



## REPORT OF THE ADJUDICATOR

**WASPA Member (SP)** Clickatell

**Information Provider (IP)** Alentejo (Western Cape) cc t/a Access International –  
Western Cape

**Service Type** Unsolicited SMS & SMS Competition

**Source of Complaints** Competitor

**Complaint Number** #0411

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### Complaint

A complaint was received from a competitor of the SP in respect of SMS messages sent by the IP through the SP. The complaint reads:

1. *Sending Spam,*
2. *Not saying price of call*
3. *Using the word prize. Prove that the prize is not for everyone*
4. *No opt out*
5. *No identification from who*
6. *Can't unsubscribe without a premium call*

*A total on 6 SMS was sent to \*\*\*\*\*, from 27820070220 on 16th Aug 2006.*

*Details of the SMS are:*

1.  
GOEIE-DAG SKAKEL A.S.B. ONMIDDELIK VIR LINDA BY  
0216861590/0839109300..DANKIE...

2.  
GOEIE-DAG SKAKEL A.S.B. ONMIDDELIK VIR LINDA BY  
0216861590/0839109300..DANKIE...

3.  
VEELS GELUK!!!! U IS 100% ONS DATA WENNER!!!! SKAKEL  
ONMIDDELLIK VIR LINDA BY 0216861590/0839109300 OM U  
FANTASTIESE PRYS TE EIS!!

4.  
WAARSKUWING!!!! U LAASTE EN FINALE KANS SKAKEL ONMIDDELLIK  
VIR LINDA BY 0216861590/0839109300 OM U FANTASTIESE PRYS TE EIS!

5.  
*WAARSKUWING U LAASTE EN FINALE KANS OM U PRYS TE EIS. SKAKEL  
A.S.B. ONMIDDELIK VIR LINDA BY 0216861590/0839109300*

6.  
*WARNING YOUR LAST AND FINAL CHANCE TO CLAIM YOUR PRIZE.  
PLEASE CONTACT LINDA IMM. AT 0216861590/0839109300*

These SMS messages were received on a single day and in the space of just over two hours, the first at 09:21 and followed by messages at 09:23, 10:33, 10:44, 11:37 and 11:38.

The following provisions of the WASPA Code of Conduct were considered:

2.12. An **"information provider"** is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

2.14. A **"message originator"** is the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.

2.18. A **"premium-rated service"** is any service charged at a higher rate than the standard rate set by the network operator for that particular service.

2.20. **"Spam"** means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

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

### **3.9. Information providers**

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

## **5. Commercial communications**

### **5.1. Sending of commercial communications**

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, persons receiving commercial messages should be able to remove themselves from the database of a message originator using no more than two words, one of which must be 'STOP'.

5.1.4. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

## **5.2. Identification of spam**

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

## **5.3. Prevention of spam**

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

## **9. Competitions**

### **9.1. Provision of information**

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

- (a) how and when prize-winners will be informed;
- (b) the manner in which the prizes will be awarded;
- (c) when the prizes will be awarded;
- (d) how prize-winner information may be obtained;
- (e) any criteria for judging entries;
- (f) any alternative prize that is available;
- (g) the details of any intended post-event publicity;
- (h) any supplementary rules which may apply;
- (i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

**9.3. General provisions**

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

In addition, the Adjudicator considered the following provisions of the WASPA Advertising Rules:

**11.1 SCOPE**

Applies to all SMS and MMS's to the general public where Access Channels are displayed. While cognizant of the limited space in an SMS, senders must nonetheless abide by the General Terms.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

**11.3 TEXT DISPLAY**

11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS

11.3.2 The SMS must contain contact details of the sender, preferably a web site address

**11.8 COMPETITIONS:** Indicate If Prize Award is Conditional // Must have and show a closing date If Conditional (Note: This section is not meant to be an exhaustive overview of any possible permutation of competition types. The general guiding principles remain however)

