

REPORT OF THE APPEALS PANEL

Date: 9 June 2010

Appellants: Molo Africa Speech Technologies (Pty) Ltd (SP)
Ostrich Media Ltd (IP)

Complaint Number: 5460

Code of Conduct version: 6.2

1. BACKGROUND TO THIS APPEAL

- 1.1 This appeal relates to an adjudication regarding a television advertisement for a service provided by the IP, through the services of the SP, the Brainbox service, as aired on etv.
- 1.2 The initial complaint was lodged on the 29th of December 2008 by a competitor of the SP which wished to remain anonymous. The complaint lodged against the services of the IP and the SP in essence relates to (i) the question whether, given the perceived negative reputation of the IP in the UK, the daily prizes were actually paid to eligible entrants for each day the service was advertised and (ii) that the advertisement complained of did not comply with the Advertising Rules in a number of respects.
- 1.3 The SP was notified of the complaint on the 5th of January 2009 by which time the flighting of the advertisement which formed the subject of the complaint had already ceased. The SP, together with the IP, filed a response on 12 January 2009 which was presented to the complainant for possible informal resolution. The complainant, however, insisted the complaint be escalated to a formal complaint to be adjudicated by a WASPA adjudicator.
- 1.4 A WASPA adjudicator duly rendered a decision in a report dated 30 June 2009. The adjudicator's decision is discussed in detail in 4 below.
- 1.5 The Adjudicator's Report was sent to the SP on the 17th of July 2009, after which the SP provided WASPA with a notice of its intention to appeal the adjudicator's decision on the 24th of July 2009. The SP, together with the IP, consequently lodged an appeal at WASPA, dated 7 August 2009.
- 1.6 At the time the complaint was lodged the IP was not a member of WASPA. The SP was a full member of WASPA at all times. It would seem that the SP and IP regard themselves as jointly liable in terms of the adjudication of this complaint. The panel therefore concludes that the IP submits to the jurisdiction of WASPA considering the fact that only the SP was a member of WASPA at the time the complaint was lodged.
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2. BASIS OF THE COMPLAINT

2.1 The Service complained of:

2.1.1 As set out in the complaint and the adjudicator's report the complainant requested that the IP provide proof of the fact that the IP had in fact paid an amount of R35 000 to an eligible entrant of the service advertised for each day the advertisement was broadcast on television. The complainant made this request against the background of (i) 'a barge of negative press' about the activities of the IP; (ii) 'an indication that the prizes are seldom given out' and that in the UK a staff member of the IP claimed that staff members of the IP are 'selected as winners to avoid distributing the prizes'; and (iii) the fact that the answer to the question asked in the advertisement is so obvious that it is 'near to impossible that there isn't a daily entrant eligible'.

2.1.2 The complainant further averred that the IP's advertisement breached the WASPA Advertising Rules in several respects, namely that (i) 'the advert doesn't display the Price Box in the correct format or position as required for the entire duration of the advert'; and (ii) 'the required terms and conditions for TV adverts and competitions are also missing'.

2.2 The relevant sections of the Code and the Advertising Rules

2.2.1 The adjudicator considered clause 3.1.1 (Professional and lawful conduct of members) and clause 6.1.1 (all members are bound by the WASPA Advertising Rules) of the Code.

2.2.2 In addition to the above clauses of the Code the adjudicator also considered provisions 2.1.1 (mandatory cost of access text display rules); 2.1.2 (mandatory T&C display rules) and 2.2.5 (competitions) of chapter 2 of version 2.3 of the WASPA Advertising Rules as being relevant.

2.2.3 These Rules are generally accessible and the adjudicator's report quotes these rules relating to television advertising in full, so we will not repeat these here.

3. THE SP'S AND THE IP'S RESPONSE

3.1 The SP and IP filed a joint response to the complaint on the 12th of January 2009, in which they commented on the issues raised in the complaint.

