

REPORT OF THE APPEALS PANEL

Date: 3 March 2010
Appellant: Teljoss cc
Complaint Number: 5273
Code version: 6.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal highlights the less attractive but nonetheless necessary and financially lucrative side of wireless application services, and the manner in which they, like many other services, exploit and rely on human weakness for profit.
- 1.2 The panel has been guided in its assessment of the complaint and adjudication by the principles, history, and purpose of the Code, and the more general sentiment in our law that the consumer ought to be protected from unethical, unprofessional and unfair conduct by service providers.
- 1.3 The facts also highlight the need to educate subscribers about the nature of wireless application services, and that they may in fact approximate real life in order to “entertain” as the SP argues, and ought not in the circumstances, be considered to be a true reflection of real life.
- 1.4 The financial risks of participating in premium-rated services and particularly in premium-rated adult services and chat services, which these types of services often are, ought also to be brought to the fore.
- 1.5 The report is unfortunately lengthy but this is so because the panel wished to be absolutely clear on the reasoning behind its findings.

2 THE COMPLAINT

2.1 *The complaint*

- 2.1.1 The complainant alleged that he thought he was signing up to a chat service but that it soon became very personal and the nature of the messages became very disturbing to him. The person providing the service or “operator” also “harassed” him with messages regarding her personal safety. As a result he became concerned which caused him to engage further to find out if she was in danger.
- 2.1.2 The SP’s response was that the complainant had “subscribed” to an adult fantasy chat service, that he had fallen in love with the operator

**WASPA appeals panel
Complaint 5273**

and could not distinguish fact from fantasy. Although, said the SP, the complainant did send the word "stop" from time to time, he quickly re-engaged with the operator. We must assume the complainant was aware of the costs of doing so.

2.2 *The service*

2.2.1 The SP furnished WASPA with logs from 17 October to 25 November 2008 in support of its response to the complaint, which the panel has reviewed.

2.2.2 A total of 1335 messages were exchanged between the complainant and operator, 751 messages being sent by the complainant. As the adjudicator put it, "the tone of the messages exchanged between the complainant and the SP's chat operator ranges from friendly to flirtatious to explicitly sexual. The sexual tone of the messages develops very quickly from the time that the service was initiated suggesting that the complainant knew or expected the chat operator to be available to engage in chat of a sexual nature". The adjudicator's report provides a good summary of the interaction between the parties.

2.2.3 Important to note, which the adjudicator did in the report, was that on at least 7 occasions the operator invited the complainant to SMS her up to 15 times in a row in order to connect to her with a voice call by sending him a message saying, "SMS CALL ME 15 SMSes in a row now it connects our call". The result was an enormous bill for 15 premium-rated SMSs, but no voice conversation. We repeat these facts although they are set out in the adjudication, as we consider them to be significant and relevant to our decision.

2.2.4 The adjudication classified the service as a subscription service, but it would appear from the facts that it was actually a premium-rated chat service, offering sexually explicit conversation by text message with an "operator".

2.2.5 The advertisement for the service was not supplied by the SP despite request by the panel, apparently because the original site is no longer active. It is therefore not possible for the panel to assess what information was or was not provided to the complainant in relation to the rules of the service, charges, and "chat".

2.2.6 It would appear from the information provided however, that the service operated much as a subscription service, in that conversation continued until and unless the complainant himself terminated it, and it would appear that the complainant was billed for all messages sent by him.

2.2.7 The service did not actually enable the parties to meet although the text of the conversations logged by the SP and network operator indicates that the parties discussed meeting on several occasions. This distinguishes the service from a "contact and dating service".

**WASPA appeals panel
Complaint 5273**

perhaps only by virtue of the fact that the parties did not meet and that the operator was intent only on “chatting”. The definition of “contact and dating service” requires “intention” to meet.

