



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mira Networks / SafikaTel (from 26.02.2007)*
Information Provider (IP) (if any)	SafikaTel* / Dion Kriek
Service Type	Competition
Source of Complaints	Public
Complaint Number	3812
Date received	2 April 2008
Code of Conduct versions	3.1, 4.8, 5.7

* In this matter SafikaTel has acted primarily as an IP but is also, since 26 February 2007, as a full WASPA Member in its own right.

Complaint

The Complaint relates to an SMS-based competition which appears to have been closed without the termination of the shortcode entry mechanism or the awarding of the competition prize.

The Complainant entered an SMS competition on 17 April 2006 by SMSing the word "Golf" to 37374 at a cost of R7.50. The competition advertising indicated that the 300 000th entrant would be the winner of a motor vehicle ("the competition prize"). After effecting the entry the Complainant was informed by return SMS that this entry had been number 122 452 as received, and was further invited to enter the competition as many times as he cared to.

On 27 September 2007, some 17 months later the Complainant once again sent in an entry. This time he was notified that his entry was the 131 755th received. Justifiably alarmed that only 9 303 entries had been received during the 17 month gap between his first and second entries and reasonably suspecting that the magic number of 300 000 would probably never be reached, the Complainant made enquiries with Vodacom (his network provider) who referred him to the SP and to Mira Networks, which acted as an upstream aggregator.

Upon contacting the SP (by which is meant SafikaTel) he was informed that the competition had in fact been closed for some time. The Complainant conveyed his disquiet that the SP was still accepting entries and was further informed that the competition had been closed due to a change in the law and the introduction of specific WASPA regulations which had rendered the competition unlawful.

After further interaction the Complainant was directed to pursue the matter through WASPA.

In the words of the Complainant:

“There was clearly an unspecified period of time between when the competition was closed and the actual competition line was closed during which people were entering the competition with no chance of winning the prize. Also, there was no end date to the competition - even while it was still operational. I think this may be the reason the competition was ended.

I think it will be appropriate to re-imburse the people who entered the competition after it had been closed and to do the draw of the vehicle based on the amount of entries received before the competition was terminated.”

SP Response

The SP provided a reasonable degree of co-operation during the informal resolution procedure. The SP is not focused on the provision of SMS services but does have some clients and agents who require these services. In such cases it acts as a facilitator and contracts with Mira Networks as its aggregator of choice.

The SP noted that the competition was conceived and commenced prior to guidelines and rules governing these promotions being enacted.

“Competitions without specific closing dates, but relying on a minimum number of entries were common and this was one of many at that time. The terms and condition of the promotion were clear and complied with all existing requirements for promotions of such a nature at the time it was being run.

As soon as the regulations and guidelines were published, this promotion was stopped! No further marketing or promotion was undertaken as the promotion was suddenly deemed illegal.”

The SP supported the action of the competition owner in stopping the promotion:

“Since the promotion of the number had stopped, no thought or urgency was given to discontinuing the mechanism behind the number which provided the response sms. In any event, a sms sender would be billed the same if they had continued to send to that number even if the mechanism had been discontinued.”

In terms of the manner in which the promotion was to be stopped the SP states that it considered reimbursing entrants:

“Reimbursing users would require the cooperation of all the cellular networks and access to data years old. We have been advised that this has not done in the past and they will not or cannot do it now.”

Neither was a draw for the competition prize held:

“Regarding the draw of the vehicle, the rules of the promotion stated that the draw will be done once the required number of entries has been achieved, and whilst this is no longer legal, it was at the time of the promo as was the discontinuation of the promo without a draw at that time.”

In response to queries raised by the Complainant during the informal resolution process the following statements were made by the SP:

1. Marketing and promotion of the competition was stopped in or around October 2005. The last advertising ran for two weeks in the Auto Trader magazine commencing “around mid October 2005”. It appears that the decision to close the competition was taken in mid-October.
2. The SP is, however, not sure as to when it received notification that the competition may be unlawful.
3. The SMS line itself was closed on 28 September 2007 by way of request to Mira Networks to do so.
“The keyword was deleted on the 27th of September 2007. I suspect that was done after [the Complainant]’s query alerted us to the oversight.”
4. Entries received after the decision to close the competition was made were charged at R7.50:
“I must stress however that although you might not get a response, any sms delivered to that number irrespective of the keyword or what is actually monitoring the number or keyword are billed at R7.50.”

