

## REPORT OF THE APPEALS PANEL

**Date:** 6 January 2011  
**Appellants:** AMV Holdings Limited  
**Complaint Number:** 5927  
**Code version:** 6.2  
**Ad Rules :** 2.3

### 1 INTRODUCTION TO THIS APPEAL

- 1.1 The parties have all referred to v6.2 of the Code as being applicable however the complainant in fact subscribed (or didn't as the case may be) in July 2008, when v6.1 was applicable. The parties do not mention the applicable version of the Ad Rules, but in July 2008 this would have been v1.6, whereas in February 2009, it would have been v2.3. Because the matter has reached this stage without dispute or even question about the applicable version (and there are no material differences between the 2 versions in relation to the matter itself), we have decided to determine the appeal on the basis of v6.2 of the Code and v2.3 of the Ad Rules.
- 1.2 We note that although the SP itself is not a South African company, it appears to have submitted to WASPA's jurisdiction. Its website records that it does "extensive advertising" in South Africa under the brand "bling!" and it has apparently registered a South African domain under this name although we are not able to find this. The website is, however, very old.
- 1.3 The SP is recorded as an affiliate member on WASPA's website, with, among others, South African and United Kingdom contact details. The SP is said to offer "adult content services". The responses received from the SP were submitted on its behalf by representatives claiming to be from Bling Mobile and CIPRO records the registration of a CC in South Africa.
- 1.4 In conducting a search on both Bling Mobile and the SP, the panel did notice a number of complaints against either or both of them, relating to adult content services and subscription services.
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### 2 THE HISTORY OF THE MATTER

- 2.1 *The service complained of*
- 2.1.1 A complaint was lodged by the complainant, specifically requesting that she be "unsubscribed" from a service. The complainant noted that the service sent her and schoolboys that she was aware of, links to pornographic material. Although she had downloaded a ringtone, she began receiving the links to what appeared to be adult content.

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The complainant also alleged that she was unaware of a R6,50 weekly charge.

2.1.2 The complainant herself noted that the service constituted in her view, a breach of sections 3.7, 3.8 and 4.1.1 of the Code. The WASPA Secretariat sent the complaint to the SP and referred to possible breaches of sections 4.1.1 and/or 4.1.3 and/or 4.1.5 and/or 4.1.6 and/or 4.1.7 and/or 5.1.2 and/or 5.1.7 of the Code. The expansion of the sections relied on followed emails from the complainant who also referred to a lack of, or poor, customer service by the SP and a failure to provide an adequate opt-out mechanism or any such mechanism at all in relation to the service.

2.1.3 Following the SP's response (set out below), the complainant, with reference to the call she placed to the SP's call centre and the SP's consequent statements in this regard, denied that she had been abusive towards the call centre representative and requested a record of the call. She also advised that she had waited some 15 minutes for someone to answer her call.

### 2.2 *Response by the SP*

2.2.1 Briefly, the SP responded in a series of emails during March 2009 stating that the complainant had accessed their WAP site through an advertisement on an affiliate's website. The SP claimed that the site stated at the time that "content purchasers or users who access free content may receive future promotions from us and that they should send an SMS with STOP ALL to 31434 to opt out, or call their helpline number". The SP also stated that they had not received a request to opt out from the complainant and had in fact contacted her with other promotions from time to time.

2.2.2 The SP denied that the material to which the links were connected was pornographic or constituted adult content as defined in the Code, and was instead "bikini content only, there is certainly no adult content". The SP also confirmed that the complainant had not purchased any content and had not been charged for any content.

2.2.3 As regards the call centre complaints, the SP advised that they would only disconnect a call if "the user persists to be rude [sic] or aggressive towards staff despite being given warnings to refrain..." The SP concluded, on 10 March 2009, that they had removed the complainant's number from their database.

2.2.4 The SP provided call and data logs for the period between 1 July 2008 and 1 March 2009, and a written account of the complainant's call to the call centre which had been noted by the operator at the time, in response to the adjudicator's request for a transcript and the logs.

### 3 DECISIONS OF THE ADJUDICATOR

#### 3.1 *Findings of the adjudicator*

3.1.1 The adjudicator considered possible breaches of v6.2 of the Code and specifically sections 2 (definitions), 3.7 (decency), 3.8 (number re-use), 4.1.1, 4.1.3, 4.1.5-4.1.7 (provision of information to customers), 5.1.1-5.1.3, 5.1.7 (sending of commercial communications), 8.1.2, and 8.1.3 (required practises). The adjudicator also referred to sections 9.2.1 of the Ad Rules (adult content and age-restricted services), and 9.3.9 (distribution lists).

