

**WASPA appeals panel
Complaint 6727**

REPORT OF THE APPEALS PANEL

Date: 15 June 2011

Service Provider: Blinck Mobile

Appellant and Information Provider (IP):

Complaint Number: 6727

Applicable versions: 7.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 5 June 2009 against Blinck Mobile.

1.2 The complaint related to several issues, of which 4 are appealed. The appeal relates to Clauses 9.2.2.1 of the Advertising Rules; Clause 11.1.10 of the Code, Clause 6.3.1 of the Code and Clause 11.1.2 of the Code.

1.3 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The appeal relates to Clauses 9.2.2.1 of the Advertising Rules; Clause 11.1.10 of the Code, Clause 6.3.1 of the Code and Clause 11.1.2 of the Code.

2.2 The Clauses in question are:

9.2.2.1. The T&C text must be in 12 point font size, or 50% of the largest access number on a Web page, whichever is the greater.

11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:
[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

6.3.1. For services such as MMS, that have specific handset requirements, advertisements must make it clear that the customer needs to have a compatible handset that has been correctly configured to use that service.

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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The findings of the adjudicator on these issues are:

3.1.1. Issue 4 – size of terms and conditions

The SP has conceded that the advertised terms and conditions for the service do not meet the minimum font size requirements of the Code read with section 9.2.2.1 of the Advertising Rules. The complaint of a breach of section 9.2.2.1 of the Advertising Rules is accordingly upheld.

3.1.2 Issue 6 – costs of service in activation message

The Code requires the cost of service and the frequency of billing to be presented, not the cost per SMS plus the number of SMS's in a billing period. The website

plainly informs that the service will be charged at “**R45/ week**” and, assuming that then is in fact the case, then the notification message ought to have done the same (i.e. “R45/week” and not “R15/SMS 3SMS/wk”). The complaint of a breach of section 11.1.10 is upheld.

3.1.3 Issue 8 – compatible handsets

Section 6.3.1. of the Code provides that “**for services such as MMS, that have specific handset requirements, advertisements must make it clear that the customer needs to have a compatible handset that has been correctly configured to use that service.**”

The word “**clear**” must be interpreted in the light of a specific advertisement. In the present matter the service provider provided a link in its terms and conditions to a list of compatible handsets. This link appears to have escaped the attention of the Monitor however this might have been due to the fact that the terms and conditions themselves are not presented in the minimum font size. The purpose of having a minimum font size in the Code is to ensure that terms and conditions are clear and easily legible. It is quite possible that compatible handset requirements could be made clear within the terms and conditions section of an advertisement however in this case the requirements were positioned in a link that was presented in a font size below the minimum prescribed size. In my opinion, the presentation of compatible handset requirements for this service was not sufficiently clear and a complaint of a breach of section 6.3.1 is upheld.

3.1.4 Section 11.1.2 must therefore be interpreted as prohibiting the bundling of any request to join a subscription service with a request to receive any specific sound

clip, ring tone, wallpaper item, image, video, game, text or MMS content or information.

In the present case, it is apparent that a subscription is intended to be activated when

the consumer requests the answer to the “Love Test”. The “Love Test” answer generated by the service would be a “**specific content item**” as contemplated by

section 11.1.2 of the Code. Following a request by the consumer for the answer the subscription is activated. In this sense the subscription activation is not an independent request but a bundled request that is entirely dependent on the Love

Test answer request.

The subscription activation process would comply with the consumer protection offered by section 11.1.2 of the Code if the Love Test answer were first generated for free or for a once off content item fee and, thereafter, the consumer was invited to independently request and transact for his or her subscription to the service at advertised rates.

The complaint of a breach of section 11.1.2 of the Code is accordingly upheld.

3.2 Sanctions

The following sanctions were given:

The SP is directed to:

1.1 immediately suspend the service and all billing for the service;

1.2 pay over to WASPA a fine of:

1.2.1 R25 000 in respect of the breach of section 9.2.2.1 of the Advertising Rules;

1.2.2 R25 000 in respect of the breach of section 9.3.1 of the Advertising Rules;

1.2.3 R25 000 in respect of the breach of 6.3.1 of Code;

1.2.4 R25 000 in respect of the breach of section 1.1.10 of the Code;
and

1.2.5 R100 000 in respect of the breach of section 11.1.2 of the Code;

4. **GROUND OF APPEAL**

Grounds of appeal for complaint 6727

4.1 The grounds for appeal are recorded (that is copied exactly as submitted, errors included) and paragraphed as follow:

4.1.1. Decision of the Adjudicator on issue 4: Size of terms and conditions

As mentioned in our initial response to this case, we've taken this campaign immediately off line the moment we were notified about the fact that the font size for the terms and conditions was not according the guidelines set by Waspa. Furthermore, we've started immediate action to rectify the font size for all other campaigns. The result of these actions was communicated to Waspa in the response to case #7010, also dealing with the size of the font used for the terms and conditions. On the 15th of July 2009 we've informed Waspa that all our campaigns were adjusted, and on the 17th of July 2009 Waspa notified Blink that, based on our actions which were reviewed by Waspa and the complainant, case #7010 was closed without further action or sanction. Therefore we are very surprised, that now Waspa has a different opinion and imposes a penalty upon Blink for the same breach, even though this breach was rectified long time ago. I hope that based on above arguments, the appeal panel will stick to the decision made in July 2009 and will drop the sanction of 25K Rand for this breach.

4.1.2 Decision of the Adjudicator on issue 6: Costs of service in activation message

As mentioned by the adjudicator, the Code requires the cost of the service and the frequency of billing to be presented. I truly have the opinion that the way the pricing was worded in the subscription instruction, R15/SMS 3 SMS/week, is a more accurate description of the pricing of the service than the way proposed by the Waspa monitor (R45/week), based on the following arguments:

- The customer is receiving (up to) 3 items per week, and each item costs 15R. Therefore the 15R price is the best indication of the price of the service.
- Since the customer is receiving (up to) 3 items per week on 3 different moments in time, the frequency of billing is 3 times per week. If we would have used R45/week, we would have raised the suggestion that there is only one billing moment (once per week), which is not the case. So the statement that our service costs R45/week is in fact incorrect.
- The customer can stop the service any time, not only once per week. So it happened in many occasions that a customer stopped the service in the middle of the week, which means that only part of the weekly charge was billed to the customer. So also here the pricing per SMS is more accurate than the pricing per week.

Furthermore I would like to comment on the following phrase of the adjudicator: "The website plainly informs that the service will be charged at R45/week and, assuming that then is in fact the case, the notification message ought to have done the same." As mentioned in the advertising rules, the pricing information in the price box on the right top of website should reflect the **full, potential**, upfront costs, which is not always the same as the actual costs. As mentioned in various examples on pages 41-60 the pricing in the price box (in the right top corner of each example) is on a more aggregated level than the actual (more detailed) pricing and frequency of the service (in the yellow box). So the statement made by the adjudicator that the pricing in the notification message ought to be the same as the pricing in the pricing box, is from my point of view not correct.

I hope the Panel agrees that, based on the above arguments, the statement “cost of service and frequency of billing” made in the Code in article 11.1.10 can be qualified (at least) as unclear and subject to different interpretations. The focus should be more on making the Code clearer, instead of imposing a sanction on an unclear statement.

4.1.3 Decision of the Adjudicator on issue 8: Compatible handsets

The Adjudicator claims that we are in breach of article 6.3.1 of the Code. This article is referring to “services such as MMS, that have specific handset requirements”.

The Adjudicator claims that the reference to the link in the terms and conditions is not clear enough, because of the fact that the font size used is not matching the guidelines set by Waspa. So in fact this is the same breach as the one in Issue 4, as discussed above. It would be unfair to sanction Blinck twice for the same breach.

Furthermore, it is stated by the Waspa Monitor that the only way the link becomes visible is by scrolling down “profusely” through the T&Cs, right to the end of the page. As can be seen by the scroll bar on the screenshots that were delivered by the Waspa Monitor, almost the full page is visible for the Waspa Monitor and I cannot deny that the Waspa Monitor needs to scroll down to see the link to the compatible handset list. But it needs to be recognized that for most users the link to the compatible handset list would have been visible in the screens without scrolling. As can be seen in the screenprints used by the Waspa Monitor, the Waspa Monitor has a large amount of menu-/tool-bars opened, which reduces the effective screen size significantly, and hereby causing the need to scroll down to see all information provided by Blinck. In a normal setting, the number of menu-/tool-bars does not exceed 4, whereby the Waspa Monitor has opened 6 lines of menu-/tool-bars.

4.1.4 Decision of the Adjudicator on breach of Section 11.1.2

It is stated by the Adjudicator that Blinck did not deal directly in its response with the Waspa Monitor’s complaint that the service breaches section 11.1.2. The explanation for not responding to the alleged breach of section 11.1.2 is that the Waspa Monitor did not explain why we were in breach of section 11.1.2.

We have carefully read the Adjudicator’s opinion on page 16 of the Adjudicator’s report, dealing with section 11.1.2, and must conclude that Blinck does not agree with the opinion of the Adjudicator.

