

REPORT OF THE APPEALS PANEL

Date: 3 September 2010
Service Provider and Appellant: Marketel (Pty) Ltd
Information Provider: Candice van Doosen T/A G-Talk
Complaint Number: 6577
Applicable versions: Code v.7.0

1 BACKGROUND TO THE APPEAL

- 1.1 This appeal concerns the adjudication of a complaint made by a member of the public, arising from the escalation of an unsubscribe request regarding unsolicited commercial communications, apparently to an adult subscription service.
- 1.2 The WASPA Secretariat sent the formal complaint to Marketel (Pty) Ltd., the Service Provider (SP), on 26 May 2009, and a reminder notice on 04 June 2009. Neither the original complaint nor the reminder elicited a response from the SP.
- 1.3 The Information Provider (IP) in this matter is Candice van Doosen T/A G-Talk.
- 1.4 The SP is the only appellant in this matter.
- 1.5 The facts in this appeal concern confusion relating to the nature of the service considered by the adjudicator and the facts submitted in the SP's appeal documentation. The panel notes that this confusion could have been avoided by a timely response on behalf of the SP.
- 1.6 The decision in this appeal hinges largely on (i) the relationship between the SP and the IP and (ii) the facts relating to the nature of the service.
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2 RELATIONSHIP BETWEEN IP AND SP

- 2.1 The panel is on record as having dealt with the relationship between SPs and IPs numerous times. We repeat:
- 2.1.1 The relationship between a SP and an IP is not new in relation to wireless application services. A SP who has the primary contracting relationship with a mobile network operator, will frequently engage an IP to provide content for transmission over the network.
- 2.1.2 The definition of "*information provider*" in the Code states that this is "*any person on whose behalf a wireless application service provider*

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may provide a service, and includes message originators". A "wireless application service provider" is "any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services."

- 2.1.3 Section 3.9.1 of the Code states that *"members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene this Code of Conduct"*. Section 3.9.2 provides that *"the member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct"*.
- 2.2 The SP is a member of WASPA. The obligation to comply with the Code and to ensure that the IP also complies, rests with the SP. It is against the SP that the finding of the adjudicator was made and it was the SP that lodged the appeal.
- 2.3 The finding of the panel therefore concerns the SP alone.
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3 DECISION OF THE ADJUDICATOR

3.1 Findings of the adjudicator

- 3.1.1 The adjudicator considered no less than twenty-five sections of the WASPA Code of Conduct (Code), relating to professional behaviour, lawful conduct, honest and fair dealings, deceptive and misleading information dissemination, ability to be removed from a database, to stop receiving messages, as well as all the detailed provisions of the Code relating to subscription services.
- 3.1.2 The adjudicator found that:
- 3.1.2.1 The SP had failed to respond to the complaint or the reminder notice and had breached sections 4.1.1 (honest and fair dealings with their customers) and 4.1.2 (not knowingly disseminate information that is false or deceptive, or that is likely to mislead) of the Code.
- 3.1.2.2 The complaint related to an advertisement addressed to *"musicians, artists, performers, comedians and dancers"*, inviting them to auditions that promised local and international entertainment contracts. Consumers responding to the invitation to audition were, according to the adjudicator, subscribed to an adult service that mislead the public and exposed children to harm. He found a breach of section 8.1.1 (adult services to be clearly indicated as such) of the Code.
- 3.1.2.3 The service also breached section 11.1.1 (promotional services to clearly identify services as subscription services),

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11.1.2 (request for a subscription service to be an independent request), 11.1.5 (no automatic subscription to result from a non-subscription request), and 11.1.8 (notification messages to follow a subscription request).

3.1.2.4 Additionally, sections 11.5.1, 11.5.2 and 11.5.5 (all relating to a failure to provide instructions to terminate a subscription service) and 11.5.8 (failure to honour unsubscribe requests) had been breached.

3.2 *Sanctions imposed by the adjudicator*

3.2.1 Regarding these breaches as multiple and serious, the adjudicator:

3.2.2 Imposed a fine of R250 000.00 on the SP;

3.2.3 Directed the SP to disclose the details of the IP;

3.2.4 Ordered the SP to immediately terminate the service; and

3.2.5 Ordered the SP to refund the complainant.

3.3 The sanctions were not subject to suspension pending any appeal.

4 **GROUNDS OF APPEAL**

4.1 The appeal document is in the form of a letter dated 10 June 2010, addressed to WASPA, from a firm of attorneys acting for the SP. The panel will refer to this letter as the SP's appeal documentation and refer to the contentions submitted as those of the SP.