- Promotional material must clearly state any information which is likely to affect a decision to participate, including:
  - the closing date;
  - any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
  - an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
  - any significant age, geographic, or other eligibility restrictions;
  - any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.
  - any significant facility, access or skill a consumer must have in order to obtain, use or otherwise access the full or even partial extent of the award promised in the advertisement. e.g. Having access to and being able to use the Internet in order to fully utilize the prize
- If a prize or reward is offered and the allocation of any prize/reward is conditional on any event and/or date, then this fact must be CLEARLY and visibly stated in the body of the advertisement as well as in the T&C text. For example, if a minimum number of participants to a competition are first required to successfully enter the competition before any prizes may be allocated and/or before the competition begins, then this must be clearly stated in the T&C text.
- Adverts for Competitions must show a specific closing date, except where there are instant prize-winners. However if the instant prize component of a competition is first dependent on any condition (eg a certain number of SMSs must first be

received before the ability to win any advertised prizes becomes applicable), then a closing date MUST be indicated.

- If a prize or reward is offered and the notification of whether the participant to that competition has won a prize (or not) is NOT Instant, then a closing date of the competition must be CLEARLY and visibly stated in the T&C text
- An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.
- Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.
- All correct entries must have the same chance of winning.
- Unless the winner of a competition requests anonymity, then the advertiser must advertise the names of the winners of the competition on the web site of the promoter of the competition within one week of appointing the winners, which may not be more than 28 days after the closing date of the competition. This requirement for publication does NOT apply in cases of Instant Prize Competitions where the result of the entry will be instantly communicated to any entrant, but WILL apply if that Instant Prize Competition has any conditions attached to the start of the competition.
- Note that the WASPA Code of Conduct v3.2 obliges disclosure of the names and/or contact details of any winner of any competition to WASPA or to a consumer should they request it so as to verify the legitimacy of the competition.

**11.9 CONTACT DETAILS:** Provide web site address AND helpline number/shortcode // Advertisers must include a helpline number or a working web site address that has direct applicability and linkage to the advertiser

**11.11 DISTRIBUTION LISTS:** Indicate If Consumer Automatically Placed On List. // No sexual or sexually suggestive Content in list if the list recipient does not request or expect it. // Provide reasonable opt-out procedure // Sender must have direct and recent association with recipient

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- The sender to a distribution list must indicate the cost and T&C of access to a service in each and every communication, even the receiver was previously a user of that service. No assumption as to the knowledge of the recipient in respect of the costs and T&C of a service must be made for users who had previously used the service.
- If using SMS as the Access Channel and where has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, must indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.
- Opt-Out: Any further communication with a consumer in a distribution list must contain a relatively easy and unambiguous method for immediately opting-out of any further communications from that distribution list:

o Fax: No premium rated fax lines [eg 0866 fax-2-email type numbers] may be used for the mandatory opt-out procedure.

o SMS: The total cost of opting-out from any distribution list using a premium rated SMSs Access Channel may not exceed R1 total cost

\_ [See also "TOTAL ACCESS REQUIREMENTS" below]

\_ [See also v3.2 of "WASPA CODE OF CONDUCT"]

o IVR (or any other time-based method): Where applicable, any IVR systems used for any opt-out procedure must be designed so that a reasonable user will not need to exceed 120 seconds (from the start of the IVR call or time-based method) for the entire opt-out process.

\_ [See also "PRICING" below]

\_ [See also "TOTAL ACCESS REQUIREMENTS" below]

**11.15 PRICING:** Show component, bearer and total cost // Cannot use term Standard Rate when no free/discounted SMS/Minutes cannot be utilised

**Overview:**

The display text must show the full or potential cost of access for fully obtaining the advertised Content and/or service.

**Background:**

Note that the term "Standard Rates Apply" as has in the past been used widely is, according to the definitions supplied by all three mobile networks, an incorrect description of IVR and PSMS, as a "Standard Rate" is only applicable to use of eg free bundled SMSs/Minutes. The original term was "VAS Standard Rates Apply" which was only applicable to IVR access, but which many over time incorrectly abbreviated to "Standard Rates" with purported applicability to for both IVR, PSMS, and Premium Rated USSD Access Channels.

