

**WASPA appeals panel
Complaint 12465**

REPORT OF THE APPEALS PANEL

Date: March 2012

Appellant: Sprint Media

Complaint Number: 12465

Applicable versions: 9.0

1 BACKGROUND TO THE APPEAL

1.1 This is an appeal against the sanction imposed on the Appellant by the adjudicator in complaint 12465. In that matter the Appellant acted as an Information Provider (IP), i.e. as an affiliate member of WASPA which provides its services via a full WASPA member or Service Provider (SP).

1.2 The adjudicator held that the Appellant had breached sections 11.2.2, 11.5.2 and 11.5.4 and imposed the following sanctions:

“1. The IP shall refund the user all sums debited against her account plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from date of debit until date of refund, less any refunds already paid to the Complainant.

2. In addition to the refund in paragraph 1, the IP shall further compensate the user / Complainant in the amount of R1,000.00.

3. A fine of R60 000.00 is imposed on the IP, to be paid to the Secretariat within 10 working days of the date of delivery of this report failing which:

3.1 the IP shall be suspended from WASPA; and

3.2 the SP, Mira Networks, shall suspend all subscription services to the IP, until such time as the fine has been paid in full.”

1.3 In reaching the conclusion that this was an appropriate sanction in the circumstances, the adjudicator took into account:

1.3.1 The breaches of the Code were significant and had the effect of undermining consumer confidence in wireless application services.

1.3.2 There were no excusing factors.

1.3.3 Notwithstanding the conflicting versions advanced by the parties, the failure of the IP to send the first reminder messages in the correct format could have contributed to the complainant remaining subscribed for a longer period.

1.3.4 The adverts for the service were confusing and could “lull an unsuspecting web user into becoming inadvertently subscribed to a

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commercial service”. This was exacerbated by the non-compliant and vague reminder messages.

- 1.3.5 The Appellant had recently been the subject of adverse findings in two reports – [11033](#) and [12527](#) - dealing with complaints of the same nature.

“There are two other upheld adjudications against the same IP, for complaints of exactly the same nature – indeed, concerning the same service, in one complaint. These appear to be recent and as such the complaint at hand may have originated before the IP had the benefit of the two adjudications mentioned. However, noncompliance by the IP with provisions of the Code dealing with subscription services on a repetitive basis cannot be ignored as their repeated non-compliance impacts negatively on the reputation and standing of the wireless application services industry as a whole. In addition, sanctions that have previously been imposed but have clearly not had the necessary deterrent effect, need to be increased.

I note that in report #11033, a fine of R20 000.00 was imposed on the IP, in addition to the obligation to refund the complainant and compensate him a further amount of R500.00. Similarly, in respect of report #12527, the IP was fined R20 000.00 in addition to being ordered to refund the complainant, and both the SP (also the SP in this case) and the IP were directed to furnish to WASPA a list of all subscription services currently offered by the IP in conjunction with the SP and all such further information as may be required so as to enable the WASPA Monitor to assess the subscription initiation processes utilised by such services for compliance with the Code.”

- 1.4 The Appellant sought in its Appeal document to lay out grounds for the reduction of the fine imposed and the voiding of the sanction ordering the payment of compensation to the complainant / the complainant’s wife. It also made it clear that it was not appealing against the findings that it had contravened the Code, but rather the sanctions imposed as a result of these findings.

- 1.5 As regards the fine imposed the Appellant advanced the following arguments:

- 1.5.1 The same adjudicator had delivered the reports in respect of complaints 11033 and 12465 and said adjudicator had not treated complaint 12465 as a “stand alone” matter.

“All sanctions related to an individual complaint should be addressed accordingly in relation to the complaint and issues raised within that specific file. It is of our opinion that due to the fact that the adjudicator was the same as the one presiding over case #11033 that the case in question here #12465 has not been treated as a stand-alone case and this is reflected in the amount of the fine imposed as well as within the report whereby the adjudicator has referred to previous sanctions set out against us.