2.2.8 Clause 12.3.2 (a) of the Code provides that an SP should not cause a customer to incur costs by sending them messages, or should not bill for messages sent by the SP (or “operator” in this case). It is not possible to tell from the logs without the billing detail whether or not the complainant was billed for messages received as well as sent, so we are not able to make a finding on this and the SP avers no charge was made for messages sent to the complainant by it.

2.2.9 We were similarly not able to determine from the logs what messages were returned by the SP itself to the complainant, and not the “operator” (which would form part of the chat). On asking the SP we were advised that the text sent to the complainant automatically on receiving a “stop” message, read “You have successfully been removed from the database.” The logs seemed to indicate that despite sending the word “stop” the operator continued to send messages to the complainant, inviting him to re-establish contact, and so the complainant’s number must in fact have been active even if only on the operator’s side, which could be said in our view, to constitute part of the SPs database. The SP advised in response to a query about this, that “in the context of a conversation flowing, at the time when the chat user replied stop, the conversation went cold, until they decide whether or not to re-initiate the chat at there [sic] peril.”

2.2.10 In conclusion, the panel finds that the service was a chat service which charged a premium for messages sent to the relevant number or short code, but which did not in fact remove the complainant from its database on receiving a STOP request.

2.3 *The Code*

2.3.1 The complainant did not mention the sections of the Code relied upon but the adjudicator referred to sections 3.7.1 (c) (*general provisions – decency*), 3.12.1 (*employee awareness*), 5.1.2, and 5.1.5 (*sending of commercial communications*).

2.3.2 The panel has also considered other provisions of the Code to be relevant in understanding the nature of the service:

2.3.2.1 “Chat services” are governed by the Code in general, but there is no definition of a “chat service” in the Code.

2.3.2.2 A “commercial message” is defined in section 2.8 as “a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.” The panel finds that in the circumstances (and as set out more fully below),

**WASPA appeals panel
Complaint 5273**

the service offered by the SP did involve the sending of “commercial messages”

- 2.3.2.3 The definition of “adult service” may well be applicable in this instance since it is “any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature” This is defined in section 2.1 of the Code.
- 2.3.2.4 “Premium rated services” are “any service charged at a higher rate than the standard rate set by the network operator for that particular service.” This is defined in section 2.20 of the Code.
- 2.3.2.5 Section 4.2 (*privacy and confidentiality*) states “WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.”
- 2.3.3 Although the panel has considered provisions of the Code dealing with spam and with chat services in general, we do not find that these are of application to the facts of this matter.
- 2.3.4 The panel considers the public interest to be an overriding factor in considering any appeal and when applying the Code:
- 2.3.4.1 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.” Section 3.1.2 provides that “Members are committed to lawful conduct at all times.”
- 2.3.4.2 These general rules should always be uppermost in the minds of members when checking that a service complies with the Code, particularly when the service will charge significantly more for sending messages than the cost of ordinary messages.
- 2.3.5 The adjudicator did not find it necessary to consider the Advertising Rules or rules specific to television advertising. In the circumstances as we cannot assess the original advertisement, we agree this is not necessary.

3 DECISIONS OF THE ADJUDICATOR

3.1 *Findings on Complaints*

- 3.1.1 In summary, the adjudicator found that the SP was in breach of:

**WASPA appeals panel
Complaint 5273**

- 3.1.1.1 Section 3.7.1 (c) in that the SP should have been aware of the potential consequences of its messages and the operator should not have pretended to be in danger nor that she was contemplating committing suicide and therefore the SP conducted itself or permitted its services to be conducted in a manner that was “designed to commercially exploit members of the public in the manner that this service appears to have done”
- 3.1.1.2 Sections 5.1.2 and 5.1.5 in failing to deal properly with the STOP commands sent by the complainant because, in the adjudicator’s view, “the SP continued to chat with the complainant even after receiving a stop message from time to time”
- 3.1.1.3 Section 4.1.1 of the Code, on at least 7 different occasions, in that the request to “CALL ME” by the operator to connect to a voice call was “exploitative and misleading”
- 3.2 *Sanctions*
- 3.2.1.1 For breach of sections 3.7.1 (c), 3.12.1, 4.1.1, 5.1.2 and 5.1.5 the adjudicator fined the SP R300,000; and
- 3.2.1.2 The SP was also directed to pay the complainant an amount of R30 for each SMS sent by him as a subscriber to the service, a total of R22,530; and
- 3.2.1.3 The SP was directed to pay R5,000 to the complainant as compensation for the anxiety caused to him by the service; and
- 3.2.1.4 All of the SP chat operators were to be made aware of the provisions of the Code specifically as dealt with in the adjudication.

