



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	25908
Cited WASPA members	<i>MTN Internal WASP Services (IWS) 0035 Space Trading Projects (Proprietary) Limited</i>
Notifiable WASPA members	<i>N/A</i>
Appeal lodged by	<i>MTN Internal WASP Services (IWS)</i>
Type of appeal	<i>Written appeal</i>
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	<i>13.6</i>
Clauses considered by the panel	<i>5.1,5.4,5.6,5.7,5.8,5.11,5.12,5.13,5.14,8.1,8.4,8.7,14.1,14.2,14.3,18.2,18.4,18.9</i>
Related complaints considered	<i>25672, 26103. 26203.</i>
Amended sanctions	MTN Internal WASP Services (IWS): R50,000.00 fine for breach of clauses 8.7, 18.2 and 18.7 replaced with: <ul style="list-style-type: none"> • A fine of R50 000 for breach of clauses 8.7, 18.2 and 18.4 less any amount proven to have been refunded to the end users of the service who sent an SMS/s in this campaign.
Appeal fee	<i>Appeal fee to be forfeited</i>
Is this report notable?	<i>Not notable</i>
Summary of notability	<i>N/A</i>

Initial complaint

1. The initial complaint related to an SMS which read:
*An all expenses paid Trip to The Metro awards in Durban Plus R5000 cash could be yours by simply answering the following,
Who was the 3rd Black President in South Africa?
Sms Answer to 38054
, Closing date 22 feb 2014 at 12h00 at 12h00 midnight.to optout from receive this sms please sms stop to 31014*
 2. According to the complainant each SMS cost R10 each and the Metro Awards were unaware of the competition.
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Adjudicator's findings

3. No response was forthcoming from MTN Internal WASP Services (IWS) 0035.
 4. After considering the matter, the adjudicator found:
 - 4.1. The SMS in question contains no pricing information in breach of clause 8.7 of the WASPA Code of Conduct.
 - 4.2. That the cost of the service (which was R10 per SMS) breached clause 18.2 of the WASPA Code of Conduct in that the maximum cost per SMS must be R1.50.
 - 4.3. That clause 18.7 of the WASPA Code of Conduct was breached (see our decision on this below).
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Appeal submissions

5. On the 28th October 2015 a submission was received from MTN Internal WASP Services ('IWS') which provided the following background information:
 - 5.1. The actual message originator in the matter was Space Trading and Projects (Proprietary) Limited ('Space Trading') who was a WASPA member at the time of the campaign.
 - 5.2. Space Trading's entire service account was suspended on the 12th February 2015 after an investigation by IWS.
 - 5.3. 58 588 SMS' were sent as part of the campaign and 3 202 customers responded to the campaign at a cost of R10 each.
 - 5.4. The informal and formal notices of the complaint sent by WASPA to IWS were received.
 - 5.5. The informal and formal notices were undetected as a result of restructuring at the time of the complaints.
6. IWS then lodged an appeal against the decision on the following grounds:

- 6.1. IWS should not be responsible for the actions of Space Trading as it had – in terms of clause 3.4 of the WASPA Code of Conduct – taken reasonable steps to comply with the Code of Conduct.
 7. IWS lodged an appeal against the sanctions on the grounds that:
 - 7.1. IWS was not initially aware of the illegal campaign and took reasonable steps to deal with it once it became aware of the campaign;
 - 7.2. IWS has since taken ‘steps’ so that illegal campaigns of this nature would be identified;
 - 7.3. IWS will be refunding all affected end users the R10 entry fee;
 - 7.4. IWS had a good track record with WASPA.
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Deliberations and findings

8. There is no doubt that the campaign by Space Trading breached the WASPA Code of Conduct and that the adjudicator’s finding that the SMS breached clauses 8.7 and 18.2 was correct. This is not disputed in the appeal submission.
 - 8.1. The reference by the adjudicator to a breach of clause 18.7 (which deals with awarding the prize within 28 days of the closing of the competition) is unfortunately an error on the part of the adjudicator. This clause was not listed as a clause that was considered by the adjudicator, and the merits of the breach of clause 18.7 were never discussed in the adjudication. Instead it appears clear that clause 18.4 – which deals with promotional competitions – was the clause that was considered.
 - 8.2. Clause 18.4 reads:
 - 18.4. An offer to participate in a promotional competition must clearly state:*
 - (a) the competition to which the offer relates;*
 - (b) the steps required by a person to participate in the competition;*
 - (c) the full cost to enter the competition;*
 - (d) the basis on which the results of the competition will be determined;*
 - (e) the closing date for the competition;*
 - (f) how the results of the competition will be made known;*
 - (g) how a person can obtain a copy of the competition rules; and*
 - (h) how the successful participant can obtain the prize.*
 - 8.3. Sub-clauses (a), (c), (d), (f), (g), (h) of clause 18.4 were breached in respect of the SMS and as a result clause 18.4 of the WASPA Code of Conduct is hereby found to have been breached.