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It is also telling that this adjudicator has presided over 2 cases where the subscription was initiated during 2010. This was the time when the services subscribed to were being advertised as stand alone services, rather than part of the now formed Mobmatic Social Mobile Entertainment portal.

However, the levy of a fine of R60,000 imposed upon us is in itself out of proportion compared to other fines that have been levied against us.

The adjudicator's statement that previous sanctions that had been previously imposed had not had the necessary deterrent is grossly inaccurate.

This would be an acceptable argument had the sanctions been imposed on breaches of service relevant to the most current code of practice. However, of the sanctions imposed on us, they have been related to code of practice versions 9 and 10. Since version 11 of the code has been in circulation, on June 28th, 2011 we provided a list of subscription services that we operate in South Africa to the Media Monitor in relation to sanctions set out in the adjudicator's report #12527, and as recently as this September we were once again asked to provide lists of all subscription services we operate in South Africa as part of a random selection of companies. With regards to the Media Monitor's review of the list submitted as part of the sanction relating to case #12527, we were notified on 22nd September 2011 that this case was now closed as all sanctions had been adhered to. If WASPA state that our services are compliant, it is then unfair of an adjudicator to report in a public document that previous sanctions had not been enough of a deterrent."

1.5.2 The Appellant had taken measures to engage with WASPA and the Media Monitors and to take up a constructive role in ensuring a comprehensive regulatory regime in South Africa. It stated further that the adjudicator's reference to the changing of the reminder message format in October 2010 was as a result of this initiative and the member had since then worked with the WASPA Secretariat to improve these messages further.

1.5.3 The R60 000 fine imposed was too high and was "unjust and unwarranted based on the fact that we have taken previous sanctions previously imposed seriously and have continually strived to improve the services we offer from all aspects".

1.6 As regards the sanction that the Appellant pay compensation of R1 000 to the complainant or his wife, the Appellant advanced the following for consideration by the panel:

1.6.1 The Appellant had queried the validity of sanctions of this nature in response to the report in complaint 11033 – which had been delivered by the same adjudicator and also featured an order for compensation amongst the sanctions. Subsequent to discussions with the WASPA Secretariat, the Appellant decided that it would not

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appeal that element of the report but would raise the issue at the next meeting of WASPA's Codecom.

- 1.6.2 At this meeting the Appellant had raised the following arguments:
- 1.6.2.1 If no compensation claim had been advanced by a complainant how was it possible for an adjudicator to determine what might be reasonable compensation in the circumstances?
- 1.6.2.2 In the absence of a formula for determining compensation any award for compensation by an adjudicator would be arbitrary.
- 1.6.2.3 Where a compensation claim is submitted this should be dealt with separately from the adjudication process and the WASPA member should be afforded an opportunity to make representations with regard to the claim.
- 1.6.2.4 An invoice should be issued where compensation is ordered.
- 1.6.2.5 The compensation received by a complainant should be regarded as taxable income in the hands of the complainant.
- 1.6.3 The Appellant noted that Codecom had agreed to remove the provision empowering adjudicators to make compensation awards with immediate effect.

"Therefore, based on the fact that this clause had been removed from the code of conduct prior to the publishing of the adjudicator's report, this sanction should not have been imposed upon us.

It is also concerning to subsequently find out, that previous codes of practice specifically relating to appeal processes or sanctions are not dynamically updated dependent on changes to the code subsequent. It is understandable that an IP or SP have breaches upheld on the Code of Practice relevant to the code in place at the time, but sanctions should be issued in relation to how the code operates at the time the sanction is being decided, not based on what was said at a previous time."

2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v9.0

- 2.1 The following provisions were considered:

14.3.15. In determining any appropriate sanctions, the adjudicator must take into consideration:

- (a) any previous successful complaints made against the member;
- (b) any previous successful complaints of a similar nature.

