

# The positive side of how section 54 of the Lotteries Act, 1997 affects consumer competitions

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It's time to cut through the negativity about section 54 of the Lotteries Act and ask what it allows, rather than what it prohibits.

Section 54 does not stifle marketing activity; it facilitates it. It *exempts* sales promotion competitions from the overall prohibition against running lotteries.

For more than 100 years it has been illegal to run competitions in which purchasing a product brings with it the chance of winning a prize. The prohibitions in the Lotteries Act are practically identical to those of the Gambling Act of 1965 and the provincial ordinances that preceded it. South Africa is not alone in prohibiting schemes like these. It is true that effective enforcement of the Gambling Act started disintegrating around 1985, but the fact remains that until now sales promotion competitions have never been favoured with exemption.

## Lawful lotteries

Competitions were a dime-a-dozen even while the Gambling Act was stringently enforced. The simple reason is that it is relatively easy to run competitions that are lawful and therefore need no exemption. Lawful competitions don't have to comply with section 54 and its much-maligned regulations, which means you can give cash prizes and do any of the other prohibited things.

So the first question is whether one can make the competition lawful. A competition will be lawful if participants are not obliged to purchase a product to obtain the right to compete. To achieve that and still have a very effective sales promotion is not nearly as difficult as it sounds. Prior to 1985 all competitions were structured in that way and companies like Coca-Cola ran some of their most successful promotions ever as lawful competitions.

## Unlawful lotteries and the exemption in section 54

The alternative to a lawful competition is an exempt competition under section 54. Sadly, one cannot avoid being critical about section 54. In one sense it is completely contradictory. The regulations are even worse. Besides being woefully badly worded, section 54 is based on an apparent complete lack of appreciation of what sales promotion is all about. The legislature does not seem to understand that sometimes promotions are to promote brands rather than goods, or that promotions for goods do not invariably involve the sale of the goods being promoted. There is also no provision in section 54 for joint promotions or cross promotions.

Section 54 was amended during 2002. The amendments created some unanticipated and certainly unintended opportunities. They have opened the door to certain types of businesses running private lotteries on a continuous basis by simply dressing them up as promotional competitions. The Lotteries Board probably doesn't yet realise this, but malpractice has already started and will, no doubt, worsen with time. The problem is that Minister Alec Irwin and his board persist in wasting millions consulting people who may understand lotteries, but know nothing about sales promotion.

The exemptions in section 54 apply to goods and services, but while discussing the provisions I will for brevity refer only to goods. I will also omit comment on provisions that are relatively unimportant.

The most bizarre situation is that sub-sections 54(1)(b) and (j) contradict each other directly. The former prohibits increasing prices during a promotion, whilst the latter (if it means anything at all) says prices may be increased but not beyond the point where the consumer is paying for the right to enter the competition rather than for the goods. The rules of interpretation have it that in the event of a contradiction the later section takes precedence. The problem is that the sub-section (j) is meaningless. The rules of interpretation have yet to deal with such a situation.

The most important other provisions of section 54 may be summarised as follows -

- The consideration payable for the goods being promoted must include consideration for the right to compete. Although the intention is far from clear, the provision seems to mean that the competitor may not be obliged to pay anything other than the purchase price of the goods in order to obtain the right to compete.
- The inducement to enter the competition must not outweigh the desire to acquire the goods.
- The goods being promoted must be the goods normally sold by the person conducting the competition. This provision prohibits a franchisor from conducting sales promotions for its franchised outlets, unless the franchisor itself sells the goods being promoted. Franchisors usually sell nothing - they deal in franchises and licence others to sell their brands.
- The competition may not be "substantially similar to any competition, game or sports pool conducted by or on behalf of the National Lottery". The only comment I wish to make is that the national lottery is an event and an event cannot conduct anything. The licensee conducts the national lottery under licence.

The minister has authority under sub-section 54(4) to declare a promotional competition unlawful. Such a declaration deprives a competition of its exempt status. The minister's authority is, however, limited to making a declaration in relation to a competition that would otherwise be exempt. He cannot declare a competition unlawful if the right to compete is available other than through making a purchase.

