

REPORT OF THE APPEALS PANEL

Date:

Appellant: Smartcall Technology Solutions (SP); Lessa Ltd (IP)

Complaint Numbers: 9792

Applicable versions: 9.0

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 9792. This arose from an anonymous complaint which was lodged on 21 June 2010. The adjudicator's report was issued on 21 September 2010. The members subject to this complaint are as listed above. While their identities as SP / IP are uncertain as discussed in paragraph 5.1, they will be identified as above for convenience. Smartcall Technology Solutions provided all responses to the initial complaint and lodged the appeal itself.
- 1.2 The facts of this complaint are remarkably similar to those in complaints 10512 and 10802, which are also before the panel.
- 1.3 The facts are briefly these: the complainant alleged that he received a "WAP push", which was unsolicited and consequently constituted spam. When he clicked on the link in the message, he was taken to a WAP site displaying a notification of adult content with text immediately below this requesting confirmation that the consumer is over 18, with a confirm link. Six or seven lines down from this link terms and conditions were displayed with pricing and an indication that the service was a subscription service. This text was not immediately visible on the complainant's cellphone screen, and he had to "scroll down" in order to view this text. The complainant could not provide screenshots to support this contention, but later provided screenshots of another related service. These screenshots did not show the six or seven lines between the "confirm" link and the terms and conditions, but did show that the visitor would have to scroll down at least one line in order to see the terms and conditions, which were not apparent immediately.
- 1.4 On the SP's version, the "WAP push" was in fact a confirmation as a result of the complainant's visit to the WAP site. The visit itself was initiated by the complainant clicking on a WAP banner on another WAP site which directed him to the WAP site complained of. As to the terms and conditions, the SP stated that they were located directly under the "confirm" button and provided a screenshot in support of this claim.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v9.0

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2.1 The adjudicator correctly applied version 9.0 of the WASPA Code of Conduct to this complaint, and cited some 12 sections thereof, which are reproduced here for convenience:

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.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

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.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

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

(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 and must be visible on the same screen as the link.

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

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8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.2.3. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

3 THE DECISION OF THE ADJUDICATOR

Spam (5.3.1)

- 3.1 The adjudicator noted that there was a difference of opinion between the complainant and the member as to whether the message received by the complainant was spam or a result of interacting with the WAP site. He then ruled that none of the preconditions for “legitimate” messages set out in section 5.2.1 had been met, and that consequently section 5.3.1 had been infringed.
- 3.2 The adjudicator did not decide whether the offending message was a confirmatory message or not. He took the unusual step of making his finding of a breach of section 5.3.1 contingent upon the complainant making the alleged spam message available to the WASPA Secretariat, failing which the ruling would be withdrawn.

Adult Marketing Messages (8.1.4)

- 3.3 The adjudicator also made an adverse ruling in respect of section 8.1.4, which forbids the sending of marketing messages for an adult service where a customer has not made use of the service in the preceding three months. This finding was also made contingent upon the complainant providing proof of the message in question.

WAP Site Requirements (6.2.12)

- 3.4 Section 6.2.12 deals with certain requirements for transactions initiated via, amongst others, WAP or a link in an MMS. The adjudicator found that the member had infringed sections 6.2.12 (b) and (c):

After carefully reviewing the landing page, as well as the screenshots provided by the Complainant, the Adjudicator does concur with the Complainant on its allegation that the SP does not comply with section 6.2.12's (sic) paragraphs (b) and (c). This is clearly visible from the SP's music site.

The SP's screenshot of the landing page in question, although different in spacing from the page allegedly made available to the Complainant, does

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not conform with the term “adjacent” and is most definitely not “visible on the same screen as the link”, therefore a clear breach of section 6.12.2(c) (*sic*).

- 3.5 The panel assumes that the “landing page” refers to the screenshot provided by the SP, as opposed to the screenshot of a related service (the “music site”) provided by the complainant. Nonetheless, the adjudicator does not make clear on what grounds he has found a breach of the relevant sections. While he accepts that there is insufficient proof that there were six or seven lines between the "confirm" link and the terms and conditions (as does the panel), he is not clear as to why the spacing does not conform with the term “adjacent”.
- 3.6 The panel also noted that the adjudicator referred to section "6.12.2" which does not exist in version 9.0 of the Code of Conduct, and assumes that this is an error on the part of the adjudicator who should have cited "6.2.12".

Notification of Subscription Service (11.1.1)

- 3.7 The adjudicator noted that the terms and conditions (presumably referring to those in the screenshot provided by the SP) did not prominently identify the service as a "subscription service", and that consequently there was an infringement of section 11.1.1 of the Code of Conduct.