14.4.1. Possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:

- (a) a requirement for the member to remedy the breach;

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- (b) a formal reprimand;
- (c) an appropriate fine on the member, to be collected by WASPA;
- (d) a requirement, in appropriate circumstance, for the member to pay reasonable and valid claims for compensation;
- (e) suspension of the member from WASPA for a defined period;
- (f) expulsion of the member from WASPA;
- (g) a requirement for the member to disclose the identity of any information provider found to be acting in breach of this Code of Conduct;
- (h) a requirement for the member to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct;
- (i) a requirement to withhold a specified amount or portion of money payable by the member to the information provider.

14.6.11. The panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions, as it deems appropriate given the nature of the breach and the evidence presented.

14.6.12. An appeals panel must also determine, based on the merits of the appeal, whether the appeal fee must be refunded, partially refunded or forfeit by the service provider.

3 FINDINGS OF APPEALS PANEL

- 3.1 In assessing the merits of the appeal as it relates to the general excessiveness of the fine imposed it is helpful to look at a table setting out the dates relevant to complaints 14625, 11033 and 12527:

Complaint	Date subscription effected	Date complaint lodged	Date report published
11033	4 August 2010	27 October 2010	29 July 2011
12527	1 March 2011	27 March 2011	22 June 2011
14625	26 June 2010	28 February 2011	31 August 2011

- 3.2 The panel agrees with the Appellant that the findings and sanctions imposed pursuant to adjudications 11033 and 12527 should not be considered in aggravation when assessing the sanction to be imposed in respect of complaint 14625. While it is a matter of some concern to the panel that non-compliant services appear to have been offered for a period of at least nine months, it remains that adjudications 11033 and 12527 had not been notified to the Appellant prior to 26 June 2010, the date on which the subscription relevant to this appeal was effected. The adjudicator noted that the member had rectified non-compliance of its reminder messages in October 2010, and there was accordingly no continuing infringement of the Code after that time.

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- 3.3 This should not, however, be taken as agreement with the Appellant's argument that "sanctions related to an individual complaint should be addressed accordingly in relation to the complaint and issues raised within that specific file". The Code of Conduct expressly contemplates an adjudicator referring to the general disciplinary record of a member when considering an appropriate sanction and also authorises an adjudicator to have reference to sanctions imposed against other members for similar contraventions.
- 3.4 To the extent, therefore, that the adjudicator has regarded adjudications 11033 and 12527 as factors in aggravation when considering the sanction to be imposed in complaint 14625, such sanction must be set aside and reconsidered by the panel. The adjudicator's statement that "sanctions that have previously been imposed but have clearly not had the necessary deterrent effect, need to be increased" indicates the role played by this aspect of the matter when setting the quantum of the fine imposed.
- 3.5 Under section 14.6.11 of the Code the panel has a discretion to reconsider the issue of sanctions based on the nature of the breach and the evidence presented. In exercising this discretion the panel has had regard to the following:
- 3.5.1 The overall record of the Appellant as regards complaints submitted to WASPA. The Appellant joined WASPA on 29 October 2009 although it is not clear when it commenced service provision. There are four decided complaints against it (excluding the matter under appeal) and four pending. The decided cases against it relate exclusively to subscription services and the Appellant has been found to have breached the Code in three of these.
- 3.5.2 The nature of the breach, which is serious, and the apparent difficulties experienced by the Appellant with compliance issues during 2010 and early 2011;
- 3.5.3 The constructive attitude displayed by the Appellant over the past year with regard to compliance.
- 3.6 The panel also considered whether the sanctions imposed in complaint 12465 should have been subsumed within those set out in complaint 11033 or complaint 12527. The panel noted that the adjudicator in complaint 11997 had found that the Appellant had subsumed a sanction for breaches into complaint 12527 given that the same service as provided by the Appellant was involved in both matters.
- 3.7 It is helpful list the sections of the Code and Advertising Rules which the member was held to have breached in each of these matters:

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Complaint #	Subscription service name	Code sections breached
11033	Veage (SMS offer)	11.4.1, 11.5.2
12527	Mobmatic	6.2.12(c), 11.2.2
11997	Not specified	6.2.12(c), 11.2.2
12465	Pointforge	11.2.2, 11.5.2, 11.5.4

