

## REPORT OF THE APPEALS PANEL

**Date:** 27 February 2012  
**Appellant:** ZED Mobile  
**Complaint Number:** 13195  
**Applicable versions:** 7.4 / 9.0

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### 1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicator in [complaint 13195](#).
- 1.2 In that matter a consumer lodged a complaint with WASPA in respect of the Appellant's Club Zed subscription service. The complainant averred that she had recently discovered the fact of her subscription, that she had been charged for approximately two and a half years and that she had not made any use of the service during that period. She acknowledged having received the subscription reminder messages sent by the Appellant as mandated by the WASPA Code of Conduct but indicated she had not until recently realised what these were. The complainant was not aware of how she had come to be subscribed and noted that she had previously requested WASPA to effect an unsubscribe but to no avail (no record of such request could be located by the WASPA Secretariat).
- 1.3 The Appellant lodged a full response indicating that:
- 1.3.1 The subscription was initiated on 28 July 2009 through clicking on a Michael Jackson banner on the Nokia Mobi site.
- 1.3.2 The banner took the complainant to a landing page which set out the subscription nature of the service, its cost, the nature of the content made available and the further terms and conditions required by the WASPA Code.
- 1.3.3 A welcome message as required by the Code was sent to the relevant handset.
- 1.3.4 A total of 21 monthly reminder messages were delivered to the complainant's handset confirming the continuing subscription and informing the complainant as to how to opt out. The Appellant could not be taken to task for the failure of the complainant to understand or take remedial action on the basis of the reminder messages.
- 1.3.5 The member asserted that it was in compliance with the Code and offered a partial refund of R1 000 "in good faith".

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- 1.4 The adjudicator charged with deciding the matter requested further information from both parties, but such request was met only by the Appellant.
- 1.5 On the basis of information provided the adjudicator made the following findings:
- 1.5.1 The Michael Jackson banner on which the complainant had clicked was not compliant with section 9.3.15 of the Advertising Rules as it does not contain the word “service” as in “subscription service”.



- 1.5.2 The landing page also did not comply with section 9.3.15 aforementioned in that the pricing and words “subscription service” were depicted in a smaller font than that required. The adjudicator also regarded this as being in breach of “section 1.11.1” of the Code of Conduct. The adjudicator expressed the view that the “get up of the landing page is clearly designed to give as little prominence as possible to the pricing and the fact that this is a subscription service”.



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1.5.3 The adjudicator continued that the “confirmation page”, presumably referring to the landing page depicted above, was further not compliant with section 11.3.1 of the Code which requires that the prescribed content be displayed in a clear and easy to read manner.

“The essential information is obscured by large graphics immediately above the subscription price and fact that it is a subscription service, both of which is the smallest print on the page. This is also a contravention of section 6.2.12(b) which requires the price and frequency of the subscription service to be immediately next to the link or option to initiate the transaction. In this case there are large graphics between the link and the pricing.”

1.6 The Appellant was, in summary, found to have breached sections 1.11.1 (sic), 11.3.1 and 6.2.12(b) of the Code and section 9.3.15 of the Advertising Rules.

1.7 The adjudicator set out the sanction to be applied in the following terms:

“Although a number of previous complaints have been lodged against this WASP none of the reported complaints dealt with this service or contraventions of a similar nature to the contraventions found here.

The contraventions may seem to be of a technical nature only, but in my opinion the get up of the particular pages presented to consumers is aimed at misleading consumers to inadvertently join a subscription service. This is in my view a serious contravention.

In this particular instance however, the consumer was negligent in not immediately responding to the welcome message or failing to read most of the reminder messages sent to her on a monthly basis, 21 in total. It is also noted from the logs that the consumer never made use of any of the content services offered by the WASP.

The following order is made:

1. That the WASP refunds the consumer in full within 14 days of notification of this order.

2. That the WASP is fined the sum of R 20,000, payment of the entire amount being suspended for a period of twelve months on condition that the WASP is not found in breach of sections 9.3.15 of the Advertising Rules or Section 1.11.1, 11.3.1 or 6.2.12(b) of the Code of Conduct during this time.”

