

WASPA APPEALS PANEL FINDINGS FOR COMPLAINT NO. 0411

CLICKATELL

APPELLANT

16 October 2007

DECISION

Background:

This appeal is in respect of a report by an adjudicator dated the 24th of October 2006 relating to a complaint that an IP, through the Appellant, had sent a series of six SMSs to the complainant reading as follows:

"1.

GOEIE-DAG SKAKEL A.S.B. ONMIDDELIK VIR LINDA BY
0216861590/0839109300..DANKIE...

2.

GOEIE-DAG SKAKEL A.S.B. ONMIDDELIK VIR LINDA BY
0216861590/0839109300..DANKIE...

3.

VEELS GELUK!!!! U IS 100% ONS DATA WENNER!!!! SKAKEL ONMIDDELLIK VIR
LINDA BY 0216861590/0839109300 OM U FANTASTIESE PRYS TE EIS!!

4.

WAARSKUWING!!!! U LAASTE EN FINALE KANS SKAKEL ONMIDDELLIK VIR
LINDA BY 0216861590/0839109300 OM U FANTASTIESE PRYS TE EIS!

5.

WAARSKUWING U LAASTE EN FINALE KANS OM U PRYS TE EIS.SKAKEL
A.S.B. ONMIDDELIK VIR LINDA BY 0216861590/0839109300

6.

WARNING YOUR LAST AND FINAL CHANCE TO CLAIM YOUR PRIZE. PLEASE
CONTACT LINDA IMM. AT 0216861590/0839109300"

The complainant was an employee of a WASP, and contended that the above SMSs breached the code of conduct in the following manner:

1. sending Spam,
2. not saying price of call
3. Using the word prize.Prove that the prize is not for everyone
4. No opt out
5. No identification from who

6. cant unsubscribe without a premium call

The Adjudicator's Ruling:

In a comprehensive report, the Adjudicator found that there had been a violation of clauses 5.1.2, 5.1.3, 5.2.1, 6.2.2, 9.1.2, 9.1.4 and 9.1.6 of the WASPA Code of Conduct.

The following sanctions were imposed:

1. the SP is ordered to suspend the service of the IP for a period of three (calendar) months from the date of receipt of this report;
2. the SP is ordered not to provide a service to the IP, even after the three (3) months suspension referred to above, until such time as the IP's promotional SMS messages accord with the WASPA Code of Conduct and the WASPA Advertising Guidelines;
3. the Secretariat is instructed to notify all other WASPA members of the suspension of the IP's service in terms of 1 and 2 above and that providing a service to the IP during such period may constitute a breach of the WASPA Code of Conduct and render a member doing so liable to sanctions themselves; and
4. the IP is ordered to pay a fine in the amount of R 50 000,00 in respect of the numerous and egregious breaches of the WASPA Code of Conduct perpetrated by the IP through the SP.

Grounds of Appeal

The appellant has provided the panel with a comprehensive document setting out the grounds of appeal, which can be briefly summarised as follows:

1. There is a distinction between the SP and the IP and the SP cannot be held liable for acts of the IP that would be infringements of the WASPA Code of Conduct if the IP were member;
2. The complainant failed to specify the clauses of the WASPA Code of Conduct that had been breached, and the adjudicator failed to obtain clarity on this issue;
3. There was no infringement of clause 5.3.1 of the WASPA Code of Conduct; and
4. The sanctions imposed were excessive.

It is noted that while the appeal was prepared in accordance with Code of Conduct version 4.6, version 4.3 is the correct version to apply in this matter, version 4.6 having come into operation on the 25th of August 2006, that is some days after the complaint in question was made. However, the panel has compared the two versions of the code and found that there is no difference between the two versions which could prejudice the appellant in this matter.

First Ground of Appeal: the SP cannot be Held Liable for the Actions of the IP

It is a recurring theme in the Appellant's grounds of appeal, running as an unbroken thread throughout its argument, that if the IP, using the SP to access the network operators, commits an action that would, if the IP were a member of WASPA, be a breach of the WASPA code of conduct, the SP cannot be held liable for the actions of the IP.

WASPA is a voluntary organisation set up by the stakeholders in the industry to serve as a self-regulatory body. It is fundamental to the working of WASPA that while it is SPs who are members of WASPA, and are as such themselves subject to the WASPA Code of Conduct, if the IPs were to be given a free rein to misconduct themselves while using the SPs to access the network operators, it would do harm to the SPs and to the industry as a whole. Thus the approach of WASPA from the outset has been to ensure that SPs hold IPs to the standard set by the Code of Conduct. Members are accountable to WASPA for the rendering of services to customers in accordance with the Code. Members may either render services directly to customers or the services may be offered through information providers. The Appellant is responsible for the information provider's adherence to the Code.

The means used to uphold the standards of the Code is set out in clause 3.9 of the Code of Conduct, which reads as follows:

“Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.”