- 3.8 The Panel has considered the principles underlying the imposition of multiple sanctions in respect of the same underlying conduct and is of the view that in circumstances such as these – where the complaints have arisen from the same general deficiencies in the service and the Appellant has not been notified of an adjudication confirming such deficiencies prior to each complaint having been lodged – it would be inequitable to allow separate sanctions in respect of each complaint.
- 3.9 From the table above it is evident that the breaches found in complaint 12465 are mirrored in the other three complaints. It has already been established that the Appellant had not been notified of the outcome of any of these matters prior to any of the complaints which gave rise to them having been lodged.
- 3.10 The Panel therefore finds that the sanctions in this matter should be subsumed within complaint 12527 in respect of the breach of section 11.2 and complaint 11033 in respect of the breaches of sections 11.5.2 and 11.5.4. In making this finding the Panel is cognisant of the fact that an adjudicator may not be aware of sanctions being imposed in respect of concurrently-determined complaints and advises that an effort should be made to determine whether such complaints are pending resolution with other adjudicators.
- 3.11 As regards the Appellant’s arguments in respect of the sanction ordering the payment of consideration, the panel had regard to the history of the clause which was introduced in the very first version of the WASPA Code adopted. The clause remained in place until the latest iteration of the Code, version 11.6, which came into force on 17 November 2011, which saw the deletion of the text “d) a requirement, in appropriate circumstance, for the member to pay reasonable and valid claims for compensation”.
- 3.12 The annotated version of version 11.6 explicitly states that “[T]his change was intended to prevent adjudicators from awarding compensation to complainants. It was felt that this falls outside of the intentions of the WASPA Code.”
- 3.12.1 This is a somewhat strange motivation given that the Code had explicitly authorised adjudicators to order payment of compensation

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since inception and it therefore was presumably the intention of the drafters and the WASPA Code that adjudicators proceed to do so.

3.12.2 Notwithstanding the persuasive arguments raised by the Appellant and the swaying of Codecom in favour thereof, amendments to the Code cannot have retrospective effect. At the time that the contravention of the Code was committed and at all other material times relating to the complaint the adjudicator was empowered to make such an order and there can be no question that it was *per se ultra vires* the WASPA Code.

3.13 The panel remains charged, however, with determining whether the adjudicator has applied this empowerment in a correct and reasonable manner.

3.14 The panel notes that section 14.4.1(d) of version 9.0 of the Code presupposes the making of a “reasonable and valid claim” for compensation. In reviewing the case file the panel is not, however, able to locate an explicit claim for compensation. The complainant makes reference to claiming for “time spent on the issue” but later elects to waive interest subject to receipt of a full refund. In the final correspondence on record the complainant states:

“Again, I trust that SPRINT MEDIA will pay back the arrears with immediate effect, taking into account interest and time on our part.

Further to this, I will start charging an hourly rate of R650.00 to SPRINT MEDIA for any further consultancy on matter I have already forwarded to yourselves and them.”

3.15 This does not amount to a claim for the purposes of section 14.4.1(d) as there is no basis upon which to determine what can be regarded as a loss which it would be reasonable to compensate the complainant for. It is further the view of the panel that an award of compensation for “wasted time” is not entertained by the South African courts and should not be entertained by WASPA Adjudicators in assessing compensation to be awarded.

3.16 The panel has reviewed all instances of the application of the power to order a member to pay compensation and finds nothing to dissuade it from this view.

3.17 In the circumstances the sanction ordering the payment of compensation is struck down.

3.18 The sanction imposed in report 14625 is deleted and replaced with the following:

“1. The IP shall refund the user all sums debited against her account plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from date of debit until date of refund, less any refunds already paid to the Complainant.

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- 3.19 The Appeal is substantially upheld and the panel is of the view that the Appellant's appeal fee should be refunded.