4 GROUNDS OF APPEAL

- 4.1 The SP’s appeal confirms that the service was not intended to operate as a subscription service and that messages from subscribers were billed at R30 each whilst the operator’s response was free.
- 4.2 The grounds of appeal specifically are that:
- 4.2.1 The fine of R300,000 is a “thumbsuck” as it does not emanate from any table of offences and fines, and the SP argues other reasons why the fine is not acceptable, although the panel had difficulty understanding the arguments made;
- 4.2.2 The complainant was simply an individual wanting to chat and following up an advertisement in the lonely hearts column of a local paper, who turned out to be “a compulsive obsessive person chatting and ringing up a R22,000 bill when he can’t afford [it]” and when MTN cut his line “he gives “an incorrect complaints report” and the service was

**WASPA appeals panel
Complaint 5273**

- not a commercial communication but was advertised as a chat service and price clearly indicated;
- 4.2.3 WASPA sides with the complainant not the SP despite errors and an incorrect complaint; and
- 4.2.4 Teljoss's record is good and is a pioneer of chat, and Teljoss should have an opportunity to speak to a panel and give verbal argument.
- 4.3 In addition, the panel felt it important to repeat certain of the other assertions made by the appellant in order to support our finding:
- 4.3.1 The client reinitiated the chat on their own accord, therefore cancelling out the stop. It was an entertainment service, client was being entertained, and teased and elements of emotion, realism are all thrown in for effect, just like a movie seems so real, so is chat. There was no fear or anxiety, she (operator) was using dramatic effect to get out more sms's. She never got raped, as indicated by the initial complaint. This is merely a gross exaggeration and opinion, opinion and not factual [sic]. Complaint report States thousands of chat messages have been exchanged between chat operator and user. Again a gross exaggeration when there were under 1000 chats sent from our operator. The user sent more 35 percent more messages (approx) than the chat operator. User got a service, was age verified, was told up front all costs. User smsed CALL ME, 15 times in a row for phone sex, they had a choice to do so. This is the payment mechanism to be called discreetly by an operator phone telephone sex. Service was delivered. Nothing about this is misleading and
- 4.3.2 In relation to section 5.1 of the Code, the SP states in its appeal that 5.1.2 is used in bulk communications with clients, as it is impossible in an sms chat, to give an opt out advise on all chat events, (this is really relevant to subscription services and bulk sms communications). Not relevant in this case, a user simply does not reply to the chat, and the chat goes cold as it is a 1 for 1, 1 transmitted and 1 received message.

5 FINDINGS OF APPEALS PANEL

By way of introduction, this panel takes offence at the assertion that WASPA would 'side' with the complainant. The SP is a member of WASPA and is therefore well aware of the provisions of the Code and its intention. It is no doubt also aware of the work done by adjudicators and panellists in preserving the reputation of the industry and ensuring that services are offered to the public to a high standard, for the benefit of SPs and customers. The panel invites the SP to withdraw the assertion.

In relation to the appeal, the panel makes the following findings:

- 5.1 *Breach of the Code*
- 5.1.1 The panel is not convinced that the service was correctly advertised as an 'adult service' even though the SP agrees that it was an adult

**WASPA appeals panel
Complaint 5273**

service (confirmed by the signup procedure which required age verification). Without the advertisement it is difficult to make a finding in this regard however and we leave this point aside for purposes of our finding.