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## 2 THE APPLICATION OF THE CODE AND AD RULES

### *The Code, v7.4*

2.1 The following provisions were considered:

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

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(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

*The Code, v9.0*

2.2 The following provisions were considered:

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.3.1. The WAP confirmation page must display the following information in a clear and easy to read manner:

(a) The name of the service

(b) The price and frequency of billing

(c) A phone number for customer support

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**3 GROUNDS OF APPEAL**

3.1 The Appellant lodged a written notice requesting that “the appeals panel clarify a few things in the adjudicator’s report” and that the appeals fee be waived) or reduced.

3.2 The following grounds of appeal / requests for clarification were noted:

3.2.1 The adjudicator had incorrectly applied version 9.0 of the WASPA Code of Conduct. The relevant subscription took place on 28 July 2009, at which time the applicable version of the Code was version 7.4.

3.2.2 Insofar as the adjudicator requested further information from the complainant which had not been provided, how was it possible for the adjudicator to make a reasonable decision in the absence of such information?

3.2.3 Insofar as the adjudicator made a finding that section 9.3.15 of the Advertising Rules had been breached, the Appellant noted that this section was in a chapter of the Advertising Rules relating to web sites and could not be applied to WAP sites or banners.

3.2.4 With regard to the finding that it had contravened sections 6.2.12(b) and 11.3.1 of the Code, the Appellant noted that it was in continuous dialogue with the WASPA Media Monitor to ensure its banner advertising was compliant. The Appellant held an “understanding that we more than comply with what is required by the WASPA regulations”. They had consulted with the Monitor due to the lack of a chapter applicable to WAP sites in the Advertising Rules. The Appellant provided a detailed overview of its subscription process for review by the Panel.

3.2.5 Section 1.11.1 does not exist in version 7.4 of the Code.

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**4 FINDINGS OF APPEALS PANEL**

**4.1 Re : Contention that wrong version of the Code applied**

4.1.1 The Appellant’s contention as regards the wrong version of the Code being applied is correct. The relevant time for assessing compliance with the Code is when the act or transaction regulated by the Code is performed or entered into. This is logical: a member’s conduct can only be assessed against the set of rules by which it is bound at the time that the conduct took place.

4.1.2 This is not, however, the end of the enquiry in this regard as it must be assessed whether the effect of the wrong version of the Code being applied is prejudicial to the Appellant. In essence the Panel needs to compare versions 7.4 and 9.0 of the Code and evaluate

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whether the reliance by the adjudicator on the latter makes any material difference as regards the specific sections considered.

- 4.1.3 The Appellant does not in its appeal document attempt to motivate any prejudice arising to it from such misapplication but presumably is implying this.
- 4.1.4 As can be determined from a comparison of the two versions of the Code in question, there is no variation in section 6.2.12(c) and 11.1.1 of the Code. Section 11.3.1 was, however, only introduced in version 9.0 of the Code and this obligation on members to provide specified information on a WAP confirmation page did not exist in version 7.4.
- 4.1.5 There is accordingly clear prejudice to the Appellant constituted by the incorrect version of the Code being applied.
- 4.1.6 The finding of the adjudicator in respect of section 11.3.1 is accordingly overturned.

4.2 **Re: Contention that Adjudicator improperly decided the matter in the absence of additional information**

With regard to the Appellant's contention that it was improper for the adjudicator to have decided the matter in the absence of the additional information requested from the complainant, the Panel cannot agree. An adjudicator is charged with deciding a matter based on the information available to him or her. Was this not the case then a matter where one or both parties did not respond to a request for further information could not be concluded. It occurs to the Panel that further information provided by the complainant would be likely in any event to advance the complainant's case and there is unlikely to be any prejudice to the Appellant from the failure of the complainant to provide this.

