

WASPA appeals panel
Complaint 10433, 10896, 11147, 11150 and 11212

REPORT OF THE APPEALS PANEL

Date: 30 January 2012

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 10433, 10896, 11147, 11150 and 11212

Applicable versions: 9 &10

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns various complaints lodged over a period ranging from September 2010 to November 2010 against Buongiorno (Appellant).

1.2 The Appellant requested that all the Adjudications be heard together by the same Appeals Panel.

1.3 All the Complaints relate to the Appellant's "unsubscribe" mechanism.

1.4 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 11.8.2, 11.8.5 and 11.8.6 of version 9 of the Code, and sections 11.9.1 to 11.9.6 and 14.7.9 of version 10 of the Code.

3. FINDINGS AND DECISIONS OF THE ADJUDICATORS

3.1 Finding of the Adjudicators

Do to the length of the various Adjudications, only brief extracts will be provided with no reference to Adjudication 10433:

Adjudication 10896

“...The Complainant clearly wished to be removed as a subscriber. A “stop” instruction was sent minutes after receiving the welcome message and was sent after receiving two further reminder messages 2 days apart. The Complainant was not removed as a subscriber because her instruction generated an error on the SP’s system. Instead, what should have occurred is that the Complainant’s “stop” instruction should either have removed her as a subscriber to all services serviced by the 31191 shortcode or she should have been presented with a choice as to which specific service from which she wished to be removed as a subscriber to.

The Complainant would most likely have been removed as a subscriber minutes after first subscribing had the SP’s termination mechanism operated as the Code requires. Its failure to do so and the absence of any feedback in this regard led to the Complainant’s continued subscription to the SP’s benefit. In the circumstances, the SP’s refusal to refund the Complainant’s is unreasonable. At the same time, some time has elapsed since the Complainant’s subscription was terminated and a refund may not be practical. In considering this matter I must also take into account the likelihood that other subscribers are being charged for a service they no longer wish to subscribe to and where they remain subscribers due to non-compliant termination mechanisms...”

Adjudication 11147, 11150, 11212

“...While the motivations of complainants and background histories to the institution of complaints may be relevant in certain circumstances, they do not automatically introduce procedural or substantive irregularities in the institution or adjudication of complaints themselves.

WASPA is a self-regulating, voluntary membership body and complaints against members are very frequently lodged by competing members whose motivations do not need to be altruistic for their complaints to be valid or upheld. In fact, the motives of a complainant may be, they are very often irrelevant as to whether or not a SP’s services comply with the provisions of the Code.

Even if one was to accept the SP’s averments regarding the Monitor’s investigations and the misplaced motives of its competitor in lodging complaint #11147, I do not find

that these averments are sufficient in the present matter to sustain an argument that the complaints against the SP are either procedurally or substantively unfair.

The complaints themselves do not, on the facts, appear to have been “trumped up” in any respect nor has the SP been unfairly prejudiced in the manner in which information relating to these complaints been presented nor in the manner in which the complaints themselves have been adjudicated...”

“...The SP’s attorney has alleged in paragraphs 20 to 22 of a letter of 2 December 2010 that WASPA failed to notify or explain to the SP that the initial complaint lodged against the SP by its competitor was to be dealt with by the emergency procedure.

These paragraphs bear repeating *verbatim* below:

“20. Having advised that both matters were to be dealt with as formal complaints, WASPA then changed its mind without notice to our client and without explanation.

21. By way of amplification, on 23 November 2010, at 16:08, the secretariat issued an Emergency Procedure Notice advising that the Secretariat had invoked an emergency procedure to deal with the complaints. The Emergency Panel made a finding, and drew conclusions, which simply echoed what had been stated by the monitor as outlined in para 12 above. The conclusion that our client was ignoring attempts to de-subscribe was not a correct reflection of the facts. Our client had not yet had the opportunity to deal with either complaint, or to make representations to WASPA on the issue – having been advised that that both were being dealt with as formal complaints. Our client was prevented, by the manner in which the matter was dealt with by the secretariat, from presenting its case prior to decision. The secretariat likewise, by its unexpected and precipitate action in causing an emergency panel to be convened prevented itself from having the opportunity to engage with our client to advise precisely what it required of our client by way of compliance and to secure any such compliance voluntarily as a result of logical persuasion rather than sanction.

