

WASPA APPEAL PANEL FINDINGS FOR COMPLAINT NO #0001

INTEGRAT (PTY) LTD

RESPONDENT

in respect of PEACH MOBILE (PTY) LTD

23 November 2005

DECISION

Following adjudication against Integrat (Pty) Ltd, the Respondent lodged an appeal. The Appeals Panel have considered the grounds of appeal as lodged by Respondent. The points raised as grounds for the appeal are addressed below. The final adjudication in this case follows:

1. Ad point 1 of the Appeal, the Respondent claims that it is not responsible for the breach by the Information Provider and that insufficient time was given to the Information Provider to implement the necessary changes. The first argument raised in this point is rejected as the member accepted responsibility for Information Providers' adherence to the Code of Conduct in terms of Clause 3.9 of the Code of Conduct. The second argument is also rejected. The Code of Conduct was developed over a long period of time and adopted in June 2005. As correctly pointed out by the Adjudicator on page 13 of his report, the two month hiatus period between the adoption of the Code of Conduct and its implementation was sufficient to enable members to comply...
2. Ad point 2, the Respondent alleges that the Adjudicator erred by failing to investigate the alleged contraventions. The Adjudicator tested the alleged contraventions by means of reviewing the advertisement and subscribing and unsubscribing to the services. The Appeals Panel rejects this point as a ground for appeal as it is clear from the Adjudicator's report on pages 9-10 that he fully investigated the alleged contraventions.
3. Ad point 3 the Respondent alleges that the Adjudicator made findings in respect of alleged contraventions to which the Respondent had no opportunity to respond to. The original claim related to a contravention of clause 11 of the Code of Conduct, specifically the bundling of subscription services and content. On page 6 of his report the Adjudicator noted that clause 13.3.7 of the Code of Conduct provides him with the power and authority to review other *prima facie* breaches of the Code of Conduct by the Respondent that are apparent from the body of the advertisement itself. The Appeals Panel is of the opinion that the Adjudicator erred in this respect and that the Adjudicator had to restrict the adjudication to the complaint as received. First, it is in accordance with the literal interpretation of this clause. Secondly, as

the Adjudicator investigated aspects other than the contraventions listed in the complaint, the Respondent was not afforded an opportunity to respond to these additional alleged contraventions (refer to clauses 13.2.2 and 13.3.3 of the Code of Conduct). Thirdly, in terms of Clause 13.1.5, only the Secretariat may (independently) initiate a complaint against a member on behalf of WASPA, should it become aware of an apparent breach of the Code. The secretariat is defined as the persons employed by WASPA to handle the administration of the organization, including the handling of the Code of Conduct complaints. The Adjudicator is not a member of the Secretariat, and should he be deemed to be a member of the Secretariat, a complaint against a member for the apparent breach of the Code of Conduct may not be investigated by the Secretariat without affording the member an opportunity to respond to the complaint. Furthermore, in terms of the Promotion of Administrative Justice Act 3 of 2000, WASPA members 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 (refer to s 3(2)(b)(a) and s 3(2)(b)(b) of the AJA Act). This ground for the appeal is upheld.

4. Ad point 4 the Respondent claims that it is an unfair business practice to preclude Information providers from becoming members of WASPA and secondly, it is prejudicial to the Respondent to expect it to be responsible for one of its clients. The point is rejected as the member accepted responsibility for Information Providers' adherence to the Code of Conduct in terms of Clause 3.9 of the Code of Conduct. Points raised under 4(a)-(e) are also rejected. Members are accountable to WASPA for the rendering of services to customers in accordance with the Code of Conduct. Members may either render services directly to customers or services may be offered through Information Providers. The Respondent's allegations of "unfair burdens", "unfair business practices" or "advantages" and "impairment of fundamental rights" are unfounded. WASPA members remain responsible for breaches of the Code of Conduct by Information Providers, but they may protect themselves contractually by obtaining warranties and indemnities.
5. Ad point 5, the Respondent claims the ruling is in contravention of the limitation of liability envisaged by section 73 of the ECT Act. This point is rejected as the limitations of liability will only become operative once the industry representative body is recognized in the *Gazette*.
6. Ad point 6, the Respondent indicated that the ruling should not have been made public prior to the opportunity to appeal. Clause 3.2 of the Code of Conduct covers the constitutional right to freedom of speech and expression. The Appeals Panel firmly believes that complaints and/or rulings should be held up for public scrutiny. This point is therefore irrelevant and this ground for the appeal rejected.

7. Ad point 7, without having had sight of the “mybroadband” article and the context in which the logo was used, the Panel has no comment suffice to say that the WASPA Secretariat should deal with this point separately.
8. Ad point 8, the Respondent denies any wrongdoing. This ground of the Respondent’s appeal is rejected. It is clear that:
 - a. Although the words “COOL SUBSCRIPTIONS FOR YOUR CELL PHONE” is printed at the top of the page and the frequencies of delivery are repeated throughout the advertisement, the manner in which the advertisement has been laid out appears to have been deliberately designed to bewilder the consumer. The Appeals Panel was unable to interpret the scope and nature of the subscription services as advertised. As the Appeals Panel failed to understand what the subscription service was going to deliver the average consumer will also have difficulty to grasp the true nature and extent of the subscription service. This is a breach of Clause 11.1.1.
 - b. Although each consumer is notified when the first item is downloaded, that the service is a subscription service, they are told “DO NOT sms STOP”. Clause 11.1.7 (b) is breached.
 - c. The transaction is bundled with the first content request and may therefore not be viewed as a separate transaction. This is in breach of Clause 11.1.2, which clearly states that joining a subscription service must be an independent transaction.
 - d. The Respondent’s comment that sufficient information was provided to make the consumer aware of the subscription services is unsatisfactory as discussed in point 7a above.
 - e. Ad the comment advising that the consumer is notified of the call centre number for any difficulty experienced with the service, the Appeal Panel subscribed to several of the services and was only provided with a website address. Clause 11.2.1 is breached.
 - f. The claim that the advertisement and service meets Vodacom’s requirements for subscription services is irrelevant. The member is bound to the WASPA Code of Conduct.

Decision

We find that the Respondent, Integrate (Pty) Ltd, contravened the Code of Conduct relating to the original complaint, namely the bundling of subscription services and content.

We draw a different conclusion on the matter of sanctions which we have the power to rescind or vary. The sanctions imposed by the Adjudicator relate to the complaint as well as the other alleged contraventions that were reviewed. The Adjudicator’s review lacked core elements of procedural fairness. The fine imposed in the Sanction

is therefore rescinded. On that basis and notwithstanding the above comments, we uphold the Appeal.

We would like to reiterate that the respondent should not construe the outcome of this Appeal as a “not-guilty” verdict.

THE APPEALS PANEL

25TH NOVEMBER 2005