

**WASPA appeals panel
Complaint 13378 and 13379**

REPORT OF THE APPEALS PANEL

Date	24 September 2012
Service Provider	TIMwe New Media Entertainment South Africa
Complaint Number	13378 and 13379
Applicable Version of Code	V10.0

1 BACKGROUND TO THE APPEAL

1.1 These two appeals against the “*merit and quantum*” of the adjudicators’ findings and sanctions in 13378 and 13379 are a mix of appeals against these two ‘complaints’ and the earlier, related findings and sanctions of complaints 9962 and 10739.

1.2 Appeals 13378 and 13379 are being considered together because the facts of each are almost identical.

1.3 The Service Provider, TIMwe New Media Entertainment South Africa (SP) refunded the complainants in both 9962 and 10739 as directed by the adjudicator(s), but failed to appeal either decision and failed to pay the fines imposed in either case.

1.4 While the original complaints, 9962 and 13739, were lodged by consumers, complaint numbers 13378 and 13379 were lodged by the WASPA Secretariat, not as a result of a breach of the Code *per se*, but as the result of the SP’s failure to pay the fines imposed in the earlier underlying complaints, 9962 and 10739.

1.5 The SP, in its appeal against the “*merit and quantum*” in 13378 and 13379, attempts simultaneously to appeal against the findings and sanctions in 9962 and 10739.

In summary then, the questions before this panel are (i) whether a late filing of notice to appeal will be condoned and (ii) whether the WASPA Secretariat may (or needs to) lodge a complaint(s) against the SP for the SP’s failure to pay a fine(s) / comply with adjudicators’ sanctions or, if the failure on its own constitutes grounds for further consideration by the appeals panel.

2 THE COMPLAINTS AND THE ADJUDICATOR(S) FINDINGS / DECISIONS

2.1 The panel, like the adjudicator(s), does not think it necessary to consider the facts of the original complaints in 9962 and 10739, as these are not in issue. If anything the actions of the SP in refunding the original complainants, support this contention. The issue here, is that the SP did not (i) confirm to WASPA that it would pay the fines, (ii) did not pay the fines, and (iii) the WASPA Secretariat responded by lodging a further complaint.

2.2 In both 9962 and 10739 the SP was found to be in breach of various sections of the Code. See table at 2.3 below, for a summary of facts, actions taken by the SP,

**WASPA appeals panel
Complaint 13378 and 13379**

the WASPA Secretariat and the adjudicators' decisions and sanctions in respect of complaints 9962 and 10739.

**WASPA appeals panel
Complaint 13378 and 13379**

2.3 Summary

9962	10739	Actions taken by the WASPA Secretariat and the SP	Adjudicators' decisions (from the reports) and sanctions in 13378 and 13379
1. The SP is ordered to refund all amounts charged to the complainant's account and send proof of the refund to the WASPA Secretariat within 7 days of receiving notice of the Report. 2. The SP is fined an amount of R80,000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report. Report date: 11 November 2010. No 'meaningful' response by: 8 June 2011. SP refund to complainant: 8 July 2011.	1. The SP is ordered to refund the complainant, within 7 days of receiving notice of this decision, all amounts which were debited to the complainant's account, ... 2. The refund must be provided in a form acceptable to the complainant, either in South African Rands or air-time, useable on a South African mobile network. 3. The SP is fined the sum of R25,000.00. Report date: 11 November 2010. No 'meaningful' response by: 9 June 2011. SP refund to complainant: 8 July 2011.	The adjudicators' reports on both 9962 and 10739 were delivered to the SP on 11 November 2010. The SP did not confirm with the WASPA Secretariat that it would comply with the sanction and no invoice for the fine was therefore issued. (Sections 14.3.23 {member to provide confirmation of compliance} and 14.3.24 {member to pay fine within 5 days of receiving invoice from WASPA Secretariat} of the WASPA Code). No 'meaningful' response by the SP. WASPA raised non-compliance with SP on 8 and 9 June 2011 respectively. SP refunded complainants on 8 July 2011. No fines were paid and when queried, the SP responded to WASPA: "We will appeal to these complaints, as soon as they go to the adjudicator".	The question considered by the adjudicator(s) in both cases is identical - to determine whether the SP had breached the Code by not complying with an order made by the adjudicator in the earlier complaints. There was no need for the adjudicator(s) to consider the subject matter of the earlier cases, which had been adjudicated, given that the SP "appears not to have taken the opportunity afforded to it by section 14.3.20 of the Code to appeal that decision(s)". The adjudicator(s) found breaches of the following sections of the Code in both cases: 3.1.1 (professional behavior), 4.3.3 (no delays in refunds), 14.3.20 (5 days to notify WASPA Secretariat of notice to appeal), 14.3.21 (sanctions suspended if appeal lodged), 14.3.22 (if no appeal is lodged, or if the adjudicator has