3.2 The SP and IP's response to the complaint is reproduced in full in the adjudicator's report and will not be repeated here. The panel has taken careful consideration of the detail of the SP and IP's response but will only refer to the main arguments as set out below: (The panel followed a similar approach regarding the appellant's grounds of appeal in 5 below)

3.3 The individual issues raised in the complaint, to which the SP and the IP responded are:

3.3.1 1. *"The advert in question is running at an incredibly high frequency on TV, it was observed in almost every single ad break on eTV."*

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3.3.1.1 In this regard this SP and IP simply replied that neither the Code nor the Ad Rules regulated the frequency in which a 'specific advertisement is shown' on television.

3.3.2. 2(a) *"I would like to request that the company provide proof that there is a winner who is paid R35 000, for each day the advert ran on TV."*

3.3.2.1 To this part of the complaint the SP and IP replied that the winners of the competition had been selected and that they were in the process of contacting the winners. The SP and the IP also expressed the intention of publishing the names of the winners on their website no later than the 20th of January 2009.

3.3.3 2(b) *"There is an indication that the prizes offered are seldom given out and in the UK a staff member claimed in the press that staff members are selected as winners to avoid distributing the prizes"*

3.3.3.1 Although admitting to negative press on the premium-rated industry in the UK in the past, the SP and IP claim that they have had no regulatory or legal contraventions that resulted in sanctions or a fine and that the complainant's statements are entirely untrue.

3.3.4 3 *" The advert doesn't display the Price Box in the correct format or position as required for the entire duration of the advert. It flashes the price once briefly at the bottom of the screen. This is an irrefutable contravention. The required terms and conditions for TV adverts and competitions are also missing."*

3.3.4.1 The SP and IP explain the service rendered in detail and specifically note that this service was not a subscription service so as to avoid any doubt in this regard.

3.3.4.2 They further claim that the television advertisements were carefully designed in order to ensure transparency in the limited time available.

3.3.4.3 As well as listing all the relevant information conveyed in the advertisements the parties state that the information listed was conveyed both verbally and in written format on the screen.

3.3.4.4 The SP and IP continue by reiterating that they strongly disagree with the complainant that the pricing information '*only flashes the price once briefly at the bottom of the screen*' because all the relevant information was shown statically and was repeated several times in order to provide 'everyone time to fully read and understand.' This approach, according to the SP and IP, has advantages over the 'advertising guideline's recommendation to show all the information at the same time' and that this approach allowed them to 'show the information significantly larger than required by the code'. (To this end a detailed exposition of the way in which the information was presented including the text, colour and format were provided). They further state that because the service did not include a subscription or opt in service that they were satisfied that the information provided 'complies with the mandatory information as required by the Code'.

3.3.5 Conclusion

3.3.5.1 In conclusion the SP and IP state that they genuinely believed that they acted 'in good faith and best consumer interest' throughout the design and the management of the competition and that they at no point intended 'to harm consumers or hide essential information from them.' Therefore the SP and IP claim that they do not believe that they breached any 'applicable guidelines or rules'.

4. **DECISION OF THE ADJUDICATOR**

4.1 The adjudicator's decision is a matter of public record and easily obtainable. We will therefore not repeat the adjudicator's decision in full, although we have taken careful note of the decision in its entirety. We will refer shortly to the most critical parts of the adjudicator's decision under the same headings used in the decision for the sake of easy reference:

4.2 Lawful Conduct

4.2.1 After considering the complainant's averment that there was a breach of clause 3.1.1 of the Code, the adjudicator concluded that there was no evidence in support of the complainant's allegations and no factual basis for the complaint. The adjudicator, although stating that there seemed to be a prima facie case to be answered to the question of whether the service could be regarded as lawful in the light of the Lotteries Act, noted that WASPA was not the best-placed body to make a finding in this regard which should rather be referred to the National Lotteries Board, and according to the adjudicator this had been referred.

4.2.2 The adjudicator noted that the SP and IP were not afforded the opportunity to address the allegations with regard to the lawfulness of the service under the Lotteries Act in terms of the WASPA process. The adjudicator made no decision on the issue of lawfulness with regards to the breach of clause 3.1.1. of the Code which deals with lawful conduct.

