Appeal Panel's Report

Appeal Details

Complaints on appeal : 15477, 15722, 16851, 16977, 17184 and 17236 ("the Complaints")

Date appeal lodged: 16 November 2012

Applicable Code versions: 11.0 and 11.6

Appeal hearing venue: Riverside Estates, Cape Town

Appeal hearing date: 11 March 2013

Complaints referenced in this report:

- Appeal report regarding complaints 11258, 11582, 11626, 13038 and 13039 (delivered on 23 May 2013)
- Report on complaint 11863

Parties

WASPA member and appellant: Buongiorno South Africa ("the Appellant")

WASPA member's representative: Adv Kirk-Cohen SC (instructed by Cliffe Dekker Hofmeyr) ("Mr Kirk-Cohen")

WASPA's representative: Mr A Marshall ("Mr Marshall")

The Issues Raised On Appeal

The Appellant filed a substantial appeal against the adjudicators' decisions set out in their reports ("the Reports") on the Complaints on a number of grounds which are detailed in the Appellant's submissions. The grounds of the appeal are both procedural and substantive and were preceded by a number of preliminary points.

Preliminary Points for Consideration

The Appellant raised a few preliminary points before presenting arguments on the procedural and substantive issues addressed in its appeal. These preliminary points were not contentious and we mention them at this point for completeness' sake.

The Appellant pointed out that versions 11.0 and 11.6 of the WASPA Code of Conduct ("the Code") applied to the merits of the appeals. We agree and have considered these versions of the Code as they applied to the Complaints and, subsequently, the Reports.

The Appellant motivated for a “collective appeal” on various grounds listed on page 3 of its appeal submissions and we found that such a collective appeal was appropriate in the circumstances and for the reasons the Appellant proposed. This appeal was also conducted on a face to face basis.

Lastly, the Appellant insisted that our names, the names of the appeal panel’s members, be disclosed to it in advance and that it has the opportunity to object to our participation as members of the appeal panel. Although this is not common practice, the Secretariat disclosed our names to the Appellant in advance and the Appellant did not raise any objections to the appeal panel’s composition.

Procedural Issues

Fair Hearing

The Appellant raised two important procedural issues which have since been addressed by an appeal panel adjudicating report on complaints 11258, 11582, 11626, 13038 and 13039 (“the First Appeal”). These two issues are the application of the Promotion of Administrative Justice Act and the issue of double jeopardy. Given that the appeal panel in the First Appeal had not yet delivered its report and that the appeal panel in that matter had the benefit of a fully ventilated debate by legal representatives acting both for WASPA and the Appellant, we chose to defer a decision on these issues until we had an opportunity to consider the First Appeal panelists’ report (“the First Appeal Report”). The First Appeal Report was published in late May 2013 and, in the interests of consistency between appeal panel findings, we have reviewed the First Appeal Report in the context of this appeal.

When it comes to the Promotion of Administrative Justice Act’s application to the Code, the First Appeal panel recognised that there is some difference of judicial opinion regarding whether the Promotion of Administrative Justice Act binds legal frameworks like the Code and stated the following:

> It is the opinion of this panel that it would be presumptuous and unwise for this panel to endeavour to do what our wise judges, as well as the parties’ learned counsel, find difficult to agree on - find a definitive answer to the question of when and to whom PAJA applies or does not apply. We therefore do not see the sense in expressing our opinions on the legal correctness or soundness (or the opposite) of all the individual submissions raised by the parties and the decisions they rely on, in their efforts to convince us of one point of view or another. Doing so will create further uncertainty, and will not contribute in any positive way in solving the issues and problems faced by the industry, its members, WASPA and its complaints resolution - and adjudication processes. Consequently, this panel does not regard itself to be in a position to speak the “final” or “definitive” word on whether PAJA applies, and will we not mislead ourselves, the SP or WASPA into thinking that we are in a position to do so. We therefore do not base our findings on whether or not the SP is successful in this appeal on a finding of whether PAJA applies.

The First Appeal panel further concluded as follows:

> That being said - this panel does, however, believe that the principles of due process and natural justice - including the principle of audi alteram partem, are fundamental principles in our law that cannot be ignored. In order for WASPA and its complaints resolution and/or adjudication processes (including the Code) to be legitimate and fair, these fundamental principles must be observed as far as it is possible and reasonable.