**Standard Rate:** [see Also definition of Standard Rate in the Definition section]

A Standard Rate is a rate that is part of an in-bundle tariff which a user would ordinarily pay for domestic person to person communication pursuant to the specific terms and conditions of their service agreement with a mobile network operator. No "revenue sharing" applies. Thus, where free/bundled SMSs/Minutes cannot be utilized or where the tariff for an Access Channel differs from the in-bundle tariff for any user pursuant to the terms of conditions of the service agreement that user has with a mobile network operator, then term "Standard Rate" may not, from implementation of the Ad Rules, be used under those circumstances.

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**Investigation**

The SP provided the following response, which is largely a summary of the IP's response:

*I received feedback from our client via fax, a scanned copy is attached.*

*Access International does not have a shortcode or do premium rate messaging. They send only notifications via standard rated SMS messages. Access International answered the complainant's concerns as follows:*

*> Code\_Breached:*

*> 1. sending Spam,*

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*Messages are not SPAM (unsolicited) as everyone in the database is subscribed via a 'lead form' which is completed by a consultant and the client. The client therefore supplies his/her mobile number (subscribes) to the consultant and therefore Access International.*

*> 2. not saying price of call*

*The SMS text requests that you call either: 0216861590 or 0839109300. These numbers are not premium rated. In fact (021)6861590 is the standard switchboard number for the company on which they receive all calls. It is also the number on which Clickatell would call our client.*

*> 3. Using the word prize. Prove that the prize is not for everyone*

*The word 'prize' is used as there is a prize for every person which receives the SMS. Only about 30 out of 400 applicants receives a prize.*

*> 4. No opt out*

*At present if you call either number on the SMS you will reach the office of Access International where you can request to be unsubscribed. Calls are not premium rated. Access International will at the option of implementing an unsubscribe function also via SMS.*

*> 5. No identification from who*

*At present the SMS only says 'contact Linda'. Access International will update the text to display 'contact Linda at Access International'.*

*> 6. cant unsubscribe without a premium call*

*Yes they can, the numbers on the SMS are not premium rated. As per point (5) Access International will also look at the option of implementing an unsubscribe function over SMS, even though this is not a subscription service.*

The IP's response indicated:

*With reference to your E-mail received, dated 4 September 2006.*

*Though we took notice of the complaint lodged by [the complainant] we need to explain the following:*

*Access International works according to legislation in regards with our sms system. Currently our contract is with Clickatell and therefore it is the first time that we hear of WASPA and their Code of Conduct, which contains some new rules that we were not aware of. Therefore we would like to take the opportunity to ask Clickatell to assist and help us to upgrade our system.*

*With regards to the complaint the following:*

**PURPOSE OF OUR BUSINESS.**

- 1. The main purpose of our business is to sell points to our clients by means of our marketing and sales department.*

2. *Our marketers receive the necessary lead forms from our Off Premises Consultants, whereby they phone and discuss our business with the client.*
3. *The marketing department also makes use of a SMS system whereby they do send sms's to our clients for the last couple of years.*

**SPAM**

*1. We do not send Spam to our clients. Our Off Premises Consultants complete a lead form whereby the client provides all the necessary detail on the form. The lead form gets through to our marketing department where they phone or send sms's to the client with his/her consent.*

**PRICE OF THE CALL**

*We as a company never mentioned any prices in our sms's and therefore needs to upgrade our system in this regard.*

**PRIZE IS NOT FOR EVERYONE**

*We handle approximately 400 leads (clients) per day. Only 30 clients of the 400 potential clients get to win prizes and it is not for everybody.*

**OPT OUT**

*Currently we do not have or provide the facilities. Clients phone or write to us and request the removal of their name on our database.*

**IDENTIFICATION**

*This will be upgraded to put our company name in the sms's and not only the contact person's name.*

**UNSUBSCRIPTION**

*Currently we do not have the facility but will upgrade immediately in this regard.*

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**Excursus - Lawfulness of Service**

A key element of the complaint is a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting "that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize."

