



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Integrat
<b>Information Provider (IP)</b> (if any)	Glomobi
<b>Service Type</b>	Subscription
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	2048
<b>Date received</b>	10 September 2007
<b>Code of Conduct version</b>	5.3

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### Complaint

The Complainant, an anonymous competitor, alleged a breach of section 11.1.2 of the WASPA Code of Conduct which prohibits the “bundling” of requests for specific content items with requests to join a subscription service.

The detailed complaint states:

“Glomobi/Integrat are running several TV adverts featuring blatant bundling. The first showcases three different baby sounds, all with different keywords (B1, B2, B3) and invites users to sms in the relevant keyword to 31944 to receive the baby sound they want. When a user sends in a keyword (B1, B2, etc) he/she is sent the item and automatically subscribed to the service. Other similar ads flighted include Sounds (keywords S1, S2, S3) and Car Alarm sounds (keywords A1, A2, A3). A response to any of the keywords mentioned also automatically subscribes users to a service and sends an item for download.”

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### SP Response

The comprehensive Response provided by the SP deserves to be reproduced in full:

“The complaint is concerned with a series of adverts flighted by Glomobi (hereinafter referred to as the Client). The complainant has referred to three different adverts flighted at different times using the different categories of keywords corresponding to a particular service, namely;

- a) B1 B2 B3 for the Baby Service;
- b) A1 A2 A3 for the Car Alarm; and
- c) S1 S2 S3 for the Sound Service.

For clarity, this response will make reference to the first advert in the series, namely the Baby Service, since this is the advert forwarded by WASPA complaints staff. An analysis of all categories of services as occurs in all three adverts, would be improvident. The Client employed multiple keyword advertising for subscription services, using sound clips to illustrate the type of content the user should expect when subscribing to the service.

In response to this complaint, the Client denies that advertised services constituted bundling and that in accordance with WASPA advertising guidelines as well as the Code, it is clear at all times that the services advertised are provided in terms of a subscription.

## 1. The Advert

The visuals on the advert, are cartoon graphics which change according to a voice prompt.

The word subscription is mentioned 4 times in the advert; twice in the voice over script and twice in the text of the advert. The complete phrase “subscription service” occurs in the terms and conditions at the bottom of the screen, for the duration of the advert.

The voice over is copied hereunder:

“New from Glomobi, **SUBSCRIBE** to the sweetest baby ringtones on your cellphone. To start with this annoying crying baby sms B1 to 31944, for this funny burping baby sms S2, this laughing baby sms S3. **SUBSRCIBE** to the funniest baby ringtones on

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your cellphone. SMS B1 for annoying crying baby, B2 for funny burping baby, B3 for laughing baby to 31944.”

In addition, there is also a prominently displayed description during the entire duration of the 30 seconds advert with the price point, frequency and it being mentioned that it is a subscription service being published clearly on the right hand corner of the advert stating the following:

**“R4.90/sms max 4 sms/week *subscription*”**

Note: Please note that the R4.90 per sms refers to sound services only.

The terms and conditions at the bottom of the screen also states that

[This is a **subscription** service. You will be charge R4.90x4/wk until you unsubscribe. Sms Stop Sound to 31944 to unsubscribed. All prices include VAT. This service requires WAP. Obtain bill payers consent before using the service. Customer Service Hotline: 082 2350 450.www.glomobi.com]

## **2. WASPA Precedent and Ratio**

We wish to direct the attention of the adjudicator to the **Adjudicator’s Report** for WASPA **Complaint 0022** dated November 2005, which was concerned with the promotion of subscription services and centered on the same provisions of the Code, as the present complaint. In dismissing the complaint, the adjudicator paid due regard to the following;

*“the IP’s submission regarding pricing, the specific description of the service as a subscription service and the absence of content specific keywords, as well as considering the objective clarity and frequency of the information displayed in the advertisement and contained in the “voice over”, ;”*

The adjudicator goes on and expounds on the motivation for provision 11, which is *“...to protect customers and potential customers from confusing or misleading subscription services”*. The adjudicator goes further and affirms that; *“It is reasonable and appropriate for providers of subscription services to give customers*

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*and potential customers of their subscription service an indication of the type of content or service to be delivered". The adjudicator then states that;*

*"...the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services)."*

The quoted clauses in the extract (4.1.1 and 4.1.2) refer to the obligation on SP's for fairplay and bona fide dissemination of information for services, particularly in respect to pricing. In the matter at hand the Client, clearly prioritized transparency and in good faith included examples of the type of content, customers could expect when subscribing.