22. WASPA therefore caused a ruling to be made against our client in utter disregard to the fundamental procedural principle of “audi alteram partem” - there was no proper basis for an emergency panel to be involved to address the issue which had arisen, or for that panel to rule as it did, The emergency panel presumably exists for extreme situations – which this plainly was not.”

To summarise, the SP’s attorney has alleged that WASPA failed to give notice to the SP that the complaints had been escalated from the ordinary complaints process to the emergency complaints process. “*By way of amplification*” of this allegation, he states that an Emergency Procedure Notice was issued on 23 November 2010 at 16:08 advising that the Secretariat has invoked an emergency procedure to deal with the complaints.

Whilst the SP’s attorney’s allegation is, semantically speaking, true, it is not the whole truth. This must surely have been apparent to the SP’s attorney at the time the averment was constructed.

Whilst it is correct that an emergency procedure notice was issued on 23 November 2010 at 16:08 advising the SP of the emergency procedure that had been invoked (and of the ruling made against it), this was the second emergency procedure notice.

The first emergency procedure notice was sent more than 24 hours earlier, i.e. on 22 November at 15:21. It was in the first notice that the SP was first advised that the emergency procedure had been invoked. The second notice essentially contained further statement confirming that the emergency procedure had been invoked. The SP's attorney has not commented on the first notice and drawn attention only to the second notice after the emergency panel had convened and ruled.

There is little merit in the SP's attorney's submissions that the SP was denied an opportunity to address WASPA before the emergency panel ruled and that the emergency panel ruling was made "*in utter disregard*" for the *audi alteram partem* principle as alleged.

It bears repeating that the specific complaints against the SP concerned allegations that its de-subscription mechanisms were not working. In these circumstances, many consumers might find themselves "locked in" to having daily charges debited against their cellphone accounts, including in respect of services they no longer wished to be subscribed to. In these circumstances, I do not consider the use of the emergency hearing procedure to have been inappropriate.

In any event, the emergency panel ruling of 23 November 2010 was of the form of a temporary injunction against billing that would only remain in place pending the SP's de-subscription mechanisms being brought into conformance with the requirements of the Code. The ruling made it clear that the SP could notify the WASPA Monitor to re-test its services once they were compliant and that billing could continue after the Monitor had certified this. The emergency panel's ruling was not a permanent injunction against billing, or even an injunction against billing pending the final determination of the formal complaint. The ruling specifically empowered the SP to recommence billing as soon as its services complied with the Code.

Clause 14.7.9 of version 10.0 the Code deals with the situation where an emergency procedure may be invoked for a complaint already being handled by the formal complaint procedure. It provides that: "*[i]n this case, the SP must be provided an opportunity to supplement any response already submitted to the formal complaint once the emergency procedure has been completed.*"

In the present matter, the SP had not yet submitted any response at the time the emergency procedure was invoked, however the time period for submitting a response to the formal complaint had not yet expired. The question that falls to be considered is whether clause 14.7.9 should be interpreted as preventing a SP from submitting a response to an emergency complaint other than by supplementation of an answer already filed once the emergency procedure has been completed. Clause 14.7.9 does not lend itself to such a strict interpretation and the principles of administrative justice would dictate that the SP must have the right to submit a response, even if the time frame for doing so might be very severely limited due to the urgent nature of a complaint.

The emergency notice sent to the SP made it clear that, following the emergency hearing, an emergency ruling may be issued. The notice stated further that *“You do not need to respond to this notice”*. The notice did not prohibit the SP from responding although it could have been more inviting of a response. Ideally, such a notice would say that, if the SP wished to submit a response, it may do so by a specific time, but that it is not obliged to do so, in which event the emergency hearing may proceed in the absence of any response.

The emergency procedure is an extra-ordinary procedure and its use should be confined to appropriate cases. The first complaint was lodged on 17 November 2010. No action appeared to have been taken by 22 November 2010. In the circumstances of the present matter, and having regard for the fundamental purposes of WASPA and the Code of Conduct in promoting consumer confidence in the WASP industry as a whole, I do not regard the emergency hearing procedures to have been inappropriately invoked or applied given the potential prejudice to consumers that was at stake.