While this provision does not actually state that penalties will be imposed on an SP for IP contraventions of particular clauses of the Code of Conduct, it does impose a general duty upon the SP to ensure that the IP does not contravene the Code of Conduct.

Furthermore, clause 1.6 of the Code makes provision for the applicability of the Code to non-members.

If an IP is at fault, adjudicators have developed the practice of citing the clause in the Code of Conduct that would have been contravened if the IP had been a member of WASPA.

There are, nonetheless, sanctions that adjudicators **can** apply to IPs, but even so such sanctions must by necessity be implemented by the SPs. These sanctions include suspension of services to an IP by an SP as set out in clause 13.4.1 (h), and an IP Notice as set out in clause 13.5.

We further refer to the report of the Appeals Panel in its decision relating to complaints 2, 11, 26, 37 & 58:

Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP.

The appellant is at some pains to show that a distinction must be made between the IP and the SP in adjudicating matters such as these, and lists the clauses of the Code of Conduct that it contends go to show this distinction. The panel agrees that the acts of the SP and the IP must be assessed separately; in many cases the SP and the IP is in fact the same person, while more often the IP is a party which contracts with the SP in order to gain access to the network operators. Merely to say however that because the code treats them separately the SP cannot be liable for actions of the IP in terms of clause 3.9 goes no way to refute the basis of SP liability as set out above.

The first ground of appeal is accordingly rejected.

Second Ground of Appeal: the Adjudicator did not have Sufficient Information on the Complaint to make a Ruling

At paragraphs 2.2 and 4.1 – 4.3 of its Grounds of Appeal the appellant submits that the complaint does not set out which clauses of the Code of Conduct were allegedly breached in this matter. The contention is that the complainant is a competitor of the appellant and should thus have been conversant with the Code of Conduct, and that the adjudicator himself could have obtained better information but failed to do so.

It is unclear whether the appellant is raising this point as a ground of appeal or as an aside, but we address it for the sake of completeness.

It would appear that the complainant was indeed employed by a WASP, but received the SMSs in her "personal capacity". This series of SMSs are unlikely to be the result of a competitor "testing" the appellant as is sometimes the case where a complaint is lodged by a competitor. The complainant can thus not be assumed to have an intimate knowledge of the Code of Conduct as his/her role with the WASP is unknown.

Moreover clause 13.1.3 (c) of the Code states that complaints must include reference to the relevant parts of the Code breached to the extent that it is known or available. A lay person is not expected to be conversant with chapter and verse of the Code, and consequently a complaint lodged by such a person with vague reference to the Code will not be rejected on that basis.

In reviewing the adjudication, the panel did not find that the appellant was in any way prejudiced by the fact that the complaint did not cite which clauses of the Code of Conduct were allegedly breached. The complaint itself allowed the adjudicator to clearly identify the clauses at issue. It was not necessary for him to approach the secretariat or the complainant for clarification. There was also no indication from the appellant or the IP that they were confused as to the issues at hand either.

The second ground of appeal is accordingly rejected.

Third Ground of Appeal: There was no Breach of Clause 5.3.1.

The adjudicator did not indicate the basis upon which he found that a breach of clause 5.3.1 had occurred. His reasoning was that the SMSs in question clearly constituted spam, that the SMSs were sent by the IP through the SP, and hence that clause 5.3.1 had been breached.

It is clear from the IP's response to the original complaints that it was not aware of the existence of WASPA and the Code of Conduct, to quote from the IP's letter per facsimile of the 8th of September 2006:

Currently our contract is with Klikcatell (sic) and therefore it is the first time that we hear of WASPA and their code of conduct, which contains some new rules that we were not aware of.

Clause 5.3.1 reads as follows:

Members will not send or promote the sending of Spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

The appellant examined the provisions of clause 5.3.1 and correctly submitted that it was made up of three parts: that members will not send Spam, that they will not promote the sending Spam, and that they will take reasonable measures to ensure that their facilities are not used by others for the transmission of spam. The appellant submitted further that it had not contravened any of these three parts.

The test for what "reasonable measures" must be taken in ensuring that a member's facilities are not used for the sending of Spam is that of a reasonable person in the position of the member. Thus in determining whether the appellant acted reasonably in preventing the transmission of Spam, the panel must take account of what measures were available to it to do so. While there are technical methods which are used in the industry to monitor traffic through an SP's system to establish if a particular IP is transmitting Spam, the first, best and most obvious measure to be taken in preventing Spam (as well as one that is required by the Code of Conduct) is to advise the IP that rules exist forbidding the sending of Spam in the first place. The IP was clearly not aware of the restrictions on unsolicited communications contained in the WASPA Code of Conduct. To the contrary: the IP was not even aware of the existence of the Code as per IP's letter per facsimile of the 8th of September 2006 quoted above.

