

**WASPA alternative appeals panel
Complaint 2082**

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 21 April 2008
Appellant: Exactmobile
Complaint Numbers: 2082
Code of Conduct Version: 5.3

1. INTRODUCTION TO THIS APPEAL

- 1.1 This appeal relates to the adjudication of complaint 2082, which was lodged by a member of the public, against the SP, Exactmobile.
- 1.2 It is for the record noted that a further complaint, complaint 3016, was lodged by the same complainant against the same SP, Exactmobile, after the Report of the Adjudicator for complaint 2082 was published. Complaint 3016 was lodged by the complainant because the SP did not refund the complainant as promised in its response to complaint 2082. The SP's appeal document also makes reference to facts relating to complaint 3016. It is also quite clear that the SP decided to appeal against the adjudication of complaint 2082 after and in reaction to the complainant lodging complaint 3016. The SP, however, did not appeal against the decision of the adjudicator in complaint 3016. The panel therefore specifically notes that complaint 3016 was not considered by the panel, in this appeal.
- 1.3 The complaint was submitted when version 5.3 of the Code of Conduct was in force.
- 1.4 The panel also notes that the Secretariat accepted a very late appeal from the SP which seems to have been an afterthought in response to the complaint under 3016. Whilst the panel has condoned the late filing of the appeal in this case, the panel wishes to note that it is under no obligation to do so and is, in light of the administrative burden that the Secretariat and panellists are under, unlikely to do so in future.
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2. SUMMARY OF COMPLAINT AND RESPONSE

- 2.1 Complaint 2082, was lodged by the complainant via the WASPA website, receipt of which was confirmed by the WASPA Secretariat on 26 September 2007.
- 2.2 The complaint in essence relates to an unsuccessful attempt by the complainant to download content (a ringtone) from the SP's website. It is further evident that the SP's internal procedures did not resolve the complainant's queries to the satisfaction of the complainant or at all despite several lengthy attempts by the complainant to reach the bottom of the problem, which led to the complainant ultimately lodging a formal complaint with the WASPA Secretariat. The complaint is on record and will not be quoted here.

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2.3 The SP filed a formal response in which the SP explains why it was not possible for the complainant to download the desired content through the service offered by them which was in essence because the complainant's mobile phone was not compatible with the content although the SP website indicated that it was, how its internal complaints procedure functions, as well as how this procedure was implemented to address the queries made by the complainant.

2.3.1 Because we consider the essence of the appeal to lie within the SP response we have repeated this, verbatim and unedited as filed by the SP, here in full:

"Exactmobile attempts to resolve all queries as quickly as possible. A call centre is run from 06:30 in the morning until 23:00 at night in an attempt to provide good service to subscribers. Management are kept up to date with complaints and take appropriate action when required.

The complaint lodged by this subscriber was initially handled in the correct manner by the call centre agents.

As Exactmobile does not have access to all the handsets in the market, much of the information on handset compatibility is retrieved from the manufacturers web sites and other sites that provide technical information on the handsets.

The first step in handling a complaint like this is to resend the content to the client. This was done. As the subscriber's handset does not support service indicators, binary SMS, or the facility to cut out URL's, the subscriber had to manually type in the URL to connect to the URL to retrieve the content.

Once the client downloaded the content, the handset would not play the music. After investigating this situation it was found that the subscriber's handset does not support Digital Rights Managed (DRM) content. As it is illegal to deliver content which is not digitally locked, Exactmobile was not able to deliver music to this handset.

The next step is to allocate the user Exact Credits to the same value as the purchase so that the user could use this to purchase other products. The client refused to accept this.

As the Exactmobile system was incorrectly configured for this handset, in that the system showed that the handset could play DRM locked content, when in fact it could not, Exactmobile will refund the user the R15.00 he paid for the content.

The handset compatibility list has been updated so that a user checking for compatibility will immediately see that the handset does not support this type of content. This complaint took longer to resolve than normal as the user refused to accept exact credits and the process to find out what the real problem was took longer than usual due to the lack of information on the users handset."

2.3.2 The panel also notes the additional correspondence provided by the SP in its response which includes internal emails as well as emails exchanged between the SP and the complainant.