The Adjudicator states that a subscription is activated when the consumer requests **the answer to the “Love Test”**. I admit that, if we would have promoted that the customer would receive the answer to the Love Test (“Get your score” or something along those lines), that this would be in breach of Section 11.1.2. But at no place in our advertisement we suggest that the user receives this answer. What we promote is the Love Test **application**, which is the first item in a range of “Test”-applications the consumer will receive. Also therefore we have included on the Call-to-Action page that the consumer will “Get this and many more games”, where 2 examples are displayed of other games the customer will receive. On top of that, on 3 occasions on every page, it is communicated to the customer that the service is a subscription service (right top corner, black bar and T&Cs). We feel that this makes it sufficiently clear to the customer that they will not receive a score, nor a single item, but that the customer signs up for a subscription service. As a consequence we feel that the complaint of breach of section 11.1.2 should be dismissed.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 5 June 2009. Version 7.0 of the Code, in use from 25 March 2009 to 17 June 2009, applies.

5.2 Finding

5.2.1 Issue 4 – Size of terms – Clause 9.2.2.1 of the Advertising Rules

5.2.1.1 It appears to be common cause that the Appellant was indeed in breach of this clause.

5.2.1.2 The Appellant's issue in this matter is that this relates to an error that was made across all its advertising. It undertook to amend this problem in all advertising, and has apparently done so. In another matter, this undertaking was accepted without sanction.

5.2.1.3 The Appellant is confused that there is now a sanction in this matter, and calls for its removal.

5.2.1.4 The Panel wishes to point out to the Appellant that WASPA decisions are made by a panel of adjudicators, and therefore there may be inconsistencies in the Adjudicator's approach – particularly with regard to sanctions. Much like a court system, there is an element of "luck of the draw" as to how "strict" an adjudicator you are assigned.

5.2.1.5 This having been said, the Panel agrees that there is an inequity in the results of the current approach.

5.2.1.6 **The sanction is therefore suspended for six months. Should the Appellant be found in breach of Clause 9.2.2.1 of the Advertising Code, or its successor in content, in 6 months from the date of this finding, the Appellant will immediately be subjected to the fine of R25 000,00, in addition to any other fine for the subsequent breach.**

5.2.1.7 The Panel believes that if the Appellant is indeed bona fides in its attempts to address this breach, this sanction should not cause any concern.

5.2.2 Issue 6 – Pricing wording – Clause 11.1.10

- 5.2.2.1 Clause 11.1.10 requires the following wording flow from a subscription confirmation: U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].
- 5.2.2.2 The Appellant used the following wording: Fill in this code 37375. Or reply OK.U will be subscribed TO WL TEST from Blink@R15/sms, 3sms/wk.Help?Call 0800980963. To unsubscribe:txt WL TEST STOP.
- 5.2.2.3 The Adjudicator felt that the sms should read "R45/week" as opposed to R15/sms 3sms/wk".
- 5.2.2.4 The Appellant has argued that the wording they chose is clearer, as it explains exactly what you get at what cost.
- 5.2.2.5 The Panel understands the Appellant's argument. However, it must be understood that the users of these services are frequently people with minimal literacy.
- 5.2.2.6 The layout of the pricing might confuse them, as it does not actually give the total cost per week. It relies on them to work it out. We speculate that this is exactly the reason for the strict requirements of Clause 11.1.10.
- 5.2.2.7 **For this reason, the Panel agrees with the Adjudicator's finding.**
- 5.2.2.8 We submit that the Appellant can find other ways to communicate that this will pay for 3 sms's.
- 5.2.2.9 However, we are satisfied that the Appellant appeared to be trying to comply with the clause, as the format is followed. In addition, they appear to have attempted to set the information out in what they believed was a clearer way. The Panel will give the Appellant the benefit of the doubt in this respect.
- 5.2.2.10 **The sanction is therefore removed.**