Subscription Services and Minors (11.1.7 and 11.2.3)

- 3.8 The adjudicator noted that "No clear parent or guardian permission is deduced from the terms and conditions and the wording would indicate a breach of sections 11.1.7 and 11.2.3".

General Sections (4.1.1 and 4.1.2)

- 3.9 In light of the above infringements, the adjudicator also found breaches of sections 4.1.1 and 4.1.2 of the Code of Conduct.

Sanctions

- 3.10 The adjudicator imposed the following sanctions:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;

2. The SP shall send an sms notification, detailing such suspension, to all existing subscribers of the service (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites (irrespective of medium) that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.

4. The SP is fined:

4.1. R10 000 for its breach of sections 4.1.1 and 4.1.2 on the basis set out above;

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4.2. R 15 000 for its non-compliance with sections 5.3.1 and 8.1.4 pending the sending of the alleged message received by the Complainant to the WASPA Secretariat;

4.3. R 5 000 for its non-compliance with section 6.2.12 (c); and 4.4. R 50 000 for its contravention of sections 11.1.7 and 11.2.3, payable to the WASPA Secretariat within 5 (five) days notice hereof. The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.

4 GROUNDS OF APPEAL

4.1 The SP took issue with the adjudicator's decision in respect of each section breached, save 4.1.1 and 4.1.2:

Spam (5.3.1)

4.2 The SP continued in its assertion that the message in question was a confirmation of the complainant's MSISDN following a visit to the WAP site. It also noted that the sanction was subject to the complainant making available the alleged spam message.

4.3 Given that the adjudicator had tested the service in reaching his decision, the SP requested the opportunity to check the adjudicator's testing logs, as the sanction was imposed based on that testing.

Adult Marketing Messages (8.1.4)

4.4 The SP's submission in respect of section 8.1.4 was included in its submission in respect of 5.2.1 above.

WAP Site Requirements (6.2.12)

4.5 The adjudicator made his decision based on screenshots provided by the complainant and, the SP accordingly submitted that it should have sight of the screenshots so that it could comment on them.

4.6 The SP also noted that while the adjudicator found an infringement of section 6.12.2 (b) & (c), no such sections exist in the WASPA Code of Conduct version 9.0.

4.7 The SP submitted that neither the complainant nor the adjudicator took note of the fact that the cost and the service type (subscription service) is set out on the landing page of the WAP site. The terms and conditions are also clearly visible with the cost of service.

Notification of Subscription Service (11.1.1)

4.8 The SP submitted that the alleged spam message was sent to the complainant only after initial interaction with the service.

Subscription Services and Minors (11.1.7 and 11.2.3)

4.9 The complainant had to click to confirm that he was over 18 before the service would be provided, according to the SP.

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4.10 Further, the adjudicator in citing section 11.1.7, reflected it as:

Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

whereas the section should read as follows:

Promotions for subscription services must not appear in publications or other media specifically targeted at children.

4.11 Consequently, the SP took the view that the adjudicator did not apply the correct clauses of the Code of Conduct in deciding the issue.

General Sections (4.1.1 and 4.1.2)

4.12 The SP did not address the adjudicator's findings with respect to sections 4.1.1 and 4.1.2.

General

4.13 The SP made the following general comments:

The above decision was based not on facts but from the lack of evidence from the complainant. The complainant requested the WASPA Monitor to test the service and the WASPA Monitor reported that the service did not hide the terms and conditions and they were unable to produce hard evidence. The decision to make a concluding sanction that due to the accumulative breaches in the code results in further breaches of the code is not based on evidence but hearsay from the complainant. Each breach in the code needs to be sanctioned on its own and without evidence or actual testing the sanction cannot be imposed.

The above reports, based on the decisions of the adjudicator, clearly states that the adjudicator did not take all information provided in consideration. The code of conduct was incorrectly quoted and clause's that does not exist was used to make the decision.

Sanctions

4.14 No submission was made in respect of the sanctions imposed.

5 FINDINGS OF APPEALS PANEL

5.1 The adjudicator did not deal with the relationship between the SP and the IP, and the report heading cites the "WASPA Member (SP)" as "Lessa Ltd. | SP = Smartcall Technology Solutions". Whether this means that the IP was Lessa Ltd and the SP was Smartcall Technology Solutions, whether they were both SPs, or whether they are one and the same entity is not made clear, and the adjudicator should have established the exact relationship. Moreover, the adjudicator's adverse findings were made against the "SP" alone. Consequently the adjudicator is not clear whether he meant to make such findings against Lessa Ltd, Smartcall Technology Solutions, or both together.