Clause 9.1.6(d) of the WASPA Code of Conduct was drafted having regard to the provisions of the Lotteries Act, Act 57 of 1997 as amended (the "Lotteries Act") and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 as amended (the "Consumer Affairs Act").

While the key determination of this report concerns Clause 9.1.6(d) of the WASPA Code of Conduct (as set out in the Adjudicator's findings below) national law was also considered to ascertain the possible contravention of Clause 3.1.2 of the WASPA Code of Conduct as well as any extenuating or exacerbating circumstances regarding a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct.

The provisions of the Lotteries Act, Act 57 of 1997 (the "Lotteries Act"), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the "Consumer Affairs Act") were considered.



The Lotteries Act provides the following definitions:

(xii) “lottery” includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the <i>Gazette</i> declare to be a lottery;
(xxii) “prize” means the prize awarded to the winner of a lottery;
(xxiii) “promotional competition” means a lottery conducted for the purpose of promoting the sale or use of any goods or services;

From a review of the SP and IP’s submissions and the Lotteries Act it appears that:

- The competition conducted by the IP may be a lottery for the purposes of the Lotteries Act, however the process is more akin to a gift being given in return for a potential customer attending a timeshare presentation;
- The competition conducted by the IP (if it is indeed a competition) is most likely a promotional competition, even though the promotional material (the promotional SMS messages sent to the complainant) contains no discernable promotion of goods or services.

Certain types of competition have been the subjects of extensive investigation in terms of the Consumer Affairs Act. Pursuant to such investigation, General Notice 303 of 2005 was published in Government Gazette 27311 on 21 February 2005, in terms of section 12(6) of the Consumer Affairs Act. Such notice proclaims as an “unfair business practice” the business practice “whereby mail-order entities, inform consumers or potential consumers, by any means whatsoever, that they have won a sum of money or any other prize,

- (a) where the consumers have not won the money or prize mentioned in the headline; and/or
- (b) where such money or prize is subject to suspensive conditions prior to entitlement, and the suspensive conditions are not printed, immediately after the announcement of the prize, in the same letter type and size as the announcement of the prize; and
- (c) where consumers are required to send any sum of money in order to claim the prize, except such sum of money which is the purchase price for identified goods bona fide offered for purchase by the company and ordered by the consumer.”

The SMS messages received by the complainant fall within both (a) and (b) above, but not (c). Moreover, General Notice 303 of 2005 defines the term “mail-order entities” as “manufacturers, wholesalers or retailers who contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients. **It also includes entities who do not necessarily offer goods but require of consumers to forward any type of fee in order to receive a prize**” (emphasis inserted). The term “prize” includes, but is not restricted to, “awards, donations, bonuses, gifts, grants, presents and rewards.”

In the instant case the IP does not appear to fall within the prohibited business practice specified in General Notice 303 of 2005 because the IP does not appear to fall within the definition of "mail-order entities", as no fee is required in order to receive the prize. However, the IP's practice of informing customer or potential customers that they have won a sum of money or any other prize, where the consumers have not won the money or prize mentioned in the headline, is highly suspect.

Moreover, the IP is a member of an industry self-regulatory body, namely the Timeshare Institute of Southern Africa ("TISA") and as such subject to the TISA "Timeshare Code of Conduct". This Timeshare Code of Conduct provides, inter alia,

## **12. BENEFITS INVOLVING GIFTS AND CERTIFICATES**

12.1 Programmes that include the offer or distribution to consumers of gift incentives, which include certificates, coupons, vouchers, cheques, stamps or any other documents representing something of value, visits to a timeshare resort or attendance at any activity involving the alienation or promotion of timesharing interests, must, over and above the relevant statutory requirements, comply with the following requirements:

12.1.1. Any restrictions or conditions relating to the granting of the gift, its redemption or use of the certificates must be fully disclosed and precisely described at the time when such gift is offered to the public.

