

Exactmobile (PTY) LTD

APPELLANT

In respect of BNT

16<sup>th</sup> of February 2006

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## DECISION

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### Background:

The original complain alleged that the SMS messages of Respondent didn't indicate the originator it required a premium rated SMS to STOP and the price of the 32268 number wasn't displayed. Following adjudication against MTN Airborne in which the adjudicator found that the Respondent had breached the Code of Conduct ("Code"), the Respondent lodged an appeal. The subject-matter of the appeal relates to a breach of paragraphs 4.1.1, 4.1.2, 6.2.4 and 6.2.5 of the Code. As indicated above, these relate to ambiguity relating to pricing as well as the cost of the unsubscribe service.

Following adjudication against Exactmobile (Pty) Ltd, the Respondent lodged an appeal against the Adjudicator's ruling.

### The adjudicator's ruling:

The adjudicator's ruled that the Respondents were guilty of a breach of the Code of Conduct ("the Code") in that –

- The pricing information in the initial SMS message is confusing and it is unclear whether the R10 price refers to the price of a content request or the unsubscribe option or both. The Respondents knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission a breach of clauses 4.1.1, 4.1.2 and 6.4.2 of the Code;
- Two of the SMS samples did not indicate the message originator which constitute a breach of clause 5.1.1 of the Code;
- The SMS samples did not include the name of the WASP of information provider which constitute a breach of clause 6.2.6 of the Code;
- The use of a premium rated number for a recipient to remove himself from the originator's database is a breach of clause 5.1.4 of the Code; and

- The SMS and MMS examples submitted by the complainant do not indicate that the service is an adult service which constitutes a breach of clause 8.1.1 of the Code.

### **Grounds of Appeal:**

The Appellant conceded that they had breached the Code in so far as the name of the WASP or the information provider didn't appear in all advertisements for premium-rated services (as is required in clause 6.2.6 of the Code). This matter will therefore not be traversed any further in the consideration of the appeal save to confirm the adjudicator's determination in that regard. The Appellant denies liability for breach of clauses 6.2.5 and 5.1.3. As the Adjudicator did not make rule that these clauses of the Code were breached, these allegations are not taken into account.

The Appellant's grounds of appeal are as follows:

- **Ad point 1 of appeal:** The Appellants argue that the example SMS is correct and there is no confusion as to the cost of the MMS nor of the unsubscribe service as referred to in breach 6.2.5 nor 4.1.1 nor 4.1.2 nor 6.2.4. The Code provides in 4.1.1 that 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. The Appellant argues that pricing is given clearly it is then repeated in all outbound MMS requests, the customer may use a R7.50 short code after expecting to pay R10. Thus they are pleasantly surprised to find that they have only paid R7.50 this is not only NOT misleading but is to the benefit of the consumer. As to the breach of 4.1.2 of the Code, namely that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission, the Appellant argues that the client has multiple opportunities to remove themselves from the BNT data base. As such, this is thus not misleading to the consumer through any form of ambiguity or exaggeration. It is also notable that any consumer that has shown the Technical ability to set-up and provision their phone for MMS is more than capable of reading and understanding all marketing material, and if they are not able, a land line phone number is provided for the consumer to remove themselves and for that matter clarify anything around the BNT service offering.
- **Ad point 2 of appeal:** The Appellant argues that as clause 11.3.2 of the Code provides that all subscriptions services must have an unsubscribe facility of no more that one rand and as the short code 32391 is clearly a R1 (one rand short code) there is clearly no breach of clause 5.1.4 of the Code.
- **Ad point 3 of appeal:** As far as the breach of clause 8.1.1 is concerned, the Appellant argues that all advertising material complies with the ASA and FSB standards and as such does inform the client that this is an Adult service when they are interacting DURING the

watershed hours provided for ADULT advertising. As such every reasonable step has been taken to ensure the people under the age of 18 do not have access to the content.

The final adjudication in this case follows:

### **Ad point 1 of the Appeal**

Without going into the specifics of the complaint and the submissions made in the appeal, the manner in which the cost structure is advertised can only be described as confusing.

The consumer has to negotiate a complex maze of prices in order to arrive at what may be the appropriate price for the service they may be seeking. At their most benign the manner in which the prices are displayed can only be described as user unfriendly. Without inquiring into motive or intention it becomes very apparent that the end result is very confusing and misleading to the consumer. The panel had difficulty deciphering the cost of the various services offered.

We concur with the adjudicator's finding in this regard. This ground of appeal is rejected.

### **Ad point 2 of the Appeal**

The Appellant used a premium-rated number. It is irrelevant what the premium rate is.

We concur with the adjudicator's finding in this regard. This ground of appeal is rejected.

### **Ad point 3 of the Appeal**

The Appellants argue that all advertising material complies with the ASA and FSB standards and as such does inform the client that this is an Adult service when they are interacting DURING the watershed hours provided for ADULT advertising. As such every reasonable step has been taken to ensure the people under the age of 18 do not have access to the content. The Appellants did not address the Adjudicator's concerns, namely the failure to indicate the nature of the service in the SMS and MMS examples.

Members are accountable to WASPA for the rendering of services to customers in accordance with the Code of Conduct. The fact that the advertisements complied with the ASA and FSB standards is irrelevant, the SMS and MMS messages did not comply with these requirements.

This ground of appeal is rejected.

We concur with the adjudicator's finding in this regard. This ground of appeal is rejected.

**Decision:**

Insofar as a breach of paragraph 5.1.2 of the Code is concerned, the panel confirms the ruling of the Adjudicator that the Respondent's admission amounted to an admission of a breach of clause 5.1.2 of the Code. The panel is of the view that the reasons given by the appellants, namely that the subscriber had forgotten to unsubscribe after testing the system are incredulous. The appellants also indicate that they only started receiving the "stop DB yesterday" meaning the 21<sup>st</sup> of September 2005 as can be gleaned from their communication to WASPA. It is noteworthy that from the dates in which the complainant said she had been receiving these messages up to the time in which the appellants said they were able to remove individuals who unsubscribed from the system, a continuous breach of the Code was occurring.

The imperative for the SP to remedy the breaches identified in the report in all future advertising cannot be overemphasised. The same goes for other role players in the industry.

We find that the Appellant, Exactmobile (Pty) Ltd, contravened the Code of Conduct relating to the original complaint on the provision of information to clients and adult content.

The panel agrees with the sanction imposed by the adjudicator and will leave these as they are. The appeal is accordingly overruled and the decision of the Adjudicator is confirmed.

The adjudicator's ruling and the fine imposed in the sanction is therefore upheld.

On that basis, we reject the Appeal.

**THE APPEALS PANEL**

**16th of February 2006**