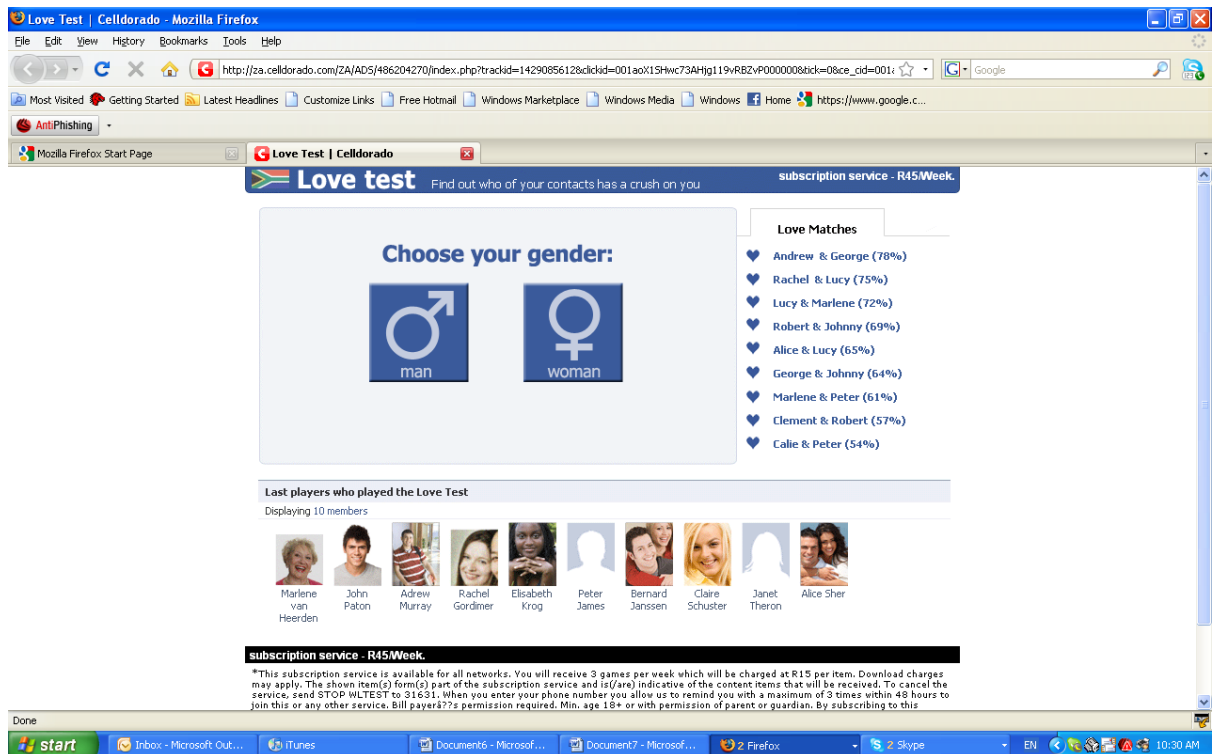
5.2.3 Issue 8 – Compatible handsets – Clause 6.3.3.1

- 5.2.3.1 The Adjudicator's issue in this matter is that the advertising did not clarify that you require certain handsets to receive the advertised service.

- 5.2.3.2 The Appellant pointed out that this is partially related to the font issue, addressed above. In addition, it submitted that there is a clear link to the compatible handsets which a normal user would see on the screen without scrolling.
- 5.2.3.3 This link is in the terms and conditions.
- 5.2.3.4 The Panel, however, takes issue with the inclusion of the compatible handsets as simply another term and condition.
- 5.2.3.5 The Panel is of the opinion that the requirement that the advertising make it “clear” requires something more than a hidden term in the small print (even if that small print is now bigger than in the advertisement before us.)
- 5.2.3.6 The Panel is of the opinion that the link to the compatible handsets should be in the body copy of the offer.
- 5.2.3.7 **Therefore, for differing reasons, the Panel concurs that there is a breach of Clause 6.3.3.1.**
- 5.2.3.8 **The sanction is, however, reduced to R 5000,00.**

5.2.4 Subscription services – Clause 11.1.2

- 5.2.4.1 Clause 11.1.2 requires that, “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.”
- 5.2.4.2 This requirement is really very simple – a consumer must not respond to a specific content offer and find themselves subscribed to a service.
- 5.2.4.3 The Appellant has argued that, “What we promote is the Love Test application, which is the first item in a range of “Test”-applications the consumer will receive.”
- 5.2.4.4 However, there is nothing in the original screen shot that supports this.



- 5.2.4.5 It clearly offers that you can “Find out who of your contacts has a crush on you”, implying that you will receive a specific content answer.
- 5.2.4.6 It is true that the words “subscription service R45/Week” appear, and are legible.
- 5.2.4.7 This does not, however, detract from the issue at hand which is that in responding to a specific content request, you will be subscribed.
- 5.2.4.8 **We concur with the finding of the adjudicator.**
- 5.2.4.9 In addition, we are of the opinion that the contents of this clause and the case history on this clause are clear. We find this attempt to side step this issue somewhat disingenuous.
- 5.2.4.10 **We therefore uphold the sanction of R100 000,00.**
- 5.2.5 **In summary:**
1. **On Clause 9.2.2.1 of the Advertising Rules, the sanction is suspended for 6 months;**
 2. **On Clause 11.1.10, the appeal on the merits fails, but the sanction is overturned;**
 3. **On Clause 6.3.3.1, the appeal on the merits fails, and the sanction is reduced to R 5000,00;**

4. **On Clause 11.1.2, the appeal on the merits fails, and the sanction remains R 100 000,00.**

5.2.6 The cost of appeal is non-refundable.