4.2 The letter comprises a response, under 12 headings and 3 Annexures. These are detailed hereunder.

4.2.1 Background

4.2.1.1 The SP "*believe that the adjudicator misdirected himself in various respects*" and submits that the sanctions are "*inappropriate, overbroad and duly harsh*".

4.2.1.2 The SP concedes that through no fault of the adjudicator, his decision was made "*without possession of the full facts relating to the matter*" and that the missing facts are material and significant to the findings and as mitigating factors.

4.2.2 Condonation of time period for submission [of appeal documentation]

4.2.2.1 The SP concedes that section 13.6.2 of applicable version 7.0 of the Code allows an appellant 10 working days to submit additional information to WASPA in the event of an appeal.

4.2.2.2 They record that on receipt of the adjudicator's report, they paid the R10 000.00 appeal fee within ten days.

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- 4.2.2.3 They record that they were "*forced to [undertake] an investigation into the circumstances of the complaint*", which took longer than the ten working days allowed.
- 4.2.2.4 Following conclusion of this investigation, the SP sought to retain the services of a legal firm, and having done so, to provide the appeal submission.
- 4.2.2.5 The SP's legal representatives attempted to establish a date for the 'appeal hearing' and were informed (presumably by WASPA) that there was a 'significant backlog'. They concluded the appeal submission with the SP prior to any hearing by an appeal panel and were of the opinion that the delay was not prejudicial to anyone involved. Nevertheless, the SP seeks condonation of the extended period taken to respond.
- 4.2.3 Lack of response by the SP
- 4.2.3.1 The SP acknowledges that it failed to respond to the complaint or the reminder and submits that it was "*under the impression that it had in fact, addressed the complaint as a whole*".
- 4.2.3.2 The appeal panel is referred to complaints number 6782, 6783 and 6784, all of which relate to with the same advertisement, submitting that all three complaints were successfully resolved through the informal complaints procedure of WASPA because of the 'expeditious actions' of the SP.
- 4.2.3.3 Complaint 6782 is provided as an example of how the IP handled the complaints. In essence, recording that the SP was shocked by the IP's misleading advertisement, which was not a subscription service but a 'MO service', with the result that there was no requirement to unsubscribe. The SP had discontinued the service, contacted the complainant and offered a refund.
- 4.2.3.4 The SP submits that its speedy resolution of the earlier complaints clearly showed that it had no intention of ignoring complaint 6577. The "*SP's quick and drastic action to prevent the IP in question from being in a position to benefit from the use of its [the SP's services] as a result of those complaints and cancelled its commercial service provider agreement with the Information Provider*".
- 4.2.3.5 As an additional example of the 'proactive effort' by the SP, they provide an example in which a different complainant thanks the SP for its handling of a complaint.
- 4.2.3.6 In relation to complaint 6577, the SP submits that was under the impression, based on the successful resolution of the

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other complaints dealing with the same issue, that all of the disputes arising from this particular advertisement had been resolved. They acknowledge that this transpired to be 'erroneous'.

4.2.3.7 The SP requests the appeal panel to take the following factors into account as mitigating factors:

4.2.3.7.1 The SP had responded to 3 previous complaints, resulting from the same advertisement;

4.2.3.7.2 All three complaints were resolved to the satisfaction of the complainants, and;

4.2.3.7.3 The IP had been barred from providing the same services with effect from 02 July 2009.

4.2.3.8 The SP was under bona fide impression that all complaints relating to this advertisement had been resolved.

4.2.4 Content of the advertisement

4.2.4.1 The SP concedes that the advertisement was misleading and manipulative "*on the part of the IP to obtain funds*". They clarify however, that the service complained of was not a 'subscription service', as the service was run on a Mobile Originating (MO) SMS number and not on an Online Billing System (OBS) or an Event Based Billing (EBB) number. This meant that it was in fact technically impossible for anyone to actually be subscribed to the service through the short code.

4.2.4.2 The SP states that the content of the advertisement makes it clear that the IP intended to mislead the public and the SP given that the IP suggested in the advertisement that by registering for auditions a person could take part in musicals/plays which was not in fact the case. Even the SP was the victim of a fraud. As soon as the SP became aware of the fraud, it took immediate action including suspending the IP's access.

4.2.5 Sections of the WASPA Code of Conduct that were not contravened

4.2.5.1 The SP contends that there was no breach of section 4.1.2 of the Code, because the SP never 'knowingly' disseminated information that was false or deceptive, claiming that the SP was "*as surprised as any member of the public when the 'real' service was discovered*".

4.2.5.2 The SP contends that because of the impossibility of running a subscription service through a MO number, none of the alleged breaches of the subscription-related clauses are relevant to this complaint. In summary, the SP submits that

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sections 11.1.1, 11.1.2, 11.1.5, 11.1.8, 11.5.1, 11.5.2, and 11.5.5, and 11.5.8 were not breached.