Sections of the Code considered

The following sections of Version 3.1 of the WASPA Code of Conduct, which came into force on 1 September 2005, were raised and considered:

9.3. General provisions

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

The following sections of Version 4.8 of the WASPA Code of Conduct (which was in force at the time that the SP became a member of WASPA) were considered:

2.10. A "competition service" is any competition or game with prizes or entry mechanism into a draw.

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.

3.1.2. Members are committed to lawful conduct at all times.

The following sections of Version 5.7 of the WASPA Code of Conduct were 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.

3.1.2. Members are committed to lawful conduct at all times.

3.3.3. A member is not liable for any failure to provide a service due to circumstances beyond that member's control.

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Decision

Timeline of events

Before considering the merits of the matter it is helpful to set out a timeline of relevant events:

Date	Event
June 2005	Competition commences
1 September 2005	Version 3.1 of WASPA Code of Conduct comes into force
October 2005	Promotion of competition ceases.
17 April 2006	Complainant's first entry
26 February 2007	SP becomes a member of WASPA
27 September 2007	Complainant's second entry
28 September 2007	SMS line deactivated and entry no longer possible

From the above it appears the version of the SP to the effect that the decision to cease the competition was based on the coming into force of new rules regulating such competitions is plausible. These rules came into effect on 1 September 2005 at which time Mira Networks, through which the SP was providing the service, would have been bound thereby.

Breakdown of entries

The Adjudicator requested that the SP provide a spreadsheet showing the volume of entries on a monthly basis and the following was provided, having been sourced from Mira Networks.

Month	Count	Cumulative
2005-06	6 156	
2005-07	47 090	53 246
2005-08	11 790	65 036
2005-09	8 954	73 990
2005-10	44 808	118 798
2005-11	27 277	146 075
2005-12	6 621	152 696
2006-01	3 671	156 367
2006-02	1 852	158 219
2006-03	1 705	159 924
2006-04	3 299	163 223

2006-05	1 453	164 676
2006-06	990	165 666
2006-07	714	166 380
2006-08	499	166 879
2006-09	384	167 263
2006-10	314	167 577
2006-11	284	167 861
2006-12	1 906	169 767
2007-01	418	170 185
2007-02	271	170 456
2007-03	172	170 628
2007-04	126	170 754
2007-05	126	170 880
2007-06	74	170 954
2007-07	73	171 027
2007-08	70	171 097
2007-09	50	171 147
	171 147	

A simple analysis of the table above indicates that:

1. A total of 171 147 entries were received for a total gross revenue of R1 283 602.50.
2. If it is accepted that the competition ceased in that the intention of the competition owner to continue therewith no longer existed as at 1 November 2005, then a total of 52 349 entries were received after this date, equating to R392 617.50 in gross revenue.
3. Clearly the above figures do not represent revenue received by the competition owner or the SP and the Adjudicator is not privy to the commercial entities entered into between the SP and Mira Networks which would have determined the division of revenue derived from the operation of the competition line.

Evaluation of the version of the SP

The Adjudicator accepts the version of the SP insofar as it relates to the reason for the decision being made to close the competition.

Insofar, however, as the SP states that the failure to close the competition line was an “oversight” the Adjudicator wishes to raise a query with regard to the division of revenue derived from entries to the competition after the decision to close it was made. It seems logical to assume that the SP and the competition owner would have continued to be paid their portion of revenue attributable to such entries by Mira Networks (itself receiving a portion of revenue from the network operators) after October 2005. This is not touched on by the SP and the Adjudicator finds that the SP must have been aware that entries were still being received as a result of its failure to close the SMS line and that the failure to close the line for a period of close to two years cannot be characterised as an “oversight”.

The SP further alleges that it considered reimbursing entrants (recognizing, perhaps, that it was under a duty to do so) but was unable to effect this the networks would not cooperate in providing access to “data years old”. This ignores the fact that the decision to close the competition was taken in October 2005, only four to five months after the competition commenced. This aspect of the SP’s version is rejected.

With regard to holding a prize draw the SP states that, because the rules of the promotion stated that the draw would only be done once the required number of entries had been received and notwithstanding this later being ruled unlawful, it was entitled to discontinue the promotion without a draw at that time. Without delving into this aspect too deeply it is sufficient to say that this amounts to a legal interpretation advanced by the SP without any further argument and that such interpretation is not accepted by the Adjudicator.

