

REPORT OF THE APPEALS PANEL

Date: November 2010
Appellants: Smartcall Technology Solutions (STS) ("SP")
Mobimex ("IP")
Complaint Numbers: 5696
Applicable versions: Code of Conduct v6.2 & v7.4

1 BACKGROUND TO THE APPEAL

- 1.1 The SP and the IP have independently appealed the adjudication in complaint 5696, in terms of which various sanctions were imposed upon them as a result of a breach of sections 11.1.2, 11.1.3, 11.1.4, 5.1.5 (of version 7.4), 6.2.3, 6.2.8, 6.2.11, 3.1.1, 3.3.1, 4.1.1 and 4.1.2 of Version 6.2, sections 4.1.8, 4.1.7, 5.3.1 and 5.1.5 of version 7.4 of the WASPA Code of Conduct ("the Code") and sections 9.3.1, 9.3.5 of the WASPA Advertising Rules ("the Advertising Rules") by the IP.
- 1.2 For reasons which appear to be typographical rather than rooted in the Code, the SP, which was at no stage a respondent or party to the complaint, was also sanctioned in that the adjudicator required that it pay a R250 000 fine imposed on the IP in the event that the IP did not pay the fine within the specified time period.
- 1.3 Both parties have appealed against both the decision and the sanctions imposed. Both parties submitted detailed appeal notices.
- 1.4 The appeals must be seen in the context of a number of appeals which have been raised against the IP in respect of its subscription services.
 - 1.4.1 This matter and complaints 5696, 6928 and 7081 (all separately appealed) involve the IP in conjunction with the abovementioned SP, although different subscription services offered by the IP are involved in these matters.
 - 1.4.2 The IP has also appealed the adjudications in respect of complaints 6303, 6671, 6678, 6719, 6759, 7285, 7314 and 7424.
- 1.5 In the instant matter the complaint was lodged with respect to the IP's South African Music Portal service.
- 1.6 The IP is currently suspended as per the order of a WASPA Emergency Panel delivered on 3 December 2009.

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- 1.7 As will become evident from the below, the appeals are essentially unrelated: whereas the IP is appealing against the breaches and sanctions relating to the underlying subscription service, the SP is appealing the correctness of the adjudicator finding that it was responsible for the breaches of the IP as also the sanctions applied to it.

2 PRELIMINARY FINDING IN RESPECT OF THE APPLICABILITY OF VERSION 7.4 OF THE CODE

- 2.1 The Panel notes that the alleged subscription took place on 25 October 2008 and that the complainant was unsubscribed during January 2009. Any offences relating to the subscription service offered by the IP therefore fall to be adjudicated under version 6.2 of the Code.
- 2.2 The Panel notes further that the adjudicator in this matter tested the services during or about 21 July 2009, at which time version 7.4 of the Code was in force. The Panel is, however, of the view that the tests conducted by the adjudicator should have been used only for the restrictive purpose of evaluating the complaint before him or her and not for the purpose of initiating a further complaint against the IP (in respect of which the IP had no opportunity to make representations).
- 2.3 The Panel therefore regards the findings of breaches of sections of version 7.4 of the Code to be irregular.
- 2.4 Further the Panel notes that both versions 1.6 and 2.3 of the Advertising Rules are applicable to the service.

3 PRELIMINARY FINDING IN RESPECT OF THE SP'S APPEAL

- 3.1 It is evident from the adjudication in complaint 5696 that:
- 3.1.1 The adjudicator has confused the roles of the SP and IP and more often than not referred to Mobimex as the SP notwithstanding having initially correctly defined
- 3.1.1.1 Smartcall Technology Solutions as the SP and
- 3.1.1.2 Mobimex Group as the IP.
- 3.1.2 The IP was in its own right a member of WASPA at the time that the complaint was initiated.
- 3.1.3 No basis in the Code has been set down by the adjudicator for his or her decision to impose a sanction on the SP;
- 3.1.4 The SP has been sanctioned without at any stage being notified that it was party to the proceedings or being given an opportunity to make representations;
- 3.1.5 There is no evidence available to the Panel which indicates that the adjudicator made any enquiry into the relationship between the SP

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and the IP and whether the SP had taken reasonable steps to ensure that the IP complied with the Code and Advertising Rules.