**WASPA appeals panel
Complaint 13378 and 13379**

			<i>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.</i> <i>14.3.23 (member to provide confirmation of compliance within 5 days), 14.3.24 (member to pay fines within 5 days of receiving WASPA invoice.)</i> Sanctions in 13378: 1. A further fine of R50,000.00 for unreasonable delay in refunding complainants and otherwise complying with Part 1 and 2 of the order; and 2. Order to SP to confirm, within 5 days that it would pay the R80,000.00 fine imposed in 9962 and, would indeed pay the fine imposed in 9962 (Part 2). 3. Failure of SP to comply with 2 above (i.e within 5 days), to result in suspension of
--	--	--	---

**WASPA appeals panel
Complaint 13378 and 13379**

			membership. 4. Failure of SP to comply with 2 above, within 180 days, to result in termination of WASPA membership. Sanctions in 13379: 1. A further fine of R50,000.00 for unreasonable delay in refunding complainants and otherwise complying with Part 1 and 2 of the order; and 2. Order to SP to confirm, within 5 days that it would pay the R25,000.00 fine imposed in 10739 and, would indeed pay the fine imposed in 10739 (Part 3). 3. Failure of SP to comply with 2 above (i.e within 5 days), to result in suspension of membership. 4. Failure of SP to comply with 2 above, within 180 days, to result in termination of WASPA
--	--	--	--

**WASPA appeals panel
Complaint 13378 and 13379**

			membership. Both reports dated: 20 September 2011. Appeal documentation (undated) received on 27 October 2011.
--	--	--	---

2 GROUNDS OF APPEAL

- 2.1 The SP provided no grounds of appeal in respect of complaints 9962 or 10739.
- 2.2 The SP provided identical grounds of appeal in respect of complaints 11378 and 11379. These are:
- 2.2.1 Making statements of good faith with respect to its intentions to comply with the WASPA Code;
 - 2.2.2 Purporting, with respect to the original consumer complainants, to have *“solved this issue as soon as possible with a proper refund to the customer and reported proof of this payment to the Secretariat”*;
 - 2.2.3 Purporting with respect to matters related to the fines imposed, that *“TIMWE decided to present an appeal and notified the secretariat of that decision”*; and
 - 2.2.4 Subsequent to the allegation made by the SP in 2.2.3 above, to *“... have not presented its appeal due to numerous factors ...”*.
- 2.3 In both 13378 and 13379, the SP states that it *“... believe(s) the desicision(s) is (are) excessive ... and should be revised and, “TIMWE shall be acquitted of any and all sanctions, orthe value of sanctions be reduced, ... to pay a more appropriate fine, ... which should be much smaller”*.
-

3 FINDINGS AND DECISIONS OF THE APPEALS PANEL

3.1 Findings of the appeal panel

- 3.1.1 Making statements of good faith with respect to its intentions to comply with the WASPA Code is not a ground for appeal. Good faith is the very minimum required of members of WASPA in their conduct with consumers and one another.
- 3.1.2 The panel accepts that the original complainants in 9962 and 10739 were refunded, albeit late (almost 8 months late). The panel does not intend to dwell on this aspect of the complaint or appeal, but rather, to concentrate on the following 2 important issues:
 - 3.1.2.1 Whether a late filing of notice to appeal will be condoned – effectively, the earlier complaints 9962 and 10738 are appealed via the later complaints 13378 and 13379; and
 - 3.1.2.2 Whether the WASPA Secretariat may / needs to lodge a complaint(s) against the SP for the failure to pay a fine(s) / comply with adjudicator sanctions.