We now direct the attention of the adjudicator to the **Adjudicator's Report** for WASPA **Complaint 0590** dated January 2007, which was concerned with similar provisions in the Code. The complaint summary as it appears in the document is copied below;

### **Complaint**

*The Complaint relates to a television advertisement for a subscription service flighted on television during the weekend of 13 & 14 October 2006. The Complainant alleges a breach of clause 11.1.2 of the WASPA Code of Conduct which requires that a request to join a subscription service must be an independent transaction and such request "may not be bundled with a request for a specific content item".*

*The detailed Complaint as submitted states as follows:*

*"The ad shows 3 movie themes. As it shows the themes the audio says :*

*'Choose your favourite sound tracks for your mobile. Send M1, (pause) M2*

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*(pause) or M3. Subscribe now to movie club. Just send M1, M2 or M3 to 31606.'*

Prior to assessing the complaint, the adjudicator quotes the established precedent in evaluating complaints of this nature by stating; *"In considering the use of specific content items in the marketing of subscription services the approach adopted in the Adjudicator's Report in respect of Compliant #0022 is approved and applied."*

The following test has been set in these complaints;

- *Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:*

- o *The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.*

- o *The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.*

- o *The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.*

- o *The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.*

- o *Whether there is a mix of content items and a subscription service being advertised or only a subscription service.*

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*o Whether the same short code or access number is used for both content items and a subscription service.*

*o Whether similar key words are used for content items and a subscription service.*

*o The clear differentiation between the content examples or indicators and the subscription service itself.*

*There accordingly must be a comparison of the indicators the IP provides to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer in the advertisements which are the subject of the two complaints.”*

In the absence of a published WASPA Code Interpretative Guideline, the Client will use the test set in the foregoing precedent to motivate in favour of the complaint being dismissed

### **Applying the 8 Aspects of the Test**

#### **Aspect 1 “The use of Keywords”**

The Client used 3 keywords, indicating that each keyword related to the ordering of the delivery of content. As a result of the technical methodology of the service, the customer may choose which item they wish to receive first. The fact that the service is a subscription service had already been established in the voice over and in the text at the top right hand corner as well as at the bottom of the screen in the terms and conditions at the bottom of the screen (in accordance with the WASPA Code and Advertising Guidelines) . With this in mind, it is false and malicious to suggest that a user transmitting the advertised keyword, would unwittingly be subscribed. At all material times the customer is aware that the advertised content is related to a subscription.

In addition, the Code does not prohibit the user of the content item or items in advertising for subscription services and the Client had used the different pictures/

content in their advert as a clear indication or examples of the type of content provided in the subscription services.

## **Aspect 2 “The Clarity of the Indication that Service is a Subscription Service”**

In support of the contention that it was neither the Client’s intention to mislead customers, nor can it be reasonably argued that the average customer may have been misled by the advert, recourse is had to the **WASPA Advertising Guidelines**:

### *1.1 SCOPE*

*In cases where Access Channels are utilized, this section applies to:*

- TV Advertisements which primarily promote mobile content and where delivery is to mobile devices*
- Cinema Advertisements*

### *1.2 DISPLAY RULES FOR COST AND T&C INFORMATION*

#### *Subscription Services*

*Any advertisement that has a subscription service component must include:*

- (a) The periodic subscription charge, AND*
- (b) The charging frequency, AND*
- (c) Any additional premium-rated charges that might be applicable to access particular content.*

*Minimum Display Time for Subscription T&C*

*Of the 10 seconds minimum display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service (if applicable ; see attached graphics).*

*Minimum T&C Display Text For Subscription Services:*

*“This is a subscription service. You will be charged Rx every seven days until you unsubscribe, plus R4 per content item.” Or*

*“This is a subscription service. You will be automatically charged R--- every 7 days until you unsubscribe, plus R--- per xxxx”*

It is common cause that all the foregoing information was indicated in the advert in the prescribed manner.