12.1.2. The document describing the gift incentive must clearly disclose any expiry date.

12.1.3. Lengthy delays, onerous procedures or any other restricting conditions that have the purpose or effect of delaying the granting of the gift incentive or of discouraging its redemption or use may not be imposed.

12.1.4. Should the public be required to pay any money in order to make effective use of the gift incentive, certificate or document thus distributed (including for example a 'reservation or administration fee'), such condition must be disclosed at the outset. No consideration or money may be made payable or accepted until the potential purchaser is made aware of all the terms, conditions and obligations upon which receipt of the benefit are contingent.

12.2 Whether or not any payments are involved, all terms, conditions and obligations upon which receipt of the benefits are contingent, must be clearly explained to the recipient and in particular must clearly disclose:

12.2.1 The purpose and approximate duration of the promotional activity.

12.2.2 Whether participation in a sales presentation relating to a timesharing interest or tour of the timeshare resort is necessary in order to receive the benefit.

12.2.3 Whether any purchase is necessary in order to receive the benefit.

12.2.4 Whether any additional costs / payments are necessary in order to make a gift usable.

12.3 Additional or different restrictions or conditions may not be imposed subsequent to the original approach.

### **12.4 Electronic Media Advertisements**

Advertising or promotional activity using electronic media advertisements (i.e. radio, television, internet etc.) need not provide all of the disclosures required by this Code but advertisements and promotional activity must be accurate and consistent.

### 13 GIFT INCENTIVE PROGRAMMES

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13.10 Members of the public may not be referred to as 'winners' told that they have 'won' an item, or be informed that the item is a, 'prize', 'gift', or is 'free, unless this is factually and undisputedly the case.

13.11 Any terms, conditions and obligations upon which the gift is contingent, must be clearly and conspicuously set out by the member so as to leave no reasonable probability that the terms of the offer might be misunderstood.

13.12 All gift and incentive programmes must at all times comply with the provisions of The Lotteries Act.

(Emphasis added.)

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#### ***Point in limine***

A consideration of the SMS advertisements giving rise to the complaint considered in this report appears, *prima facie*, to possibly give rise to multiple possible breaches of the section of the WASPA Advertising Rules dealing with SMS advertising, which is itself a breach of Clause 6.1 of the WASPA Code of Conduct. However, the complainant has made no reference to such WASPA Advertising Rules or Clause 6.1 of the WASPA Code of Conduct in the complaint being considered in this report.

As such, the Adjudicator had to consider whether he was entitled to consider the possible breach/es of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct, without the SP or the IP being given notice thereof.

In this regard, the Adjudicator considered the decision of the WASPA Appeal Panel in an appeal concerning complaints #0002, #0011, #0026, #0037 and #0058, which states:

*Clause 13.3 of the Code specifically requires the respondent to the complaint to respond to the complaint. In our view, this implies the right to respond to all allegations that make up the complaint. This is also a requirement of the Promotion of Administrative Justice Act 3 of 2000 (the "AJA Act"), which enshrines the right have a right to administrative action that is lawful, reasonable and procedurally fair. Core elements of procedural fairness include adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations (see specifically s3(2)(b)(a) and s3(2)(b)(b) of the AJA Act).*

This raises the question of what standard of fairness must be applied when considering the WASPA Code of Conduct and the actions of the Secretariat and the Independent Adjudicator in terms thereof. The Appeals Panel in its decisions concerning complaint #0001 and complaints #0002, #0011, #0026, #0037 and #0058, referred to the Constitution of the Republic of South Africa and the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

Section 33 of the Bill of Rights provisions of the Constitution provides:

**Just administrative action**

**33(1)** Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

PAJA contains the following definitions:

'administrative action' means any decision taken, or any failure to take a decision, by -

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

**3 Procedurally fair administrative action affecting any person**

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

According to Lawrence Baxter (*Administrative Law* (1984) 2), general administrative law consists of the 'general principles of [common] law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. While Baxter's definition pre-dates both PAJA and the Bill of Rights, it is useful as it seems to exclude a voluntary industry representative body, such as WASPA, which is not an "administrative institution". Furthermore, judicial and quasi-judicial actions do not fall within the scope of administrative actions.