4.3 **Re: Contention that Chapter 9 of the Advertising Rules cannot be applied to WAP sites**

- 4.3.1 The contention that Chapter 9 of the Advertising Rules cannot be applied to WAP sites as it is intended to apply to websites is accepted. In making this finding the panel notes that it is the structure of the Advertising Rules to make distinctions between different access media and that this is done on the basis that there are significant differences in the manner in which information is presented across such media. Text size and required wording in particular require different treatment.
- 4.3.2 The Appellant has not sought to raise any direct grounds of appeal in respect of the findings that it had breached section 6.2.12(b). Rather it emphasised steps taken to ensure compliance and requested that the panel review its subscription process.
- 4.3.3 The panel notes that the adjudicator could have found a breach of either section 6.2.12(b) or section 6.2.12(c). Given that the latter

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refers specifically to subscription services the panel believes that this is the correct section to cite. The panel cannot identify any prejudice accruing to the Appellant as a result of this finding. Certainly all sufficient evidence is before the Panel for consideration.

- 4.3.4 It is not the role of a WASPA appeals panel to review a member's subscription process: other avenues exist for this purpose. The appeal before the panel involves a specific service as it was provided at the time that the subscription took place and all relevant times thereafter.

4.4 **Re: Reference to “section 1.11.1” of the Code**

The reference to section 1.11.1 is clearly an erroneous reference to section 11.1.1 of the Code. Both the context in which this reference is made by the adjudicator and the fact of section 11.1.1 being included in that part of the adjudication setting out the clauses of the Code considered irrefutably support this conclusion. The panel does not see any prejudice accruing to the Appellant as a result of this error: the error is patent and the Appellant cannot have been under any illusions regarding the case it had to answer. The panel agrees with the adjudicator that there was a breach of section 11.1.1 of the Code.

4.5 **Summary of findings on breaches of the Code and Advertising Rules**

In the circumstances the Panel upholds the findings of the adjudicator as regards the breaches of sections 6.2.12 and 11.1.1, but overturns the findings that the Appellant had breached section 11.3.1 of the Code and section 9.3.15 of the Advertising Rules.

4.6 **Review of the sanction imposed**

Given this finding the panel proceed to review the sanction imposed on the Appellant and formed the view that the quantum of the suspended fine should be reduced. In assessing the extent of the reduction the panel noted that the core of the complaint – that the service was not prominently and explicitly identified as a subscription service on the confirmation page – was upheld and that this of itself constitutes a serious breach on the part of the Appellant. This exercise was not assisted by the failure of the adjudicator to provide detail on the apportionment of the fine as between the four infringements originally identified or detailed reasoning as to how the quantum of the fine was settled upon.

4.7 **Order**

The panel makes the following order:

- 4.7.1 The appeal is upheld in respect of the findings of the adjudicator that the Appellant had contravened section 11.3.1 of version 9.0 of the Code and section 9.3.15 of the Advertising Rules.

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- 4.7.2 The appeal is dismissed in respect of the findings of the adjudicator that the Appellant had contravened sections 6.2.12 and 11.1.1 of version 9.0 of the Code, subject to the substitution of version 7.4 of the Code for version 9.0.
- The sanction imposed by the adjudicator is substituted with the following sanction:
- The following order is made:
1. That the WASP refunds the consumer in full within 14 days of notification of this order.
  2. That the WASP is fined the sum of R15 000, payment of the entire amount being suspended for a period of twelve months on condition that the WASP is not found to be in breach of sections 11.1.1 or 6.2.12 of the Code of Conduct during this time.
- 4.7.3 The Secretariat is requested to refer the report in complaint 13195 back to the Adjudicator in terms of clause 14.3.19 of the Code and request that he or she consider whether to amend and replace the published report in the light of this appeal finding and with specific reference to the citation of clause “11.1.1” as “1.11.1”.
- 4.8 In assessing whether the appeal fee should be refunded as requested by the Appellant, the panel considered that the Appellant had raised some valid arguments and had been partially successful. The panel regards it as equitable that 50% of the appeal fee be refunded.
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