## The regulations

The regulations give credence to the contention that the board's consultants do not understand sales promotion and also possibly that they have difficulty with the English language. The provisions of the regulations may be summarised as follows -

age restrictions -

Regulation 2(1) prohibits offering or awarding prizes to winners under an age that in terms of "a law, code of conduct or ethics, agreement or rule" may not be sold or supplied to or used by a person under that age. Advertising for the competition may also not be directed to persons under the age concerned. The rules of competitions will have to be adapted to deal with the requirements. The problem is that it is well nigh impossible for anyone to be aware of all rules and codes of conduct and ethics that may be applicable.

prize restrictions -

Regulation 3(1)(b) prohibits prizes similar to prizes "in a competition, game or sports pool conducted by or on behalf of the National Lottery". Most commentators believe that this regulation outlaws cash prizes, because the prizes in the national lottery are cash. The writer is not amongst them.

Regulation 3(1)(c) prohibits prizes "the possession, use, rendering, distribution or delivery (of which) is dependant on the payment of a fee or other consideration ... in order to fully possess or use the prize". The bewildering split infinitive aside, it is difficult to understand the implications of this prohibition. It clearly prohibits requiring a winner to pay any kind of delivery fee and possibly also prohibits any kind of prize that requires a licence. Does it prevent the award of a motor car?

Regulation 3(1)(d) prohibits prizes "in respect of which any licence, approval, endorsement, sanction, consent, agreement or any form of authorisation by -

- (i) any organ of state;
- (ii) a person's legal guardian; or
- (iii) any other person;

is required for the lawful possession or use of those goods, services or benefits". The exclusion relates to all things that may not be either possessed or used without a licence. Motor vehicles and TV sets are amongst the most obvious. The prohibition may also apply to some forms of prizes awarded to minors.

Regulation 3(1)(e) prohibits the award of any prize to a winner who is required to "endorse, promote or advertise" the organiser's wares. The prohibition does not apply if, after the winner's name is announced, s/he is given written notice of the requirement and consents in writing. If the winner is a minor regulation 3(2) also requires consent of his or her guardian. The scope of the prohibition is more limited than it may at first appear. By allowing publication of his or her name and photograph a winner is not necessarily engaging in the activities mentioned.

## **Publication of rules**

Regulation 4 requires publication in advertising related to the competition of details of the manner and time of announcing winners. The requirement does not apply to information set out on the goods themselves or their container.

## **Persons who may not participate**

Regulation 5 contains sweeping provisions prohibiting participation in a competition by any "director, member, partner, employee or agent of or consultant to" every corporate or natural person involved in organising a competition, or "a spouse, life partner, parent, child, brother, sister, business partner or associate" of any of the listed persons. Curiously, for no apparent reason, the prohibition does not apply to the persons who actually conduct the competition, only to their directors, members etc. The scope of this prohibition is extremely wide and includes not only shareholders and employees of the marketer of the product being promoted, but also of any distributors, wholesalers and retailers involved and of those responsible for the publication of the competition details, the printers of competition entry forms, packaging and other material and many others. Employees and directors of the media that carry advertisements for or details of the competition are also disqualified. Advertising for the competition must "alert prospective participants" to the prohibition.

If one or more of the persons involved in the promotion is a listed company with a few hundred thousand shareholders, the prohibition may affect millions of people. The regulation does not suggest how it will be possible for those organising the competition to monitor and police the situation.

## **Conclusion**

The requirements of section 54 and the regulations are far-reaching and sometimes wholly inappropriate and unnecessary. Review is undoubtedly necessary and the board needs to consult persons who actually understand sales promotion and the wide variety of different types of competition that can be conducted.

Marketers should, however, not despair because it remains possible to arrange their promotional competitions in a way that section 54 and the regulations do not apply.

The board may be unaware that in certain respects section 54 opens the door far too wide and in others not yet open wide enough. There will be a proliferation of private lotteries disguised as sales promotions. Marketers are starting to recognise

the possibilities and some are already reaping disproportionately large rewards. To allow certain types of businesses to run their own lotteries is not only inequitable but the situation will ultimately no doubt have an adverse impact on the national lottery itself. As prizes become larger people will realise that they have a better chance of winning in sales promotion competitions than in the national lottery. When the board notices what is happening it will hasten to change the law, but judging by its past record several years will pass before anything is achieved. After all, the board took 6 long years to produce mediocre regulations and bring section 54 into effect.

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