3.2 On this basis alone the SP's appeal should succeed and its appeal fee be refunded.

3.3 Section 18.2 of the WASPA Constitution is also relevant to the position of the SP:

"18.2. No member of WASPA shall be answerable or deemed to be in any way responsible for any act or default of any other member or for any deficiency or insufficiency of any title or security whatsoever taken by WASPA, save to the extent that such member acted negligently or fraudulently."

(our emphasis)

3.4 Where there is a question as to whether an SP has been at fault in the non-compliance of another WASPA member it would, the Panel believes, be incumbent upon WASPA to make such SP a direct party to the proceedings so that it can be properly heard in this regard. This was not done in complaint 5696.

3.5 It should be noted that the question under consideration has since been rendered moot due to the insertions of sections 14.4.5 and 14.4.6 into Code version 9.0 – the current version. These clause make the correct position explicit:

"14.4.5. Where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

14.4.6. For the avoidance of doubt, no sanction may be applied to a member who has not been given an opportunity to respond to a complaint."

3.6 In addition a new section 3.9.3 has also been inserted:

"3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider."

3.7 The position going forward accordingly appears to be clear.

4 THE APPLICATION OF THE CODE AND AD RULES

The Code, v6.2

4.1 The following provisions were considered:

3.1.1. 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.

3.3.1. Members will not offer or promise services that they are unable to provide.

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".

6.2.11. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

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(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.7 Once a customer has subscribed to a subscription service, a notification must immediately be sent to the customer.

4.2 The following provision of version 1.6 of the WASPA Advertising Rules was considered:

9.2.7 BEARER REQUIREMENTS & CHARGES: Indicate need for and possibility of additional bearer charges eg WAP

If any additional bearers (eg WAP and/or GPRS) are required for full access to the advertised service/Content, and where charges will be incurred by a user over and above the cost of the Content or service offered by the advertiser, then the display text in both the body of the advertisement as well as in the T&C must indicate that additional bearer charges may apply.

eg “R10/Game + WAP charges”

4.3 The following provisions of version 2.3 of the WASPA Advertising Rules were considered:

The table of abbreviations set out in section 9.3.1.

9.3.5 BEARER REQUIREMENTS & CHARGES:

If any additional bearers (eg WAP and/or GPRS) are required for full access to the advertised service/Content, and where charges will be incurred by a user over and above the cost of the Content or service offered by the advertiser, then the display text within the T&C box must indicate that additional bearer charges may apply.

5 COMPLAINT AND DECISION OF THE ADJUDICATOR

- 5.1 The complainant lodged the complaint on 23 January 2009, alleging that he had been subscribed to the IP's services without his consent during October 2008 and that he had been told that this had happened through accessing a link while using the Internet.
- 5.2 In its initial response the IP confirmed that the complainant had been unsubscribed (in the normal course and without the intervention of WASPA). The IP refused to pay a refund on the basis that the complainant had unsubscribed himself and that he had "downloaded a product".
- 5.3 The IP produced logs which indicated that the complainant had browsed a WAP menu on 25 October, 15 November and on 19 December 2008 and accessed a "Product Set" on 19 December 2008. The logs provided to the adjudicator are not particularly detailed or helpful.
- 5.4 The adjudicator decided to evaluate the service provided by the IP in order to get greater clarity on the complaint. The steps and findings of the adjudicator in this regard are set out in Annexure B to the adjudication.
- 5.5 The adjudicator further requested the WASPA Media Monitor to test the service and the results of this testing are set out in Annexure C to the adjudication.
- 5.6 In the view of the Panel the critical finding made by the adjudicator is set out in paragraph 47 of the adjudication, viz: "[A]n examination of the service seems to indicate that a consumer would be able to request a specific item for a specific price or be subscribed to the service as a member. In this regard the WASPA Monitor's report is particularly helpful as this clearly indicates that the complainant must have been "subscribed" even though he would have, quite justifiably, not considered himself to have been subscribed to the service."
- 5.7 On the basis of the above the adjudicator found that the IP had breached sections 11.1.2 (the request to join the subscription service was not an independent transaction), 11.1.3 (billing does not indicate that the service is a subscription service) and 11.1.4 (complainant was automatically subscribed as a result of a request for non-subscription content).
- 5.8 The adjudicator further found that the IP had breached
- 5.8.1 Section 6.2.11 in that it had not kept records of the specific confirmation provided by the complainant in respect of transactions billed at R10 or more, alternatively had not provided these to the adjudicator.