3.1.2 The adjudicator made the following findings:

3.1.2.1 *Unsolicited SMS messages* – the complainant was not the sole user of the mobile phone as her son also used it, and the logs provided by the SP confirmed that the complainant's MSISDN did access the SP's service. This part of the complaint was dismissed.

3.1.2.2 *Subscription services* – although the complainant claimed not to have been aware of the R6,50 weekly fee she did not seem to have been charged, and the service did not seem to have been a subscription service. This part of the complaint was also dismissed.

3.1.2.3 *Adult services* –

3.1.2.3.1 The SP claimed that it did not provide these services in South Africa (despite the reference to these services on the WASPA affiliate member list). However, the logs sent in by the SP reflected messages headed, amongst others, "Free Sexy Vids", "Sexy Vids", "Sexy Housewife", "See my Sexy Vids", "College Girl Vid", "Free Naughty Vids", and "Free Sexy Movies". The adjudicator considered the messages to fall within the definition of "adult services", being "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".

3.1.2.3.2 The adjudicator acknowledged the lack of evidence in this regard, given that the complainant had not wished to click through on any of the banners to establish whether in fact the service was an adult service, as it appeared to be one. However the adjudicator nonetheless found that the SP was in breach of section 8.1.2 of the Code in that the promotion of adult services could not reasonably be said

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to have been sent within the context of a request for a free item on the relevant wap site.

- 3.1.2.3.3 Accordingly the adjudicator also found that the SP had breached section 9.3.9 of the Ad Rules in that there was no adult verification system in place, despite the SP having stated on previous occasions in responding to other similar complaints, that the wap site complained of was an +18 only site. As an aside, the panel is unable to verify any of the information which the adjudicator was referring to, and the links to the various videos and movies referred to no longer exist.
- 3.1.2.4 *The abusive phone call* – the adjudicator made no finding in this regard.
- 3.1.2.5 *Customer service* – the adjudicator did not uphold this aspect of the complaint having tested the service and having found the level of customer service on that occasion, satisfactory.
- 3.1.2.6 *Other breaches* – the adjudicator was of the view that there had been other breaches of the Code than those to which the complainant had referred, specifically a breach of sections 5.1.1 and 5.1.2 (no valid originating number and/or name or identifier of the message originator, and no opt-out mechanism. Having considered the SP's information on the WASPA site, the adjudicator also noted that there was no local web presence and the local support number was not available on the primary website of the SP, namely <http://amvholding.com>.

### 3.2 *Sanctions*

- 3.2.1 In imposing sanctions the adjudicator took account of other complaints in which the SP had previously been cited and specifically complaint 5235 in relation to a different wap site but in relation to “essentially” the same conduct. The adjudicator quoted from this report with approval. The quotation refers specifically to offences involving minors, and to other adjudications in which similar clauses were found to have been breached by other WASPA members, or where the same SP had been found to have breached the same sections.
- 3.2.2 The adjudicator noted that in another matter in which the SP was implicated, the report was delivered on 21 June 2009 and the SP was fined and duly paid. There were no other matters falling within the relevant period. In total the SP had been fined R200,000 in relation to complaints 5235 and 4673.

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- 3.2.3 As a result, the adjudicator stated that further fines should not be imposed but did wish to send “a clear message” to the SP and other members that “the exposure of children to adult content or the possibility of their obtaining adult content would not be accepted.”
- 3.2.4 The adjudicator found further that in complaint 5235 the failure of the SP to provide adequate mechanisms to opt out was neither identified nor sanctioned by the relevant adjudicator.
- 3.2.5 In the circumstances, the adjudicator imposed the following sanctions:
- 3.2.5.1 In respect of breaches of sections 8.1.2 of the Code and 9.3.9 of the Ad Rules:
- 3.2.5.1.1 The member was fined the sum of R300,000, payment of which was suspended for a year provided the member did not again breach the same sections and in addition, did not breach section 8.1.3; and
- 3.2.5.1.2 The member had to suspend for 6 months, any promotion or advertising of adult services or content, although this sanction was also suspended for a year (on the basis that the SP claimed it did not provide adult services or content).
- 3.2.5.2 In respect of breaches of sections 5.1.1, 5.1.2 and 4.1.3 read with 4.1.7, all of which relate to difficulties in contacting the SP, the SP was fined R40,000, payable within 5 days of the receipt of a WASPA invoice.