The appellant has not denied this or placed any evidence before the adjudicator to the contrary. It seems on the probabilities that the IP was not educated about the Spam restrictions contained in the WASPA Code to which the SP is subject. It is therefore clear that the appellant did not take reasonable measures to prevent the sending of spam and that whatever measures the appellant did take (if any), they have not been effective. The adjudicator's finding in this regard is upheld.

The third ground of appeal is accordingly rejected.

Fourth Ground of Appeal: the Sanctions Imposed were Excessive

The appellant only substantially addresses the sanctions imposed directly upon it in the adjudicator's fourth sanction, that is a fine of R 50 000. Before addressing this issue, however, it mentions as an aside that sanctions 2 and 3 are impracticable, as measures are not in place to determine whether "the IP's promotional SMSs messages accord with the WASPA Code of Conduct and the WASPA Advertising Guidelines;" It is not necessary to address this issue as the sanctions have been amended as set out below.

The appellant attacks the fourth sanction imposed by the adjudicator on several grounds, which I will address *seriatim*:

1. "5.5.5.1 Neither of the SMS messages complained of in complaints #0050 and #0069 were sent by the SP;"

This is dealt with adequately in the discussion of the first ground of appeal above. **This ground is rejected.**

2. "5.5.5.2 The SP was commended by the adjudicator for its exemplary conduct with regard to complaints #0050 and #0069;"

These commendations however should not be seen as a license from the adjudicator of those complaints for the appellant to rest on its laurels: the duty imposed by the Code of Conduct subsists and the appellant's experience in these to complaints should have served as warning to be on its guard. The adjudicator however erred in finding that these previous complaints were an aggravating factor, given the praiseworthy conduct of the appellant in those cases. **This ground is upheld.**

3. "5.5.5.3 The IP involved in complaint #0411 was not the same IP as that involved in complaints #0050 and #0069;"

It would however be impractical to judge an SP's conduct relative to each individual IP that it services. It is the duty of the SP to ensure that all the IPs that use it comply with the Code of Conduct. **This ground is rejected.**

4. "5.5.5.4 The SP was not the message originator of any of the SMS's complained of;"

It has been established above that of the SP does not have to be the message originator for it to fall foul of the provisions of clause 5.3.1. **This ground is rejected.**

5. "5.5.5.5 In the present instance, the "numerous and egregious breaches of the WASPA Code of Conduct" were found to be perpetrated by the IP and not by the SP;"

See the discussion of the first ground of appeal in this regard. **This ground is rejected.**

6. "5.5.5.6 No reference is made by the adjudicator to any previous breaches of the WASPA Code of Conduct by the IP involved in complaint #0411;"

The significance of this ground is not clear, but presumably it relates to the same point as that raised in point 3 above. **This ground is rejected.**

7. "5.5.5.7 Despite having failed to establish any breach by the SP of the Code of Conduct, the SP is ordered to pay a fine;"

See the discussion of the first ground of appeal in this regard. **This ground is rejected although the rejection of this ground of appeal must be viewed together with the amended sanction imposed herein**

8. "5.5.5.8 The amount of the fine, being R50 000.00, is, with respect, not only completely unfounded, but also substantially in excess of the amount awarded in complaint #0069 (no fine having been imposed in complaint #0050). The only explanation proffered by the adjudicator for the amount of the fine is the "numerous and egregious breaches of the WASPA Code of Conduct" by the IP."

The fine of R50 000,00 is indeed high, but it must be borne in mind that no fewer than seven clauses of the Code of Conduct were breached in this complaint.

Spam is a significant problem in the industry at present which requires strong measures to bring it under control, thus breaches of clause 5.3.1 are viewed in a serious light.

Marketing by making misleading statements to consumers that they have won prizes is dishonest, undesirable and has the potential to seriously compromise the integrity of the industry. Breaches of clause nine of the Code of Conduct should thus be treated sternly.

On the other hand, the panel has not taken the complaints against the appellant under complaints numbers 50 and 69 as aggravating factors.

Finding

The appeals panel upholds the findings of the adjudicator but replaces the sanctions imposed by the adjudicator with the following sanctions:

1. In respect of its failure to take reasonable measures to prevent the sending of Spam through its failure to effectively educate the IP about the Spam provisions of the WASPA Code, the appellant is fined R10 000.
2. The SP is directed to comply with the provisions of section 3.9.2 of the Code and directed to suspend the provision of its services to the IP for a period of 7 days save for the continued provision of already activated consumer subscription services.
3. In respect of all further breaches of the Code by the IP, the appellant is directed to pay to WASPA an amount of R25 000 within 14 days of receipt of this report, failing which all members of WASPA, including the appellant, are ordered to suspend the provision of all services to the IP concerned for a period of 3 months save for the continued provision of already activated consumer subscription services.

As the appeal was substantively rejected and only a reduction in the sanctions was granted by the panel, the appellant forfeits 75% of its appeal fee.

The Appeals Panel