

**WASPA appeals panel  
Complaint 9354**

**REPORT OF THE APPEALS PANEL**

**Date:** 18 August 2011  
**Service Provider:** Teleplay Communications Close Corporation  
**Complaint Number:** 9354  
**Applicable versions:** Code v 9.0

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**1 BACKGROUND TO THE APPEAL**

- 1.1 This appeal is made by Teleplay Communications CC, the service provider (SP) and full member of WASPA that provided the IVR adult chat service which forms the subject matter for the complaint.
- 1.2 The panel has taken note of various communications between the SP, the WASPA Media Monitor, Integrat and Strike Media (the latter two being WASPA members), the outcome of which is that the SP was, following some early confusion, correctly identified. The communications record also shows the complaint moved from an informal complaint process, with a good deal of support for the SP from the Monitor and other WASPA members, to the formal complaints procedure under section 13.3 of the WASPA Code of Conduct.
- 1.3 In the report below, the panel will consider (i) the adjudicator's findings on breach and (ii) the reasons for the appeal and mitigation relating to the quantum of the fine imposed.
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**2 THE COMPLAINT**

**2.1 *The complainant***

- 2.1.1 The complaint was lodged by an individual who, while employed by a competitor of the SP, made the complaint on behalf of his father.

**2.2 *The subject matter of the complaint***

- 2.2.1 The complaint was made in response to an unsolicited SMS which read:

"M2M chatting live right now! 082 239 9449 xxx reply stp to opt out xxxx dial 082 239 9449"

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**3 DECISION OF THE ADJUDICATOR**

**3.1 *Findings of the Adjudicator***

- 3.1.1 The adjudicator found that the SP had breached sections 3.1.1, 4.1.1, 4.1.2, 5.1.5, 5.2.1(b), 6.2.2, 8.1.1 and 8.1.4 of the Code and sections 11.2.1 and 11.2.3 of the WASPA Advertising Guidelines (Rules)<sup>1</sup>.

**3.2 *Sanctions imposed by the adjudicator***

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<sup>1</sup> The sections of the Code and Advertising Guidelines quoted are fully detailed in the adjudicator's report and the Code itself. It is unnecessary to repeat them in this report.

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- 3.2.1 In imposing a fine of R300,000 the adjudicator took into account an earlier complaint, number 6542, citing the two similar breaches in that complaint (sections 8.1.3 and 8.1.4) as the reason for the punitive level of the fine imposed in complaint 9354.
- 3.2.2 The adjudicator proposed to suspend the SP's services until the fines for a previous complaint (6542) and this 9354 were paid in full.
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#### **4 GROUNDS OF APPEAL**

- 4.1 The SP's grounds for appeal and reasons for mitigation (together referred to as the SP's appeal) relating to the quantum of the fine, recorded in an undated document addressed to WASPA, have been summarised below.
- 4.2 The opening paragraph mentions (i) 'technical errors' in the process of lodging the complaint and (ii) the alleged dishonesty of the complainant.
- 4.2.1 Paragraph 1 - technical errors
- 4.2.1.1 In making the complaint the complainant declared that he had no affiliations with WASPA or its members. The complainant is in fact an employee of a competitor WASP.
- 4.2.2 Paragraph 2 - technical error
- 4.2.2.1 The adjudicator had taken note of the adjudication report for complaint 6542 without allowing for the fact that the matter was subject to appeal or that the fine imposed was subsequently reduced by an appeals panel.
- 4.2.3 The SP avers that the facts recorded in paragraph 1 and 2 should "abolish the legitimacy of the complaint and its sanction."
- 4.2.4 Paragraph 3 - the complaint
- 4.2.4.1 The relationship with the user
- 4.2.4.1.1 The SP confirms its intention to act honestly and in the best interest of its relationship with its customers. It avers that the complaint was made by a competitor seeking fault with its services to gain competitive advantage. Furthermore, that attempts to contact the complainant (user), had been unfruitful due to 'evasions' on the part of the complainant as he sought only to complain as opposed to seeking redress.
- 4.2.4.2 The call event made by the user
- 4.2.4.2.1 The user (being the person allocated the identified MSISDN) or someone on his behalf actively called the SP's IVR service and spent over 60 seconds on the line. This user actively agreed to the SP's terms and conditions, which included the provision that the SP may send marketing SMS to the user from time to time and provided for the user to opt-out of receiving messages at any time.
- 4.2.4.3 The SMS advertisement

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4.2.4.3.1 At the time of the complaint the SP's SMS advertisements were manually processed. This manual process resulted in a 'human mistake' on the 'side' of the SP in that an "old database was mixed up with a new database and a message with missing text was sent to this specific user". The SP has subsequently upgraded to automatic systems which should lessen the risk of such errors occurring in the future.

