

REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exactmobile
Service Type	Content download
Source of Complaints	Public
Complaint Number	3016
Date received	6 December 2007
Code of Conduct version	5.3

Complaint

This Complaint relates to Complaint 2082 which was lodged by the same Complainant against the same SP – a copy of the Adjudication (which should ideally be read together with this Adjudication) is available from www.waspa.org.za¹.

During the course of its Response to Complaint 2082, which related to an unsuccessful attempt to download content, the SP indicated that it would “refund the user the R15.00 he paid for the content”.

It does not appear, however, that this refund was paid.

In the words of the Complainant:

“I have still not received a refund (R15) and would furthermore like to submit my claim for costs and lack of earnings that I incurred while having to take time out to ensure that get a refund.

I am a business owner and multimedia developer and charge my time out at R225 / hour.

¹ <http://www.waspa.org.za/code/download/2082.pdf>

I spent more than two hours resolving this matter (telephone calls, researching the WASPA website & emails to both Exact Mobile and WASPA). In addition to the R15 refund, I expect compensation for this lost income (R450).”

Informal Resolution & Further Correspondence

The SP was notified of this Complaint on 11 January 2008 (the Secretariat having taken a deserved holiday) and responded directly to the Complainant on 15 January 2008 in the form of a request for banking account details so that the refund could be effected.

The Complainant replied directly to the SP on the same date indicating that he was not prepared to provide his banking details in the absence of the SP agreeing to pay his “wasted expenses” of R450 in addition to the refund. A failure to so agree, the Complainant warned, would result in him proceeding against the SP in the Small Claims Court in respect of such wasted expenses.

The SP thereafter and on the same day reiterated its position that it would only pay the refund of R15 and once again requested the Respondent’s banking details.

Further correspondence ensued with the Complainant expressing his dissatisfaction with both the SP and WASPA and issuing a number of threats regarding legal action and negative publicity.

SP’s Response

After the Complainant had, inevitably, requested that the matter be escalated to the formal dispute resolution process under the Code the SP filed the following formal response:

“Exactmobile has offered to refund the customer with R15.00 as this is the amount of money the client paid for the content that he did not get. The customer has rejected this and is withholding his banking details, preventing us from making the refund, and is now claiming damages for ‘time spent on this’.
Exactmobile cannot make a refund without having the banking details so his

comment 'I still have not been able to get a refund' is deliberately misleading and out of context.

Exactmobile is not obligated to pay any additional money to this client. The client is essentially trying to extort further money from Exactmobile and he appears to see WASPA as a small claims court, rather than an Industry Regulatory Authority with jurisdiction over only its own rules and guidelines.

I further refer you to the Disclaimer section of the Terms and Conditions as published on the Exactmobile Web site and included in our Directories and other printed material. These state as follows:

Whilst every effort has been made by Exact Mobile (PTY) Limited (herein eExactmobile) and its suppliers of information to ensure the proper performance of every service, eExactmobile, its affiliated companies, suppliers, or any of their employees do not guarantee the availability of services, content and information offered. In particular we make no warranty that the Services will meet your requirements, be uninterrupted, complete, timely, secure or error free. We will only entertain requests for exchanges, returns and/or refunds at our discretion. Errors will be billed in full. By using eExactmobile Services you indemnify and hold us harmless against all or any loss, liability, actions, suites, proceedings, costs, demands and damages of all and every kind (including direct, indirect special or consequential damages) and whether in action based on contract, negligence or any other action, arising out of or in connection with failure or delay in performance of the Services offered or the use of said Services.

Exactmobile is further appealing complaint number 2082 which relates to the same client and the same complaint as we believe a dangerous precedent has been set with this ruling. This second 'complaint' is already proving why said precedent is an issue."

Sections of the Code considered

The following section of Version 5.3 of the WASPA Code of Conduct was considered:

3.1. Professional and lawful conduct

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.

13.4 Sanctions

13.4.1. Possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:

.....