4.3 Names and details of competition winners

4.3.1 Because the Code and the Advertising Rules require names and contact details of winners be provided, the adjudicator ordered the IP to make available to WASPA the names and contact details of the winners of the competition.

4.4 Advertising Rules

4.4.1 After considering the 'character' of the material provided, the adjudicator reached the decision that the 'clip' provided could be regarded as an advertisement for a competition broadcast on television and that chapter 2 of the Advertising Rules applied.

4.4.2 The adjudicator clearly expressed the view, notwithstanding the assertions of the IP, that 'the clip' is not compliant with the provisions of chapter 2 of the Advertising Rules, and that the following breaches are apparent:

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- 4.4.2.1 the cost of entering the competition is not displayed in the required manner or for the duration of 'the clip' and there is no 'Price Box' as required;
- 4.4.2.2 the full terms and conditions of access are not set out for the full duration of 'the clip';
- 4.4.2.3 the age restriction is not set out for the full duration of 'the clip';
- 4.4.2.4 the animated effect (practically and objectively viewed) distracts from the terms and conditions;
- 4.4.2.5 the price is displayed for only a total of approximately 6 seconds, the term 'entrants must be 18+' for approximately 4 seconds, and the terms 'Lines close soon! Prizes daily' for approximately 5 seconds, out of the total of 20 seconds of the clip (according to the adjudicator's own calculations);
- 4.4.2.6 the term 'Lines close soon! Prizes daily' does not specify the closing of the competition with sufficient detail. The adjudicator qualifies this statement by accepting that the nature of television advertising and its 'fleeting imprint on the memory' will, to some extent, mitigate this point; and
- 4.4.2.7 according to the adjudicator, there was a real likelihood that a viewer would not have all the necessary information to make a choice.
- 4.4.3 After stating the IP's position in detail, the adjudicator concluded that the IP's response misrepresented the true position in the following respects:
- 4.4.3.1 the fact that the IP's approach had advantages over the current formulation of the Advertising Rules was unacceptable in the face of the SP and the IP's commitment to comply with the existing provisions of the Code;
- 4.4.3.2 the fact that each line of the 'terms and conditions' was not 'repeated several times' because each 'was shown twice for a period not exceeding 3 seconds per segment'; and
- 4.4.3.3 that despite the IP's explicit assertion that the cost was clearly mentioned by the presenter, it was evident from the 'clip' that the presenter mentioned all the other information represented on the page apart from the cost of entry and other terms and conditions which were not mentioned at all.
- 4.4.4 The adjudicator concluded that the IP was aware of the requirements of the Code and the Advertising Rules but chose to disregard them because the IP believed 'that its approach was better and would afford better protection and information to consumers.'
- 4.4.5 The adjudicator ultimately upheld the complaint and found that clauses 2.1 and 2.2.5 of the Advertising Rules read with section 6.1 of the Code were breached.
- 4.5 Sanctions
- 4.5.1 In arriving at an appropriate sanction the adjudicator had reference to:
- 4.5.1.1 the clean record of the IP and the SP;

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- 4.5.1.2 the fact that the competition and advertising had ceased at the time the complaint was lodged;
 - 4.5.1.3 the statement of the IP regarding the frequency with which the advertisement was aired. The adjudicator found the frequency of the airing of the advertisement an aggravating factor;
 - 4.5.1.4 the conduct of the IP and/or SP in intentionally disregarding the provisions of the Code and the Advertising Rules. Here the adjudicator stated in no uncertain terms that such conduct could not be tolerated and that the adjudicator believed 'that it is necessary to send a clear message to the industry in this regard';
 - 4.5.1.5 applicable precedent in the database of WASPA rulings;
 - 4.5.1.6 the fact that the 'clip' was considered to be a stand alone advertisement and the consequential irrelevance of the 60 second segment;
 - 4.5.2. After quoting an Advisory Note addressed to WASPA adjudicators in respect of suspensions as sanctions the adjudicator concluded that suspension was not an appropriate sanction in this matter. Similarly the adjudicator found the refund of affected consumers to be an inappropriate sanction.
 - 4.5.3. The adjudicator was nevertheless of the view that the breaches were of a very serious nature and that a substantial sanction should be imposed in order to deter the SP and the IP as well as any other third party from intentionally disregarding the provisions of the Code and the Advertising Rules.
 - 4.5.4. In conclusion the adjudicator imposed the following sanctions:
 - 4.5.4.1 a fine of R500 000;
 - 4.5.4.2 an order in terms of which the IP must make available to WASPA a list of the names and contact details of the winners of the competition; and
 - 4.5.4.3 a request that the WASPA Media Monitor investigate 'any current advertising regarding the Brainbox service'.
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5. The SP'S AND THE IP'S GROUNDS OF APPEAL

