

Promotional competitions in terms of the CPA

For this month's article we have decided on a slight departure from the franchise specific provisions of the CPA in order to concentrate on another topic which we believe to have far reaching effects for franchises, namely promotional competitions. These competitions, which used to be regulated by the Lotteries Act, have since 1 April this year been regulated by the Consumer Protection Act 68 of 2008 (the CPA) and its regulations. Other relevant topics will also be covered in future articles.

The relevance to any company which runs competitions of this nature will become apparent below. From a franchisor point of view, it is important to take note of these provisions (and especially those of the final regulations) to ensure that the sections relating to the rules of the competition and record keeping are adhered to. It is further important to ensure that, should franchisees be allowed to run their own competitions, they know what is to be expected of them. Failure to do so may lead to damage to the brand, damage to the franchise system and ultimately damage to the franchisor.

The first important factor is to know what qualifies as promotional competition in terms of the CPA. Section 36(1)(d) defines a promotional competition as:

'...any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if:

- *It is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and*
- *Any prize offered exceeds the threshold prescribed in terms of the regulations (which currently stands at R1.00 in terms of regulation 11(4));*

Irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize...'

This definition is extremely wide and it is difficult to imagine any competition arranged by a supplier which will not fall into this definition. The terms 'promoter', 'prize' and 'participant' are equally widely defined in section 36(1) which leads to an even broader interpretation of the term 'promotional competition'. Suffice to say that virtually any giveaway arranged for the purposes of promoting a franchise or any products relating to the franchise will fall into this definition.

The definition for 'promoter' may for instance be interpreted to be wide enough to include both the franchisor and the franchisee, irrespective of which one runs the competition.

The CPA sets out a number of general do's-and-don'ts relating to the arrangement of the competition, advertisement thereof, determining the winners and the like. A supplier must not, for instance: inform a person that they have won a competition if they have not (or if they have not entered a competition in the first place), attach any undisclosed conditions to the prize, require any consideration for entering the competition (other than the reasonable cost for transmitting the entry, which is currently set at R1.50 for electronic transmissions (read SMS entries) in terms of the regulations) or that a prize may not be awarded to any person if it is unlawful to supply those goods or services to the winner (this does however not mean

that a winner is precluded from receiving a prize because that person's right to receive such prize is regulated).

This list is rather comprehensive and you are advised to consult an attorney knowledgeable on the CPA, before running any competitions in future.

The section further sets out the minimum information which must be included in an 'offer to participate' in a competition. This will typically be the information appearing in the 'terms and conditions' which accompany the advertisements for a competition. This minimum information includes:

- The benefit or competition to which the offer relates;
- Steps required by a person to accept the offer or to enter/participate in the competition;
- The basis on which the results of the competition will be determined;
- The closing date of the competition;
- The medium through or by which the results will be made known; and
- A place where or person from whom a participant may obtain the competition rules and where one may receive a prize.

The CPA further provides that the Minister of Trade and Industry may publish regulations including minimum monetary thresholds, minimum record keeping standards and audit and reporting requirements. These were included in regulation 11 of the final regulations published on 1 April 2011.

The regulations provide that any term in the rules of a competition requiring a prize winner to permit use of his image, partake in any marketing activity or to be present at the draw without affording the prize winner an opportunity to decline the invitation to do so, is void. The promoter must also inform the prize winner of his right to decline such invitation.

Regulation 11(6) sets out eighteen categories of records which must be kept by the person who conducts the promotional competition, for at least three years – presumably after the draw. This list is very comprehensive and includes, for instance:

- Full details of the promoter (registration numbers, ID numbers and the like);
- A full list of the prizes offered;
- A selection of the marketing material used in the competition;
- A breakdown of all instances when, where and how the competition was marketed;
- An acknowledgement of receipt from the prize winner, including all relevant detail of the prize winner such as full names, ID number and the like;
- The basis on which the prizes were determined;
- The details of the independent person who oversaw the competition draw;
- A declaration, under oath, from the person responsible for the competition that the prize winners were not connected to or related to the promoter or marketing service provider;
- The means by which the prize winners were informed of their winnings; and
- Many others.

The regulations further state at sub-regulation (5) that the promoter must ensure that an independent accountant, registered auditor, attorney or advocate oversees and 'certifies' the conducting of the competition.

The final regulation states that a report based on the abovementioned material must, on demand, be submitted to the Commission. This regulation includes a slight typographical error but our interpretation is that it should not have a significant influence on the application of the regulation. Given the ease at which a regulation can be amended, we also do not expect the error to remain in the regulations for an extended period.

Given all of the above, it appears that persons who run promotional completions will have a much more onerous and accountable task in future. Our advice is therefore, as with so many of the franchise specific provisions of the CPA, to get ones house in order, so as to ensure that, should any complaints or difficulties arise and should the Commission request a report, that the necessary documentation and reports are ready and available.

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