(d) a requirement, in appropriate circumstance, for the member to pay reasonable and valid claims for compensation;

Decision

The crisp question to be answered in this matter is whether the failure of the SP to pay the refund constitutes a breach of section 3.1 of the Code of Conduct. A related question is whether the Complainant is permitted, within the context of the Code, to recover from the SP the wasted expenses which he alleges are due to the conduct of the SP.

It is helpful, at the outset, to sketch a timeline in respect of this Complaint and Complaint 2082:

2007-12-05: Report 2082 published & sent to Complainant and SP

2007-12-06: Complainant notifies WASPA that refund not paid; Complainant advised to and proceeds to lay new Complaint 3016

2007-12-15: WASPA offices close

2007-01-02: WASPA offices re-open

2008-01-11: SP notified of Complaint 3016

2008-01-15: SP requests banking details from Complainant, who refuses to divulge same until claim for compensation met

In this regard the following should be considered:

- the payment of the refund was not a sanction imposed by WASPA but an offer made by the SP in order to resolve the matter;
- having made such an offer the SP would have been expected to honour it reasonably promptly;

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- the first attempt made by the SP to effect the refund was on 15 January 2008 after receipt of Complaint 3016 – this is clear from the fact that it is at this stage that the SP first requested the Complainant's banking details;
 - the SP cannot however be held responsible for any delay in providing the refund subsequent to 15 January 2008, subsequent to the Complainant's refusal to provide them.

There is, in the opinion of the Adjudicator, no need to consider the SP's terms and conditions save to note that:

- Any conflict between such terms and conditions and the Code will be resolved in favour of the latter, i.e. WASPA's members have a duty to ensure that their terms and conditions of service accurately reflect and comply with the Code of Conduct where relevant;
- It is not sufficient to simply allege a particular provision of such terms and conditions. The SP would need to bring additional material before WASPA evidencing the fact that a binding agreement has been entered into between the SP and a consumer on the basis of such terms and conditions.

Insofar as the SP claims that such Adjudication constitutes a dangerous precedent, this Adjudicator does not agree and finds no causal link between such Adjudication and the present Complaint other than the fact that the SP has failed to honour its undertaking to pay the refund. The fact of the matter is that the SP acknowledged its error in respect of Complaint 2082 - "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".

In the circumstances it is the view of the Adjudicator that the SP has not acted in a manner which can be objectively described as a "professional manner" as required by section 3.1.1 of the Code of Conduct. The obligation on the SP to refund the R15 was present from no later than 31 October 2007 when it filed its formal Response under Complaint 2082 making such offer. Notification of the result of Complaint 2082 did nothing further to prompt the SP to effect the refund. A member of the public should not be reduced to having to file a further complaint in order to force a WASPA member to follow through on its undertakings.

It remains to be considered whether the claim for wasted expenses can be entertained under the WASPA Code of Conduct or under any other basis in law. In the view of this Adjudicator it cannot. The Complainant has suffered both direct loss (the R15) and indirect loss (the alleged wasted expenses). A claim for the former may be permissible under the Code of Conduct or in general law but a claim for the latter will not be entertained. If the opportunity cost of pursuing a R15 discount amounts to R450 then such cost is incurred at the choice of the Complainant.

Such a claim lacks a legal basis in that it cannot be founded in contract or delict and does not constitute unjustified enrichment. By analogy: no South African court will entertain an additional claim for the time spent by a Plaintiff in consulting lawyers and sitting in court in pursuit of his or her claim.

The Complainant has repeatedly indicated his intention to take this matter further through the formal legal process and should accordingly abide by the result obtained in whatever forum he chooses to bring his claim in.

The Adjudicator, taking into account applicable precedent and the relatively clean recent record of the SP, orders that the SP be issued with a formal reprimand and a fine of R2 000 (two thousand Rand) in respect of the breach of section 3.1.1 of the Code of Conduct as set out in this Report.