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## 4 GROUNDS OF APPEAL

- 4.1 The SP’s grounds are twofold:
- 4.1.1 The adjudicator made incorrect findings on the merits; and
- 4.1.2 The sanctions imposed are unreasonable.
- 4.2 **Incorrect findings on the merits:**
- 4.2.1 *Customer contact:* The SP was not presented with alleged “other breaches” and not afforded an opportunity to answer them. This is a fundamental right that should be afforded to WASPA’s members. WASPA and its adjudicators are bound by common law to follow proper and appropriate administrative procedures. In particular the adjudicator did not follow the *audi alteram partem* rule. The findings should not be upheld as the SP had no opportunity to answer the allegations raised.
- 4.2.2 *Adult service:*

- 4.2.2.1 According to the SP, the definition in the Code is very wide, and the actual provision of adult content is “at the opposite end of the spectrum” to the provision of promotional material implying that a service is of a sexual nature. The adjudicator did not indicate in what regard the SMSs fell within the meaning of “adult service” and acknowledged the lack of evidence in this regard.
- 4.2.2.2 Whilst the SP has been found guilty of providing content of a suggestive nature, which falls within the wide definition of “adult services”, the adjudicator should have requested further information in this regard to ascertain whether the implication that the content was of a sexual nature was in fact borne out by the actual content.
- 4.2.2.3 The SP does not provide adult content services but “apologises for inadvertently sending inappropriate messages to a minor implying that a service of a sexual nature was being offered.”

#### 4.3 **Sanction**

- 4.3.1 *Customer contact:* the complaints by the complainant regarding customer service, subscription services and unsolicited messages were not upheld by the adjudicator therefore the finding of breach of sections 5.1.1 and 5.1.2 should be set aside. The fine should be appropriate to a breach only of sections 4.1.3 and 4.1.7.
- 4.3.2 *Adult services:*
- 4.3.2.1 Generally: the quantum and nature of the penalty is indicative of the severity of the breach and type of conduct leading to the breach. The SP therefore appeals the sanctions which are suspended. Although the adjudicator has considered aggravating factors in imposing the sanction, there does not appear to have been consideration of mitigating factors. In particular no minor was harmed by the promotional material or exposed to content of a sexual nature, and this sort of content was not in fact available to be downloaded.
- 4.3.2.2 First sanction: the quantum of the first fine is disproportionate to the breach and inflated by the adjudicator’s incorrect supposition that the SP is providing adult services. If there is no breach of section 8.1.3 then it is not appropriate to link a suspended sentence to this section.
- 4.3.2.3 Second sanction: this should be set aside as unreasonable and inappropriate, because although the SP does not provide adult content services or adult services at present it may wish to do so in future, and the broad definition of “adult services” may result in minor transgressions in future being harshly punished because of the suspended sanction.

- 4.4 The SP's appeal also contains a general section which concludes that the SP has not previously appealed any finding against it and so the instant appeal is to be taken more seriously. They also note that they "seek[s] to use every available and commercially feasible safeguard to ensure minors are encouraged and effectively prevented from receiving or accessing adult content or content of a sexual nature. This includes a separate and upfront AGE CONFIRMATION PAGE that we now have as compulsory on all our sites where sexually suggestive words or content are being used".
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## 5 FINDINGS OF APPEALS PANEL

### 5.1 Incorrect finding on the merits:

#### 5.1.1 *Right to be heard*

5.1.1.1 First, and most obviously, the correspondence which passed between the parties suggests that the SP has in fact been heard. The appeals process has allowed an additional opportunity to be heard. We do not accept this argument.

5.1.1.2 Second, WASPA is a voluntary organisation operating within a sector that has opted for self-regulation in relation to wireless services. It is relevant to note that WASPA may in fact render further regulation in this sector by law or other more formal interventions, unnecessary if it is successful in its endeavours – which will no doubt be measured by the way in which its members indicate their willingness to comply with the provisions of the Code, and the number and severity of complaints. We accept that adjudicators and appeals panellists are required to take account of the principles of equity in applying the provisions of the Code, to ensure that the consumer is protected and the consumer's interests are advanced. However, the application of the common law is not required when the procedure for complaints, responses and appeals has been set out in the Code, which is, as we have said above, accepted by and agreed to by members and affiliated members.

5.1.1.3 The panel is quite comfortable based on WASPA precedent and the provisions of the Code, that an adjudicator is authorised to consider additional information and indeed, required to ensure that unwary consumers are not exposed to conduct which breaches the ethical tenets of the Code. In weighing up all the facts, and taking into account the ideal that a person should know the case they must meet, an overriding consideration in this context and indeed in all services, must be the requirement that members comply with the Code. This

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means that partial compliance cannot excuse non-compliance – members must comply with all the sections of the Code. Failure by WASPA to refer to a particular section of the Code in the course of an adjudication, does not and should not absolve a member of compliance with obligations which always existed.

5.1.1.4 Apart from its arguments on a right to be heard, the SP has not denied that its services did not comply with the provisions of sections 4.1.3, 4.1.7, 5.1.1 and 5.1.2. Its failure to comply with these sections constitutes a serious breach of fundamental principles of the regulation of wireless application services and specifically section 1 (introduction and objectives).