- 5.1.2 The panel accepts that the service was a “chat” service, in that it was intended primarily to afford subscribers an opportunity to send text messages to an “operator” and receive responses, and that it was not a subscription service or contact and dating service. The panel notes however, that the purpose of the sending of message in the course of the “chat” service was in fact “to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient” and therefore that the messages sent by the operator to the complainant were in fact “commercial messages”. The SP admits as much in its appeal.
- 5.1.3 The panel finds that the SP did not send spam to the subscriber in the circumstances, and that the fact that there was a mechanism in place to terminate the service was probably adequate to meet the requirements of the Code in this regard.
- 5.1.4 The panel does not agree that section 5.1 is not of application, and does not agree that a chat can simply be terminated by ceasing conversation (as alleged by the SP in its appeal), since even when as in this case, the complainant sent a STOP message, the SP continued through the operator to contact the complainant and encourage communication! Without the STOP message, the SP would no doubt have argued that the complainant never wished at any point to terminate the service, and was simply taking time out of the conversation, or something similarly ridiculous. The Code requires that services offer a mechanism by which subscribers can signify their intention to terminate a service. Equally important, but ignored by this SP, is that when an instruction is actually given to stop the service, it should be respected. The sending of further “commercial messages” after receiving a STOP request, is therefore in effect, a breach of the Code provisions in relation to terminating commercial messages.
- 5.1.5 Therefore, although the panel has noted that there was an adequate mechanism in place to terminate the service by sending a STOP message, and although the panel does not consider the sending of messages after the STOP by the operator to constitute “spam” as this is defined in the Code, it would be wrong in our view to permit unsolicited communications of this sort. These messages, sent after receipt of a STOP instruction, were clearly and obviously designed to invite more messages from the subscriber who would have to then pay for them. In the circumstances, the messages were unsolicited *despite* the existence of a prior commercial relationship and even if

**WASPA appeals panel
Complaint 5273**

not spam, those messages resulted in financial prejudice to the complainant.

- 5.1.6 For the sake of completeness, the panel notes the argument by the SP that the complainant had a choice to respond or not. However, the number of “commercial messages” sent by the operator to the complainant and the content of them is, in our view, a direct cause of the further communication by the complainant, concerned as he was for the safety of the operator, and therefore a direct cause of a large portion of his substantial charges.
- 5.1.7 In relation to the finding by the adjudicator that the SP had breached clause 3.7.1(c) in that the operator had induced an “unacceptable sense of fear or anxiety” we agree that it is clear from the logs that the complainant appeared to be taking the operator’s messages seriously. We also agree with the adjudicator “and the SP itself confirms that this is the case” that it was the intention of the operator to induce this reaction. Unless it is part of the training of SP operators to recognise this and deal with it by alerting the subscriber to the possibility that he is being “carried away” we suggest that the SP avoid chat services with this intention. The line between creating fear as “entertainment” and inducing a sense of anxiety which is real for the complainant, was obviously blurred in a way in this case that WASPA cannot condone.
- 5.1.8 Whilst the panel agrees that section 4.1.1 may not have been upheld by the SP, we do not agree with the reasoning of the adjudicator in this regard. It would appear that the complainant was well aware of the price for the services, and it was the aggregate of the charges in the circumstances that he objected to.
- 5.1.9 The panel finds that in addition to the sections which are referred to by the adjudicator, the SP also breached:
- 5.1.9.1 section 4.2 in that having to all intents and purposes, asked for his privacy not to be disturbed further by sending the STOP message, the operator continued to send messages inviting the complainant to resume communications, and created the impression that she was or continued to be in danger of her life, or that she herself was contemplating taking her life; and
- 5.1.9.2 section 3.1 which requires members to deal lawfully and professionally with their customers, since the panel’s view is that inviting continued communication from a person who had already sent hundreds of messages at significant cost by appealing to his emotions despite his requests to terminate involvement in the “service” is not professional and not the sort of conduct that the panel considers appropriate or desirable.