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- 5.8.2 Section 6.2.3 of the Code read with section 9.3.5 of the Advertising Rules (version 2.3) in that there was no reference to bearer costs in the terms and conditions.
- 5.8.3 Section 4.1.2 in that the IP could not have realistically claimed that it did not know that the manner in which the service was set up was ambiguous and confusing.
- 5.8.4 Section 6.2.8 of the Code read with section 9.3.1 of version 2.3 of the Advertising Rules in respect of the use of the incorrect abbreviation "R09 Rand".
- 5.8.5 Section 6.2.11(c) of version 7.4 of the Code for a failure to provide the price and frequency of the IP's subscription service.
- 5.8.6 Section 6.2.4 of the Code in respect of the failure to indicate that more premium messages were required to obtain content.
- 5.8.7 Section 3.3.1 in that various services offered were not operational or accessible.
- 5.8.8 Sections 4.1.7 and 4.1.8 of version 7.4 of the Code due to the inability of the adjudicator to access the IP's call centre and the adjudicator's view that no call centre service was in fact operational.
- 5.8.9 Section 5.3.1 of version 7.4 of the Code in that the adjudicator was of the view that messages received from the IP subsequent to the adjudicator's testing of the service were unsolicited.
- 5.8.10 Section 3.1.1 based on the cumulative effect of other breaches.
- 5.9 In considering an appropriate sanction the adjudicator noted that:
- 5.9.1 The IP was unresponsive and uncooperative.
- 5.9.2 The IP had been sanctioned for a similar offence under complaint 5816.
- 5.9.3 In complaint 4755 the IP had been found to have breached sections 6.2.3 and 4.1.1.
- 5.9.4 The service was continuing.
- 5.9.5 The WASPA Mancom advisory on sanctions indicated that offences should be regarded as serious.
- 5.10 In the circumstances the adjudicator imposed the following sanction:
- "65. The following sanctions are imposed:
- 65.1. The South Africa Music Portal service and any service related to the URL of <http://5ja.in/?dst=461165> is immediately and indefinitely suspended. This sanction is specifically ordered to continue to operate in terms of clause 13.3.15 even if the IP and/or SP appeals this adjudication.

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65.2. The South Africa Music Portal Service may only resume if all the breaches of the above clauses are rectified as certified by the WASPA Secretariat.

65.3. The IP (Mobimex Group) is suspended from WASPA in terms of clause 13.4.1 of the CoC version 7.4 until it is able to provide suitable proof to the WASPA secretariat that it complies with the following requirements:

65.3.1. It has a functioning call centre where a human person is able to speak to a customer;

65.3.2. In the event that the call centre agents are busy it is possible for the customer to leave a message and the mailbox is not full;

65.3.3. The STOP functionality is operational in its services;

65.3.4. It has systems to ensure that unsolicited messages are not sent to members of the public who have requested that a service be terminated; and

65.3.5. The IP is able to prove that it has the required systems to record and maintain the necessary records which it is required to keep in terms of clause 6.2.12 of the CoC version 7.4.

65.4. The SP is directed to refund the Complainant in this matter. Should the amount that the Complainant paid be unclear or be unverifiable, the IP will refund the Complainant the sum of R500.00.