3. RELEVANT SECTIONS OF THE CODE

3.1 Section 3.1: Professional and Lawful Conduct

- 3.1.1 **Section 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.

3.2 Section 3.3: Service Levels

- 3.2.1 **Section 3.3.1:** Members will not offer or promise services that they are unable to provide.
- 3.2.2 **Section 3.3.2:** Services must not be unreasonably prolonged or delayed.

3.3 Section 4: Customer Relations

- 3.3.1 **Section 4.1.2:** Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- 3.3.2 **Section 4.1.5:** Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.
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4. DECISION OF THE ADJUDICATOR

4.1 Findings on the Complaint

- 4.1.1 The adjudicator found that the SP breached section 3.3.1 of the WASPA Code of Conduct because of the fact that the SP could not in fact offer the service it advertised “through a combination of marketing material and the information displayed on its website regarding handset compatibility.”
- 4.1.2 The adjudicator accepted the version advanced by the complainant with regards to the failure of the SP’s call centre staff to return calls as promised or to provide the complainant with a reference number. The adjudicator’s decision in this regard was based on the fact that the SP, apart from stating in its response that the “complaint lodged by this subscriber was initially handled in the correct manner by the call centre agents” did not deal with the allegations raised by the complainant “relating to the failure of the SP’s call centre staff to return calls as promised or to provide the complainant with a reference number.”

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- 4.1.3 The adjudicator did not find that the SP breached section 4.1.5 of the WASPA Code of Conduct, but did however find the SP's conduct in the matter to fall short of the professional standard as required by section 3.1 of the WASPA Code of Conduct. The adjudicator stated that it is understandable that the complainant "did not want to accept credits or continue a process which had not advanced his cause". The adjudicator further made the point that he or she is aware of the fact that this section was not cited in the original complaint, but that he or she did not regard making a finding in this regard "as being procedurally [fair] as the SP has laid out the full facts of the matter and it does not appear that any additional material could be adduced in this regard."
- 4.1.4 The adjudicator did not regard "anything advanced by the complainant as substantiating his allegations in respect of intentional misconduct on the part of the SP" and therefore regarded such allegations "as indicative only of the frustration of the Complainant".

4.2 Findings on the Sanctions

- 4.2.1 The adjudicator fined the SP R500 in respect of the breach of section 3.3.1 of the WASPA Code of Conduct.
- 4.2.2 The adjudicator also fined the SP a further R1000 in respect of the breach of section 3.1 of the WASPA Code of Conduct.

5. GROUNDS OF APPEAL

- 5.1 The SP submitted its appeal of Complaint 2082 to WASPA on the 13th of February 2008. The appeal firstly sets out the SP's reasons for appealing the adjudicator's decision in complaint 2082. The SP then proceeds by presenting arguments why it is of the opinion that the adjudicator erred in finding that the SP breached both clauses 3.3.1 and 3.1.1 of the WASPA Code of Conduct.
- 5.1.1 The SP in providing the reasons for appealing the adjudicator's decision in complaint 2082, under the heading "Background" states the following (verbatim and unedited):

"Exactmobile has decided to appeal this ruling as we believe that the Adjudicator has erred in this ruling and has misapplied the meaning/sentiment of the Code clauses in question. The appeals panel should appreciate that Exactmobile is not appealing this in the interests of saving R1,500. We are appealing this because we believe that this ruling sets an unnecessary, even dangerous, precedent.

WASPs like Exactmobile offer complex services – hugely complex services. We have hundreds of thousands of content items offered to thousands of different handsets across multiple billing channels, etc. We feel therefore that instead of comparing our service to a reasonable standard, WASPA has compared it to some generic (and hence ambiguous) clauses in the Code of Conduct and has found against us almost 'for

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the sake of it'. WASPA in this ruling appears to be thinking about things as if real world constraints and realities do not exist. Our "crime" appears to have been that we tried to help the customer.