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The Client has ensured that they have complied with all the display rules for cost and T&C information as required in their advert as illustrated above.

**Aspect 3 “Indication of Price, Continual Billing & Billing Frequency”**

The price is indicated in the top right hand corner as well as the on the T & C’s at the bottom of the page in the prescribed manner as indicated; the price is indicated as R4.99 per sms at a maximum of 4 sms per week.

**Aspect 4 “Indication of Ongoing Delivery of Content”**

The indication that content is not once off, is clearly illustrated by the use of the word “subscription”, “subscription service” as well as the voice over indication that the service is for ringtones.

The Client’s Welcome message reads:

EXAMPLE:

Welcome to Baby service. Get the cutest baby sounds on your cellphone.  
Info:www.glomobi.com 0822350450. To end send stop to 31944. R4.99/4sms/wk

**Aspect 5 “Whether there is a mix of Services on Offer”**

No once off content was offered in the advert and none is available through this service. Client specializes in subscription services. The likelihood of confusion is non existent.

It is mentioned repeatedly in the voice over in the advert that this is a subscription service and has also been displayed in the terms and conditions of the advert “This is a subscription service” hence the potential customer will not be misled.

**Aspect 6 “Whether the same access code is used for Subscription and Non-subscription Services ”**

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The access code: 31944 is the only access code used in the advert and is linked with the advertised content, which is available only with subscription.

**Aspect 7 “Whether the similar keywords are used for Subscription and Non-subscription Services ”**

Refer to Aspect 5.

**Aspect 8 “Differentiation between the content examples or indicators and the subscription service itself.”**

As indicated previously, the client used sound clips to illustrate the type of content the user should expect when subscribing to the service. The illustrating content items are not punted separately from the subscription, the illustrating content chosen by customer is the first content which the customer will receive at the beginning of their subscription.. This is supported by the use of the words “**to start with...**”, in the voice over.

We submit, that in order to uphold this complaint, it ought to be distinguished from the quoted complaints 0022 and 0590.

## **2. Mitigating Factors**

In the event that the complaint is upheld, we wish to highlight steps taken by Integrat as well as the Client with a view of expiating the breach.

- 3.1 The Client initiated changes prior to any complaints being raised. The adverts were first flighted in April 2007. Owing to a lack of certainty in the regulations and the Clients general anxiety, the adverts were amended after the first batch had been flighted.
- 3.2 Since then, the voice over was amended to state “to start with...”, the overall presentation of the advert has also been amended at least three times. (Old versions of the adverts can be made available to the Adjudicator).

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- 3.3 As soon as an informal complaint was raised by a competitor, Integrat complaints' staff set about researching a precedent for this type of advertising.
- 3.4 When a precedent was found and it was in favour of the Client, this was immediately communicated to the competitor and justification was forwarded. The competitor was not satisfied that the presented interpretation was correct.
- 3.5 Integrat then contacted high ranking WASPA officials and the issue was canvassed telephonically as well on email. Certainty on the matter was ever illusive.
- 3.6 Integrat then took the initiative to set the matter before CodeCom. The peer review results indicated, that although there were some sp's who accepted the precedents as well as Integrat's interpretation of the matter; still there was no clear consensus on the matter. .
- 3.7 An email was then forwarded to WASPA advising WASPA complaints' staff, that Integrat had issued a communiqué to the Client, advising the latter to immediately suspend the advertising campaign. Furthermore, WASPA complaints' staff was asked for a grace period of 5 working days in order to allow the Client to make changes to its flighting schedules. It is common cause that broadcasting space is not only reserved prospectively, but that amendments to the flighting schedule may take two to fourteen days.
- 3.8 At all times Integrat as well as the Client, were more than willing to engage any complainant and industry peers. The adverts were discontinued, even in the absence of a binding WASPA report. The client has since revised its marketing approach.