- 5.1 The SP and IP filed a joint appeal against the decision of the adjudicator.
 - 5.1.1 In summary the appellant's grounds of appeal are that (i) the adjudicator erred in certain respects as regards the findings of infringements of the Advertising Rules and (ii) the sanction imposed by the adjudicator is, unreasonable and inappropriate.
 - 5.1.2 Before dealing with the factual findings of the adjudicator the appellant's legal representative emphasizes that (i) the appellants at all times believed, in good faith, that the advert presented was in compliance with 'the rules' (ii) that steps were taken to ensure that issues such as the pricing would, through use of the flashing text at regular intervals, be

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more apparent to the user than static text; and (iii) the purpose for which the appellants did this was to protect consumers by making consumers aware of the terms and conditions of the offer.

5.2 The specific findings of the adjudicator regarding the breaches of the Advertising Rules were addressed separately in the appellant's grounds of appeal.

5.2.1 *'Breach 1 "the cost of entering the competition is not displayed in the required manner or for the duration of the clip, nor is it mentioned in the voice over. There is no "Price Box" as required in the Advertising Rules".'*

5.2.1.1 In response to the first breach of the Advertising Rules found by the adjudicator the appellants state that they consciously chose, in the bona fide belief that they were complying with the Rules, to flash the cost of entering the competition repeatedly on the screen. This was, according to the appellants, done to bring the price to the viewer's attention. The price was further displayed clearly and legibly four times for a total of 10 seconds, at different times during the advertisement; particularly in the beginning and the end shot. All of this the appellants argue would surely have brought the price to the viewer's attention and that they therefore submit that there was substantial, if not absolute, compliance 'with the rule' and that it was their contention that consumers were protected by the manner of display.

5.2.2 *'Breach 2 "The full terms and conditions of access are not set out for the full duration of the clip".'*

5.2.2.1 The appellants do not dispute this breach, although they argue that the 'conditions were also prominently displayed at regular intervals within the advertisement'.

5.2.3 *'Breach 3 "The age restriction is not set out for the full duration of the clip".'*

5.2.3.1 The appellants agree, as with the pricing, that they believe that the age restriction was brought to the viewer's attention.

5.2.4 *'Breach 4 "The animated effect which follows the voice-over is designed to hold the viewer's eye and attention – and practically and objectively viewed – distracts from the terms and conditions, which are in any event individually only on display for portions of the clip".'*

5.2.4.1 The appellants submit that the impression created by the adjudicator that they intentionally set out to mislead consumers is hardly an objective or practical view of the advertisement and that the fact that the complaint was lodged by a competitor, rather than a consumer, is proof thereof.

5.2.4.2 The appellants continue by stating that nothing in the rules forbids animation and that animation is commonly used in advertising for visual appeal. The adjudicator's view that the animation is distracting is according to the appellants a subjective opinion and not an objective infringement. Moreover, the appellants state, that the 'presentation of the pricing and flashing segments was designed to counteract the use of animation in other parts and portions of the advert to increase its visibility'.

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5.2.5 *'Breach 5 The adjudicator calculates that the price is displayed for a total of approximately 6 seconds (2 segments of 3 seconds each) out of a total of 20 seconds for the clip, i.e. the price is displayed for approximately 30% of the duration of the clip. The terms "Entrants must be 18+" is displayed for approximately 4 seconds'*

5.2.5.1 The appellants contest the calculations of the adjudicator regarding the number of seconds which the pricing information was displayed in the advertisement. According to the appellants the pricing information was displayed for a total of 10 seconds of the 20 second advertisement and not 6 seconds as calculated by the adjudicator.