Despite this appeal process, we are more than happy to refund the customer the R15 (in cash). The customer is however refusing to supply his bank account details unless we also pay him R450 for his time. As well as this suggesting that the client now sees WASPA as a small claims court, his actions are an indication of what could happen if this ruling was to set a precedent. This was a 'commercial error' and the punishment should be an unhappy customer who does not reuse the services and tells his friends we are no good. The punishment should not be a WASPA fine that then leads to arguments about damages for time spent, etc. We believe, with respect, that WASPA is getting involved in a commercial dispute, which is not part of the mandate set out for it."

- 5.1.2 In providing the reasons why it is of the opinion that the adjudicator erred in finding that it breached clause 3.3.1 of the WASPA Code of Conduct the SP, under the heading "Clause 3.3.1", states (verbatim and unedited):

"The adjudicator found Exactmobile guilty of clause 3.3.1, which states "Members will not offer or promise services that they are unable to provide".

The service in question is a True Tone service. True Tones are successfully delivered from our systems to thousands of users every day and hence Exactmobile does deliver this service. In fact we deliver it better than anyone else in SA. We were the first WASP in SA to deliver a True Tone and we have successfully delivered over 6 million of them. The fact that one specific handset was incompatible due to a handset manufacturer error does not mean that Exactmobile is pretending to offer a service that we do not.

Indeed any normal arm's length SLA would guarantee 99% uptime or service delivery. We believe we beat this by some margin on all our services but on 100,000 transactions a day, even 0.05% errors is 50 people who will have something to 'complain' about. Despite operating in a country with many infrastructure/IT deficiencies, power outages, poor quality skills, etc. we maintain 99% or more uptime. We have numerous live backups, two huge generators and so on. We have not been down for even one hour in the past 4 years.

We feel therefore that instead of comparing our service to a reasonable one, WASPA has compared it to this general clause of the Code of Conduct. Indeed this clause is to stop WASPs claiming to offer PRS, for example, when they cannot or to prevent misrepresentation of some ability at a high level (it does after all appear in the General section of the Code). This clause is not to say that every single content item on

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every handset must work 100% of the time. If this clause is saying that then every single WASP will be breaching this clause hourly and they should all be sanctioned immediately."

5.1.3

The SP then proceeds, under the heading "clause 3.1.1", to supply reasons why it is of the opinion that it did not breach clause 3.1.1 of the WASPA Code of Conduct in what the SP terms as the "second part of the ruling" by stating (verbatim and unedited):

"The second part of the ruling claims that Exactmobile did not comply with Section 3.1.1, which states that "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".

Firstly we would like to mention that we operate a 7 day a week Call Centre. This Call Centre has operated since 2001 and it has since then answered millions of support calls (3,000 a day on average). Furthermore we have systems and procedures for dealing with technical client problems and these were followed. When the customer initially queried the problem, the content was resent and different options were given to the user so he could retrieve the content. When these did not work, the issue was escalated to our content/deliver engineers. The process of breaking the issue down takes time and is made especially difficult if the handsets are rare and might have even rarer software versions. Then thrown in misleading manufacturer specs, etc. and fixing the issue is not a 5 minute task. Despite the fact that our Terms and Conditions gave us the right to say 'sorry, not our problem', numerous staff were involved to try and find a resolve to this problem. When a technical resolve could not be found, the customer was offered a suitable remedy (a full refund via eXactCredits as the networks do not allow reverse billing), which the customer refused. It appears that had we not even answered the phone, the norm for many WASPs, the customer would have just drifted away. It was because we were acting professionally that the customer had something to 'hold on to' and complain about.

Exactmobile is therefore of the strong opinion that we acted in a professional manner in trying to solve the problem and we tried to adequately compensate the customer. Indeed we believe that our approach is probably close to, if not, at the top end of service quality of any WASP and hence if we are not considered 'professional' enough with a staff of over 60 (20 of whom are dedicated to support and IS), how are 2 or 3 man WASPs, many of them offering competing 'content services', operating a professional enough service? Indeed how many of the WASPs offer an automated refund policy on hundreds of items a day? Hence the benchmark for judging us against this clause must be what a reasonable WASP would have done. The benchmark cannot be a theoretical one that sets the standard at an unrealistically 'perfect' level."

