

WASPA APPEALS PANEL FINDINGS FOR COMPLAINT # 0141, #0186 and #0188

INTEGRAT (SP) & GOZOMO (IP)

Appellants

19 March 2007

DECISION

BACKGROUND

1. The Appellants have lodged an appeal against the sanction imposed by the Adjudicator in the above complaints wherein the Appellants were found to have breached clause 11.1.2 of the WASPA Code of Conduct (version 3.2, dated 28 June 2005) ("the Code") arising from the publication of certain print advertisements published in People Magazine on 20 January 2006, in Huisgenoot on 23 February 2006 and in TV Plus Magazine on 22 February 2006 and which gave rise to Complaints No. 141, 186 and 188 respectively. In all three instances, the complaints arose from the alleged bundling of requests for specific items of content with requests to join a subscription service.

GROUND OF APPEAL

2. Although the Appellants raise their own views relating to the interpretation of section 11.1.2 of the Code, they do not allege that the Adjudicator erred in his interpretation of the Code or raise it as a ground for appeal of his decision. This is because the Appeals Panel has now made it clear in its appeal decision for Complaints No. 2, 11, 26, 37 and 58 (which decision is available for download at http://www.waspa.org.za/code/download/0002_11_26_37_58_appeal.pdf) that advertising of the sort that forms the subject of the present matter is regarded as being breach of the provisions of section 11.1.2 of the WASPA Code. The

Appellants in the present matter were also the Appellants in the decided appeal referred to above and they appear to have accepted the interpretative ruling handed down in that appeal on the meaning of section 11.1.2.

3. The grounds of appeal raised by the Appellants in the present matter may be summarised as follows:

- 3.1 The Adjudicator erred by failing to properly consider the effect of the appeal noted by the Appellants in respect of Complaints No. 2, 11, 26, 37 and 58 which appeal related to similar breaches of section 11.1.2 of the Code (and the interpretation thereof) and which appeal was pending at the time of publication of the print advertisements that are the subject of this present matter.

- 3.2 The Adjudicator erred by failing to properly consider the time of submission and publication of the advertisements that are the subject of this present matter, specifically with reference to the date of the adjudication of Complaints No. 2, 11, 26, 37 and 58 and the 45-day “grace period” granted by the Adjudicator in that complaint within which the Appellants were to ensure full compliance with the provisions of section 11.1.2 of the Code in future advertising of content and subscription services.

- 3.3 The Adjudicator was prejudiced against the Appellant and biased in his determination of the complaint.

- 3.4 The Adjudicator erred by imposing excessive sanctions against the Appellants.

- 3.5 The Adjudicator erred by imposing sanctions that were unreasonably prejudicial to the Appellants’ customers.

- 3.6 The Adjudicator acted *ultra vires* by imposing sanctions that exceed the powers conferred on him by the Code.

4. In addition to the above grounds of appeal, several ancillary points were raised by the Appellants that do not take the matter any further and, for reasons that will become clearer below, do not require to be dealt with.
5. Each of the grounds of appeal is considered in turn below.
6. **First ground:** the Adjudicator erred by failing to properly consider the effect of the appeal noted by the Appellants in respect of Complaints No. 2, 11, 26, 37 and 58 which complaints related to substantially similar breaches of section 11.1.2 of the Code and which appeal was pending at the time of publication of the print advertisements that are the subject of this present matter.
 - 6.1 In the report of the Adjudicator for Complaints No. 2, 11, 26, 37 and 58, the Adjudicator ruled that the advertisements in question (which are materially similar to the advertisements in question in the present matter) breached section 11.1.2 of the WASPA Code. The Adjudicator in that matter stated that the IP and SP (the Appellants in the present matter) should ensure that their content and subscription advertising complied with the provisions of the WASPA Code within 45 days of the date of the adjudication. The IP and SP then noted an appeal against the Adjudicator's decision. This Appeal was pending at the time of adjudication of the present matter.
 - 6.2 The first question that therefore falls to be considered in this appeal is whether the noting of an appeal against an Adjudicator's decision suspends the operation of an Adjudicator's decision, and if so, whether such suspended operation would permit an Appellant to continue to engage in conduct of a nature that the Adjudicator had ruled amounted to a breach of the Code.
 - 6.3 In determining the answer to this question, regard must first be had for the provisions of the Code and, for the purposes of the present matter, it is relevant to note the provisions of clauses 13.3.8, 13.3.9 and 13.5.1 of the Code which provide as follows:

“13.3.8 On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits”.

“13.3.9 If the adjudicator determines that there has been a breach of the Code, then the adjudicator must determine appropriate sanctions.”

“13.5.1 Any member found to have breached the Code of Conduct by an adjudicator has the right to appeal for a review of the adjudicator’s decision, and / or a review of the sanctions imposed by the adjudicator.”