5.2.6 *'Breach 6 "Lines close soon! Prizes daily!" for approximately 5 seconds. The adjudicator cannot see that "Lines close soon! Prizes daily!" specifies the closing of the competition with sufficient detail as to the extent time after which entries will not be accepted. The adjudicator accepts that the nature of television advertising and its fleeting imprint on the memory will, to some extent, mitigate this point.'*

5.2.6.1 The appellants argue that the terms and conditions, as well as the pricing, were clear and legible. They further state, that there is no specific reference in the rules as to how the term details should be dealt with in specifying the closing time for a competition and that it is therefore their submission 'that there has been compliance with this rule'. The appellants also specifically note the adjudicator's finding that 'the nature of television advertising and its fleeting imprint on the memory will, to some extent, mitigate this point.' The appellants submit that this reasoning also applies in respect of the other issues related to the complaint and that the intent in flashing information on the screen was to increase the 'Likelihood of imprinting information on the viewer's memory to ensure that it is accurately and correctly conveyed to the viewer'.

5.2.7 In concluding the grounds of appeal regarding the breaches of the Advertising Rules the appellants accept 'that there has not been strict compliance with the rules', but that 'the infringement of the rules was not as extensive as found by the adjudicator' and that the 'motivation which led to such infringement must also be considered.'

5.3 In addressing the sanction imposed by the adjudicator the appellants contend that the fine imposed by the adjudicator is 'grossly unreasonable and inappropriate, and that it falls to be set aside or reduced substantially.' In support of this statement the appellants refer to the following factors to which the adjudicator had reference when considering an appropriate sanction:

5.3.1 The clean record of both the SP and the IP. The appellants argue that the fact that they are first offenders should be the overriding mitigating factor in support of a reduction of the fine and that it was inappropriate to make them 'a scapegoat or an example for other service providers' or use them 'as the vehicle to deter third parties from intentionally disregarding the provisions of the Code'. The appellants refer to the sanction of suspension as dealt with in detail by the adjudicator as an appropriate sanction for members who repeatedly infringe the Code, which the appellants argue they are not.

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- 5.3.2 In reference to applicable WASPA precedent, the appellants, admitting the fact that the adjudicator's ruling in terms of the relevant breaches of the Code and Advertising Rules is correct, aver that the fine imposed by the adjudicator 'far outweighs the actual breach'. In support of this argument the appellants state that the fine imposed is the largest in the history of WASPA rulings, 'three times larger than largest fine ever imposed on a WASPA member'. The appellants also refer to the fact that the fine imposed by the adjudicator is inconsistent 'with similar rulings on similar issues in a similar time frame' by way of reference to the decisions and fines in three particular WASPA complaints. In defence of the further factor taken into account by the adjudicator, namely, the fact that it was not possible to effect a refund to consumers affected by the breach, the appellants state that there was no evidence before the adjudicator that any consumers were negatively affected because the complaint was lodged by a competitor and that the adjudicator should therefore not have taken the loss to any consumer into account in determining the sanction.
- 5.4 In conclusion and in support of their argument that the imposed fine 'is grossly unreasonable and out of proportion' the appellants again state their grounds of appeal in a summary format which will not be repeated here.
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6. FINDINGS OF APPEALS PANEL