3.2 Decisions of the appeal panel

- 3.2.1 The panel will not condone a late filing of appeal. Our position in this regard is fully recorded in the Mobile Condonation appeal published on the WASPA website, and will not be repeated here.

**WASPA appeals panel
Complaint 13378 and 13379**

- 3.2.1.1 We comment merely that the panel is of the view that there may be exceptional circumstances which warrant condoning the late filing of a notice to appeal. Such circumstances, in the view of the panel, do not exist here. The SP's delays in filing appeals with respect to 9962 and 10730 seem to result from not knowing about, not taking seriously enough and / or relying on the provisions of the Code. The SP lists "*numerous factors*" for the delays, including staff turnover and becoming aware of "*this process already in the final stage*". Appeals require at least timeous notification and proper arguments in support of requests for reductions or changes in findings including mistakes of fact having been made by the adjudicator, none of which appear from the documents submitted by the SP.
- 3.2.1.2 The sanctions imposed by the adjudicators in 9962 and 10730 are upheld. The fines are due and payable and are now close to 2 years overdue. No attempt by the SP to use the appeal process in respect of 13378 and / or 13379 can alter this.
- 3.2.1.3 We note that the only aspects of the appeal against the findings of the adjudicator(s) in 13378 and 13379 relate to the SP being "*aquitted of all sanctions*" or "*the values of the sanctions shall be reduced*". The panel can find no basis upon which to 'quit' the SP or to reduce the sanctions imposed by the adjudicator(s) in its findings on the complaints. The additional fines are upheld.
- 3.2.2 The second question is more troublesome – is it necessary for the WASPA Secretariat to have lodged a complaint(s) to enforce previously adjudicated sanctions?
- 3.2.3 The panel has had regard to the provisions of the applicable version of the Code, and this does not make provision for an expedited process to say, suspension and or termination of membership, in the event of non-payment of fines. The reason, no doubt is that membership and the adoption of the Code are voluntary.
- 3.2.4 While section 14.3.22 provides that "*If no appeal is lodged, , 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*", the imposition and 'enforcement' of sanctions is provided for solely through adjudicators and or panels of appeal. There is nothing in the provisions of the Code that authorise the WASPA Secretariat to suspend or to terminate membership or impose further sanctions unless directed to do so by an adjudicator or panel of appeal. Equally however, there is nothing preventing the Secretariat from itself lodging a complaint in this regard.
- 3.2.5 Because of this, the panel accepts the approach adopted by WASPA of lodging complaints 13378 and 13379 to enforce the sanctions imposed in 9962 and 10739. (As an aside, we mention that the WASPA ExCo / ManCo may wish to review a possible amendment to the Code allowing for expedited procedures to avoid unnecessary delays in such cases).

**WASPA appeals panel
Complaint 13378 and 13379**

3.3 *Sanctions of the appeal panel*

- 3.3.1 All fines imposed in the original complaints 9962 (a total of R80,000.00) and 10739 (a total of R25,000.00) are to be paid to WASPA within 5 days of receipt of this report.
- 3.3.2 The additional fines imposed by the adjudicator(s) in 13378 (a total of R50,000.00) and 13379 (a total of R50,000.00) are to be paid to WASPA within 5 days of this report.
- 3.3.3 The WASPA Secretariat will immediately issue the necessary invoices and need not wait for a 'compliance notice'.
- 3.3.4 Failure by the SP to comply with 3.3.1 and 3.3.2 above will result in termination of membership on the 6th day following publication of this report.
- 3.3.5 The appeal fee is not refundable.