5.2 Smartcall Technology Solutions in its appeal submits that it was the SP in this matter and that Lessa Ltd was the IP. It further states that Lessa Ltd is an

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“affiliate” of Smartcall Technology Solutions. It is not clear what this means in the context.

- 5.3 The panel has reviewed the original submissions and the SP’s appeal, and has reached the following conclusion. By describing the parties as he did in the adjudication heading, the adjudicator meant that both Lessa Ltd and Smartcall Technology Solutions should be regarded as the SP, and that consequently his decision and sanction were against both parties. The panel is however of the view that the adjudicator was incorrect in this regard. The only party fulfilling an “SP” role in this matter was Smartcall Technology Solutions, while Lessa Ltd fulfilled the “IP” role.
- 5.4 The adjudicator further erred in making a finding against Smartcall Technology Solutions; it was clearly the party fulfilling the “IP” role that was at fault in this matter. Consequently Smartcall Technology Solutions’ appeal is upheld in its entirety insofar as the adjudicator’s decision and sanctions applies to it.
- 5.5 The effect of the above would be that the adjudicator’s decision and sanction still stand against Lessa Ltd. The panel is concerned that correcting the adjudicator’s error in this case would have the effect of prejudicing Lessa Ltd by denying it an appeal. Consequently, the panel is prepared to accept that Smartcall Technology Solutions submitted the appeal in this matter on behalf of both itself and Lessa Ltd on the understanding that the adjudicator had made his ruling against them both, and that they were affiliated parties. The panel will apply the grounds of appeal raised by Smartcall Technology Solutions to the adjudicator’s decision in respect of Lessa Ltd.
- 5.6 Where the SP provides documentation that pertains to the IP, such as log extracts of interactions with the IP’s WAP site, the panel assumes that these logs originate from the IP.
- 5.7 The appeals panel will deal with the sections of the code of conduct that the adjudicator found had been infringed.

WAP Site Requirements (6.2.12)

- 5.8 The panel observes from having sight of the original case files that the screenshot of the “music site” landing page as displayed on the complainant’s mobile phone does not display the text required by section 6.2.12 when first displayed, and that the user must scroll down to access this text.
- 5.9 The service complained of however was not the “music site”. The adjudicator observed that while the complainant stated that the WAP site complained of had six or seven lines between the confirm “button” and the required text, this was not apparent from the “music site” screenshots. The panel takes the view that this apparent difference between the two undermines any probative value the screenshots of the “music site” may have had in determining the layout of the WAP site complained of.
- 5.10 The panel does not believe that it can find an infringement of section 6.2.12 in respect of the “music site” screenshot alone for two reasons. Firstly, the complaint relates to the adult service WAP site, and not to the “music site”. Secondly, on reviewing the original case file, the panel found that the SP was indeed not provided with copies of the screenshots of the “music site” that the

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complainant submitted nor given the opportunity to respond to them The SP's submission in that regard are noted and approved.

- 5.11 The adjudicator incorrectly cited section 6.12.2 in his decision instead of section 6.2.12. The panel is satisfied that this was an error – the correct section number was cited in the report's section headed "Sections of the Code Considered". The same is true of the adjudicator's incorrect quote of section 11.1.7. The errors were obvious and were clearly picked up by the SP which suffered no prejudice in the panel's view. The correct citations have been set out by the panel, and the adjudicator's report is amended accordingly.
- 5.12 The SP's submission that the relevant text was available on the landing page misses the point: the text was not immediately visible to users.
- 5.13 Notwithstanding, in the absence of sufficient evidence of an infringement, the panel upholds the IP's appeal in respect of an infringement of section 6.2.12.

Notification of Subscription Service (11.1.1)

- 5.14 The panel has viewed the screenshot that the SP provided of the WAP site "landing page" for the service complained of. The only mention of a subscription service on the page is contained in the terms and conditions, the relevant portion of which reads as follows:

Strictly 18+. Clicking confirm will initiate an adult subscription service.

- 5.15 The panel agrees with the adjudicator's assessment that this does not constitute prominent and explicit notification of subscription services as required in section 11.1.1 of the Code of Conduct. Even if the terms and conditions were immediately discernible by consumers when they viewed the landing page, such oblique phrasing is certainly not sufficient to draw attention to the fact of the subscription service. The context further confuses the user, who would be under the impression that he or she is merely confirming his or her age, not actually agreeing to the subscription service.
- 5.16 The IP's appeal is thus not upheld in respect of section 11.1.1.