PAJA does recognise that juristic persons (such as WASPA) may perform administrative acts, but only "when exercising a public power or performing a public function in terms of an empowering provision", bearing in mind that the definition of an "empowering act" includes "an agreement, instrument or other document in terms of which an administrative action was purportedly taken". However this will not apply if the power or function is judicial or quasi-judicial in nature.

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5th ed, 2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution. They concur that judicial and quasi-judicial processes do not fall within the scope of administrative actions and as such are not subject administrative justice rights in the Constitution. They do indicate their view that the epithet 'judicial' should be reserved for dispute-resolution by individuals or entities possessing constitutional judicial authority. In this regard Currie and de Waal refer to *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853 (Jockey Club's powers not 'governmental' in nature, not performing 'the business of government'). This is a more qualified and restrictive interpretation of the phrase than that proposed by Van Reenen J in *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 75 ('exercising a public power' conveys the ability to act in a manner that affects or concerns the public'). The phrase 'concerns the public' is certainly too wide. See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) para 51 which makes the point that mere public interest in a decision does not make it an exercise of public power or the performance of a public function.

Consideration of the recent decision of Harms JA in *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [Supreme Court of Appeal, Case Number 459/04 – as yet unreported] seems to indicate that the WASPA Code of Conduct proceedings are quasi-judicial in nature, which accords with the view of Currie and de Waal above. This indication follows from Harms JA's consideration of the complaints adjudication function of the Advertising Standards Authority SA, which has a procedure concerning complaints of breaches of its Code of Conduct and in light of the fact that the procedure of Advertising Standards Authority SA is similar to the procedure set out in the WASPA Code of Conduct.

Having regard to the above, it can be seen that the question of whether the WASPA Code of Conduct and the actions of the Secretariat and Independent Adjudicator in terms thereof are an administrative act or not, is a complex one. It is the view of the Adjudicator that such actions are not administrative acts, nevertheless the Adjudicator is willing to consider the standard set for administrative acts by the Bill of Rights and PAJA as a goal for the Secretariat and Adjudicator to strive towards and if possible meet or exceed, but not a requirement.

Bearing this in mind the Draft Code Of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed administrative action to be given to the affected person, before the decision is taken. "Adequate notice" is defined as meaning that "the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.

As such, the Adjudicator was of the view that as the adjudication of a complaint is not an administrative action, the complaint **NEED NOT** refer specifically (that is by clause number) to the clause or clauses of the WASPA Code of Conduct alleged to have been breached, however the possibility of the finding of a breach of the WASPA Code of Conduct **MUST** be clear from the complaint itself, if no clause reference is provided. In opinion of the Adjudicator and in the instant complaint, the possibility of a finding of a breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct is not sufficiently clear from the complaint of the complainant for the SP and/or the IP to have responded thereto or to be expected to have responded thereto.

Moreover, the complainant is a WASPA member and a competitor of the SP. As such, the complainant (and the member assisting it) is, or should have been, aware of the provisions of Clause 6.1 of the WASPA Code of Conduct and the WASPA Advertising Rules (and specifically section 11 thereof).

As such the Adjudicator made no finding as to a possible breach of the WASPA Advertising Rules and/or Clause 6.1 of the WASPA Code of Conduct.