- 6.4 It is clear from the above sections that two separate components to an adjudicator’s decision are envisaged. The first component is a ruling or determination on whether there has been a breach of the Code. The second component, which is conditional upon the first, is the determination of a sanction for that breach.
- 6.5 Whether the operation of both the first and second components of a decision is suspended by the noting of an appeal can be determined with reference to clause 13.3.13 of the Code provides as follows:

“13.3.13 The member must, within five working days, comply with any sanction imposed, or notify the secretariat that it wishes to appeal against the decision of the adjudicator”.

- 6.5 The above provision makes it clear that a member need not immediately comply with the second component of an adjudicator’s decision (the “sanction imposed”) if it has appealed against the decision of the adjudicator. The Appellants in this matter appear to suggest that section 13.3.13 also permits them to disregard the first component of a decision, (i.e. the ruling that certain conduct amounts to a breach of the Code) until such time as their appeal has been decided. In other words, the Appellants

argue that they are entitled to continue to engage in conduct that has been ruled to be in breach of the Code until the appeal has been decided. We cannot conclude from the wording of section 13.3.13 that this was the intention of the drafters of the WASPA Code. Taken to its logical reach, if a member were to advertise offensive material that was held to be in breach of the Code, the member would, on the Appellant's argument, be permitted to continue advertising the offensive material for as long an appeal against any ruling was pending. Although the advertisements in question in the present matter are certainly not offensive in nature, nor do we suggest that the Appellants' argument is not a bona fide argument, it is clear that their suggested interpretation could have quite serious and negative consequences if taken to its logical conclusion.

- 6.6 It seems clear from the wording of section 13.3.13 of the Code that the section confers only an election to either comply within 5 days with the sanction imposed or to appeal against the decision, in which event compliance with the sanction would be suspended pending the outcome of the appeal.
- 6.7 It may be worthwhile to refer here to the accepted principle of legal interpretation "*expressio unius est exclusio alterius*" i.e. the express mention of one thing is intended to exclude all others. The Code clearly distinguishes between a finding that certain conduct amounts to a breach on the one hand and the sanction imposed for such breach, on the other. Accordingly, while section 13.3.13 expressly suspends compliance with the sanction in the event of an appeal, it cannot be taken to also suspend compliance with the ruling and thereby condone further instances of conduct that has been held to be in breach of the Code.
- 6.8 The fact that further offending advertisements (the subject matter of the present complaints) were published before an appeal was finally determined on Complaints No. 2, 11, 26, 37 and 58 is of no assistance to the Appellants in this appeal and the advertisements were rightly taken by the Adjudicator to be further instances of breach. Whether these further instances of breach ought to have been condoned in light of the "grace

period” provided for by the Adjudicator is a separate matter and will be dealt with below but the first ground of appeal must be dismissed.

7. **Second ground:** the Adjudicator erred by failing to properly consider the time of submission and publication of the advertisements that are the subject of this present matter, specifically with reference to the date of the adjudication of Complaints No. 2, 11, 26, 37 and 58 and the 45-day “grace period” granted by the Adjudicator in that complaint within which the Appellants were to ensure full compliance with the provisions of section 11.1.2 of the Code in future advertising of content and subscription services.

7.1 The Adjudicator’s decision in Complaints No. 2, 11, 26, 37 and 58 was reported on 31 January 2006. In that decision, the Adjudicator held that the IP’s advertisements had breached section 11.1.2 of the Code. The Adjudicator required the IP and SP to remedy the breach although, having regard for advertising lead times, the Adjudicator granted the parties 45 days to ensure full compliance with the Code. Although the Appeals Panel in complaints 2, 11, 26, 37 and 58 substituted new fines for the fines imposed by the Adjudicator, we are of the opinion that the obligation not to continue to breach in future could not have fallen away but would be inherently present in any ruling of a breach even if it was not expressly stated. The grace period initially granted by the Adjudicator within which future compliance ought to have been ensured should at least have been a factor that the Adjudicator in this matter should have considered when determining an appropriate sanction for subsequent similar breaches of the Code. Subsequent breaches that occurred within the grace period ought to receive a lighter treatment than further breaches that occurred outside of the grace period by which time the Appellants would have been expected to have their house in order.

7.2 The Appeals Panel has noted that the advertisements in question in this matter were submitted for publication prior to 31 January 2006 and were respectively published in People Magazine on 20 January 2006 (Complaint No. 141), Huisgenoot on 23 February 2006 (Complaint No. 186) and TV

Plus Magazine on 22 February 2006 (Complaint No. 188), i.e. either before the adjudication of Complaints No. 2, 11, 26, 37 and 58 or before the expiry of the 45 day grace period granted in that adjudication. The Appeals Panel finds that the date of placement and publications of the advertisements should have been taken into account by the Adjudicator when considering appropriate sanctions.