5.1.2 *Adult services and adult content services*

5.1.2.1 The answer to the question of whether or not the SP does or did in fact offer adult services is a complex one. The definition in the Code is a broad one, we agree. The purpose is, we understand, to catch those services which are not appropriate for children, and/or to which a premium rate attaches. It is intended that the definition be as wide as possible given the potential for harm.

5.1.2.2 We note that the SP accepts that it is not acceptable to send messages advertising inappropriate material to children. We note too that although the SP states that it uses “every available and commercially feasible safeguard to ensure minors are encouraged and effectively prevented from receiving or accessing adult content or content of a sexual nature” (or adult services), it did in fact send inappropriate material which ended up in the hands of a child. We note too that the SP states that now it does have in place an AGE CONFIRMATION PAGE where sexually suggestive words or content are being used. Where adult services are concerned, age verification is required because of the possibility that the phone concerned may be used by a child. We acknowledge the responsibility of parents in relation to use of phones by their children, but it is impossible in this case to make a determination of fault on the part of the parent, given the nature of the services and the responsibility that falls on an SP. It would appear that no age verification system existed at the time the service was provided to the complainant.

5.1.2.3 It is unfortunate that the SP has been cited for its involvement in the area of adult services and adult content services, because it is at the same time entirely understandable that WASPA takes a very dim view of any transgressions in this



area, however slight. This is because, simply put, the public interest is not served by the distribution of inappropriate material or material which is not adequately protected, which may find its way to children. As we have mentioned above, it is not sufficient to note that the Code does impose certain restrictions and to apply them when it suits, it is imperative that in the case of children and adult services on the one hand, and adult services in general on the other hand, the Code is implemented as it stands and with due regard to the public interest motivation behind the various provisions. From the facts it appears that the service *is* one that 'indicates directly or implies that the service is of a sexual nature'.

5.1.2.4 In the circumstances and even taking into account the fact that the adjudicator and this panel cannot verify whether or not the videos and movies referred to are of a "sexual nature", we find that the references to this content is nonetheless suggestive, so suggestive in fact that the SP must use age verification systems.

5.2 **Sanctions:**

5.2.1 The panel agrees that the fines imposed by the adjudicator are substantial.

5.2.2 The panel is unclear on why the total of R300,000 was imposed as a suspended sanction, given the reasoning adopted by the adjudicator in coming to the decision. The panel agrees that other findings in matters that are similar to this one are relevant to the question of quantum.

5.2.3 The panel does not agree that the breaches of sections 5.1.1 and 5.1.2 should be set aside and therefore that these sanctions should be set aside. In this regard, we have set out above why we believe that the SP is required to comply with the Code and why, therefore, the adjudicator is not required to apply anything other than the Code. In any event we consider that the SP has in fact been heard.

5.2.4 The panel does not consider that the sanction in relation to the provision of adult services is useful in the circumstances. The purpose of imposing sanctions is to punish actual contraventions, and deter future conduct of an unacceptable nature or conduct which amounts to a breach. Suspending a sanction which relates to the future provision of services is not immediately logical to us.

5.2.5 The apparent failure of the SP to have an age verification system in place at the relevant time is also relevant.

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- 5.2.6 The panel finds that the SP was in breach of section 8.1.2 of the Code and section 9.3.9 of the Ad Rules, for the reasons set out in our paragraph 5.1 above.
- 5.2.7 The panel has taken into account all arguments made by the SP in relation to the findings made against, and the SP's acceptance of its breach of sections 4.1.3 and 4.1.7.
- 5.2.8 We should note that we would find the SP's arguments in mitigation unpalatable in any other context.
- 5.2.9 We would also like to make the following statement for the record in relation to the lack of physical material in support of the SP's arguments and appeal. It is terribly difficult to reach clear decisions and provide adequate reasons for findings if we are not provided with proper materials or records or only with what members themselves are willing to provide. If members are not able to provide evidence in the form of records or documentation that can serve as proof that the Code was not breached (or in mitigation of a breach) then a negative inference will be drawn from the fact that we only had limited information to base the decision on. While the SP makes the point that the adjudicator should have requested more information regarding the service, it does not volunteer any.
- 5.2.10 In all the circumstances, the panel makes the following order:
- 5.2.10.1 both suspended sanctions are overturned;
- 5.2.10.2 the fine of R40,000 for the breach of sections 4.1.3, 4.1.7, 5.1.1 and 5.1.2 is upheld; and
- 5.2.10.3 the SP is also fined R60,000 for the breach of section 8.1.2 of the Code and by implication, section 9.3.9 of the Ad Rules.
- 5.3 The fines should be paid to WASPA within 5 days of the publication of this report. The appeal fee is not refundable.