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## Decision

At the outset the Adjudicator recognised that he is not a court of law and as such is unable to adjudicate on whether the IP's SMS message contravene national law (particularly the Lotteries Act and the Consumer Affairs Act). In the view of the Adjudicator, the IP's conduct did not contravene national law for the reasons set out above. Had there been a *prima facie* contravention of national law, this may have given rise to the Adjudicator considering a breach of clause 3.1.2 of the WASPA Code of Conduct as well as being an aggravating factor in determining any sanctions to be imposed. As this was not the case, this issue was not considered further.

Similarly, the Adjudicator is not able to adjudicate a possible contravention of the TISA Timeshare Code of Conduct. However, the IP appears *prima facie* to be operating in contravention of a code of conduct it has specifically subscribed to, as compared to the WASPA Code of Conduct, where the IP is required to adhere to the Code of Conduct because it uses the services of a WASPA member. With regard to the TISA Timeshare Code of Conduct:

- the IP did not indicate any of the terms, conditions and obligations upon which receipt of the benefits promised to the complainant are contingent;

- These terms, conditions and obligations were not clearly explained to the complainant and no clear disclosure of the purpose and approximate duration of the promotional activity was given;
- Neither was any indication given that participation in a sales presentation relating to a timesharing interest is necessary in order to receive the benefit.

as is required by clause 12 thereof. Notwithstanding the provisions of clause 12.4 of the TISA Timeshare Code of Conduct, which is understandable, particularly in an advertising medium such as SMS, which is technically limited to 160 characters, the IP made no attempt to provide the complainant with any information. Instead the IP appeared intent on deceiving the complainant and imposing terms on the complainant after the original complaint, in contravention of clause 12.3 of the TISA Timeshare Code of Conduct.

Furthermore the IP used the term “prys” and “prize” in direct contradiction of clause 13.10 of the TISA Timeshare Code of Conduct while not clearly and conspicuously setting out the terms, conditions and obligations on which it is contingent, as required in clause 13.11 thereof.

*Spam, opt-out and identification (Clause 5 of the WASPA Code of Conduct)*

The IP has admitted breaches of clauses 5.1.2 and 5.1.3 of the WASPA Code of Conduct.

The Adjudicator considered the messages transmitted through the SP by the IP as spam according to the definition contained in the WASPA Code of Conduct as:

- the complainant had not requested the message;
- the complainant had no direct and recent prior commercial relationship with the IP and had no reasonable expectation of receiving marketing communications from the IP; and
- the complainant had not given his explicit consent to the organisation supplying the IP with the complainant’s contact information to do so.

These issues were independently verified with the complainant.

The IP’s response is noted, however no evidence is provided for this bare allegation that a client (or more correctly a prospective client) has provided details in a lead form to an Off Premises Consultant. In the absence of verifiable proof that this was the case with the complainant and having verified with the complainant that he was not aware of any such lead form having been filled-in, this allegation is rejected.

Accordingly, the Adjudicator found a breach of clause 5.3.1 of the WASPA Code of Conduct.

*Price (Clause 6 of the WASPA Code of Conduct)*

The Adjudicator noted the SP and IP’s contentions regarding the price of the service. The WASPA Code of Conduct is clear that pricing needs to be stipulated in any advertisement for a service and the WASPA Advertising Rules contain the specific

detail of how this pricing must be displayed. This applies equally to wireless application services being advertised in other media and services (which are themselves not wireless application services) being advertised through a wireless application services, such as SMS.

Accordingly, the Adjudicator found a breach of clause 6.2.2 of the WASPA Code of Conduct.

In the instant case, the calls are at “standard rates” as such term is defined in the WASPA Advertising Rules, which is a mitigating factor to be considered in respect of any sanction to be imposed. At the same time, the fact that the WASPA Advertising Rules have been circulated since late 2005 and came into effect on 1 January 2006 in order to allow a period for implementation, must be considered an aggravating factor to be considered in respect of any sanction to be imposed.