4.2.4.4 Good faith

4.2.4.4.1 The SP confirms its good faith and best intention to comply with the WASPA Code and not to "bother any end user". It confirms that there are numerous ways for consumers to contact the SP including, "automatic SMS customer service for opt out and an immediate live phone customer service line". It emphasises that it also provides "within our IVR service clear terms and conditions and also over the web at [www.3gxxx.co.za](http://www.3gxxx.co.za)"

4.2.4.5 In summary, the SP asks that WASPA reconsiders "fining Teleplay for these 6 main reasons":

4.2.4.5.1 The complainant provided false details.

4.2.4.5.2 The adjudicator's sanction was influenced by a previous complaint subject to appeal.

4.2.4.5.3 The complainant agreed to receive SMS notification by accepting the SP's terms and conditions and never elected to opt-out or to contact the SP's call centre.

4.2.4.5.4 The SP's attempts to contact the complainant were unsuccessful due to the competitor-complainant evading the SP.

4.2.4.5.5 Errors were caused by human error as a result of manual systems, subsequently rectified.

4.2.4.5.6 The enormous fine could lead to the SP's insolvency and impact negatively on employees and South African families.

4.2.4.6 Note

4.2.4.6.1 The final paragraph is a statement alleging that WASPA Secretariat staff agreed with the SP on the 'technical errors' and advised the SP to include details in this regard in the appeal.

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## **5 FINDINGS AND DECISIONS OF APPEALS PANEL**

### *5.1 Findings of the appeal panel*

5.1.1 With regard to the adjudicator's findings on breach

5.1.1.1 The panel upholds the adjudicator's findings of breach of the following sections of the Code:

5.1.1.1.1 5.1.2(b). The recipient did not have a direct and recent (within the last six months for commercial messages and three months in relation to adult

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services) relationship with the SP. The evidence provided relates only to a previous relationship with the identified a MSISDN, dating back to 2006.

- 5.1.1.1.2 6.2.2. The advertisement did not include the full retail price of the service.
- 5.1.1.1.3 8.1.1. The advertisement for the service was not clearly indicated as adult content.
- 5.1.1.1.4 8.1.4. The marketing message concerning adult content was sent to the user who had not made use of the service during the three preceding months.
- 5.1.1.2 The panel upholds the adjudicator's findings of breach of the Advertising Guidelines:
  - 5.1.1.2.1 11.2.1. The SMS text did not show access cost or terms and conditions for the service.
  - 5.1.1.2.2 11.2.3. The SMS text did not show details of the sender, a fact that contributed to the confusion mentioned at 1.2 above.
- 5.1.1.3 Resulting from the panel's findings of breach as set out above, the panel finds that sections 3.1.1 (professional manner) and 4.1.1 (fair dealings) have also been breached by the SP.
- 5.1.1.4 The panel does not uphold the adjudicator's finding of a breach of section 4.1.2 of the Code which requires an element of intention - the SP *knowing* that the dissemination of information is false, deceptive or likely to mislead. While we find a 4 year gap in communications unusual, we will accept human error as opposed to intention as the reason.
- 5.1.2 With regard to the reasons for the appeal and mitigation in terms of the quantum of the fine imposed:
  - 5.1.2.1 The panel finds that the status of the complainant is no impediment to the complaint. The WASPA complaints process is open to all consumers. The fact that the complaint was lodged by the user's son on behalf of his father is clearly recorded in the original complaint, and subsequently in various communications. The panel accepts that the reference to the complainant having no affiliation to WASPA or its members reflects the user's relationship, or lack of it, with WASPA and its members, and not that of the son who filled out the WASPA complaints form online on behalf of his father. The panel is fully aware of the highly competitive nature of the wireless industry, but the fact remains that the SMS advertisement breached the provisions of the Code and the Advertising Rules. It is this fact alone that has led to the sanctions against the SP.
  - 5.1.2.2 The panel has taken note of the SP's practice of measuring an incoming call to its IVR services in excess of 60 seconds as constituting consent to use the service along with the fact that its terms and conditions (Annexure A below), include implied consent to receive marketing messages. The panel finds however that the initial marketing message constitutes an unsolicited

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commercial communication which forms the basis of the complaint. The complaint related to receiving an unsolicited commercial communication in the first place. To aver that consent to receiving marketing messages arises following a timed but not positive response to an unwanted marketing communication is not compelling.