Breach of section 3.1 of the Code of Conduct

The Adjudicator regards the conduct of the SP in this matter as being in breach of sections 3.1.1 & 3.1.2 of the WASPA Code of Conduct. There has been no amendment of this section as between the initial version of the Code and the current version.

In the view of the Adjudicator the SP should have ensured the termination of the competition in its entirety, including the SMS line, at the time at which it became clear that it was unlawful. It appears that it was at this time that the SP and the competition owner came to the firm decision to halt the competition. The SP refers to the failure to close the line down as “an oversight” but fails to offer an explanation for the continuing revenue stream flowing from entries received in the clear knowledge that no prize would ever be awarded.

Leaving aside the failure to close the SMS line the question still remains as to whether it is acceptable for the SP, upon ascertaining that the competition may be illegal (and it does not appear that any great effort was made in this regard) to simply decide to close it and retain all monies received. In the view of this Adjudicator this is not an acceptable course of conduct and the reasons advanced for failing to reimburse entrants at this time are far from convincing.

This most certainly does not constitute professional conduct. Nor, in the opinion of the Adjudicator and based on the facts and statements presented, does it amount to lawful conduct.

The above finding holds for the period 1 November 2005 (the date on which, for the sake of convenience, it is held that the decision to close the competition was made), to 28 September 2007 (the date on which the SMS line was closed). The question of WASPA’s jurisdiction over the SP prior to it becoming a WASPA member is dealt with further below.

The position of Mira Networks

The Adjudicator wishes to make it explicitly clear that Mira Networks is not regarded as bearing any culpability in this matter. The citation of Mira Networks in this Adjudication should in no manner be construed as indicating any finding against them.

Jurisdiction

Given that the SP joined WASPA on 26 February 2007 it is necessary to raise the question as to whether WASPA has jurisdiction to make a finding in respect of the conduct of the SP as evaluated against the Code of Conduct. This needs to be considered from the perspective of conduct occurring prior to the date on which the SP became a member. The issue as to whether there was any breach of the Code of Conduct subsequent to the date is separately dealt with.

Prior to 26 February 2007 and at all relevant times subsequent to 1 September 2005, the date on which WASPA's Code of Conduct first came into force, the SP had a commercial arrangement with Mira Networks. Mira Networks became a WASPA member on 26 August 2004.

There is an abundance of precedent holding that an SP can be required by WASPA in terms of its Code of Conduct to ensure that an IP which is not a member of WASPA observes the Code of Conduct. The SP must further enforce any sanctions imposed on the IP and may be required to suspend service provision to the IP where it does not comply with such sanctions.

The WASPA Appeals Panel, in disposing of an appeal against the decision of the Adjudicator under Complaint 411, dealt with this matter definitively:

"It is a recurring theme in the Appellant's grounds of appeal, running as an unbroken thread throughout its argument, that if the IP, using the SP to access the network operators, commits an action that would, if the IP were a member of WASPA, be a breach of the WASPA code of conduct, the SP cannot be held liable for the actions of the IP.

WASPA is a voluntary organisation set up by the stakeholders in the industry to serve as a self-regulatory body. It is fundamental to the working of WASPA that while it is SPs who are members of WASPA, and are as such themselves subject to the WASPA Code of Conduct, if the IPs were to be given a free rein to misconduct themselves while using the SPs to access the network operators, it would do harm to the SPs and to the industry as a whole. Thus the approach of WASPA from the outset has been to ensure that SPs hold IPs to the standard set by the Code of Conduct. Members are accountable to WASPA for the rendering of services to customers in accordance with the Code. Members may either

render services directly to customers or the services may be offered through information providers. The Appellant is responsible for the information provider's adherence to the Code. The means used to uphold the standards of the Code is set out in clause 3.9 of the Code of Conduct, which reads as follows:

"Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct."

While this provision does not actually state that penalties will be imposed on an SP for IP contraventions of particular clauses of the Code of Conduct, it does impose a general duty upon the SP to ensure that the IP does not contravene the Code of Conduct.

Furthermore, clause 1.6 of the Code makes provision for the applicability of the Code to non-members.

If an IP is at fault, adjudicators have developed the practice of citing the clause in the Code of Conduct that would have been contravened if the IP had been a member of WASPA.

There are, nonetheless, sanctions that adjudicators can apply to IPs, but even so such sanctions must by necessity be implemented by the SPs. These sanctions include suspension of services to an IP by an SP as set out in clause 13.4.1 (h), and an IP Notice as set out in clause 13.5.

