaint. Please provide us with as much information about your complaint as possible in this section. This should include relevant dates wherever possible. If you are complaining about a print, radio or television advertisement, please include the date of publication, or the date and time of broadcast. Without this information, WASPA may not be able to process your complaint. If you wish to send additional supporting documents to WASPA to support your complaint, please send them to the following email address after you have submitted your complaint.

complaints@waspa.org.za

Please Tick, as appropriate:

I have already contacted the service provider concerned regarding this complaint, but the service provider has not resolved the complaint to my satisfaction.  
 I am unable to determine who the service provider is  
 I have not contacted the service provider concerned because I believe that this complaint cannot be resolved by the service provider, and instead needs WASPA's attention.

**Declaration by Complainant**

I hereby declare that the information provided above is to my knowledge true and correct, and that I am submitting this complaint in good faith.

Where did you hear about WASPA? Internet

send reset

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

9/3/2009

#7519

03/09 2009 22:58 FAX  
Code of Conduct Complaint

003

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[Disclaimer](#) [Contact](#) This document was last modified on: Monday, 05-Jan-2009 09:31:37 SAST

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

9/3/2009

03/09 2009 22:59 FAX

Mobile marketing, mobile messaging, CMS, Shortcodes, SMS, MMS, WAP, Wap push, ...

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*cellsmart.*

leaders in mobile marketing




**mobile marketing solutions**

**Call2Action Messaging**



**Service Alerts/Reminders**



**our products**

Our Mobile Marketing products are designed to provide our clients with no fuss seamless use of mobile technologies for effective value driven mobile marketing campaigns. We deliver these through the convergence and integration of mobile technologies, mobile media, web 2.0 application and

**mobile marketing leaders**

CellSmart is a full service mobile marketing agency everything the mobile device has to offer marketers for and marketing. Through our expertise in everything mo offering, from mobile marketing products and services, 1 platforms, we are able to provide the best in creative n conceptualising, managing, developing and implementr and strategies.

Delivering world class mobile marketing requires us to edge of mobile technology development and mobile mai remaining there requires us to push the boundaries all t technology, and customer services. Culminating in a bl CellSmart, our mobile products and services, creativi technological superiority ensures that we continue to i results to our clients, from every camps

Should you wish to find out more, please don't hesiti Alternatively, you can also view our [Flash pre](#)

**only excellence**

*no limit to Wapaa.*

<http://www.cellsmart.co.za/home/index.php>

9/3/2009



#7519

03/09 2009 22:59 FAX

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**Ferrari**  
OFFICIAL LICENSED PRODUCT

## Drive your business with this exclusive Ferrari laptop

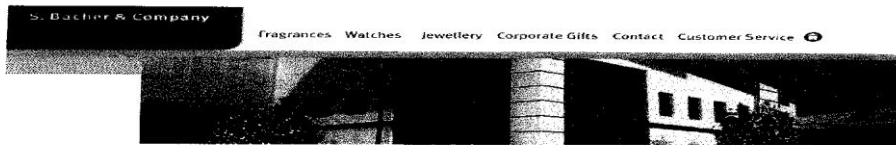
All you need to do to stand the chance of becoming the proud owner of this exclusively imported Ferrari laptop, valued at R 25 000, is send us an SMS.

Acer Ferrari FR1100-5457  
Memory 4GB DDR2  
C/D/S 2  
Hard Disk 250GB SATA  
Optical Drive DVD Super  
Multi-DVD writer  
Graphics card ATI Radeon  
1.270 IGP

**FOSCHIN**

03/09 2009 23:00 FAX  
S.Bacher & company

008  
Page 1 of 1



### PLANT FLOR

## S. BACHER & COMPANY

Based in Johannesburg, South Africa, S. Bacher & Company was incorporated in 1938 as a general importer and distributor of products.

S. Bacher & Company's entrée to the marketing of timepieces goes back to 1970's when it began acting as an agent for a diversity of fashion and related brands.

Amongst the stable of products was a watch brand called Lanco and as the appeal of many other product lines started declining,

S. Bacher's focus was more and more on this watch brand, growing it into the biggest single watch brand in South Africa. Today the company is responsible for the development, distribution and marketing of many global brands, the portfolio having grown beyond watches into fragrances and branded jewellery. Our strength and continued growth is based on our strong understanding of brand building in Southern Africa and long established relationships with all of the major retailers, well-established channels to market, and stock management expertise.

<http://www.sbacher.co.za/>

9/3/2009

**Annexure C - Reminder**

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

From: <REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>

Cc: <REMOVED BY ADJUDICATOR>

Sent: Tuesday, September 15, 2009 8:18 AM

Subject: [WASPA.complaints] Reminder: WASPA Code of Conduct complaint

Ref:#7519

> Dear WASPA member,

>

> This message serves as notification that the WASPA Secretariat has  
> not received any response from your company regarding the attached  
> complaint. As set out in the formal complaint procedure in section  
> 13.3 of the WASPA Code of Conduct, members have five working days  
> to provide a response to any complaints lodged.

>

> While you are not required to provide WASPA with a response, should  
> no response be forthcoming from your office today, the WASPA Secretariat  
> will be obliged to hand this complaint to an adjudicator without the  
> benefit of your input.

>

> Should you still wish to respond, your reply should be sent to  
> <[complaints@waspa.org.za](mailto:complaints@waspa.org.za)> and must be submitted by the close of  
> business today.

>

> Please confirm your receipt of this message.

>

> Warm regards,  
> WASPA Secretariat

>

> --- original notification attached ---

>

> ----- Original Message -----

> Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint

> Ref:#7519

> Date: Fri, 04 Sep 2009 14:28:56 +0200

> From: <REMOVED BY ADJUDICATOR>

> Reply-To: <REMOVED BY ADJUDICATOR>

> Organisation: Wireless Access Providers' Association

> To: <REMOVED BY ADJUDICATOR>

> CC: Complaints <REMOVED BY ADJUDICATOR>

Dear WASPA member,

#7519

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The attached complaint has been lodged with WASPA against Cellsmart. 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 deem 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 adjudicator for review, and if upheld, determination of appropriate sanctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.
- Your response, and any other correspondence relating to this complaint, must be sent to <[complaints@waspa.org.za](mailto:complaints@waspa.org.za)>. Correspondence sent to any other address may not be deemed to constitute a formal response.
- 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](mailto:complaints@waspa.org.za)>.

Please confirm your receipt of this message.

Warm regards,  
WASPA Secretariat

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

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

Wasp\_Service : CellSmart

Description : See attached faxed complain

Status : Formal

Attached file : 28927858\_Cellsmart.pdf