It is a verifiable fact, that at the time Integrat was notified of this complaint (13 September 2007), the questionable adverts had been discontinued as of week-ending 7 September 2007.

### 3. Conclusion

The South African Telecoms industry is one of the fastest growing industries in South Africa. However, the absence of clarity on key issues is indicative of the market's immaturity in terms of the regulatory process. There is a lack of synchronicity, between the regulation and commercial bounty, which is damaging to business. There is a mean between ensuring, that business interests do not take precedence over those of the consumers and hindering commercial viability altogether. There are many WASPA Adjudicator's Reports which could have been quoted to illustrate support for the Client's marketing methodologies; and yet there is pervading anxiety in respect to multiple keyword advertising using sound clips. It is our contention, that to advertise subscription services without giving the customer an opportunity to test the goods, will do less to protect the consumer and in fact may spawn worse monsters. We are mindful of the mischief which the bundling clause aims to remedy, but without an interpretative guideline and conflicting Reports, it is anyone's guess what the clause entails in practice.

We will reiterate the fact that the Client has all times not bundled its content and has always repeatedly made clear that they are providing a subscription based services, hence the complaint under 11.1.2 should be dismissed."

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#### Sections of the Code considered

The following sections of Version 5.3 of the WASPA Code of Conduct were considered:

3.5.1. **"Bundling"** means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.

#### 11. Subscription services

##### 11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

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 bundled with a request for a specific content item.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

The following sections of the WASPA Advertising Rules were considered:

**2.3.13 SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

**(i) Must Use The Words “Subscription Service”**

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg “S”), number, abbreviation (eg “Subs”), icon, or any other mark may be used as an alternative to the words “Subscription Service” anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

**(ii) Must Indicate Charge/s:**

The advertisement must indicate in the font size, position and type as indicated:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below] This indication must include the potential and cost of any (additional) bearer charges.

**ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:**

Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION (see s11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis. Confusion by consumers may arise in cases where a single advert may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range. If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2).

**COST OF ACCESS TEXT DISPLAY RULES****Trigger:**

At any display of, or mention by a voice-over, of a unique access number

**Display Length:**

100% of the length of the advertisement

**Display Text Font:**

'Zurich' font

**Display Text Font Size:**

18 points MINIMUM

**Display Text Font Position:**

In a visible block or triangle in a top corner of the screen in the Title Safe Area (see diagrams)

**Display Text Font Colour:**

Contrasted colour superimposed on the block/triangle Block/Triangle Colour

Contrasted colour, behind the display text

**Display Text Type:**

- Text must be static
- No Caps (except for the first letter of the first word) or italics may be used as the display font for the word subscription.
- No italics may be used as the display font for the price text.
- No text must be placed around the access cost text that may obscure clear reading

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- The access cost text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
  - The access cost must not be part of a colour scheme that may obscure easy reading of complete details of the access cost
  - The access cost text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the cost

### **2.2.3 T&C TEXT DISPLAY RULES**

#### **Trigger:**

At any display of, or mention by a voice-over, of a unique access number

#### **Display Length:**

- Minimum 10 seconds
- If applicable, of the 10 seconds display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service.

#### **Display Text Font:**

'Zurich' font

#### **Display Text Font Size:**

15 points MINIMUM

#### **Display Text Position:**

On bottom edge of title face of the screen

#### **Display Text Type:**

- No CAPS-only or Italics-only text is permitted for the T&C font.
- The T&C text must be static and horizontal for the requisite minimum display time, changing as is necessary to show all the T&Cs in equal time proportion
- The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
- The T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
- The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C

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- The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text.
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## **Decision**

The SP is thanked for the comprehensive nature of its Response and the manner in which it sought to resolve this Complaint. While the Adjudicator may not agree with all of the deductions made in the Response, the facts averred therein are accepted for the purposes of this Adjudication.