Having dealt with the allegations of procedural irregularities, I turn now to deal with the merits of the complaints. It is most convenient for me to do so by making reference to individual message numbers from the combined message log set out above.

Although not specifically in issue in this present complaint, I have noted that **message no. 3** was a welcome message for the Fun Club service that made use of the abbreviations “2” for the word “to” and “unsub” for “unsubscribe”. These abbreviations are not expressly permitted in terms of section 11.1.8 of version 9.0 of the Code for activation messages, welcome messages or other similar messages.

The annotated version of version 9.0 of the Code reveals that section 11.1.8 *“was introduced in version 9.0 in order to provide clarity on alternate typography”*. Clause 14.3.8 of the Code, an adjudicator may make reference to the “annotated” version of the WASPA Code.

In particular, using the digit “2” immediately after the short code digits “36060” in the sentence phrase “SMS STOP FUN to 36060 2 unsub” could be misread at a glance into thinking that number that the STOP FUN command is to be sent to is 360602. Notwithstanding my observations and comments, I have made no ruling in respect of this message and simply draw it to the SP’s attention.

Message no. 4 was the first attempt to unsubscribe from the Fun Club service by sending the word “stop” to 36060. The syntax of the message did not comply with the required message format for a subscription to be terminated as the specific keyword for the relevant subscription service did not follow the word “stop”.

Section 11.8.5. of version 9.0 of the Code provides that *“Where a service is linked to a specific short code in advertisements for that service, then sending a ‘STOP’ request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.”*

Furthermore, section 11.8.6. of version 9.0 of the Code requires that *“[i]f a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.”*

Following the receipt of message no. 4, if the SP could parse message no. 4, it should have either terminated all 36060 services to which the message originator was subscribed or it should have given the message originator (the “recipient” of the services) a choice of which specific subscription service to terminate. If it could not successfully parse the message, it should have sent a response to the message originator containing sufficient information for the message originator to be able to unsubscribe from the Fun Club service, or to be able to contact the service provider's customer support.

The SP's attorney claimed in paragraph 25.9.3 of his letter of 2 December 2010 that the SP had replied to the “stop” request by sending a message inviting the subscriber to contact the SP's call centre to clarify their instruction. However, following the adjudicator's request for copies of all message logs, the SP's attorney later admitted in paragraph 10 of a subsequent letter dated 18 May 2011 that no such messages were actually sent.

The SP accordingly breached section 11.8.5 of version 9.0 the Code, alternatively section 11.8.6.

Although not specifically in issue in this present complaint, **message no. 6** was a welcome message for the VIP service that also made use of the abbreviations “2” for the word “to” and “unsub” for “unsubscribe”. For the reasons set out in relation to message no. 3 above, message no. 6 may also have breached section 11.1.8 of version 9.0 of the Code. Notwithstanding my observations and comments, I have made no ruling in respect of this message and simply draw it to the SP's attention. **Messages no's. 9, 11, 12, 13, 14, 15, 16, 22** were subscription reminder messages and all contained the words “you get unlimited downloads”. These words are not permitted in subscription reminder messages which have to adhere to the specific wording and format of section 11.5.2 of the Code. On the face of it, these messages all breach section 11.5.2 of version 9.0 of the Code read with section 11.7.1 thereof.

Notwithstanding my observations and comments, as these messages were not part of the initial complaint, I have made no ruling in respect thereof and simply draw them to the SP's attention.

Messages no's. 29 and 32 were further “generic” attempts to unsubscribe from subscription services by sending the word “stop” to 35050 and 36060 respectively.

The syntax of the messages did not comply with the required message format for any specific subscription to be terminated by the SP as the specific keyword for the relevant subscription services did not follow the word “stop”.

Section 11.9.5. of version 10.0 the Code provides that *“Where a service is linked to a specific short code in advertisements for that service, then sending a ‘STOP’ request*

to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.”

