

REPORT OF THE ADJUDICATOR

WASPA Member: Peach Mobile

Service Type: Decency

Complaint Number: 4985

Adjudicator: Kerron Edmunson

Code and Ad Rules: v6.2 (14 August 2008) read with v1.6 of the Ad Rules

Introduction

The complaint raises an interesting issue, that of the use of wireless application services to convey political messages, or to convey messages of any kind other than those which are purely commercial in nature, or as WASPA terms them, mobile application services. It does so in the context of the decency provisions of the WASPA Code of Conduct at section 3.7. These must, however, be read against the provisions of the freedom of expression provisions contained in section 3.2. The complaint is submitted by an individual who calls himself a “concerned peace-loving South African citizen”. In order to set the complaint and the finding in proper context, I am repeating the substance of the complaint almost in full.

Complaint

The complaint, lodge in October 2008, refers to a TV2 commercial for the SP which “promoted [the] “Umshini Wami” ringtone. It is well known that this is the offensive Jacob Zuma song which mean[s] bring me my machine gun”. The complainant states that the advert and content of the ringtone contravenes the decency clause of the Code, “insofar as that it promotes both services and promotional material that:

1. contains very real potential to promote and/or incite violence which constitutes incitement to cause harm;
2. results in any unreasonable invasion of privacy;
3. induces (promotes) an unacceptable sense of fear or anxiety;
4. encourages or incites any person to engage in dangerous practises (such as mass action protest);
5. induces or promotes racial disharmony;
6. causes grave or widespread offence; or
7. debases, degrades or demeans law-abiding and ethical South Africans.”

In addition, the complainant avers that the commercial “could be interpreted by members of the public as a means of advertising or promoting “pro-ANC” messages ahead of the 2009 General Elections when other Political Parties are not permitted to flight TV advertisements.

Finally, the complainant requests the following relief:

1. that the offensive advert no longer be broadcast;
2. that Peach Mobile publishes and/or flights a televised public apology;

3. that Peach Mobile cease the distribution of "Umshini Wami" to its current and prospective subscribers;
4. that Peach Mobile contact all subscribers who already have downloaded or requested a download of "Umshini Wami":
 - a. explain to such subscribers that there was an infringement of the WASPA Code of Conduct;
 - b. refund such subscribers for the said download;
 - c. request such subscribers to delete "Umshini Wami" from their cellphones."

SP Response

The SP responded later that month in some detail with a categorical denial. Specifically the SP stated that the words of the song actually mean "My Comrade, the machine is back". The SP also referred to other advertisements featuring a modified version of the "Mshini-am" song, meaning "My machine, answer, answer" and stated that the words refer to a cellphone ringing. Furthermore the ringtone was intended by them as a parody (although it is not stated of what), "designed to amuse and delight a reasonable consumer, and has no racial epithets included in it, and does not incite or promote racism, violence or racial hatred. The ring tone is satirical of a topical subject (not stated) and not insulting or harmful in any way".

I presume that what is meant by the SP is that the ringtone *is not intended* to promote racism, violence or racial hatred, and *is not intended* to be insulting, or harmful in any way.

The SP states further that it is an a-political organisation but records its belief that the original version of the song Mshini Wam testifies to the triumph of good over evil in South Africa.... And is a song that millions of South Africans identify with very strongly. They do not believe that the complainant's views are held by the majority of South Africans since it has been sung at rallies which were all concluded peacefully.

Importantly in this case, the SP states that the advertisement has been aired for more than 21 months with only one complaint to the ASAASA, which was dismissed (no detail is given).

The SP states that the views of the complainant are his alone and he is seeking through the complaint to enforce his opinion on others. The SP refers to and relies on the constitutional right to freedom of speech and expression, and suggests that the way to avoid being offended by the song is simply not to download it.

Finally, the SP suggests that the relief sought is excessive and invasive in the circumstances.

Consideration of the WASPA Code

As set out above, the complainant has referred to section 3.7 of the Code but it is clear that section 3.2 is also relevant.

Section 3.2 provides that "WASPA and its members respect the constitutional right to freedom of speech and expression."

In addition, the introductory sections to the Code stipulate at section 1.2 that the primary objective of the Code is to ensure that members of the public can use mobile

services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with them. The Code aims to equip customers with a mechanism for addressing concerns, and for fair and impartial evaluation, and also sets standards for advertising.

Decision

In considering the complaint, I have divided it into 2 parts, the first part dealing with the decency complaint under the Code, and the second with the allegation that the commercial is political in nature and therefore not appropriate ahead of the elections.

In relation to the second part, the conduct of broadcasting activities is also governed by other legislation, notably the Electronic Communications Act, 2005, which specifically deals with political broadcasting. This falls outside WASPA's mandate and I therefore do not consider it further.

On the first part, I will not debate the likelihood that the SP represents or even knows how the majority of South Africans feel, nor what they identify with the song, nor whether every rally at which the song could have been sung was peaceful, as that information is clearly outside the knowledge of the SP. I must also note that this is the only complaint that I am aware of to WASPA. As an aside I note that in doing a Google search of the songs referred to there are varying interpretations, but the vast majority (on my search) seem to record the song as a political call to arms, steeped in emotional history, and evoking fairly strong responses. Several of the articles specifically refer to the song in relation to Jacob Zuma, his rallies, his supporters, and his controversial views.

However, in light of the provisions of section 3.2 of the Code, I tend to agree with the general defence of the SP. Specifically I am not clear on how the commercial might reasonably be said to meet the requirements of section 3.7 in each respect. For a finding on section 3.7 to be made, in my view there would need to be a weighty number of facts supporting most of those legs, and there is not. I think it likely that the SP has taken advantage of a song which is, at the very least, controversial, to further its commercial imperatives, and whilst I may find the subject material distasteful personally, that cannot affect a finding in relation to the complaint. If further complaints result, then this finding should be re-considered.

Sanction

The complaint is therefore not upheld.