

WASPA appeals panel
Complaint 9762 and 9809

REPORT OF THE APPEALS PANEL

Date: 13 December 2011

Appellant and Service Provider: Zed Mobile

Information Provider (IP): /

Complaint Number: 9762 and 9809

Applicable versions: 9.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns two complaints. One was lodged on 23 June 2010 by the Waspa monitor, and the other one in June 2010 by a consumer.

1.2 In essence, the Appeal relates to commercial for downloadable content that would result in the consumer being entered into a competition. The mechanisms of the competition involve an accumulation of points.

1.3 While the two complaints differ in format and detail, they essentially relate to the same issues and as such the matter will be considered as one.

1.4 While many issues were raised in the original matter, only certain findings are on Appeal. The considerations of this Panel are limited to those issues.

1.5 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 several issues. The related clauses are:

- 3.3.1 Members will not offer or promise services that they are unable to provide.
- 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.
- 6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.
- 9.1.2. Any promotional material for a competition service must include details of how the competition operates.
- 9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:
 - (a) the closing date;
 - (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
 - (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
 - (d) any significant age, geographic or other eligibility restrictions;
 - (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;
 - (f) the entry mechanism and workings of the competition.
- 9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:
 - (a) how and when prize-winners will be informed;
 - (b) the manner in which the prizes will be awarded;
 - (c) when the prizes will be awarded;
 - (d) how prize-winner information may be obtained;
 - (e) any criteria for judging entries;
 - (f) any alternative prize that is available;
 - (g) the details of any intended post-event publicity;
 - (h) any supplementary rules which may apply;
 - (i) the identity of the party running the competition and responsible for the prizes.

4 FINDINGS AND DECISIONS OF THE ADJUDICATOR

4.3 Finding of the Adjudicator

In essence, the Adjudicator breaches of the above sections.

The full details of the 3 findings are available on the WASPA website. Some of the relevant details will be discussed below in the discussion of the findings of this Panel.

4.4 Sanctions

The Adjudicator made the following findings in relation to sanctions, quoted verbatim:

“The Member has been found to have infringed sections 3.3.1, 4.1.2, 6.2.4, 9.1.2, 9.1.4, and 9.1.5. The Adjudicator does not find it feasible to impose separate sanctions for the discrete infringements, and imposes the following sanction in respect thereof:

70.1. The Member is fined the amount of R50 000, payable to the WASPA Secretariat within 5 business days of notification of this report.

70.2. The Member is to refund all monies paid by consumers in respect of this service from the date that it went live until the 27th of June 2010 or the date on which the Member ceased to process payments in respect of the suspended service, whichever is later. For the avoidance of doubt, this order does not apply to monies accruing to the Member after the service was resumed on or about the 8th of July 2010. The Member is to provide proof of fulfilment of the refund to the WASPA Secretariat within 10 business days of notification of this report.

71. Mira Networks acted as the service aggregator in this matter, and was informed of the possible breach before the service was launched. Despite having the benefit of this warning, Mira Networks nonetheless allowed the service to proceed. Mira Networks was not the subject of these complaints and was not given the opportunity to respond. The Adjudicator consequently makes no ruling in respect of Mira Networks, but nonetheless wishes to express his displeasure at its conduct. The WASPA Secretariat is consequently requested to forward a copy of this report to Mira Networks.”

5 GROUNDS OF APPEAL

For ease of reference, the grounds of Appeal will be discussed below under each separate issue.

6 FINDINGS OF APPEAL PANEL

6.3 Version of the Code

6.3.1 Version 9.0 of the Code applies to this matter.

6.4 Finding

Background

6.4.1 The Adjudicator summarised advertising of the competition as follows, and the Panel concurs with this description:

The service in question was widely advertised on national television and its provision was apparently intended to correspond with the period of the Soccer World Cup hosted in South Africa in June and July 2010. The Adjudicator was provided with six versions of the television commercial for the service, as provided to the WASPA Secretariat by the WASPA Monitor in an email of 23rd June 2010. The following was common to all of them.

4.1. “18+” appeared in the top left-hand corner of the screen, and “R7,50 / SMS” in the top right-hand corner.

4.2. Immediately above the prescribed field at the bottom of the screen displaying terms and conditions, a horizontal bar was displayed. This bar displayed text and by rotating along its horizontal axis repeated the following in sequence:

- “R100 000 every day”
- “R200 000 every Sunday”
- “and a final R1 000 000”

4.3. Immediately to the right of this text the words “SMS DISKI to 37374” appeared in a circular background superimposed over the bar.

4.4. Terms and conditions were then displayed as follows:

You will be charged R7.50 per download. Obtain bill payers consent before using this service if under 18. Errors billed & free SMS's do not apply. Premium rates & WAP charges apply. Help [0861 number listed]. Check handset compatibility and T&C at www.soccachampions.co.za. Artist names are for identification of tones only. Tones are not extracts of original recordings by named artists, nor are they endorsed by those artists or record companies. WAP is required. Competition closes on 11 July 2010.