**WASPA appeals panel
Complaint 5273**

- 5.1.10 We find the assertion that the complainant's fear that the operator was being or threatened to be raped a 'gross exaggeration' concerning. In the same way that the SP believed the complainant's response to be simply his 'opinion' so we must question how it is that the panel is expected to take seriously what must be an opinion of the SP in relation to the complainant's actual state of mind.
- 5.1.11 The following facts speak for themselves and are not in dispute in that the SP raises them in its own appeal:
- 5.1.11.1 The SP offered an adult-type chat service at a premium and trained its operators to invite as much communication by subscribers as possible to push up revenue;
- 5.1.11.2 The messages from the operator to the complainant in this case were designed and intended to induce anxiety and concern on the part of the complainant, which anxiety and concern was expected to (and did) induce further communication and therefore resulted in further revenue to the SP;
- 5.1.11.3 The STOP messages sent by the subscriber were ignored by the SP because by its own assertion, its operators are trained to or permitted to continue to contact the subscriber, with a view to inviting more communication (by sending 'commercial messages'); and
- 5.1.11.4 Despite what must be considered to be an unusually large number of messages, or at least a number of messages likely to result in an abnormally large bill for the average subscriber, the operator is permitted or encouraged to continue communicating and in fact to encourage the complainant on (in this case) at least 7 occasions, the sending of up to 15 messages at one time with the promise of verbal communication.
- 5.1.12 Against this background, the panel finds the conduct of the service by the SP to run counter to the principles and stated intention of WASPA, and as a result, to be likely to or in fact to undermine public confidence in mobile services, and to be likely to and in fact to cause financial prejudice to consumers,.
- 5.2 *The sanctions*
- 5.3 WASPA is in the process of creating a recommended list of 'crimes and punishments' but WASPA adjudicators are permitted to set their own fine having regard to all the circumstances. This is because every complaint has its own unique facts, and sanctions are considered with due regard to all the facts including type of service, seriousness of breach, number of breaches, whether or not the SP has repeatedly breached the Code, and

**WASPA appeals panel
Complaint 5273**

allegations by the complainant in that matter specifically. Guidelines for sanctions can therefore at best, only be a broad indication of what might be appropriate.

- 5.4 The imposition of a fine is upheld because of the severity of the breach of the various sections outlined above, and the arguments set out by the panel in 5.1 above. Whilst there is no official benchmark regarding the quantum of fines and each adjudicator is at liberty to set their own fine based on their response to the facts, in our view a fine of R200,000 would be adequate to reflect the severity of the breaches and the fact that the SP has previously been found to have contravened the Code. The reduction in no way suggests that the panel regards the breaches or the activities of the SP in general, as less deserving of the finding or the sanction. R150,000 must be paid immediately, and the balance is suspended for a period of 12 months unless and until such time as the SP commits any other breach of any other section of the Code, at which point it will become due immediately in addition to any fine imposed in relation to that subsequent breach.
- 5.5 The refund ordered to the complainant is upheld on the basis that even if the complainant was aware of his actions and the consequences, the service was carried out in a patently unprofessional way. The panel wishes to state in the strongest terms that users of these types of services must be aware of the charges attached to them, and our finding in this case is not indicative of support for the complainant's initial choice of service or initial participation in the service, but in the circumstances, a commentary on the conduct of the service in this particular case only.
- 5.6 The payment of R5,000 to the complainant should not be made. This is because the panel does not agree that WASPA has jurisdiction to determine pain and suffering type awards. WASPA can, however, make findings regarding financial loss directly related to a breach, which does not apply in this case.
- 5.7 The balance of the sanctions is upheld.
- 5.8 The appeal is accordingly dismissed. The appeal fee is not refundable.