As a matter of procedure it should be noted that, although the Complaint only references section 11.1.2 of the Code of Conduct, the SP has made numerous references to the provisions of the WASPA Advertising Rules and has asserted that it is in compliance therewith. The Adjudicator has accordingly also utilised the relevant sections of the Advertising Rules for the purposes of reaching a decision in this matter. Such utilisation has, however, been limited to issues relevant to the consideration of whether there has or has not been a breach of section 11.1.2 of the Code.

As raised by the SP in its response, the test to be applied in matters of this nature has been formulated in a number of prior adjudications which, while laying down guidelines and factors to be considered, have also emphasised that each Complaint must be assessed on its own merits and that the factors listed should not be regarded as a closed list.

The Adjudicator considered the following in evaluating whether the advert constituted bundling in contravention of section 11.1.2 of the Code:

1. The advertisement does not seek to promote content available both through a subscription service and as individual content items.
2. Three different keywords, each relating to a particular content example, have been utilised.
3. The substantial compliance of the advertisement with the WASPA Advertising Rules. This in turn implies that steps were taken to bring the subscription nature of the service to the attention of the viewer.

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4. The finding by the Adjudicator that the advertisement breaches the Cost of Access Display rules set out in the WASPA Advertising Rules, specifically that the access cost text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad. Having viewed the advertisement the Adjudicator is of the opinion that the failure of the SP to create a separately-coloured block with the cost of access text superimposed thereon in a contrasting colour combined with the positioning of the graphic behind the cost of access text display obscures such text to an unacceptable degree.
  5. The fact that the welcome message as quoted by the SP does not use the words subscription service.

On a balanced consideration of the above indicators provided to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer, the Adjudicator does not find that there has been a breach of section 11.1.2 of the Code.

It may be worth reiterating at this point that “[t] is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered”, but that WASPA members and their clients should exercise the utmost caution in doing so.

Points 2, 4 and 5 above indicate that the IP is sailing extremely close to the wind with these advertisements and they are urged to review their advertising against the comments made herein. The facts of the matter and the “dominant impression” nature of the test to be applied mean that another Adjudicator may well come to a different decision when faced with a complaint such as this one.

Although not specified in the Complaint the SP has nevertheless raised an assertion that the advertisement complies with the WASPA Advertising Rules and the Adjudicator is accordingly entitled to adjudicate on the veracity of this assertion. As noted above the Adjudicator finds that the advertisement forming the subject matter of the Complaint does not fully comply with the advertising rules with specific regard to the manner in which the cost of access text has been displayed. The Adjudicators

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finds further in this regard that, while any confusion created by this breach is not sufficient so as to justify a finding of bundling, it does nevertheless potentially create confusion about the cost of accessing the IP's service.

The Adjudicator therefore dismisses the complaint in respect of a breach of section 11.1.2 of the Code of Conduct but finds that there has been a breach of section 2.2.2 of the Advertising Rules.

The factors raised in mitigation by the SP are noted insofar as they may be relevant to the breach which has been established.

In the Adjudication in respect of Complaint #0590, quoted extensively by the SP in its Response, the Adjudicator, after dismissing the Complaint, makes the following observation:

"The IP and SP are, however, requested to take careful note of the potential confusion caused by:

- the use of different keywords – this could easily be avoided; and
- failure to properly adhere to the Advertising Rules.

As Complaints of this nature are handled on a case-by-case nature and within the context of each advertisement, it may be that a failure to remedy the above issues in future advertising will contribute towards a finding that sections 11.1 and 4.1 have been breached in respect of such future advertising."

This warning is repeated and the fact that the warning has previously been issued to this SP is considered an aggravating factor.

The SP is issued with a fine of R7 500.00 payable to the WASPA Secretariat within 10 days of notification of this Adjudication.