We agree with the First Appeal panel's conclusions as set out in these extracts from its report. The Code is designed to facilitate consideration for and application of the principles of natural justice and due process and it is not necessary (or even appropriate) for us to make a determination on Promotion of Administrative Justice Act's application to adjudications under the Code. We similarly agree with the First Appeal panel's comments regarding WASPA members' submission to the Code and the Advertising Rules at paragraph 2.4.6 of the First Appeal Report which confirm the following:

> Members join WASPA voluntarily and subject themselves to the Code and its procedures. Members are aware of the objectives of WASPA and the provisions of the Code which endeavour to implement and give life to these objectives.

Accordingly, the Code binds the Appellant and complaints regarding breaches of the Code's provisions must be adjudicated bearing in mind the principles of due process and natural justice which include the principle of audi alteram partem.

Clause 14.3.10 of the Code (in versions 11.0 and 11.6 which apply to this Appeal as well as the current version 12.1) states as follows:

> 14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

In cases where –

- it appears that a member has breached provisions of the Code or otherwise fallen foul of the regulatory framework binding members; and
- the adjudicator is considering whether the member has, indeed, breached these provisions; and
- the member has not been afforded a reasonable opportunity to consider its apparent breaches and make representations in this regard,

the adjudicator should interpret clause 14.3.10 as requiring the adjudicator to request the member's response to these apparent breaches and should consider the member's submissions in this regard before making a determination as to whether the member has breached these provisions.

To proceed with an analysis of whether a member breached provisions of the Code (or other regulatory framework) without affording the member an opportunity to review and respond to such allegations would result in a violation of the member's rights to the principles of due process and natural justice which include the principle of audi alteram partem.

We agree with and reiterate our colleagues' recommendations in the First Appeal Report at paragraph 6.2.1 –

> In order to give proper effect to the 'audi' principle, this panel proposes that WASPA considers amendments to the Code of Conduct that would obligate any adjudicator or appeals panel who, in adjudicating a complaint or an appeal, cite additional provisions of the Code, to provide such members a reasonable opportunity to respond to the new provisions cited;

Double Jeopardy

The second issue, "double jeopardy", is particularly challenging. The Appellant described "double jeopardy" as follows (at paragraph 26.3):

> It is based on the premise that an individual cannot be charged on same or **substantively the same** set of facts upon which he/she has previously been convicted or acquitted.

This issue arises in this matter where the Appellant was found to have breached the Code using similar campaigns and in similar respects. The Appellant's contention is that sanctioning the Appellant for each breach in respect of each campaign, given the overlap, constitutes "double jeopardy" or "duplication of charges". The First Appeal panel dealt with this issue and found itself trying to strike a balance between dealing with multiple, and yet substantially similar, complaints in a manner that did not result in a "double jeopardy" situation and yet still hold the Appellant (and enable adjudicators to similarly hold other members) accountable for repeated breaches of the Code using similar campaigns and mechanisms. The solution the First Appeal panel opted for was drawn from the so-called "Various TIMwe" appeal which was decided in May 2012. This solution, while imperfect, may help reduce the likelihood of "double jeopardy" and strike the balance the First Appeal panel was aiming for:

> Ideally as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach.

The WASPA Secretariat already endeavours to submit similar complaints to a single adjudicator for review in an effort, in part, to address this "double jeopardy" concern. We reiterate the First Appeal panel's caution to members at paragraph 3.6 of the First Appeal Report –

> Although we agree with the SP and although it is generally accepted that only one sanction should be issued per breach, even if cited in numerous complaints, we would like to warn members to be careful of their interpretation of what they themselves, like the SP in this appeal, regard to be “essentially” or “substantively” the same service. Services with the same name, look and feel, of which for example, the subscribing method, content or detail of information provided differ - even if only slightly but in an important respect, cannot always be regarded as “the same service”.

This particular issue is a challenging one for various reasons. One reason is that seemingly similar complaints are distinguishable on the specific facts of the particular complaints and do not lend themselves to similar determinations by adjudicators considering them. Another challenge is that adjudicators’ reports are not necessarily binding on adjudicators in a similar sense to court decisions being binding on other courts. Adjudicators are encouraged to consider similar decisions and to deliver more consistent decisions than not, where there are sufficient similarities between complaints. That said, adjudicators may have differing interpretations of similar circumstances and provisions of the Code and this may influence their decisions too. At the same time, the Appellant’s submissions at paragraph 44.9 of the record have merit:

> 44.9. Whilst the adjudicator(s) may be right in stating that there is no hard or fast rule for determining prominence and that each adjudicator (confirming the subjective nature of decision making) needs to make a determination on the objective material before him/her as to whether the particular campaign is compliant with section 11.1.1, it is not procedurally justifiable that adjudicators ignore fellow adjudicators decisions because they may disagree with them. There has to be some certainty with regards to the same, or substantively the same, campaigns. Adjudicators interpret the Code, and the industry must follow such interpretations. Different interpretations on the same campaigns do not lead to uniformity and certainty as to the interpretation and application of the Code. Therefore objective standards to which the industry must comply - which is one of the objectives listed in section 1.2 of the Code - cannot be achieved through erratic or conflicting decisions such as the ones referred to above.