4.5. All six advertisements featured a television presenter called “Nathi”. In each advertisement she would appear in a different context in company with a different other character. In one advertisement we see Nathi being interviewed and describing the service; in another she is to be seen with someone who is in the role of a weather forecaster, and so forth. In all the advertisements the following information is contained in the audio stream:

- Consumers should SMS the word “DISKI” to the short code “37374”.
- Consumers will get downloads (it was never stated how many)
- Consumers will stand a chance to win R100 000 every day, R200 000 on Sundays and R1 000 000.

- Consumers will stand a chance to participate in a game show to be presented by Nati called “Soccer Champions”.

6.4.2 The Adjudicator described the mechanics of the competition as follows:

The service operated on the following basis:

21.1. After viewing promotional material, the consumer SMSes the word “diski” to the short code 37374.

21.2. A welcome SMS is sent back to the consumer.

21.3. SMSes are sent to the consumer with questions to be answered. Answer SMSes are charged at R7.50 each. Each correct answer earns the consumer points in the competition. As many of the questions are not capable of being judged as correct or not (e.g. asking the consumer’s name), is not clear how these points are allocated.

21.4. Each answering SMS from the consumer entitles the consumer to download 5 content items from the Member’s WAP site.

21.5. An SMS to the short code would also enter the consumer in the competition draw(s) as discussed below.

21.6. The competition itself was to last for 42 days – from 31st May until 11th of July 2010. During this time draws were to take place for R100 000 every day, R200 000 every Sunday and R1 000 000 at the end of the competition.

22. According to the full terms and conditions, no payment is required for entry into the competition draws, but that document also states that each purchase gives “... a free entry for the different draws depending when the participants have purchased the content” and later, “The Participant that purchases content ... enters freely into the draws of the day the Participant has purchased the Content.” and later, “Each draw consists of general knowledge questions and other non-skill games where the consumer will get points for answering correctly or being lucky in the non-skill games. Each point is a participation in the draw.”

Finding on Clause 3.3.1

3.3.1 Clause 3.3.1 states, “Members will not offer or promise services that they are unable to provide.

- 3.3.2 The Adjudicator found the Appellant in breach of this clause as both the Waspa Monitor, and the Waspa Tester were unable to download the purchased content.
- 3.3.3 The Appellant submitted that the Tester was unable to download the content due to a technical problem on 22 June 2010. It also submitted that it refunded members accounts for that day.
- 3.3.4 It appears from the Monitor's initial submissions that the Monitor did not in fact attempt to download the content, as she never received a link. The Appellant submitted that she did in fact receive a link, and this was confirmed by the records.
- 3.3.5 It is therefore incorrect to say that the Monitor could not access the content as, for whatever reason, she did not try.
- 3.3.6 At the risk of sounding cynical, the Panel does find it an extra-ordinary coincidence that the ONE day that the Appellant experienced technical problems was also the one day that Waspa tested the link.
- 3.3.7 That having been said, there is no reason to find that the Appellant is lying in this regard. In addition, the Appellant does appear to have refunded the loss to members.
- 3.3.8 **We therefore overturn the finding in relation to Clause 3.3.1 and uphold the Appeal in this regard.**

Finding on Clause 4.1.2

- 3.3.9 Clause 4.1.2 says, "Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission."
- 3.3.10 The Adjudicator discussed the fact that the Appellant got Waspa feedback prior to running this campaign, and found that, "Amongst these criticisms was that the consumer would not know what he or she was purchasing. Hence the Member cannot be said not to have known that it's promotional material in respect of the service was confusing, and consequently the Adjudicator finds that the Member has infringed section 4.1.2 of the Code of Conduct."
- 3.3.11 The Appellant submitted that the advertisements very clearly state that what the consumer gets is downloadable content with free entry to a

competition. The Appellant noted that the consumer complainant appears to be, at the Adjudicator's own description, "foolish".

3.3.12 It must be said that the consumer complainant does appear to have behaved recklessly – spending R8000 on this competition on her employer's phone. The fact that consumers may be foolish does not, however, exonerate the Appellant from advertising clearly.

3.3.13 It is the opinion of the Panel that the Appellant has been somewhat disingenuous on appeal, referring only to the communications in the television commercials. It is absolutely clear from the Adjudicator's decision that it is not the content of the television commercial per se that is of concern, but rather the content of the ongoing SMS's once one engages with the competition.

3.3.14 These SMS's are worrying for a number of reasons:

- It is unclear how the points are earned – especially as one appears to earn points and "congratulations" for wrong answers;
- It is unclear how the points translate into entries in the draws;
- It is unclear when the draws happen;
- It is unclear what downloads you are actually purchasing;
- From the unfortunate behaviour of the consumer complainant, it appears that you can earn points ad infinitum without any explanation or indication that points have expired, and of who has won the draws, if anybody.

3.3.15 Given this, and given that the television commercials shed no light on these mysteries, this Panel strongly agrees that the information in the communications is misleading. It also appears that the Appellant did so "knowingly", as it was previously warned that the information was unsatisfactory.