4.2.6 Liability of the IP

4.2.6.1 The SP confirms that the IP is Candice van Doosen T/A G-talk, who entered into an agreement with the SP on 22 October 2007 in terms of which the SP would provide access to enable the IP to use the SP's SMS2Email chat platform.

4.2.6.2 The SP states that while the agreement "*indicated*" that the IP would be responsible for any contravention of the WASPA Code (Annexure A and C are provided in support of this contention) and provided for the SP to recover losses from the IP, this was not possible due to the withdrawal of the foreign IP from the South African market.

4.2.6.3 The SP contends that "*in a not dissimilar way to Internet banking fraud - the IP in question [had] close[d] down its services*", with the result that the SP is unable to "*locate and to recoup its loss*" from the IP and is left "*holding the baby*" notwithstanding that it had no intention of contravening the Code and was "*manipulated by fraud*". The SP points out that the advertisement for 'auditions' to take place would have been the advertisement that the SP "*would have had to vet*" and that "*salt had been rubbed in the wounds*" by virtue of the fact that the SP had to carry the costs of the appeal including legal fees.

4.2.7 Mitigating factor of binding the IP to the WASPA Code of Conduct

4.2.7.1 By providing Annexure A and C, the SP shows that it did bind the IP to comply with the Code as required by section 3.9.1.

4.2.7.2 The SP refers the panel to section 3.9.3 of Version 9 of the Code, stating that this provides 'illuminating insight' into the way contraventions of the Code should be considered. The section provides:

"A WASPA member shall, on obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all necessary steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and they 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"

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- 4.2.7.3 The SP submits that this section, introduced recently and not applicable at the time of the complaint, shows the “*logic behind this section*” intending it to apply as a “*significant mitigating factor*”.
- 4.2.7.4 The SP adds that “*in order to combat practices such as those of the IP*”, the SP had “*instituted a new system of requiring personal surety from the directors of any IP it contracts with in order to make this type of fraud more difficult to perpetuate*”. It records, nevertheless, that even with such practices, “*this type of fraud is extremely difficult for WASPS to prevent*”, reiterating, that the SP was also a victim.
- 4.2.7.5 The SP states that as the advertisement was flighted on www.gumtree.co.za, which provides a free advertising platform for members of the public, it was “*almost impossible to police*”.
- 4.2.8 Scope of the damage
- 4.2.8.1 The SP points out that only R516.00 was generated for the period April to May 2009 (Annexure B is provided to substantiate earnings) and states that it considers the fine of R250 000.00 ‘massively excessive’ particularly given that the limitation of [actual] damage was due to their action in terminating the service.
- 4.2.8.2 The SP confirms attempting to refund the complainant R29.00, but that it had been unable to do so, because it had been unable to contact the complainant.
- 4.2.9 Imposition of immediate sanction
- 4.2.9.1 The SP acknowledges that section 13.3.15 of the Code allows an adjudicator to impose sanctions that are not subject to suspension pending appeal. They state however that the adjudicator misdirected himself in this case.
- 4.2.9.2 The SP submits that the intention of section 13.3.15 is to prevent continued damage or harm rather than being a punitive measure.
- 4.2.10 Proposed sanction
- 4.2.11 The attorneys acting for the SP attempt to direct the panel in its findings and sanctions. Their contentions will not be recorded here.
- 4.3 Annexures attached to the letter:
- 4.3.1 Annexure A - Excerpt from the IP’s terms and conditions signed by all IPs and providing for IPs to comply with the WASPA Code and Advertising Rules;
- 4.3.2 Annexure B - Table of earnings and disbursements, and;

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- 4.3.3 Annexure C - Signatures to the SP – IP agreement dated 18 October 2007 and a clause providing that the IP will abide by the WASPA Code and Advertising Rules.
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5 FINDINGS AND DECISIONS OF APPEALS PANEL

5.1 *Findings of the appeal panel*

- 5.1.1 With regard to condonation of the late response in providing appeal documentation:

5.1.1.1 The time from the adjudicator's report on 30 September 2009 to the appeal letter dated 10 June 2010, a period of some eight months, is excessively long, but nevertheless, not requiring condonation as WASPA had in fact accepted the appeal letter and referred the matter to the appeal panel. We note merely that extensions are entirely at the discretion of WASPA.