Furthermore, section 11.9.6. of version 10.0 of the Code requires that *“[i]f a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.”*

Following the receipt of messages no. 29 and 30, if the SP could parse the messages, it should then have either terminated all 35050 and 36060 services to which the message originator was subscribed or it should have given the message originator (the *“recipient”* of the services) a choice of which subscription services to terminate. If it could not successfully parse the messages, then it should have sent responses to the message originator containing sufficient information for the message originator to be able to unsubscribe from the specific services, or to be able to contact the service provider's customer support.

Again, while the SP's attorney initially claimed in paragraph 25.9.3 of his letter of 2 December 2010 that the SP had replied to *“stop”* requests by sending messages inviting the subscriber to contact the SP's call centre to clarify their instructions, following the adjudicator's request for copies of all message logs, the SP's attorneys admitted in paragraph 10 of the letter of 18 May 2011 that no such messages were actually sent.

The SP accordingly breached section 11.9.5 of version 10.0 the Code, alternatively section 11.9.6.

Notwithstanding the emergency panel ruling issued on 23 November 2010 requiring, *inter alia*, that the SP cease billing on its subscription services and ensure that its subscription termination mechanisms were fully compliant with the Code, the SP continued billing. Section 14.7.6 of version 10.0 of the Code provides that *“[t]he member concerned must comply with the urgent remedy as soon as practicable. Failure to do so constitutes a breach of this Code.”*

Although the SP, through its attorney, alleged on 24 November 2010 that the SP did not, at that time, understand in what manner its termination services were noncompliant with the provisions of the Code, whatever ignorance it may have suffered should not have been any practical obstacle whatsoever to it terminating billing for the services as required by the ruling.

By continuing to bill, it adopted an attitude that until it was told exactly what it was doing wrong, it should be entitled to continue to bill, notwithstanding the emergency ruling. The SP placed itself above the provisions of the Code and its enforcement mechanisms. This conduct amounts to a most serious breach of section 14.7.6 of the Code.”

3.2 Sanctions

The following sanctions were given:

Adjudication 10433

1. The SP is required to amend their process in terms of 11.8.2 to make it clearer that there is a difference between the word “stop” for normal opting out and where an opt out is in respect of multiple services to make it clear that there is a difference and what the difference is that is required. This must be **clear and unambiguous** and should not be confused with the normal opt out process.
2. The SP must refund the Complainant in full.
3. The SP is fined R10 000 for its breach of section 11.8.2 to be suspended pending their compliance with sanction 1 above within 30 (thirty) days of this report.

Adjudication 10896

With respect to the Complainant, I order the SP to refund all charges levied against the Complainant’s account for the period of her subscription to the extent such an order is feasible in the WASPA Secretariat’s opinion.

Going further I order the SP to -

- send a reminder message to all current subscribers of the service that forms the subject matter of this complaint in the format specified in section 11.6 of the current version of the Code no later than 48 hours after being notified of my findings;
- immediately take steps to ensure that the SP’s termination mechanism returns the requisite response/s described in sections 11.9.2 and 11.9.5 of the Code (the SP must implement the most appropriate response given the nature of its services); and
- pay a fine in the amount of R50 000 to WASPA on demand by the WASPA Secretariat for its non-compliance with the Code as described in this report.

Adjudication 11147, 11150, 11212

The emergency ruling to suspend billing arose on 23 November 2010. By this date, the SP should have been aware of a very similar complaint that its subscription termination systems were not working in respect of its “Sexy Cherry” service (see WASPA Complaint # 10896). The facts of this complaint show that an attempt to unsubscribe from the service on 24 July 2010 was unsuccessful for much the same reasons as have been outlined above. The SP was informed of this complaint in October 2010. A further complaint was made on 17 November 2010. By 23 November 2010 it was still pleading ignorance. In its final letter of 18 May 2011, it blamed a former employee for incorrectly configuring its systems.

For the repeated breaches of section 11.8.5/11.8.6 and 11.9.5/11.9.6 of versions 9.0 and 10.0 of the Code the SP is fined an aggregate amount of R50 000.

Whatever the excuses for breach of 11.8.5/11.8.6 and 11.9.5/11.9.6 of versions 9.0 and 10.0 of the Code, the SP should under no circumstances have failed to adhere to an emergency panel ruling.