65.5. The IP is fined the amount of R250 000.00 for the breaches of clauses indicated in the decision section of this adjudication. Should the IP fail to pay this fine within the required five day period then the SP will be liable to pay the said fine.

65.6. It should be noted that the breaches identified in this section are numerous, serious and repeated. Should the IP fail to show the necessary commitment to compliance with the WASPA Code of Conduct as evidenced by future complaints, it would be appropriate for the termination of the membership of the IP to be considered.

65.7. Finally it should be noted that the refunding of all subscribers was contemplated when considering the sanctions that were appropriate for this matter. However due to the difficult technical requirements relating to the refunding of such a large group of consumers it was deemed to be impractical to make such an order."

6 GROUNDS OF APPEAL - IP

6.1 The IP's appeal notice sets out numerous submissions relating to the findings of the adjudicator.

6.2 Subscription flow:

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- 6.2.1 The complainant had subscribed on 25 October 2008 after accessing the site through a WAP banner and had accepted the terms and conditions set out on the page accessed.
- 6.2.2 These terms and conditions included subscription terms and conditions and the user was only allowed to enter the site and start a subscription after accepting these.
- 6.2.3 The adjudicator had erroneously tested a campaign promotion link from October 2008 during July 2009. "The link was valid only for a promotion in October 2008 and not valid afterwards". Accordingly the testing undertaken by the adjudicator was invalid.
- 6.2.4 The complainant had downloaded content on 19 December 2008.
- 6.2.5 No automatic subscription had taken place."The subscription was initiated by the user by confirming the terms and conditions and entering the site".
- 6.2.6 A free notification SMS had been sent to the complainant informing him of the subscription and how to unsubscribe.
- 6.2.7 Proof of subscription had been provided.
- 6.2.8 The IP had not been asked for any information regarding its product codes as set out in the proof of subscription and therefore had not provided such information.
- 6.2.9 The complainant had been subscribed prior to requesting specific content items, it not being possible to enter the site without agreeing to subscribe to the service.
- 6.3 Unresponsive and uncooperative
 - 6.3.1 The IP denied that it had been unresponsive or uncooperative, noting that it had responded promptly to every request made by WASPA and the adjudicator.
 - 6.3.2 The response to the unsubscribe request had been affected within three hours of receipt thereof.
- 6.4 Call centre
 - 6.4.1 The adjudicator had used the incorrect contact number for the IP;s call centre.
- 6.5 Additional premium rate messages required
 - 6.5.1 This relates to a confirmation page asking a user to confirm billing. The page in question has links allowing the user to confirm or to return to the previous page.
- 6.6 Failure to unsubscribe

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- 6.6.1 There was no record on the IP's systems of receiving an unsubscribe request from the MSISDN used by the adjudicator to test the service.
 - 6.7 Unsolicited messages
 - 6.7.1 The messages received by the adjudicator were sent as an element of the subscription service to which the adjudicator had subscribed during the testing process.
 - 6.8 Retention of records
 - 6.8.1 The records referred to were never requested from the IP and therefore not provided.
 - 6.9 Unavailability of services offered
 - 6.9.1 The adjudicator's handset was not properly configured to play the requested MP3 file and accordingly the message "File content not supported had been received".
 - 6.10 Breach of section 3.1.1
 - 6.10.1 The IP always attempted to offer "top-level service to its customers by adhering to WASPA regulation and responded promptly to any customer inquiries and demands". The IP accordingly was of the view that the adjudicator's conclusion in this regard was "unacceptable and based entirely on false presuppositions."
 - 6.11 Sanction
 - 6.11.1 The adjudicator's reliance on complaint 5816 was improper given that that matter was being appealed.
 - 6.11.2 Complaint 5460 was unknown to the IP and "probably has nothing to do with Mobimex".
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7 FINDINGS OF APPEALS PANEL