It may be that appeal panel decisions are opportunities for adjudicators to draw some guidance on controversial issues or where they may otherwise have differing views and while the Code does not establish such a system of precedence, appeal panels have begun to adopt the practice of giving adjudicators guidance on common themes and issues raised by members in appeals.

What is clear is that where members are challenged regarding substantially the same campaigns on the basis of substantially similar (and apparent) breaches of the Code, adjudicators should be reluctant to reach inconsistent determinations where there are no compelling reasons to do so or sufficient grounds to distinguish complaints they are considering from complaints which have been previously

decided.

Members should, however, bear in mind the sheer volume of complaints and a variety of seemingly similar and yet factually distinguishable complaints which adjudicators, operating with limited resources, must consider to when adjudicating decisions.

We agree with and reiterate our colleagues' recommendations in the First Appeal Report at paragraph 6.2.2 –

> The potential for the principle of double jeopardy to weigh unfairly on WASPA members in the adjudication of complaints against them is a valid concern. This panel proposes that WASPA considers introducing safeguards in its process of raising complaints that will have the effect of mitigating against that threat.

Regarding the Procedural Issues

While double jeopardy presents a number of practical challenges in adjudications generally, and in this Appeal, we agree with the Appellant that its rights to a fair hearing were infringed and, as a consequence, the Appellant's appeals must succeed and the findings against the Appellant and the sanctions flowing from the Reports be set aside.

Substantive Issues

The Reports all include adverse findings against the Appellant on the basis of section 11.1.1 of the Code, supported by non-compliance findings in the Advertising Rules. Many of them include adverse findings on the basis of section 11.6.4 of the Code.

While we have found that the audi alteram partem rule was not followed and that this failure is fatal to the matter, there was considerable evidence placed on what the correct interpretation of clause 11.1.1 of the Code means. While we do not make any finding on any potential breach of clause 11.1.1 in this particular Appeal, we consider this issue to be sufficiently important to provide some guidance on this issue for the sake of future adjudications.

Prominence

As the Appellant points out at paragraph 34 of its submissions –

> The major issue at stake in this appeal is the correct construction of the requisite "prominence" in 11.1.1 of the Code.

Section 11.1.1 of the Code is identical in versions 11.0 and 11.6 and states the following:

> 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 adjudicator, writing in the report for Complaint 15477, argued as follows:

> Section 11.1.1 expressly requires the identification of a subscription service to be both "explicit" and "prominent" in any material in which any portion of a service is promoted. While the promotional web page used by the SP to promote the service and the rewards facility does contain "explicit" identification of the service as a subscription service, the identification is, in my opinion, certainly not "prominent".

The adjudicator then pointed out the following:

> In determining whether this requirement has been met, some guidance can be drawn from the fact that the WASPA Advertising Rules for websites require certain minimum font sizes to be used for displaying access costs in advertisements. Section 9.2.1.1 of the Rules states as follows:
>
> **"Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a non-serif font."**

The adjudicator then went on in this report to explore a number of aspects of the Advertising Rules and concluded as follows, at paragraphs 13 to 15:

> In my opinion, 9.2.1.1 of the Advertising Rules contains both obligatory and minimum criteria. The requirement that access cost text must be in a non- serif font is obligatory, whereas the specified font sizes detail what I interpret to be minimum specifications.
>
> Accordingly, section 9.2.1.1 of the Rules does not in any way detract from the overarching requirement of section 11.1.1 of the Code that subscription services must be prominently identified within the context of any particular advertisement notwithstanding compliance with any minimum specifications.
>
> An interpretation that the minimum specifications of 9.2.1.1 cannot detract from the overarching intention of 11.1.1 of the Code is further supported by the 8th bullet point to the introductory section of the Rules which states that **"while this document has specific instructions on formatting…. WASPs and their Information Providers may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the Rules where by doing do they may deprive the consumer of the minimum information required to make informed choices as the cost of access to Content/services…"**.