The SP's conduct undermines the very purpose of WASPA and the credibility of the WASP industry as a whole. WASPA plays a self-regulatory role in the WASP industry and the primary objective of the Code is stated in section 1.2 thereof as follows:

“The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”

The role played by WASPA in providing consumers with a mechanism for addressing complaints relating to WASP services is more or less akin to the role played by consumer affairs authorities in terms of the Consumer Protection Act. The highest complaints handling authority in terms of that Act is the Consumer Tribunal. In terms of section 109 of the Consumer Protection Act, any person who fails to comply with an order of the Tribunal commits an offence and is liable, on conviction, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment. This example serves to illustrate the seriousness with which failure to any comply with the ruling of a consumer protection body is to be treated. The rulings of an industry consumer protection body should be no different, especially as the public framework makes specific allowance for the industry based management of the consumer protection role.

Subscription services that do not comply with the provisions of the WASPA Code have the potential to cause significant financial prejudice to consumers and a failure to comply with a ruling made by the WASPA Emergency Panel cannot escape with light or even moderate sanction. A heavy sanction must be imposed. In the circumstances, for the wilful failure to comply with the ruling of the emergency panel and the breach of section 14.7.6 of the Code, the SP is fined an amount of R100 000.

The total fine of R150 000 must be paid to WASPA within 5 days of the delivery of this report, failing which the SP's membership of WASPA shall be suspended until the full amount has been paid.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for various complaints

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”

4.1.3 It stipulated further that the main basis for the Appeal are:

- To highlight the negative effect of disregarding of the “double jeopardy” principle
- To address the different interpretations applied by the Adjudicator (s) to the same – or, in different versions of the Code, comparable – sections of the Code;
- To obtain clarity from WASPA with regards to the correct interpretation of the unsubscribe mechanism; and
- To question the procedure in the lead-up to the adjudication for complaint 11147; and subsequent fines imposed therein.

5. FINDINGS OF APPEAL PANEL

5.1 Versions of the Code

5.1.1 Version 9.0, in use from 31 March 2010 until 13 October 2010 and version 10.0 of the Code, in use from 13 October 2010 until 8 June 2011, apply.

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 What does seem to be prevalent in the Appellant’s allegations related to procedural irregularities, are the so-called failure by WASPA Adjudicators to abide by the “audi alteram partem” rule.

5.2.3 Whether such allegation might be proved in other adjudications remains to be seen, but this Panel has not found any evidence to sustain such allegations in the matters brought before it.

- 5.2.4 With specific reference to Adjudication 10896 and the Appellant's allegation in its paragraph 43.5, the Panel finds that the Appellant had more than ample time to provide a thorough response that would have dealt with all the issues related to the termination of a service in its response to the formal complaint.
- 5.2.5 Further to the issue at hand, the Appellant indicated that it only responded to sections 11.9.1 and 11.9.2 while the Adjudicator considered additional sections.
- 5.2.6 This Panel does not find any evidence in the SP's response to substantiate such a claim (the SP referred to section 12.3.2), although the Adjudicator does allude to the fact that the SP erroneously referenced the particular section.
- 5.2.7 The Panel further finds that the Adjudicator merely applied section 11.9 and its subsections based on the fact that those sections of the Code are considered relevant to the Complaint which relates to an "unsubscribe" mechanism.
- 5.2.8 No specific mention in the Complaint was made of any particular section of the Code breached.
- 5.2.9 The Complainant merely indicated that it was not satisfied with the "unsubscribe" mechanism.
- 5.2.10 A proper response by the Appellant (SP in the Adjudication) would therefore have catered for the inclusion of all relevant sections that might have been relevant to the termination of a service which is clearly highlighted as section 11.9 and ALL its subsections.
- 5.2.11 The Panel therefore expresses its opinion that the "audi alteram partem" rule was followed by having allowed the SP to respond to the allegations of an "unsubscribe" mechanism that was apparently not functioning.
- 5.2.12 The Appeal process also allows the Appellant with further recourse in addressing its concerns and therefore serves as further indication of WASPA's

commitment to procedural fairness. Any misunderstandings by the Appellant regarding the scope of its response are addressed by the Appeal procedure; and any potential prejudice to the Appellant has therefore now been addressed.