6. FINDINGS OF THE APPEALS PANEL

6.1 General Comments

6.1.1 It is not the role of the panel to applaud good behaviour – nor is it the panel's role to draw comparisons between the members of WASPA in determining if a particular WASP breached the Code. Members of WASPA are expected to comply with the Code. Each case should therefore be evaluated strictly on its own merits. In general the panel's view is that contraventions are contraventions, irrespective of the size, track-record or reputation of the WASPs involved.

6.1.2 WASPA has as a matter of fact, jurisdiction in relation to any service which can be termed a “wireless application service” where its members are involved in a complaint, or where its members have responsibility for the actions of third parties who may be involved in a complaint. WASPA is required to take the public interest into account when considering any complaint.

The General provisions of the Code have application in all cases in relation to matters dealt with by WASPA. Section 3.1.1 provides that: “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.” This particular provision is at issue in this appeal and this panel is of the opinion that there can be no doubt that the adjudication of this dispute falls squarely within the mandate set out for WASPA and therefore within the mandate of this panel.

6.1.3 These principles have informed our decision and our reasoning.

6.1.4 The Panel has considered each ground of appeal set out by the SP above, and we state our decision under each of the three headings below:

6.2 “Background”

6.2.1 The panel takes note of the SP's reasons for lodging this appeal, the main reason being that the SP is of the opinion that the adjudicator's decision sets an “unnecessary, even dangerous precedent.” and that the SP did not appeal the adjudicators' decision in the “interest of saving R1500”.

6.2.2 According to the panel the obvious irritation of the SP as evidenced by its appeal document is rather misplaced. The size of a service provider, the complexity of services offered or the number of content items delivered do not in any way diminish a service provider's responsibility to provide its services in compliance with the WASPA Code of Conduct. It also certainly does not justify a more lenient interpretation of the Code. Although it is true that parts of the Code of Conduct lends itself to interpretational anomalies and uncertainties, possibly even the clauses of the Code that form the basis of this

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complaint, we do not agree with the SP's statement that the adjudicator "found against" the SP "almost for the sake of it" because of an incorrect and subjective interpretation of what the SP describes as being "generic" and "ambiguous" clauses in the Code. The panel is of the opinion that the facts of this appeal do not support the allegations made by the SP against the adjudicator and WASPA.

6.2.3 Because of the fact that the SP decided not to appeal the adjudicators decision in complaint 3016 the panel did not consider complaint 3016, as stated in par 1.2 above, in reaching our decision. The SP however, mentions facts pertaining to complaint 3016 in its appeal document, specifically the fact that the complainant claimed damages for time spent. The SP proceeds by arguing this fact as a basis for why it is of the opinion that the adjudicator's decision in complaint 2082 sets a "dangerous" precedent and also for accusing WASPA of getting involved in a dispute "which is not part of the mandate set out for it". In this regard, the panel finds it necessary to state for the record that the claim for time spent by the complainant in complaint 3016 was unsuccessful, with the adjudicator clearly stating that such a claim will not be entertained under the Code of Conduct. The panel therefore does not agree with the SP's argument that this complaint falls outside the mandate set out for WASPA. As stated in 6.1.2 above, we are of the opinion that this dispute falls within the mandate of WASPA in ensuring that service providers conduct themselves according to the principles and standards as set out in the Code of Conduct.

6.3 "Clause 3.3.1"

6.3.1 The panel again wants to stress the fact that the panel is not concerned with applauding good behaviour, nor with comparing service providers with one another based on statistical information in deciding whether a particular clause of the Code of Conduct was breached. How many ring tones the SP delivers, or have for that matter delivered in the past, has absolutely no bearing on the facts before us. The percentage of "uptime" or service delivery has a bearing on the ultimate commercial success of the SP's business and possibly, the number of complaints that can potentially be lodged against the SP, but in no way does it affect the answer to the question of whether the SP actually breached clause 3.3.1 of the Code in this complaint.

6.3.2 In its appeal document the SP attributes the fact that they were unable to deliver the specific ring tone the complainant wished to download to a "handset manufacturer error". In its initial response to the complaint the SP, however, admitted that its own system was incorrectly configured and consequently offered to refund the complainant. The SP in the same document also admitted that they updated their handset compatibility list to reflect the correct position. The panel in light of this contradiction accepts that the reason for the SP not being able to deliver the requested ring tone to the complainant, to be, as the SP stated in its initial response, that the SP's system was incorrectly configured and not because of a handset manufacturer error. Besides it would seem to us that handset manufacturers do not err when they do not configure handsets for a multiplicity of content or

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downloads, its quite conceivable that the SP erred in not noting the incompatibility.

