



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	iTouch South Africa (Proprietary) Limited under its "Jippii" brand
Telephone Network(s)	Vodacom
Service Type	Subscription Service
Source of Complaints	Competitor
Complaint Number	#0005

Complaint

A complaint was received from a competitor of the SP. In particular the complaint concerned the bundling of content items and a subscription service, as evidenced by the IP's Internet web site for its "Jippii" brand at www.jippii.co.za (hereinafter referred to as "the web site"). In particular, information contained in the web site indicates that when a content item is downloaded, the consumer is automatically subscribed to the SP's subscription service.

The following breaches of the WASPA Code of Conduct were raised:

11. Subscription services

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

11.1.3. Where feasible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Investigation

The Secretariat received a response from the SP indicating:

- The Jippii Subscription Model was amended with effect from 1 September 2005, in terms of which a request for content no longer results in subscription.

- Print adverts now clearly state that in order to subscribe to Jippii, users need to sms one of the following requests: SUB TONE, SUB PICS, SUB GAMES, etc. depending on the particular package they would like to subscribe to.
- TV advertising was also changed accordingly with effect 1 September 2005.
- The SP outsources the management of the web site to a third party. The SP briefed such third party to change the copy of the relevant page of the web site, in order to clearly communicate the new subscription process. Unfortunately, the outsource provider failed to meet the deadline the SP provided and also failed to inform the SP of the delays they were experiencing.
- As soon as the SP realised that the web site was not updated, the SP had same removed and re-loaded same with the correct information.
- It was, however, a matter of miscommunication regarding the outsourced supplier failing to inform the SP of delays to the expected delivery date.
- The SP apologised for the inconsistency in communication (between web and print) but assured the WASPA Committee that no content requests have resulted in subscriptions with effect from 1 September 2005.
- The offending web site had been taken off the and was only re-loaded once all the copy had been corrected with the appropriate information.

The Secretariat accessed the web site on 8 September 2005, the same date the SP's response was received and found that the web site was still accessible, displaying terms and conditions still indicating that Vodacom subscribers are automatically subscribed.

As at 8 September 2005, clause 1.3 of such terms and conditions indicated:

1.3 Users who are Vodacom subscribers may become Club Members by subscribing to any one or more of our available Content Categories. Downloading an item of Content using your Handset will automatically subscribe you to the Service for the Category in which the item falls.

More recent attempt to access the web site indicates that the terms and conditions, as well as other pages have been changed as indicated by the SP, apparently with effect from 1 October 2005.

In addition, the secretariat accessed content from the SP's "Jippii" brand on the Vodacom network in order to test the service. Accessing such content has not resulted in a subscription service being initiated by the SP as no repeated, regular billing, without necessarily confirming each individual transaction, has taken place.

Decision

The complainant refers to a contravention of Clause 11.1.2 of the WASPA Code of Conduct, however the complaint also deals with a possible contravention of Clauses 11.1.1 and 11.1.4 of the Code of Conduct. The complaints form contains a question requesting details of the sections of the WASPA Code of Conduct alleged to

have been breached. As many complainants are unfamiliar with the WASPA Code of Conduct they leave this question blank. Other complainants, such as the instant complainant, refer to one clause (or sub-clause) of the WASPA Code of Conduct when the detail of the complaint make it clear that other clauses or sub-clauses may have been breached.

The Adjudicator had regard to the decision of the Appeal Panel in respect of Complaint #0001 and is in agreement that an SP cannot be found in breach of the WASPA Code of Conduct, unless it has had an opportunity to respond fully to the complaint. 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 Complaint #0001 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, as it is not an "administrative institution".

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5 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 also indicate that some regard such a process as quasi-judicial in nature and for that reason not subject to the administrative justice rights in the Constitution, though Currie and de Waal are of the 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.

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".

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 an 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.

In this regard, the Adjudicator is of the view that the complaint sets out in sufficient detail the possible breaches of Clauses 11.1.1, 11.1.2 and 11.1.4 of the Code of Conduct, notwithstanding the complainant's error in only referring to Clause 11.1.2 and not the other two sub-clauses. As such, the Adjudicator considered possible breaches of all three sub-clauses.

The Adjudicator dismissed the complaint in respect of Clauses 11.1.2 and 11.1.4 of the Code of Conduct, as there is no indication that the SP conduct was in breach of the WASPA Code of Conduct. The SP alleged that it had altered its conduct, in the form of its business process, to accord with the WASPA Code of Conduct and the content on the web site reflected its business process prior to the introduction of the WASPA Code of Conduct on 1 September 2005 and had been left there in error. Nothing in the complaint or the investigation of the Secretariat contradicted this submission.

The Adjudicator further dismissed the complaint in respect of Clause 11.1.1 of the WASPA Code of Conduct, as the SP's promotional material (in the form of the web site) was no longer promoting a subscription service. Nevertheless, the retention of outdated information on the web site was potentially misleading to consumers and the SP was less than accurate in indicating that the web site and erroneous information thereon was disabled on 8 September 2005, as identified by the Secretariat in its investigations. This may be a breach of Clauses 4.1.1 and 4.1.2 of the WASPA Code of Conduct, which provide:

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

The Adjudicator found no prima facie indication of dishonesty, unfairness, deception or a knowing attempt to disseminate false or deceptive information or to mislead. In addition, the SP had not been given an opportunity to respond to allegations of this nature. Accordingly these clauses of the Code of Conduct were not considered.