The adjudicator then made the following statements regarding prominence before arriving at findings in each of the Complaints:

> There is no hard and fast rule determining what is or is not “prominent” and it is for each adjudicator to make a determination on the objective material before him or her as to whether the subscription service component of an advertisement stands out sufficiently enough to be regarded as “prominent”.

The Appellant, in its submissions on this point made a number of arguments in paragraph 34. It correctly pointed out that “prominent” is not defined in the Code. It also argued that the Advertising Rules’ formatting requirements do not form part of the Code’s stringent requirements as, had WASPA intended for this to be the case, it would have included the Advertising Rules’ provisions in the Code. Because the Code does not contain these requirements, the Appellant argued that it would only be bound by the “prominence” requirement in the Code itself. The Appellant later contended that the adjudicator’s findings that the Appellant failed to comply with the Advertising Rules’ requirements and that the Appellant therefore breached the Code’s provisions was in excess of the adjudicator’s authority.

Section 6.1 of the Code deals with the Advertising Rules. It states the following:

> **6.1. WASPA advertising rules**
>
> 6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.
>
> 6.1.2. The latest version of the WASPA Advertising Rules will always be available on the WASPA web site.
>
> 6.1.3. In the case of any conflict between the WASPA Advertising Rules and the WASPA Code of Conduct, the Code of Conduct takes priority over the Advertising Rules.

The Code clearly states that members are bound by the Advertising Rules (in section 6.1.1) and even goes so far as to establish a conflict resolution mechanism giving the Code primacy over the Advertising Rules where a conflict between the two arises. The Advertising Rules, in the Introduction, confirm their application to WASPA members by stating that –

> These Rules form an integral part of the WASPA Code of Conduct and should be read concurrently with the Code of Conduct available at www.waspa.org.za.

The Advertising Rules include the following additional paragraphs in its Introduction which indicate the Advertising Rules’ function:

> These Rules have been formulated to provide best practice for the advertising of Content and Content Services by WASPs and their Information Providers in South Africa who use the South African mobile networks for access to their Content and services.

> The Rules have been devised to be specific to various advertising mediums which Content providers may utilize. Each medium has its own formatting and display variations which these guidelines attempt to cover.
>
> …
>
> Each section relating to the medium it covers will show what information and/or formatting is obligatory or what are minimum criteria. Examples of best practice are also included.
>
> While this document has specific instructions on formatting, timing and the information required and definitions pursuant thereto, WASPs and their Information Providers may not seek to circumvent these criteria in any way by attempting to exploit any potential loopholes in the Rules where by doing so they may deprive the consumer of the minimum information required to make informed choices as the cost of access to Content/services and the terms and conditions associated with such access.
>
> …
>
> For subscription services, providers should take all reasonable steps to ensure that all promotional material, whether in print media, on the Internet, television or transmitted via text message, clearly explains how the subscription service works. Consumers should have ready access to an explanation of their "purchase" and what, if anything, they need to do to access the Content. Great care should be exercised in using the word 'free'.

The Advertising Rules go into a fair amount of detail regarding the content, positioning and formatting requirements for a variety of pricing notices, terms and conditions and related notices for an assortment of media ranging from broadcast, online, print and outdoor advertising. Although the Advertising Rules do not explicitly state as much, it is clear from the various rules and the detail they go into that they are concerned, primarily, with this very issue being debated by the Appellant, namely prominence.

The Advertising Rules effectively give much needed substance to many of the Code's prominence requirements by expanding on those requirements in many respects. The two frameworks have developed at different paces over the years and may well be due for a co-ordinated update but contrary to the Appellant's assertions that adjudicators should have limited themselves to the Code's "prominence" provisions, our view is that adjudicators are correct to look to the Advertising Rules for clarity on what those prominence requirements are, where appropriate. We respectfully disagree with the Appellant's counsel's argument that reliance on the Advertising Rules exceeded the adjudicator's authority.

Flowing from this notion of the Advertising Rules as giving much needed substance to the Code's

“prominence” requirements in many respects, we take the position that non-compliance with the Advertising Rules is, essentially, non-compliance with the Code (by virtue of section 6.1.1 of the Code) and, particularly where the Advertising Rules’ requirements correspond with the Code’s “prominence” requirements, failure to comply with the Advertising Rules is a breach of the Code’s provisions.

