

**WASPA appeals panel  
Complaint 5174**

**REPORT OF THE APPEALS PANEL**

**Date:** 9 February 2010  
**Appellants:** Always Active Technologies (Pty) Ltd  
**Complaint Number:** 5174  
**Applicable versions:** Code 6.2, Ad Rules 2.3

**1 INTRODUCTION**

- 1.1 The appeal was lodged by the appellant in an attempt to redirect the original complaint against Vodacom SP and so to withdraw the finding of the adjudicator against it, despite earlier acknowledgement of responsibility and undertakings to make good the fine. The SP also requested WASPA to re-issue the invoice in relation to the fine, to Vodacom SP to give effect to its commercial relationship with Vodacom SP.
- 1.2 In this appeal we have therefore carefully examined the nature of the relationship as it appears from the documentation submitted by the appellant in response to the adjudication, and we have also examined the relationship between a SP and an IP in the Code, and the other relevant provisions of the Code dealing with liability and possible appeal outcomes.
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**2 BACKGROUND**

- 2.1 The initial complaint was filed by the WASPA Media Monitor noting an advertisement for a special offer did not display the cost of sending an SMS in response to it. The special offer advertised was available only for a short period and by the time the advertisement had been remedied it was almost irrelevant.
- 2.2 The matter was treated urgently by WASPA and the appellant responded quickly, but the Monitor was not satisfied with the proposed solution and the complaint was escalated to adjudication.
- 2.3 The adjudicator found that the appellant had breached section 6.2.2 of the Code (failure to display pricing) and 9.2 of the Advertising Rules in that the cost was not displayed as required, namely "immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font".
- 2.4 The appellant raised a concern that the entity which was responsible for the breach of the Code was in fact Vodacom SP which owned the short code, and the appellant was merely administering the portal on its behalf.

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- 2.5 The appellant noted that it had accepted that the advertisement was incorrect because it often dealt with administrative matters on Vodacom SP's behalf but it always intended to pass responsibility for the error on to Vodacom SP where it belonged.
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**3 RELATIONSHIP BETWEEN IP AND SP**

- 3.1 The relationship between SP and IP is not new in relation to wireless application services. The SP who has the primary contracting relationship with a mobile network operator, will frequently engage an IP to provide content for transmission over the network.
- 3.2 The definition of "*information provider*" in the Code states that this is "any person on whose behalf a wireless application service provider may provide a service, and includes message originators". A "*wireless application service provider*" is "any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services."
- 3.3 Section 3.9.1 of the Code (information providers, general provisions) states that "members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene this Code of Conduct". Section 3.9.2 provides that "the member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct".
- 3.4 The SP is a member of WASPA. The obligation to comply with the Code and to ensure that the IP complies, rests with the SP and it is against the SP that the finding of the adjudicator was made and the SP lodged the appeal. The finding of the panel therefore concerns the SP alone, and our further reasons for this are set out below.
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**4 AAT AS SP**

- 4.1 We have considered the appellant's website ([www.aat.co.za](http://www.aat.co.za)) and note that it describes itself as "Having almost a decades worth of experience in the Mobile space, we can offer a user friendly, robust and smart range of Mobile products, covering Mobi, SMS, MMS, Premium short code, USSD and SMS Gateway products".
- 4.2 One of the products advertised by it is a Vodacom Business Messaging Service, which is described as "Partnering with [Vodacom](#), AAT has launched the [Vodacom Business Messaging](#) mobile portal, which offers a range of mobile messaging [SMS](#), [MMS](#) and [SMS short code](#) solutions.

SMS Coverage includes all [South African](#) and most [International](#) Networks. The messaging products have been designed for [Business](#), [Developers](#) and [Mobile Marketing](#) solutions."

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- 4.3 Clicking on the Vodacom Business Messaging link directs the page to the Vodacom site, at [www.vodacomessaging.co.za](http://www.vodacomessaging.co.za), which page is divided into bulk and “other” SMS. Vodacom confirms on this page that it owns various short codes for premium and other message services.
- 4.4 The WASPA members list indicates that the appellant is a full SP member, providing all the sorts of services that one would expect of an SP, including bulk messaging services, communication gateway services, competition services, infrastructure services, location-based services, mobile commerce services, short code aggregation services, USSD services and WAP services.
- 4.5 The short code 35393 is indeed registered to Vodacom SP on the [www.smscode.co.za](http://www.smscode.co.za) website, and reflects a charge for contact of R3 per SMS. No further details are made available on the site regarding the short code owner. The panel notes that it is often the case that a short code will be shared, allocated to an IP or other SP, or transferred, and that a short code can be entirely managed by a third party even if it is registered to someone quite different (as to advertising, logs, charges, and content).
- 4.6 In summary, whilst we can see that there is (or was) a close commercial relationship between Vodacom SP and the appellant, there is nothing in the information that we have found regarding the 2 of them, that indicates that the appellant was responsible only for the portal in this case, given the wide range of services that it offers and its use of short codes for mobile services, as advertised on its own website.
- 4.7 We must also note that the appellant did in various emails undertake to assume responsibility for payment of the fine imposed by the adjudicator, albeit indicating that it would seek to claim this back from Vodacom SP at a later date.
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**5 APPEALS PROCESS AND POSSIBLE OUTCOMES**

