



ADJUDICATOR'S REPORT

Complaint reference number: #13378

WASPA member(s): TIMw.e. New Media Entertainment South Africa

Membership number(s): 1067

Complainant: WASPA Secretariat

Type of complaint: Non-compliance with adjudicator's order

Date complaint was lodged: 2011-06-08

Date of the alleged offence: 2010-11

Relevant version of the Code: 10.0

Clauses considered: 3.1.1, 4.3.3, 14.3.20, 14.3.21, 14.3.22, 14.3.23, 14.3.24

Relevant version of the Ad. Rules: Not applicable

Clauses considered: Not considered

Related cases considered: #9962, #11094

Complaint

The facts of this case are fairly straightforward. The SP was found to be in breach of the Code in complaint 9962 and the adjudicator in that matter made the following order regarding sanctions ("the Order"):

Sanctions for complaint #9962 are as follows:

"1. The SP is ordered to refund all amounts charged to the complainants account and send proof of the refund to the WASPA Secretariat within 7 (seven) days of receiving notice of this Report.

2. The SP is fined an amount of R 80 000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report."

The adjudicator's report in respect of complaint 9962 was delivered to the SP on 11 November 2010. I did not receive any invoices addressed to the SP for the fine it was ordered to pay and, when I queried this with the Secretariat I was advised that the Secretariat generally invoices SPs that have been fined once they have confirmed that they will comply with the orders against them. This process is provided for in sections 14.3.23 and 14.3.24 which I have quoted below. In this case, the SP did not furnish WASPA with the requisite compliance confirmation and was not invoiced for the R80 000 fine imposed on it ("the Fine").

The SP did not comply with this order at the time and has remained in default in respect of the Fine.

Service provider's response

The Secretariat raised the SP's non-compliance with the Order on or about 8 June 2011. The SP, in response, requested information from the Secretariat in order to enable it to identify the complainants in complaint 9962. The Secretariat furnished the SP with this information and pointed out that it has not responded meaningfully to this complaint.

The SP complied with the first part of the Order and refunded the complainants in complaint 9962 on or about 8 July 2011 and forwarded proof of these payments to the Secretariat. The SP did not pay the fine in the amount of R80 000 which was imposed by the adjudicator in complaint 9962, or any part of that fine. When the Secretariat again queried this, the SP responded as follows:

We will appeal to these complaints, as soon as they go to the adjudicator.

Sections of the Code considered

I considered the following sections of the Code:

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

4.3.3. Refunds must not be unreasonably delayed.

14.3.20. The member has five working days to notify the secretariat if it wishes to appeal against the decision of the adjudicator. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

14.3.21. Unless otherwise specified in the adjudicator's report, any sanctions will be considered suspended if an appeal is lodged, until the appeal process is completed.

14.3.22. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.

14.3.23. The member must provide the secretariat with confirmation of compliance with any applicable sanctions within five working days of receiving the adjudicator's report.

14.3.24. The member must pay any applicable fine(s) imposed by an adjudicator within five working days of receipt of invoice.

Sections of the Advertising Rules considered [if applicable]

Not applicable

Decision

The purpose of this adjudication is to determine whether the SP has breached the Code by not complying with an order made by the adjudicator in complaint 9962. I do not propose examining complaint 9962's subject matter. That matter was decided and the SP appears not to have taken the opportunity afforded to it by section 14.3.20 of the Code to appeal that decision. If I understand the SP's response to the Secretariat, it proposes appealing complaint 9962 when this complaint is decided. That course of action is procedurally problematic and I will leave it to an appeal panel to address that issue, should the SP raise

it.

Regarding this complaint, the Code clearly requires members to conduct themselves in a professional manner in relation to WASPA. The SP's failure to comply with an adjudicator's order, conveyed by the Secretariat, undermines WASPA as a self-regulating body. As the adjudicator in complaint 11094 pointed out:

The Adjudicator further agrees with the sentiments of the Adjudicator in complaint 3557 that the failure by members to comply with sanctions imposed in terms of the

Code of Conduct severely compromises the ability of WASPA to act as a self-regulating body.

The SP has not advanced any reasons why it should not pay the fine. It has simply not paid the fine despite being informed of the fine, being invoiced for it and payment being demanded by the Secretariat several months later. The SP has had opportunities to address the sanction and engage with the Secretariat. It has failed, alternatively, neglected to do so and its continued refusal to comply with the Order fundamentally undermines WASPA's effectiveness as a self-regulating body and the trust placed in WASPA.

The Code also requires members not to delay refunds unreasonably. Given the date on which the SP was furnished with the Order, the SP's delay in refunding the complainants in complaint 9962 is unreasonable and unacceptable. The amounts in question are relatively small and the SP appears to have been able to process the refund fairly soon after the Secretariat demanded the refund. The SP hasn't given any explanation for its failure to refund these amounts before the Secretariat demanded that they be made.

Sanctions

Section 14.3.22 clearly states that failure to comply with the Order is, itself, a breach of the Code and exposes the SP to further sanctions. While a further fine may be met with the same recalcitrance, I make the following order:

- The SP is fined a further amount of R50 000 for its unreasonable delay in refunding

the complainants in complaint 9962 and otherwise complying with part 1 of the Order;

- The SP is ordered to confirm to the Secretariat that it will comply with part 2 of the Order within 5 working days from the date of notification of this report and pay the R80 000 fine to the WASPA Secretariat on the terms set out in the Secretariat's invoice;
- Should the SP not meet the above deadline in respect of part 2 of the Order, it shall be suspended from membership of WASPA until it so complies;
- Should the SP not have complied with part 2 of the Order within 180 days from the date of notification of this report, it's membership of WASPA shall be terminated.