5.2.13 The conclusions reached by the Adjudicator in adjudication 11147 succinctly addressed the allegations of procedural or substantive irregularities in the institution or adjudication of complaints and this Panel concurs with the Adjudicator's decision thereon.

5.2.14 As to the allegation of double jeopardy and subsequent comments by the Appellant, the Panel must concur that all the relevant adjudications pertaining to the same allegations, should have been forwarded to one Adjudicator, if ALL such complaints were still pending or unresolved without being published.

5.2.15 This would allow for uniformity and better cross-reference when fines are levied, until publication has taken place, whereafter subsequent complaints pertaining to similar cases could be judged accordingly with proper reference.

5.2.16 The Panel however does NOT agree that additional complaints relating to a similar or the same alleged offence should not be formalised.

5.2.17 Every complaint represents a different complainant, with different time lengths of subscriptions and different demands. It also is potentially indicative of a different scope of problem, and potentially of a disregard by a particular service provider of the rules, as opposed to a "once off" error.

5.2.18 Even though the basis of the complaint might be the same, each one could carry a different outcome in terms of compensation etc, all adjudicated on the merits of each case.

5.2.19 However, as to the issuing of administrative fines, the Panel to a certain degree does concur with the Appellant.

- 5.2.20 The Panel is not equipped to rule on the finer interpretations of double jeopardy and would limit itself to suggestions as described below.
- 5.2.21 The Panel is of the opinion that double jeopardy pertaining to administrative fines might occur where complaints involve the same product or process, as in this case (“unsubscribe” mechanism).
- 5.2.22 This Panel therefore strongly recommends that the WASPA Secretariat, where feasible, endeavour to refer all formal complaints relating to the same product or process to the same adjudicator while such complaints are still pending a finding or ruling. Concomitantly, where Service Providers are aware that pending complaints do overlap, they should endeavour to make the WASPA Secretariat aware thereof. It is therefore implied that this endeavour should be a joint responsibility, shared between the WASPA Secretariat and the Service Provider, aimed at alleviating the possibility of any unfair outcome that might be alleged as a result from complaints related to the same product or process.
- 5.2.23 Adjudications 11147 and 11150 did however refer to adjudication 10896 (contrary to what is claimed by the Appellant in its paragraph 51) and in all likelihood, should have considered the administrative fines levied therein.
- 5.2.24 This did take place and additional fines were levied on the basis that repeated breaches took place.
- 5.2.25 These breaches at the time of the various complaints however were not proven breaches but only alleged breaches of the Code and the Panel concurs with the conclusion sought by the Appellant in its paragraph 52.
- 5.2.26 The Panel has to concur with the Appellant in this instance that such action (administrative fine levied for “unsubscribe” mechanism) amounted to double jeopardy (concept as interpreted by this Panel).
- 5.2.27 However, in some instances, some might argue that double jeopardy cannot occur where new evidence is introduced.

5.2.28 The amount of new evidence in adjudications 11147 and 11150 might therefore have contributed to **additional** and **NOT repetitive** fines.

5.2.29 The Appellant further raised its concerns with the emergency procedure.

5.2.30 This Panel is of the opinion that all aspects pertaining to the emergency procedure were thoroughly addressed by the Adjudicator in adjudication 11212.

5.2.31 The Panel therefore does not agree with the conclusion reached by the Appellant in its paragraphs dealing with the emergency procedure.

5.2.32 Although the Appellant constructively engaged with WASPA, this Panel is not convinced that such engagement alone justified the Appellant's subsequent refusal to abide to the Emergency Panel's ruling pertaining to suspension of billing.