- 5.1 The Code provides at section 13 for the complaints procedure, which begins with the lodging of a complaint and proceeds to an informal or formal (adjudication) process. Following adjudication the member against whom the adjudicator has found, may appeal. The appeal is referred to the appeals panel, consisting of 3 people.
- 5.2 The following sections are relevant in relation to an appeal:
- 5.2.1 13.6.5. The appeals panel must consider the evidence provided to the adjudicator, the adjudicator’s decision and any additional information provided by the service provider.
- 5.2.2 13.6.6. On the basis of the evidence presented, the panel will decide whether there has, in fact, been a breach of the Code.

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- 5.2.3 13.6.7. If the panel determines that there has, in fact, been a breach of the Code, then the panel must review the sanctions recommended by the adjudicator.
- 5.2.4 13.6.8. The panel may maintain the same sanctions recommended by the adjudicator, or may determine such other sanctions, as it deems appropriate given the nature of the breach and the evidence presented.
- 5.2.5 13.6.9. Once the panel has determined whether there has been a breach of the code, and reviewed any associated sanctions, the panel will provide the secretariat with a written report detailing these findings.
- 5.2.6 13.6.10. The secretariat will provide a copy of this report to the relevant member and to the complainant.
- 5.2.7 13.6.11. The member must, within five working days, comply with any sanction imposed.
- 5.2.8 13.6.12. The failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.
- 5.2.9 13.6.13. The member may not request a further review of the panel decision or request a further appeal.
- 5.3 The provisions of the Code are quite clear in relation to what may take place under the appeals procedure.
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**6 DECISION OF THE ADJUDICATOR**

6.1 *Findings on Complaints*

The complaint was upheld, the adjudicator finding that the appellant had breached section 6.2.2 of the Code and section 9.2.2 of the Ad Rules.

6.2 *Sanctions*

- 6.2.1 A R15,000 fine was imposed on the SP, R10,000 of which was suspended for a period of 6 months provided that the member was not found to have again breached the Code in relation to the sections complained of, the balance payable to WASPA within 5 days of notification of the adjudication.
- 6.2.2 The appellant agreed to pay the fine of R5,000 provided that an invoice was issued in this amount to Vodacom SP, claiming that it had an arrangement with Vodacom SP in terms of which it would be refunded on presentation of the WASPA invoice.
- 6.2.3 No documentation was presented to WASPA in this regard, but in any event as outlined above, WASPA's obligation is to enforce the sanction against the person identified in the adjudication.
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**7 GROUND OF APPEAL**

As set out above, these were simply that Vodacom SP owned the short code and should therefore be liable to pay the fine.

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**8 FINDINGS OF APPEALS PANEL**

- 8.1 WASPA does not regulate the commercial relationships between SPs and between SPs and IPs, and it is right and proper that such a relationship would exist between the appellant and Vodacom SP in terms of which the appellant might well be entitled to certain indemnities from Vodacom SP. This agreement was not provided to us nor was Vodacom SP at any time requested by the appellant to our knowledge, to corroborate their version. Accordingly we must assume that the appellant has remedies against Vodacom SP in terms of its agreement but if it does not, then it is not open to the panel at this point to impose a sanction on Vodacom SP, nor does it appear appropriate given the facts set out above.
- 8.2 The Code is clear about the liability of service providers, of which the appellant is one. Service providers are entitled to seek clients of the sort indicated by the appellant on its website, and to perform administrative services for them. Their relationship is, in essence, commercial.
- 8.3 The fact that a short code was allocated to Vodacom SP does not exonerate the appellant, which took responsibility for notifying Vodacom SP of the need to amend the advertisement.
- 8.4 If the appellant wished to deny liability on the basis that Vodacom SP was in fact responsible, the appellant's course of action was to have done so and to have advised WASPA to be in contact with Vodacom SP, not to accept responsibility for payment but require the invoice from WASPA to be amended to reflect Vodacom's name, which was what happened.
- 8.5 If the appellant has a commercial relationship with Vodacom SP then it must be open to it to proceed against Vodacom SP for payment to it of the sanction imposed on it. The sanction – and the suspended portion – stands.
- 8.6 The appeal fee is not refundable as the appeal was lodged, considered, and dismissed. The appeal cost is payable to enable appeals to be considered.