

**WASPA appeals panel
Complaint 10815**

REPORT OF THE APPEALS PANEL

Date: 1 July 2011

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 10815

Applicable versions: 10

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged in November 2010, by the WASPA Monitor against Buongiorno.

1.2 The complaint relates to a banner advertisement. The appeal concedes that the advertisement was in breach of the relevant clauses, but explains that it was placed in error.

1.3 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The decision related to section 3 and 11 of the Code, and section 9.2 of the Advertising Rules. Given the nature of the appeal, it is unnecessary to revisit the contents of these clauses here.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “Both versions of the ad, the offending ad and the revised ad are problematic. The offending ad has terms and conditions and pricing text placed vertically in contravention of the Advertising Rules which require horizontal text. The revised ad contains black terms and conditions and pricing text against a red background which does not appear to be readable on the screenshots WASPA was furnished with, although the text is now horizontal. The pricing information is not placed “immediately below, above or to the side of the access number” as the Rules require and is rather on the opposite corner to the access number in the two ad versions.

The Monitor did not furnish WASPA with screenshots of the subscription page which is loaded when clicking on the offending ad and I am therefore unable to comment on whether that page was in contravention with sub-sections of section 11 of the Code which I quoted above and which relate to the additional aspect of the complaint. The screenshot the SP furnished WASPA with appears to comply with those sections of the Code, assuming the “Love Match” item on offer is indeed one of a number of mobile applications on offer and which are promoted on the subscription page on the left and right hand sides.

The offending ad is clearly in violation of the Advertising Rules and the revised ad appears to be similarly problematic. The SP’s repeated assurances that it was addressing the cause of the complaint while taking no apparent steps to have the offending ad removed is unacceptable. The SP’s statements in this regard were disingenuous and not in keeping with its obligation to conduct itself professionally in its dealings with WASPA..”

3.2 Sanctions

The following sanctions were given:

I find the SP's offending ad and its conduct to be in violation of the Code and impose the following fine which is payable on demand by the WASPA Secretariat:

- In respect of the offending ad, a fine of R20 000;
- In respect of the SP's conduct in its dealings with WASPA, a fine of R30 000.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 10787

4.1.1 Attorneys DLA Cliffe, Dekker, Hofmeyr, on behalf of the Appellant submitted detailed grounds of complaint which will not be recanvassed in full here.

4.1.2 It summarised its appeal as resting on 3 legs:

A procedural irregularity

An incorrect finding on the merits

That the sanction was "grossly unreasonable"

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 Version 10.0 of the Code, in use from 13 October 2010 to the present, applies.

5.2 Finding

5.2.1 The Appellant indicated that it believed there was a procedural irregularity, and gave a detailed legal discourse on the nature of natural justice. However, it failed to actually identify in what respect the decision was flawed.

5.2.2 We are therefore unable to consider this aspect of the appeal.

5.2.3 In addition, the Appellant indicated that it was appealing on the merits of the matter, but did not proceed to do so.

5.2.4 We are therefore unable to consider this aspect of the appeal.

5.2.5 We pause here to note that this Panel is currently considering a number of appeals from this Appellant. All the documents appear to follow the same format with little thought as to the actual content of the appeal. This is a waste of the Panel's time and WASPA's resources, and the Panel wishes to caution the Appellant from this approach in future.

5.2.6 Turning to the actual content of the appeal.

5.2.7 The Appellant tacitly concedes that the actual content of the advertisement was in breach of the Code.

5.2.8 In essence, what occurred was the following: the advertisement was changed after discussions with WASPA. The Appellant sent instructions to its media house to change the advertisement and was told "it's done".

5.2.9 The Adjudicator found the Appellant's original response disingenuous, and took issue with the fact that the offending banner had been "up" for 5 months.

5.2.10 It is our understanding that this type of advertising does not remain "up" but cycles with other advertising. It is therefore not an issue of the Appellant simply checking all the sites that it has booked. We therefore do understand how it could occur that the Appellant was not aware of the ongoing use of the wrong banner.

5.2.11 We also find that the Appellant acted reasonably in its transactions with the media house. It gave an instruction, which instruction was acknowledged. While it is true, and the Appellant concurs, that it remains responsible for its own advertising, we believe that it took the steps that any reasonable advertiser would have taken in the given situation.

5.2.12 The only way in which the Appellant failed to act appropriately was perhaps in failing to institute a more thorough check and monitoring system.

5.2.13 The decision on the merits remains binding, and despite the Appellant's initial submissions, does not appear to be challenged.

5.2.14 The sanction is, however, found to be unduly harsh in the circumstances. We reduce the fine to one of R5000,00, and encourage the Appellant to institute a better checking process should this type of situation arise again.

5.2.15 The cost of appeal is non-refundable.