3.3.16 **The Appeal on Clause 4.1.2 is unsuccessful and the Adjudicator's finding stands.**

Finding on Clause 6.2.4

3.3.17 Clause 6.2.4 says, "Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications

required for that transaction. A clear indication must always be given that more premium messages are required.”

- 3.3.18 The Adjudicator found that, “The terms and conditions displayed on the television advertisements however say that R7.50 will be charged for each download. The SMSes sent to consumers in response to SMSes sent to the short code are not consistent with this. Some of the SMSes sent to the Monitor state that R7.50 is charged for 5 downloads, while those containing questions to be answered make no mention of downloads, and thus could be taken to mean that the R7.50 is in respect of the competition draw, though on the Adjudicator’s understanding the consumer was actually “buying” 5 items of content for his / her R7.50. Several of these SMSes also neglect to mention that R7.50 will be paid per SMS sent.”
- 3.3.19 In appealing, the Appellant first quotes the terms and conditions which state, “R7,50 per SMS”. The Appellant then makes the leap that every SMS entitles you to 5 items of content and that you are therefore paying R7,50 per download. So even in the Appeal, the Appellant is not exactly clear on whether this price is per SMS or per download.
- 3.3.20 This would not be a problem if every SMS clearly resulted in download, but the Panel is not happy that this is the case.
- 3.3.21 The first SMS for example, said, “Congats!Welcome 2 da game on SABC!MIL bucks waitin 4U!U could b awarded ur 1st R100000 today & b a TVstar!We need ur NAME now!Just send ur NAME to 37374.R7.50”. While the Waspa monitor did not get offered any content in exchange for her name, she was certainly charged R7,50.
- 3.3.22 In addition, if the R7,50 were indeed for the downloads, it would be charged at the time of downloading the content – or possibly on sending the download link.
- 3.3.23 It is, however, charged per SMS sent.
- 3.3.24 Given that the commercial refers to R7,50 per download, and that the Appellant itself seems somewhat confused about this issue. We find that the pricing is indeed misleading.

3.3.25 The appeal on Clause 6.2.4 is dismissed and the finding of the Adjudicator is upheld.

Finding on Clause 9.1.2, 9.1.4 and 9.1.5

3.3.26 These clauses relate to the information that must be available to a consumer entering a competition.

3.3.27 The Adjudicator said, “Even if we assume that the full terms and conditions were available at the time of the alleged infringement, the manner in which the qualification for draws and the point system was described therein is opaque to the Adjudicator, let alone to a consumer, and the Member has thus infringed section 9.1.5. Consequently, the Adjudicator finds that the Member has infringed sections 9.1.4 and 9.1.5 of the Code of Conduct, and by extension also section 9.1.2.”

3.3.28 The Appellant submitted that the consumer complainant’s behaviour was not reasonable. While the Panel essentially agree with this conclusion, it does not mean that the Appellant can communicate in an unclear and misleading way.

3.3.29 In its Appeal, the Appellant have said that the terms and conditions clearly say that “each point a participant gets is worth one participation”.

3.3.30 In the first place, in terms of Clause 9.1.4, the workings of the competition must be described in the promotional material for the competition, and not just in the website terms and conditions. The workings of the point system are not clear from the television commercial, or from the sms’s urging one to enter again.

3.3.31 In the second place, the sentence “each point a participant gets is worth one participation” is itself mystifying. What is “one participation”? An entry in that day’s draw, or all the draws? When does it expire?

3.3.32 The Panel agrees that the Appellant is in breach of Clause 9.1.2 and 9.1.4 in this respect.

3.3.33 The Adjudicator found that there was an infringement of Clause 9.1.5 because the terms and conditions were not available on the website.

3.3.34 The Panel will give the Appellant the benefit of the doubt as to the technical events of 22 June 2010, and overturns this finding.

Sanctions

3.4 While aspects of the Appeal were successful, the Panel is of the opinion that the meat of the Appeal was dismissed and that the behaviour of the Appellant in this matter was overwhelmingly unethical.

3.5 The sanctions as handed down by the Adjudicator are upheld:

- The Member is fined the amount of R50 000, payable to the WASPA Secretariat within 5 business days of notification of this report.
- The Member is to refund all monies paid by consumers in respect of this service from the date that it went live until the 27th of June 2010 or the date on which the Member ceased to process payments in respect of the suspended service, whichever is later. For the avoidance of doubt, this order does not apply to monies accruing to the Member after the service was resumed on or about the 8th of July 2010. The Member is to provide proof of fulfilment of the refund to the WASPA Secretariat within 10 business days of notification of this report.
- Mira Networks acted as the service aggregator in this matter, and was informed of the possible breach before the service was launched. Despite having the benefit of this warning, Mira Networks nonetheless allowed the service to proceed. Mira Networks was not the subject of these complaints and was not given the opportunity to respond. The Adjudicator consequently makes no ruling in respect of Mira Networks, but nonetheless wishes to express his displeasure at its conduct. The WASPA Secretariat is consequently requested to forward a copy of this report to Mira Networks.

3.3.1 The cost of appeal is non-refundable.