5.2.33 In fact, the Panel is of the opinion that the Adjudicator summarised the situation correct when he or she stated the following:

5.2.33.1 *"Subscription services that do not comply with the provisions of the WASPA Code have the potential to cause significant financial prejudice to consumers and a failure to comply with a ruling made by the WASPA Emergency Panel cannot escape with light or even moderate sanction. A heavy sanction must be imposed. In the circumstances, for the wilful failure to comply with the ruling of the emergency panel and the breach of section 14.7.6 of the Code, the SP is fined an amount of R100 000."*

5.2.34 Such refusal or ignorance should in fact carry a suspension of membership and the Panel is of the view that the Appellant escaped with a slap on the wrist.

5.2.35 With reference to the Appellant's allegation of different interpretations.

5.2.36 The Panel concurs with the Appellant that Adjudications 10433, 10896 on the one hand and 11147 and 11150 on the other hand do not provide for a uniformed approach or explanation as to how an “unsubscribe” mechanism must operate.

5.2.37 This situation could be avoided if the Panel’s recommendation in paragraph 5.2.22 is followed.

5.2.38 This fact does however not change what is stated in sections 11.9.2, 11.9.5 and 11.9.6.

5.2.39 From the communications reviewed between the Appellant and Vodacom, a certain trend already evolved as to what was requested from the Appellant.

5.2.40 The further explanation from the WASPA Secretariat also provided guidance.

5.2.41 The Panel does however agree that interpretation in this particular case has not been formalised and would want to do so here:

5.2.41.1 Section 11.9.2 usually applies when a customer replies to a message that they have received from the SP, which will mean sending a ‘stop’ command to a long-code (something like +27821234567).

5.2.41.2 Section 11.9.2 read with section 11.9.4 should be interpreted as follow:

a.i.1.a. Use of the command words ‘stop’, ‘end’, ‘cancel’, ‘unsubscribe’ or ‘quit’ via SMS as a reply to a service provider (‘SP’) message **must lead to unsubscription**;

a.i.1.b. Where the above command words (par 5.2.40.2.a.) are used with reference to a particular keyword, (e.g. ‘stop x’), then the subscriber must be unsubscribed from such particular service;

a.i.1.c. Where the above command words (par 5.2.40.2.a.) are used without reference to a particular keyword, (e.g. 'stop' (without the x)) and the subscriber uses more than one service, then:

- A response should be sent to the subscriber requesting the subscriber to specify which service(s) the subscriber wishes to terminate; OR
- The SP can choose to terminate all services for the subscriber.

5.2.41.3 Section 11.9.5 should be interpreted as follow:

- a. If a service is being marketed using a shortcode (e.g. 21212), then sending a 'stop' command (i.e. 'stop', 'end', 'cancel', 'unsubscribe' or 'quit') to that short code **must lead to unsubscription**.
- b. Where the above command words (par 5.2.40.3.a.) are used with reference to a particular keyword, (e.g. 'stop x'), then the subscriber must be unsubscribed from such particular service;
- c. Where the above command words (par 5.2.40.3.a.) are used without reference to a particular keyword, (e.g. 'stop' (without the x)) and the subscriber uses more than one service, then:
 - A response should be sent to the subscriber requesting the subscriber to specify which service(s) the subscriber wishes to terminate; OR
 - The SP can choose to terminate all services for the subscriber.

5.2.42 Having reviewed all aspects related to the Appeal, Adjudications, Complaints, subsequent SP responses and having regard to certain conclusions derived by this Panel, the Panel:

5.2.42.1 Upholds all 5 Adjudications;

- 5.2.42.2 Finds that the administrative fine levied in Adjudications 11147 and 11150 pertaining to the unsubscribe request is repetitive of the fines levied in Adjudications 10433 and 10896 without the Appellant having been afforded a chance to react to the Adjudicator's findings in 10433 and 10896;
 - 5.2.42.3 Overturns the fine of R 50 000-00 in Adjudications 11147 and 11150 and amend it to refer to the fine levied in Adjudication 10896;
 - 5.2.42.4 Amend the sanction as to the process relating to the "termination of services" in Adjudication 10433 to reflect paragraph 5.2.40 of this report; AND
 - 5.2.42.5 Change the fine of R 50 000-00 in Adjudication 10896 to a suspended 1 (one) year fine of R 50 000-00. This fine is not seen as a repetition of 10433 as Adjudication 10896 involves more sections.
- 5.2.43 The cost of appeal is non-refundable.