- 6.1 The appellants have provided detailed grounds of appeal against the breaches of the Code and Advertising Rules as determined by the adjudicator, claiming that they disagree with certain of the findings made. In other clearly contradictory statements the appellants, however, also admit to the correctness of the adjudicator's ruling in terms of the relevant breaches. The real issue for this panel to determine seems to be the appropriateness of the quantum of the fine imposed by the adjudicator. We will, however, for the sake of completeness address the appellant's grounds of appeal individually.
- 6.2 The appellants' breaches of the Code and the Advertising Rules
- 6.2.1 Regarding 'breach 1' as appealed against in 5.2.1 above, this panel finds it difficult to believe that the appellants could have had a 'bona fide belief' that they were complying with the Advertising Rules by 'consciously' choosing 'to flash the cost of entering the competition repeatedly on the screen'. The Advertising Rules are very clear regarding the cost of access text display rules. The Advertising Rules clearly state that these Rules are '**MANDATORY**' and that the cost of access display time is '**100% of ad time**'. WASPA, WASPA adjudicators and this panel cannot allow service providers to bend the Advertising Rules according to what they 'believe' will sufficiently protect consumers. Surely allowing service providers to 'interpret' the Advertising Rules in terms of what in every individual service provider's opinion will be sufficient compliance with the Rules will not only lead to constant breaches of the Rules but surely also to inconsistent decision making and unacceptable advertising practices. This panel cannot voice an opinion regarding the appellant's subjective motivation or 'bona fide' beliefs, nor is it necessary to make a value judgement regarding the importance of the

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exact number of seconds the cost of access was actually displayed. The fact remains that the appellants breached the Advertising Rules by not displaying the cost of access for the duration of the advertisement as required. This ground of appeal is therefore dismissed.

6.2.2 The same reasoning applies to breaches 2 and 3 in 5.2.2 and 5.2.3 above. The appellants do not dispute these breaches. These grounds of appeal are dismissed.

6.2.3 With regards to 'breach 4' in 5.2.4 above, the same reasoning as in 6.2.1 above again applies regarding the clear breaches of the Advertising Rules. We do not agree with the adjudicator that the SP intended to mislead consumers, purely on the basis of the animation used in the advertisement. The animation in itself does not amount to any objective breach of the Code or Advertising Rules. This ground of appeal is upheld regarding the affect of the animation alone.

6.2.4 As stated in 6.2.1 above this panel will not make value judgements regarding the importance of the exact number of seconds the cost of access was actually displayed. Determining whether the adjudicator or the appellants calculated the exact number of seconds the cost of access was actually displayed correctly (6 or 10 seconds of the 20 second ad time) does not in any way remedy the breach. This ground of appeal is dismissed.

6.2.5 We again refrain from voicing an opinion on the appellants' 'motivation' for only flashing the relevant information which according to the appellants led to the infringements, apart from stating that drawing a negative inference from the fact that the appellants in fact breached a number of the Advertising Rules would be more likely than agreeing with the appellants that consumers would be better protected by only flashing the relevant information. This ground of appeal is dismissed.

6.3 The Sanction

6.3.1 We do regard the appellants' breaches of the Code and the Advertising Rules as serious. Potential consumer exposure and harm was substantial given the frequency of the flighting of the advertisements, and it is entirely possible that consumers entered the competition in the belief that they would receive a prize, but given the lack of response and being unaware of the precise nature and scope of the Code and Advertising Rules, had not complained. We agree with the adjudicator that breaches such as those committed by the appellants warrant substantial fines or other possible sanctions which will adequately address the seriousness of the breaches. A breach remains a breach regardless of whether or not anyone actually suffers harm as a result of it.

6.3.2 We have considered the appellants' grounds of appeal regarding the sanction imposed by the adjudicator very carefully. We have considered, in particular, the following in mitigation of the sanction: (i) the fact that both the SP and IP are indeed first offenders with clean records; and (ii) the fact that having regard to previous similar breaches of the Code and the history of WASPA adjudications in general, that the fine imposed in terms of this complaint is the largest ever fine imposed.

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We have not, however, unlike the adjudicator, considered the fact that it was not possible for the appellants to implement remedial actions because the advertising has ceased as a mitigating factor. Initial consumer harm would not have been cured by later remedial actions.

- 6.3.2 We believe the fine in the amount of R500 000 imposed by the adjudicator is excessive. The appeal is therefore upheld with regards to the amount of the fine alone.
- 6.3.3 This panel is of the opinion that a substantial reduction of the fine is warranted and that a fine to the amount of R125 000 (payable in accordance to the adjudicator's instructions) will better reflect not only the seriousness of the breaches of the Code and the Advertising Rules committed by the appellants, but importantly also the circumstances and context of the specific complaint more fairly and accurately.
- 6.4 The appeal fee is not refundable.