

REPORT OF THE APPEALS PANEL

Date: 27 November 2010
Appellant (SP): eXactmobile
Complaint Number: 5288
Code version: 6.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 The WASPA Media Monitor submitted a complaint to WASPA regarding a television advertisement containing a short code, on 26 November 2008. The complaint was sent to the SP on the same day and a reminder was sent on 4 December 2008.
- 1.2 No response appears to have been received from the SP although they claim to have sent a response.
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2 BASIS OF THE COMPLAINTS

2.1 *The service complained of*

- 2.1.1 The service was apparently advertised on television but without an access cost.
- 2.1.2 In addition, having sent the necessary keyword (%ELOCITY+) to the short code 34110, after 15 days the SP had still not contacted the viewer/customer, although the Monitor did receive a reply SMS on the same day which read *%thank you, your request is being processed. We take pride in our after sales service+*. The Monitor regarded this as an unacceptable level of service.
- 2.1.3 R2 was debited from the Monitor's airtime balance after sending the keyword.

2.2 *The Code*

- 2.2.1 The Monitor claimed that the SP was in breach of sections 3.3.1 (*members will not offer or promise services that they are unable to provide*), 3.3.2 (*services must not be unreasonably prolonged or delayed*) and 6.2.1 (*all advertisements for services must include the full retail price of that service*) of the Code.
- 2.2.2 The adjudicator did not find it necessary to consider the Advertising Rules or rules specific to television advertising.
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3 DECISIONS OF THE ADJUDICATOR

3.1 *Findings on Complaints*

3.1.1 In the absence of a response from the SP, the adjudicator upheld the complaint on the grounds indicated.

3.2 *Sanctions*

3.2.1 The adjudicator imposed a fine of R65,000 given *the serious breaches of the Code*. In particular the adjudicator was concerned that the service having been advertised on television, the potential for harm to a large number of consumers was significant.

3.2.2 The SP was directed not to flight the advertisement until it had been amended as to price and until it could provide the advertised services within a *reasonable period of time*.

4 GROUNDS OF APPEAL

4.1 The SP filed an appeal in which it claims to have sent a response to WASPA on 14 December 2008.

4.2 This response indicated that its IP, Zero8 Media, was running the service in question and that the IP had (quote) *advised us that due to the huge number of responses they received, there was a delay in responding to all clients. As the responses is a manual process [sic], this has taken some time. The client has recently advised us that he has contacted the complainant to explain the situation. The omission of the pricing was a mistake and has been corrected in future ads*.

4.3 The adjudicator's report was presented to the SP on 17 July 2009, and on the SP's version, it failed to take account of the SP's response of 14 December.

4.4 The SP listed the revenue received by the IP from *their promotions*, commencing on 8 June 2008 and ending on 9 April 2009 (we assume the years are correct as they are not stated in the appeal), as a total of R3867.39. This, they say, indicates that this was not a revenue-generating promotion, but a promotion to *gather leads whereby the IP could contact people back to offer them products which they were selling. There were no consumer complaints about this promotion*.

4.5 The SP claims that both it and the IP believe *the fine of R65,000 is totally out of proportion is (sic) relation to the offence. Although the ad was run on TV, without the pricing, the number of people that responded was very low. This can be seen from the revenue generated. The IP does not deny that the pricing was left out and fixed this immediately. The IP did contact the complainant as soon as the complaint was received. The IP and*

WASP therefore request that the fine be reduced to an amount which is more in line with the offence committed and in line with revenue generated by the service.+ We note that this statement appears to conflict with the statement made by the SP which has been copied in clause 4.2 above.

5 FINDINGS OF APPEALS PANEL

- 5.1 The SP is the owner of the short code 34110 and does not deny liability for the actions of the IP.
- 5.2 Unfortunately the wording of the advertisement has not been provided and doubtless, it has been discontinued. The panel does not recall this advertisement and in the absence of any form of evidence from the SP we cannot assume the facts to favour the SP. It is therefore entirely unclear what precisely was required from consumers other than a response to the short code with a keyword, and what precisely was promised. However, there appears to be general agreement between the parties that whatever the service was it was not provided and the cost of the message with the keyword was not displayed.
- 5.3 Except in these respects, there are a number of contradictions in the appeal and facts of the matter as they have been presented.
- 5.3.1 The IP's own website indicates that it specialises in creating and growing databases. It would appear that the TV campaign . on the parties own version . was an attempt to grow a database, an attempt to create a list of consumers to whom the IP could later market other services. It is arguable that no service was ever going to follow and that the keyword merely acted as a mechanism to invite consumer participation, record consumer contact details, and later send marketing messages to them.
- 5.3.2 The IP claims, through the SP's appeal, to have been very busy dealing with a *huge number of responses*+ which is why no response was given to the complaint when sought, on 2 occasions by the Secretariat. This allows us to conclude 2 things:
- 5.3.2.1 The Secretariat gave the SP the prescribed number of days within which to reply, and sent a reminder, to no avail. The fact that a response was sent after the time had expired is therefore not relevant.
- 5.3.2.2 Either there was a lot of interest in this particular promotion, regardless of the revenue apparently received, in which case there is cause for concern about the level of harm; or the reason given for failing to reply was not in fact the real reason and there is therefore no excuse in any event for not replying, or both such things are true.

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- 5.3.3 Regardless, the amendment of the advertisement took place only after the complaint was made, and the SP's response to the complaint was received only after the time for submitting a response had expired.
- 5.3.4 The SP has not offered any facts to suggest that any service was in fact provided after the reply SMS was sent to the Monitor, and nor has it indicated that any other form of service was ever provided to any of the other consumers which sent the keyword to the short code in response to the advertisement.
- 5.4 Therefore on the facts, we uphold the finding that the SP (through its IP) contravened sections 3.3.2 and 6.2.1, and we find it likely that the SP (through its IP) was in breach of section 3.3.1 as well, considering that no evidence was provided to refute such a presumption.
- 5.5 The SP's grounds of appeal relate to the size of the fine, and not to the reasons for it (in other words, not to the findings by the adjudicator).
- 5.6 In the circumstances, given the contradictory nature of the response and the lack of information to support mitigation, we consider it appropriate to impose a fine in relation to separate breaches, and given the facts, we have applied the following terms which in our view, more than justify the aggregate fine imposed by the adjudicator:
- 5.6.1 section 3.3.1: given the probability that this section was contravened and the lack of information to suggest that it was not, we impose a fine of R10,000;
- 5.6.2 section 3.3.2: given the potential for harm, we impose a fine of R25,000 in relation to the breach; and
- 5.6.3 section 6.2.1: given the clear breach of this section, we impose a fine of R30,000.
- 5.7 The fines in the aggregate of R65,000 should be paid to WASPA within 5 days of the publication of this report. The appeal fee is not refundable.