- 5.1.2 With regard to the lack of response by the SP to the complaint:

The panel can hardly be expected to commend the SP for its speedy resolution of the three similar complaints. Such behaviour, plus termination of the IP services is expected in terms of the Code. The fact remains that this complaint was not timeously addressed. Negligence or mistake, do not change the facts. The panel sees no reason why the SP did not respond to WASPA's formal notification of the instant complaint or to the reminder message, at the very least out of professional courtesy. Had it done so, it might well have avoided this matter going to formal adjudication and / or to appeal. We note also, the waste of time and resources as a result of this failure to respond. Had the SP responded, the adjudicator would have realised that the service was not a subscription service because it could not technically operate as a subscription service. In addition to finding that the SP breached section 4.1.1 and 4.1.2 of the Code, the panel formally reprimands the SP for its tardiness and waste of resources.

- 5.1.3 Content of the advertisement:

5.1.3.1 Our comments under section 2 of this appeal document are relevant. The SP bears the primary responsibility for the actions of the IP. The panel does not accept that the SP was merely a victim of fraud. See further comments at 5.1.5 below.

- 5.1.4 Sections of the WASPA Code of Conduct that were not contravened:

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- 5.1.4.1 The panel accepts the SP's contention that the service was not a subscription service. The adjudicator's finding of breach and the high quantum of the fine were based largely on the service being a subscription service. As this is incorrect, the finding of breach in relation to the subscription provisions of the Code must be overturned. It follows naturally, that the fine in relation to this breach, also falls away. The SP's appeal is upheld in this regard.
- 5.1.4.2 The panel upholds the adjudicator's finding of a breach of section 4.1.1 and 4.1.2 of the Code because the SP bears responsibility for the actions of the IP. Had it paid better attention to its relationship with the IP and the services offered by the IP, properly vetting them prior to publication and monitoring the publicised advertisement, this complaint, others like it and the so-called fraud, might have been avoided.
- 5.1.5 Liability of the SP:
- 5.1.5.1 Our comments under section 2 of this appeal document are relevant. The SP bears the primary responsibility for the actions of the IP. The panel has not had sight of the full agreement entered into between the SP and the IP. We are not sure what is meant by "*the agreement 'indicated'*" that the IP would be responsible for any contravention. It is unclear whether services were provided by the SP to the IP during the period from October 2007 when the contract was entered into and 2009 when the complaint arose. It is not clear whether the SP carried out a thorough due diligence in respect of the IP, but it seems to the panel that the SP did not fully apply its mind to the risks involved. It is clear that having done so now, the SP has now put in place additional measures to mitigate loss in such circumstances in the future, for example, in the form of a personal surety from directors of foreign IPs. The panel does not see the SP merely as a gullible victim of fraud.
- 5.1.6 Mitigating factor of binding the IP to the WASPA Code of Conduct:
- 5.1.6.1 The panel does not consider the SP's arrangements with the IP to be a mitigating factor. This is merely confirmation of compliance with the requirements of the Code – nothing meriting special attention or reward.
- 5.1.6.2 The panel does not regard the fact that the advertisement was flighted on www.gumtree.co.za to be a mitigating factor – if anything it indicates that the SP did not have proper control over the IP's activities, as it should have had. This is a normal business risk that should be addressed and / or avoided.
- 5.1.7 Scope of Damage:

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- 5.1.7.1 The panel agrees that the fine of R250 000.00 is high. It nevertheless wishes to place on record that had all of the subscription-related sections of the Code been breached as per the adjudicator's findings, this fine would have been appropriate. Given that our findings are now limited to a breach of section 4.1.1 and 4.1.2 of the Code, we have decided to reduce the fine.
- 5.1.7.2 The panel directs the SP to endeavour to contact the complainant through the network that debited the amount in the first place, and refund the R29.00.
- 5.1.8 Imposition of immediate sanction:
- 5.1.8.1 The panel is of the opinion that fines are capable of suspension pending appeal. The panel bases its finding on section 13.4.2 of the Code, which provides "*When determining sanctions, the adjudicator should take note of 13.3.15, and specify any sanctions that will not be suspended if an appeal is lodged. Sanctions that can be specified in this way include:*
- (a) Sanctions requiring a member to amend, suspend, or terminate a service being offered in breach of the Code of Conduct;*
- (b) Any sanctions imposed as a result of the failure of a member to comply with previous sanctions, as specified in 13.3.16.*
- 5.2 *Sanctions of the appeal panel*
- 5.2.1 Having regard to the grounds of appeal and mitigation:
- 5.2.1.1 The SP is to pay a fine of R20 000.00 to WASPA within 10 days of receipt of this report.
- 5.2.1.2 The SP is to make every effort to contact and refund the complainant.
- 5.2.1.3 The remaining sanctions imposed by the adjudicator are overturned.
- 5.3 The appeal fee is not refundable.