- 7.1 The matter is somewhat complicated and this has been exacerbated by the adjudicator's erroneous references to the IP as the SP.
- 7.2 The Panel is of the view that the testing undertaken by the adjudicator in evaluating the complaint should not be considered for the purposes of this appeal and that the Panel would be better served by considering the testing undertaken by the WASPA Media Monitor.
- 7.3 Having regard to such testing (as set out in Annexure C to the adjudication report) the Panel makes the following findings:
 - 7.3.1 There is evident confusion in the way the service is presented in that a user cannot be sure whether they are entering a subscription service or purchasing single content items. It is noteworthy in this

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regard that the Media Monitor engaged with the service not as a subscription service but as a service offering individual content items and that the pricing information indicates that both subscription content and individual content is available.

- 7.3.2 To the extent that the service offered was a subscription service (as indicated by the IP) it was not prominently and explicitly identified as such as required by section 11.1.1 of version 6.2 of the Code.
- 7.3.3 The service was dysfunctional and the content offered was not available.
- 7.3.4 The incorrect abbreviation for the price of content items was used.
- 7.3.5 Pricing for the service was confusing.
- 7.3.6 The unsubscribe information and process was incorrect / not working.
- 7.3.7 The terms and conditions of the service did not indicate that bearer charges were applicable.
- 7.4 The Panel therefore confirms the breaches of sections 3.1.1, 4.1.1, 4.1.2, 6.2.3, 6.2.4, 6.2.8, 11.1.1, 11.1.2 and 11.1.4 of version 6.2 of the Code and the breaches of sections 9.3.1 and 9.3.5 of version 2.3 of the Advertising Rules consolidated with the breach of section 9.2.7 of version 1.6 of the Advertising Rules.
- 7.5 In considering a more appropriate sanction to impose, the Panel had regard to:
 - 7.5.1 The lengthy period of suspension endured by the IP and the financial consequences thereof;
 - 7.5.2 The errors committed by the adjudicator in having regard to complaints not yet finalised in aggravation of sentence;
 - 7.5.3 The errors committed by the adjudicator in not consolidating substantially similar complaints relating to substantially similar services and breaches;
 - 7.5.4 The prior record of the IP;
 - 7.5.5 The undoubted seriousness of the offence and the apparent disingenuousness of the IP in positioning the service solely as a subscription service in its dealings with WASPA; and
 - 7.5.6 The steps taken by the IP to remedy deficiencies in its compliance and in its internal processes and the lengths which it has gone to to engage with WASPA.
- 7.6 The decision of the Adjudicator is substituted with the following:
 - 7.6.1 The IP is found to have breached sections 3.1.1, 4.1.1, 6.2.3, 6.2.4, 11.1.1, 11.1.2 and 11.1.4 of version 6.2 of the Code and sections

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9.3.1 and 9.3.5 of version 2.3 of the Advertising Rules consolidated with the breach of section 9.2.7 of version 1.6 of the Advertising Rules. The following sanctions are imposed:

- 7.6.1.1 The IP is required to compensate the complainant in full in respect of all charges arriving from the interaction of the complainant with the IP to the extent that this has not already occurred.
- 7.6.1.2 Payment of a fine of R30 000 in respect of the breaches listed above. This sanction is consolidated with the sanction imposed for the same breaches in respect of complaints 6303, 6671, 6678, 6719, 6759, 6928 and 7081.
- 7.7 The Adjudicator had ordered the immediate suspension of all subscription services offered by the IP in South Africa, thereby confirming the suspension which had been put in place on 3 December 2009 by a WASPA Emergency Panel. For the avoidance of doubt the Panel wishes to clarify that this suspension is now lifted.
- 7.8 The IP has not made any submissions with regard to the appeal fee and the Panel has little hesitation in finding that such fee should not, in the circumstances of the matter, be refundable.
- 7.9 The SP's appeal is allowed and the Panel holds that the sanction imposed on the SP and the finding that it had breached the Code should be regarded as *pro non scripto* (never written).
- 7.10 The appeal fee of the SP is refundable.