Subscription Services and Minors (11.1.7 and 11.2.3)

- 5.17 The panel could find no indication in the original complaint submissions that either the alleged "WAP push" or the WAP site "landing page" were specifically targeted at children. Moreover, there is no allegation in the original complaint of a failure to ensure that children accessing the subscription service had the permission of a parent or guardian. Not only is there no evidence to support the adjudicator's findings of infringements of sections 11.1.7 and 11.2.3, but even if there were, the SP was not given the opportunity to respond to these alleged infringements, which were seemingly inserted by the adjudicator on a whim.
- 5.18 Accordingly the IP's appeal in respect of sections 11.1.7 and 11.2.3 is upheld.

General Sections (4.1.1 and 4.1.2)

- 5.19 As a consequence of the panel's rulings above, the adjudicator's findings in respect of sections 4.1.1 and 4.1.2 must also be revisited, in that they were

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founded upon the cumulative effect of the adjudicator's decisions on other sections.

- 5.20 There is insufficient evidence to support a finding of dishonesty or unfairness in this matter, and consequently the adjudicator's decision in respect of section 4.1.1 cannot be supported.
- 5.21 There is also insufficient evidence that the IP knowingly disseminated information that was false or deceptive or likely to mislead by an accuracy, ambiguity, exaggeration or omission. Consequently the adjudicator's decision in respect of section 4.1.2 can also not be supported.

Automatic Subscription (11.2.1)

- 5.22 In scrutinising the original complaint documentation, it appeared to the panel that a consumer could easily be misled by the text of the landing page to click on the "confirm" button in the belief that he or she was merely confirming his or her age, whereas in fact doing so had the effect of subscribing the consumer to a subscription service. This in the panel's view would constitute an infringement of section 11.2.1 of the WASPA code of conduct.
- 5.23 Unfortunately, this aspect was not raised in the complaint, the members were not given an opportunity to respond to any such allegation, and accordingly the panel cannot find that either member has infringed this section. Nonetheless, the members' attention is drawn to the provisions of this section, and they are strongly advised to change this signup process to avoid an infringement in future.

Spam (5.3.1)

- 5.24 It is not clear to the panel why the adjudicator did not simply ask the complainant for proof of the offending message while dealing with the adjudication in the first place.
- 5.25 The WASPA Secretariat has indicated that the complainant never provided it with a copy of the offending message. The panel believes that it is reasonable to assume that the complainant would have read the adjudicator's report and submitted a copy of the message if it was available. Consequently, on the terms of the adjudicator's ruling, the adverse finding in respect of section 5.3.1 cannot stand. Put another way, the adjudicator's ruling in this regard was subject to the condition precedent that a copy of the offending message be provided; as the message was never provided, the ruling is inchoate. The IP in effect does not have any ruling to appeal against. The appeal is upheld in respect of the adjudicator's finding of a breach of section 5.3.1.
- 5.26 In light of the above, the panel does not see how access to the logs of the adjudicator's tests as requested would have been of any assistance to the SP.

Adult Marketing Messages (8.1.4)

- 5.27 The appeal in respect of section 8.1.4 is upheld for the same reasons given for upholding the appeal in respect of section 5.3.1.

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Sanctions

- 5.28 The panel has only upheld the adjudicator's decision in respect of section 11.1.1, but the adjudicator did not impose any sanction specifically in respect of that section. Notwithstanding, the sanctions numbered 1, 2 and 3 in the adjudicator's report are appropriate to this infringement, and are sustained by the panel with the replacement of the identifier "SP" with "IP".
- 5.29 The adjudicator did not impose a fine in respect of section 11.1.1. Nonetheless, the panel is of the view that the adjudicator erred in failing to impose a fine, and proposes to do so.
- 5.30 In determining the original sanctions, the adjudicator took into account the SP's prior record with respect to breaches of the relevant sections of the Code of Conduct and "the SP's subsequent response". He however did not specify either what these were or whether these factors had a mitigating or aggravating effect upon the sanctions imposed. The panel has moreover found that the SP was incorrectly sanctioned (though the adjudicator may very well have been referring to both parties when using the term "SP").
- 5.30.1 Lessa Ltd had no record of complaints before this matter.
- 5.30.2 The panel could find no evidence of intent to mislead consumers in the infringement of section 11.1.1, which is not to say that no such intention existed. If such an intention had been found, it would have been a significant aggravating factor.
- 5.31 Consequently Lessa Ltd is fined the amount of R50 000 for its infringement of section 11.1.1 in this matter, of which R30 000 is suspended on condition that it does not infringe this section for a period of six months from the date of publication of this report..
- 5.32 The SP's appeal was successful, and accordingly its appeal fee is to be refunded in full.

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