*Competition (Clause 9 of the WASPA Code of Conduct)*

Four of the SMS messages sent by the IP through the SP (numbered 2 through 6 by the complainant) are in direct contravention of clause 9.1.6(d) of the WASPA Code of Conduct as they suggest that the complainant has already won a prize and that by contacting the IP, the complainant will have definitely secured that prize.

Moreover, the four SMS messages numbered 2 through 6 by the complainant:

- do not contain details of how the competition operates, as required by clause 9.1.2 of the WASPA Code of Conduct;
- do not state any information which is likely to affect a decision to participate, including:
  - the closing date;
  - any significant terms and conditions (such as the requirement that the recipient must attend a presentation relating to timeshare);
  - an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
  - any significant age, geographic or other eligibility restrictions;
  - any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;

as required by clause 9.1.4 of the WASPA Code of Conduct

- are promotional material and yet:
  - exaggerate the chance of winning a prize;
  - suggest that winning a prize is a certainty;

which is prohibited by clause 9.1.6 of the WASPA Code of Conduct



Accordingly, the Adjudicator found breaches of clauses 9.1.2, 9.1.4 and 9.1.6 of the WASPA Code of Conduct.

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### **Sanction**

At the outset, the Adjudicator noted the IP's contention that this complaint was "the first time that we hear of WASPA and their Code of Conduct, which contains some new rules that we were not aware of." The SP did not dispute this in its submission. This is a direct contravention of the SP's obligation to bind any information provider with whom it contracts for the provision of services to ensure that none of the services contravene the Code of Conduct.

The Adjudicator was of the view that imposing a separate sanction in respect of each of the identified breaches of clauses 5.1.2, 5.1.3, 5.3.1, 6.2.2, 9.1.2, 9.1.4 and 9.1.6 of the WASPA Code of Conduct was not practical. In imposing a sanction in respect of all of these breaches, the Adjudicator considered:

- as a mitigating factor, the fact that calls to the numbers referred to in the SMS messages received by the complainant are standard rate numbers; and
- as aggravating factors the provisions of the WASPA Advertising Rules relating to advertising by means of SMS applicable since 1 January 2006 as well as the same SP having been involved in two previous complaints in respect of a different IP but giving rise to similar concerns and breaches of the WASPA Code of Conduct, namely complaints #0050 and #0069.

The Adjudicator imposed the following sanction:

- 1 the SP is ordered to suspend the service of the IP for a period of three (calendar) months from the date of receipt of this report;
- 2 the SP is ordered not to provide a service to the IP, even after the three (3) month suspension referred to above, until such time as the IP's promotional SMS messages accord with the WASPA Code of Conduct and the WASPA Advertising Guidelines;
- 3 the Secretariat is instructed to notify all other WASPA members of the suspension of the IP's service in terms of 1 and 2 above and that providing a service to the IP during such period may constitute a breach of the WASPA Code of Conduct and render a member doing so liable to sanctions themselves; and
- 4 the SP is ordered to pay a fine in the amount of R50 000,00 in respect of the numerous and egregious breaches of the WASPA Code of Conduct perpetrated by the IP through the SP.

Should the SP wish to appeal this decision or any one or more of the sanctions, the sanctions numbered 1 and 4 above shall be suspended pending the outcome of such appeal, the sanction numbered 2 above shall continue to apply notwithstanding any such appeal and the sanction numbered 3 above shall be amended to indicate the suspension of the IP's service in terms of the sanction numbered 2 above, only.

### **Ancillary Matters**

The Adjudicator requested the Secretariat to forward a copy of this report to TISA, indicating that the WASPA Adjudicator had noted a possible contravention of clauses 12.2, 12.4, 13.10 and 13.11 of the Timeshare Code of Conduct, during the adjudication of this complaint. As the WASPA Adjudicator has no jurisdiction with regard to the Timeshare Code of Conduct, TISA may wish to investigate this matter further.

The Adjudicator further encouraged the complainant to lodge a complaint against the IP in respect of the Timeshare Code of Conduct, with TISA.