The Adjudicator in the original decision found IWS to not have breached the WASPA Code of Conduct in relation to clauses 5.1, 5.4, 5.6, 5.7, 5.8, 5.11, 5.12, 5.13, 5.14, 14.1, 14.2, 14.3, and 18.9.

SUBMISSIONS OF APPELLANT

9. IWS has raised one ground of appeal, namely that IWS should not be responsible for the actions of Space Trading as it had – in terms of clause 3.4 of the WASPA Code of Conduct – taken reasonable steps to comply with the Code of Conduct.
 10. As clause 3.4 is central to this appeal it deserves to be reproduced in full:

3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if

 - *that customer is also a member of WASPA,*
 - *provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.*
 11. As can be seen from the above it is clear that for IWS to escape liability for the actions of Space Trading it needs to demonstrate that:
 - 11.1. Space Trading was a WASPA member at the time of the offence, and
 - 11.2. IWS had taken reasonable steps to ensure that Space Trading provides services in a manner consistent with the requirements of this Code of Conduct.
 12. By its own admission IWS has since this complaint amended its own procedures to detect and avoid message originators such as Space Trading being able to breach the WASPA Code of Conduct. While it is commendable that IWS is taking some action, this statement from IWS does not provide evidence of what measures were present at the time the SMS was sent? In this respect IWS provided little to no information on what steps if any were taken by IWS to ensure that Space Trading complied with the WASPA Code of Conduct. As the appeal panel we are required to consider the steps taken by IWS in order to determine whether such steps were ‘reasonable’ and accordingly whether IWS would satisfy the second part of this test. As a result of the lack of information provided to the appeal panel it is impossible to conclude that the steps taken by IWS were reasonable and as a result IWS fails the test set out in clause 3.4. It should further be noted that this same conclusion was reached by the appeal panel in complaint 25672 which has relevance here.
 13. However this is not the end of the matter. Although we make no ruling on this point, we note that Space Trading was registered as a WASP with WASPA. Space Trading’s membership began on the 5th December 2014 and ended on the 15th May 2015. Had IWS informed WASPA of the identity of Space Trading when the complaint was first lodged, WASPA would have been able to provide the formal complaint to Space Trading. Indeed the obligation to identify any other WASP arises from clause 3.3 and failing which neither WASPA nor the adjudicator can be faulted for being unaware that there was another party involved in this complaint.
 14. Thus for the reason that IWS has failed to provide proof of reasonable measures adopted by IWS to ensure its customer’s compliance IWS appeal on the basis of clause 3.4 fails.
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Amendment of sanctions

15. After finding that IWS is responsible for the breach of clauses 8.7, 18.2 and 18.4 of the WASPA code of Conduct it remains for us to consider the various grounds put forth by the WASP in mitigation. They are:

- 15.1. IWS was not initially aware of the illegal campaign and took reasonable steps to deal with it once it became aware of the campaign;
 - 15.2. IWS has since taken 'steps' so that illegal campaigns of this nature would be identified;
 - 15.3. IWS will be refunding all affected end users the R10 entry fee;
 - 15.4. IWS had a good track record with WASPA.
16. It does appear that IWS did take steps after the fact to stop the illegal campaign and this factor is noted when determining the sanction to impose.
 17. However, as no information was provided as to what steps were taken by IWS to prevent contraventions of the Code by its customer (Space Trading), this cannot be considered as a factor when determining the sanctions.
 18. The fact that IWS will refund all affected end users their R10 entry fee (in a total of R32 202 if successfully performed) is a relevant mitigating factor.
 19. IWS claims to have a 'good track record with WASPA'. IWS has had 8 WASPA complaints over a period of approximately 5 years. Of these eight, six were lodged in the first three months of 2015, arguing that IWS did indeed have some kind of structural issue in the early part of 2015 and we have considered this as a mitigating factor. On the other hand in all eight of the complaints, the complaint was upheld (once partially) which in turn resulted in IWS having an unenviable record of a 100% failure rate and this is considered to be an aggravating factor.
 20. As a result of the above factors this appeal panel rules as follows:
 - Within 14 days of the publication of this report IWS must provide proof of the refund claimed in its appeal documentation.
 - IWS is fined R50 000 less any amount that IWS is able to prove that it repaid to its end user subscribers of the service within the said 14 days period.
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Appeal fee

The appeal fee is forfeited by the appellant.