- 5.1.2.3 The panel is not concerned as to whether the SP's manual processes were affected by human error or that it has subsequently upgraded to automated systems. Compliance with the Code is mandatory for all WASPA members. Mistake is neither a reason for mitigation in terms of breach or in reduction of the sanction imposed.
- 5.1.2.4 The panel accepts the SP's good faith. It is not convinced of the 'numerous' ways for consumers to contact it. The SP has positive obligations to make information available to consumers. Conversely, there is no positive obligation on a consumer to contact the SP following unsolicited communications. Declarations of good faith are meaningless in the face of non-compliance with the Code and South African law relating to the provision of information to consumers and requirements for company forms which include web and .mobi sites.
- 5.1.2.5 The panel agrees that the adjudicator erred in taking note of complaint 6542 and most particularly, in increasing the fine based on the findings in that complaint and the so-called non-payment of the fine imposed in that matter. The panel agrees (i) that findings in a matter subject to appeal cannot influence a subsequent complaint and that (ii) non-payment of the previous fine is irrelevant due to the fact that fines are capable of suspension pending appeal.
- 5.1.2.6 While the panel has taken this into consideration in its sanctions imposed below, it is not swayed by the SP's declarations of possible insolvency and resulting negative impact on employees and South African families.
- 5.1.2.7 The panel does not accept that the complainant agreed to receive SMS notifications by accepting the terms and conditions following receipt of the message forming the basis of the complaint. To aver that agreement arose from something that was not requested in the first place, simply does not make sense.
- 5.1.3 The panel wishes to record that its mandate to apply the Code is independent of the mandate of the WASPA Secretariat. If indeed any discussions pertaining to technical errors took place between the Secretariat and the SP, we can only presume, from WASPA's perspective at least, that such discussions would have been of an advisory nature only, and not of an evidentiary nature. In any event, they have no influence on an appeals panel.
- 5.1.4 The panel has had some difficulty in determining an equitable sanction. In our view, while the breaches were serious, the fine was excessive. We are particularly concerned that SPs should not be allowed to "impose" consent on unsuspecting consumers. The difficulty in determining a reduction in the

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quantum arises from the fact that the adjudicator did not provide any breakdown in terms of quantum per breach nor, did he indicate what part of the R300,000 fine imposed was punitive, based on the erroneous findings set out in 5.1.2.5 above. It would be useful if adjudicators could provide more detail where large fines are imposed. The panel is nevertheless of the view that a large part of the fine imposed was most likely punitive and that this was not appropriate, which is the basis for the panel's substantial reduction in quantum. The fact remains that the breaches are significant and that insufficient information was provided by the SP in our view as to the reasons for them. If repeated, consumers would be seriously prejudiced and this, is the reason that we impose a not insignificant fine.

*5.2 Sanctions of the appeal panel*

5.2.1 The fine of R300.000 imposed by the adjudicator is reduced to R120,000.

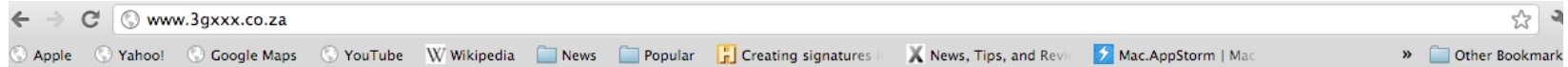
5.2.2 The fine must be paid to WASPA within 5 days of receipt of this report.

5.2.3 The balance of the adjudicator's sanctions are overturned.

5.3 The appeal fee is not refundable.

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### Appendix A



#### T&C for all IVR lines

This is an interactive voice system integrated with live chats.

The contents of this service are **NOT** suitable for persons under the age of eighteen. By using this service you confirm that you are eighteen years or older.

Calls to the service will be charged at value added services rates or premium rates.  
Free minutes don't apply!!  
No additional charge will be levied for the use of this service.

For your own security it is strongly recommended that you exercise a high degree of caution when interacting with other users. People may not be who they say they are.  
The company operating the system will not be held liable if the user elects to exchange contact details with other users.

Availability and waiting time for the Live chat subject to user's traffic on the line.

All rights in connection with content of this service are the sole property of the company operating this system. It is prohibited to record or to copy the content of the system or the basic idea of this service, partially or in full.

All endeavors will be made to ensure a strict adherence to our language policy. Material containing strong, abusive, discriminatory, profane or inappropriate language will be vetted and removed from the system.

The user hereby waives any claim or demand, if for some reason, technical or whatsoever that is beyond the control of the system if user is unable to access any of the available services.

Some of the conversation conducted thru this system shall be record from time to time for various reasons, the system / company shall be entitled to use these recordings at its own discretion.

The system will occasionally send out marketing material via SMS at no charge to you. You may request, at any time, not to receive SMS messages from the system by replying STOP to the SMS or contact our customer service during office hours.

The company operating the system reserves the right to change these terms at any time without prior notice or to change or discontinue any aspect of this service.

If you have a technical problem or you would like to tell us something, recommendations, advice on how to improve our services to you, you can get hold of our customer services at 082-239 9302 (VAS) Monday to Friday 10am to 17pm or send us e mail to info@teleplay.co.za

**We hope you will enjoy the system experience!**