We further refer to the report of the Appeals Panel in its decision relating to complaints 2, 11, 26, 37 & 58:

'Nevertheless, we believe that it is implicit in the Code that non-member IPs must comply with the rulings of the Adjudicator, where the Adjudicator finds that there has been a breach of the Code, or risk the termination of their contractual relationship with their SP.'

The appellant is at some pains to show that a distinction must be made between the IP and the SP in adjudicating matters such as these, and lists the clauses of the Code of Conduct that it contends go to show this distinction. The panel agrees that the acts of the SP and the IP must be assessed separately; in many cases the SP and the IP is in fact the same person, while more often the IP is a party which

contracts with the SP in order to gain access to the network operators. Merely to say however that because the code treats them separately the SP cannot be liable for actions of the IP in terms of clause 3.9 goes no way to refute the basis of SP liability as set out above.”

This Adjudicator accordingly finds that WASPA does indeed have the power to impose sanctions on the SP where it was acting, between 1 September 2005 and 26 February 2007, in the position of an IP vis-à-vis Mira Networks. Such sanctions may be direct or indirect as set out above.

In the alternative to the above the Adjudicator is of the opinion that the failure by the SP to terminate the SMS line dictates that, notwithstanding the making of a decision to close the competition, the competition was in fact still running subsequent to 1 November 2005 and up until 28 September 2007.

Under the version of the Code of Conduct in force at the time the SP joined WASPA a “competition service” was defined as “any competition or game with prizes or entry mechanism into a draw”. Given that the entry mechanism was still operational up until 28 September 2007 it is found that the competition service was still being offered by the SP up to this date. Certainly this was the view of some 50 000 consumers (accepted as being a massive approximation) who entered subsequent to 1 November 2005.

Accordingly WASPA would have direct jurisdiction over the SP in respect of the competition from 26 February 2007, on which date the SP became a WASPA member. This leads to a finding that the SP was in breach of section 3.1 of the WASPA Code of Conduct as it existed at that date and up until 28 September 2007.

With reference to the excerpt from Appeal in respect of Complaint 411 the following appears:

- In respect of the period prior to 26 February 2007 WASPA can impose a sanction directly on the SP (acting as an IP as it then was) or can order that Mira Networks enforce such sanction failing which it will be required to terminate service provision to the SP;
- In respect of the period subsequent to 26 February 2007 any applicable sanction can be applied directly to the SP as a WASPA Member in its own right.

Sanction

The Adjudicator regards the conduct of the SP as detailed above as amounting to a serious breach of the WASPA Code of Conduct. At the heart of the matter is the inescapable conclusion that it is iniquitous for the SP and competition owner to have been significantly

enriched at the expense of consumers who in good faith entered a competition believing that in doing so they stood a chance to win a prize.

The Adjudicator accepts that the reimbursement of entrants subsequent to the decision to close the competition may, almost three years later, be impractical. Nevertheless, while costly, it will not be impossible and constitutes one avenue for redress.

Another avenue is to require specific performance on the part of the SP and the competition owner, i.e. that they should proceed to hold a competition prize draw. This would at the least ensure that consumers are placed in a position that they reasonably expected they would be in when entering the competition, i.e. with an opportunity to win the motor vehicle.

The above measures seek to create an avenue for redress vis-à-vis entrants. It is the opinion of the Adjudicator, however, that this in itself would not be sufficient and that the conduct of the SP is such as to attract a punitive sanction.

The Adjudicator has taken into account the SP's clean record in respect of adverse findings made under the WASPA Code of Conduct.

In the circumstances the following order is made:

1. The SP is found to have breached section 3.1 of the WASPA Code of Conduct, both in its capacity as an IP using the services of a WASPA Member and as a WASPA Member in its own right.
 2. The SP is ordered to proceed to either reimburse all entrants of the competition alternatively to proceed to hold a competition draw within thirty (30) business days of the date of this Adjudication.
 3. The Membership of the SP is suspended pending compliance with item 2 above.
 4. The SP is ordered to pay a fine of R75 000.00 to the WASPA Secretariat within fifteen (15) days of the date of this Adjudication.
 5. The implementation of items 2, 3 and 4 above are to be suspended on the lodging of an appeal in respect of this Adjudication within the timeframes provided for such lodging.
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