6.3.3 It is clear, as stated by the adjudicator, that the SP therefore made an erroneous representation on its website that the handset in the possession of the complainant supported the ringtone he wished to download. The fact therefore remains that the SP advertised a service on its website that it could not provide to the complainant.

6.3.4 If all the statistical information provided by the SP in its appeal document regarding its capacity and service delivery is accurate, it begs the question to be asked why it is not possible for the SP to ensure that the information provided in its marketing material, including its website, is as far as possible accurate and correct?

6.3.5 The panel finds that the SP did in fact breach clause 3.3.1 of the Code of Conduct.

6.3.6 This ground of appeal is not upheld.

6.4 “Clause 3.1.1”

6.4.1 In this ground of appeal the SP again provides statistical information regarding its operations, for example how many calls its Call Centre answers per day, how many staff members it has and continues by comparing their service to that of other WASPs. The panel wishes in this regard to refer to our comments made in par 6.1.1, 6.2.2 and 6.3.1. above.

6.4.2 The panel appreciates the fact that not all complaints are due to circumstances within a service provider's control, nor necessarily of such a nature that it can be resolved easily and quickly. It is quite possible even that some complaints cannot be resolved to the satisfaction of a particular customer irrespective of the time and effort invested in resolving the complaint. Dealing with customer complaints is however, an inescapable and integral part of any service provider's business. “Customers” (as stated in the SP's appeal document) have the right to complain if they feel unhappy or aggrieved with a particular service offered by a service provider, irrespective of the reason or seriousness of the problem that led to the complaint. A “customer's” right extends further in the wireless applications service providers environment in that he or she may approach WASPA if a complaint was not dealt with in a manner, which according to that particular customer, was not in line with the principles and standards as required by the WASPA Code of Conduct.

6.4.3 WASPA, the Code of Conduct, and this panel for that matter, in no way sets the industry standard at an “unrealistically ‘perfect’ level, nor does this panel want to create the impression that our decision in this appeal should be seen as a general indictment of the SP's services or procedures. If the statistics provided by the SP in its appeal document are correct it seems as if the SP maintains generally high standards in dealing with “customer” complaints. The fact of the matter is that this particular customer was justifiably (in our view) frustrated and unhappy with the service he received from the SP and that the

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particular customer lodged a complaint with WASPA after his complaint was not handled to his satisfaction, which he had the right to do.

6.4.4 Based on the particular facts and documents before us, the panel agrees with the adjudicator, and accepts the version of events advanced by the complainant. The SP did not deal, in either its response to the complaint or its appeal document, with the specific allegations raised by the complainant relating to the sequence of events resulting in the complainant ultimately lodging a complaint with WASPA. This includes the failure of the SP's call centre staff not returning calls as promised and not providing the complainant with a reference number in response to the initial complaints – causing inconvenience to the customer when he had to call again. As an aside, the panel notes the comment made by the SP in its appeal remarking that had the SP not answered its phones at all the customer would have “drifted away”. We are unclear as to why the SP regards this as relevant to an appeal. It is even concerning to the panel that the SP regards this as relevant at all in a service industry to note that it would have had a better outcome had it not answered its phones as it is required to do.

6.4.5 The panel agrees with the adjudicator and finds that the SP did breach clause 3.1.1 of the Code of Conduct.

6.4.6 This ground of appeal is not upheld.

6.5 Findings of the Panel relating to Sanctions

6.5.1 The panel makes the following order:

6.5.1.1 We direct that the SP pays the fine of R500 in respect of the breach of section 3.3.1 of the Code of Conduct.

6.5.1.2 We direct that the SP pays the fine of R1000 in respect of the breach of section 3.1.1 of the Code of Conduct.

6.5.1.3 Both amounts should be paid within 5 days of the date of this appeal being notified to the appellant.

6.5.1.4.1 The appeal fee should not be refunded.