8. Third ground: the Adjudicator was prejudiced against the Appellant and biased in his determination of the complaint.

- 8.1 The Appellants' third ground of appeal seems to be based mostly upon the general tone of the Adjudicator's report, his reference to the fact that subscription services remain a "highly contentious issue" (which relates to the severity of the nature of the breach), his reference to other complaints against the Appellants and the minimal effect of the financial sanctions imposed in those matters as a future deterrent to the Appellants. The Appeals Panel is of the view that the severity of the nature of a breach, previous and similar complaints laid against a party, and consideration of the deterrent effect or lack thereof of previous sanctions imposed are relevant factors for an Adjudicator to consider and that the Adjudicator's abovementioned references to these factors are insufficient to support a claim of bias. What would be required in order to establish a claim of bias is some evidence that the Adjudicator dealt with these relevant issues in an unfair manner. Although we have found that the Adjudicator erred in that he should have had regard for the time of publications of the advertisements in question in light of the Adjudicator's report for Complaints No. 2, 11, 26, 37 and 58, the Appeals Panel does not find the Adjudicator's report to be indicative of bias. On the contrary, he appeared to consider the arguments advanced and the issues under consideration at some length and with great care and attention to detail. We can find no basis for a determination that the Adjudicator dealt with the Appeal in an unfair or biased manner.

9. **Fourth ground:** The Adjudicator erred by imposing excessive sanctions against the Appellants.

- 9.1 In the decision of the Adjudicator on Complaints numbers 2, 11, 26, 37 and 58 the Adjudicator noted that:

“...if sanctions are imposed in respect of the [specific] complaints under review, rather than in respect of the service provided by the IP through the SP as a whole, further complaints regarding the same service but different advertisements may be submitted. Such complaints may be entertained by the WASPA and additional sanctions could be imposed should this be found to be necessary and appropriate in the circumstances.”

- 9.2 The Adjudicator went on to impose a fine of R10 000 in respect of each breach of section 11.1.2 and 11.1.4 of the Code (reduced to R8 000 per breach on Appeal) and directed the SP to ensure that the IP separate its content advertising from its subscription advertising allowing for a period of 45 days to make all necessary changes in this regard.

- 9.3 Arising from the fact that the advertisements in question in this matter were submitted for publication prior to the first determination of Complaints numbers 2, 11, 26, 37 and 58 and were all published within the 45 day grace period that followed the adjudication, the Appeals Panel finds that the ordering of a suspension of any services to the SP or IP was excessive. The Appeals Panel finds that additional fines of R8 000 for each further breach of section 11.1.2 would have been appropriate and consistent with the both the original ruling of the Adjudicator and the sanctions imposed by the Appeals Panel in Complaints No. 2, 11, 26, 37 and 58.

- 9.4 It is noted that the Appellants have elected to place before the Appeals Panel a timeline showing further and additional complaints that appear to have been made against it for similar breaches of section 11.1.2 of the

Code (Complaints No. 272, 277, 278, 290, 310 and 315). Having viewed the subject matter of those complaints, it seems that all of those advertisements were run well beyond the 45 day period that the Appellants were initially granted to ensure that advertising for content items and subscription services was clearly separated. Although these later complaints appear to relate to television advertisements and not to print advertisements, a distinction between different types of media is artificial for the purposes of interpreting section 11.1.2 of the Code. It is unclear why the Appellants chose in this matter to place the timeline of complaints before the Appeals Panel as the Appeals Panel is not called upon in this instance to review either the determination of the adjudicator or the sanction imposed in respect of these later complaints.

10. **Fifth and sixth grounds:** the Adjudicator erred by imposing sanctions that were unreasonably prejudicial to the Appellants' customers and the Adjudicator acted *ultra vires* by imposing sanctions that exceed the powers conferred on him by the Code.

- 10.1 Based on our decision to substitute the particular sanctions imposed by the Adjudicator, there is no requirement for the Appeals Panel to consider further whether the original sanctions were *ultra vires* or unfairly prejudicial to consumers.

11. The sanction imposed by the Adjudicator is replaced by the following sanction:

The SP is fined an amount of R8 000 for each instance of breach (R24 000 in total).

12. Any other sanctions that have been imposed against the Appellants in respect of any other complaints, including any concurrent suspension of services arising from another complaint, is not affected by the outcome of this appeal.

13. In light of the fact that the Appellants have been substantially successful in their appeal against the sanctions imposed by the Adjudicator, the Appeals fee is to be refunded to the Appellants.

WASPA Appeals Panel.