With respect to section 11.1.1’s requirements, the Appellant argued as follows (at paragraph 34.4):

> Finally, that which must be “prominent” is our client’s "promotional material‘. This term too is not defined in the Code. Our client avers that the correct construction to place upon the phrase "promotional material’ is that it means the collective advertising campaign as a whole. This would include the pages referred to in paragraph 19 above. It would also include the messages which the potential subscriber receives on his/her mobile device.

The Appellant argued further (in paragraphs 36 and 37) that –

> Prominence is not to be adjudicated with reference to font size. The fact of “subscription services” must be both explicit and prominent. There is no doubt that it was explicit, and in none of the adjudications was there a contrary finding.
>
> The subscription process contemplated by section 11 of the Code is subject to the double opt-in provisions discussed above. Viewing “promotional material” as a whole, there is no doubt that the fact of subscription is reinforced by repetition as the process continues, and - by the moment of subscription - there must be absolute clarity in the mind of the reasonable subscriber (precisely because of the accumulated prominence thereof) that he/she is subscribing. Indeed, by the end of the process, almost everything else has fallen away and the decision to subscribe is both (a) dominant and (b) confirmed after the fact.

The Appellant was at pains to argue that clause 11.1.1 of the Code required that all the promotional material – including the SMS’ received by the consumer – must be collectively viewed in order to determine whether the fact that this was a subscription service was prominent enough. The consumer, the Appellant argued, would have a “growing realisation” that the service was a subscription service.

The Appellant’s counsel referred to the caveat subscriptor concept in South African law as indicating that the consumer should be bound by the terms and conditions relating to a service even if he does not bother to read them. Indeed, the Appellant argued, the failure to read the text on the web site (and perhaps in the SMS’) would be the consumer’s and not the Appellant’s fault.

The Appellant also indicated that it had operated similar campaigns for several years and that, for quite some time, no allegation had been made that their advertising breached clause 11.1.1 of the WASPA Code of Conduct.

We considered these arguments and wish to provide the following guidelines:

1. The purpose of the prominence of the subscription services is to alert the consumer to the

potential cost in a manner that would not be easily overlooked. As a result the caveat subscriptor rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer's attention.

2. We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted. The requirement to highlight the fact that this is a subscription service and what the cost of the subscription service is, is emphasised by chapter 9 of the Advertising Rules (version 2.3).
3. We consider the –
    1. position,
    2. size, and
    3. colouring of the text informing a consumer to be important when deciding whether the text is sufficiently prominent to comply with clause 11.1.1 of the Code as read with chapter 9 of the Advertising Rules.
4. Turning to the specific complaints in this appeal, the colouring of the subscription service text and size of the text was, in general, sufficient. However the location of the text of the subscription service is problematic. We consider page 141 of the Advertising Rules to be a good indication of what is required in terms of the positioning of the subscription services text. The consumer's attention is naturally drawn to the information on the Web page that the consumer must have or must activate in order to initiate a subscription. In the Advertising Rules as they stand the location of the subscription cost is determined by the location of the "unique access number" or "Content access code". However the Advertising Rules does not appear to contemplate that, in the case of an email or an Internet advertisement, no unique access number or Content access code is required. Instead the consumer is required to insert a code into a text field on the Web site or email or alternatively required to click on a button on the Web site (or perhaps both) in order to subscribe to the subscription service. Thus there is no "unique access number" or "Content access code" to place the subscription service text close to.
5. As a result it would appear that WASPA members have assumed that the subscription services text may be placed anywhere on the email or Web page if no unique access number or Content access code exists. We can not support this approach. Clearly a member is still required to place the subscription service text in a position of prominence and as a result of the above issue we consider it useful to issue the following guideline:

Clause 9.2.1.2 and 10.2.1.3 of the Advertising Rules (version 2.3) should be interpreted to indicate that the final cost of access must be displayed:

> *"immediately below, or above or adjacent to the unique access number or content access*

code ***or text field or button that the consumer must use to subscribe to the service****".*
(Insertion of text in bold)

We trust that this guideline will inform future adjudicators as to how to consider the location of the subscription cost text when considering clause 11.1.1 of the Code as read with clauses 10.2.1.3 (email advertising) and clause 9.2.1.1 (Internet Web Sites) of the Advertising Rules.

Conclusion

On the basis of our findings regarding the procedural aspects of the appeals, we uphold the Appellant's appeals and overturn the adjudicators' decisions. We order that the appeal fee which the Appellant paid to WASPA be refunded to the Appellant.