

WASPA appeals panel
Complaint 26203

REPORT OF THE APPEALS PANEL

Date of report: 28 January 2016

WASPA Member: MTN IWS

Complaint Number: 26203

Applicable version: 13.6

Preliminary issues

1. All references to the Code are to version 13.6 the version that was binding on the parties at the time of the complaint.

Background

2. This matter involves a complaint by a competitor in relation to alleged sending of unsolicited messages, as well as the pricing and content of the messages not being in accordance with the requirements of the Code. The alleged non-compliance with the Code was due to the fact that the messages were in fact about a promotional competition and that the requirements of the Code with respect to promotional competitions were not followed.
3. The following clauses were considered: 4.3, 8.4, 16.9, 16.10, 16.11, 16.12, 18.2, 18.4 and 18.6.
4. The adjudicator based his/her findings on the report of the Emergency Panel which was convened in respect of this complaint.

5. The adjudicator in this matter found with respect to the abovementioned clauses as follows:

1.5.1 In re 4.3 – no breach due to the fact that WASPA can only administer the WASPA Code and not make rulings in respect of the Lotteries Act, to which the breach relates. As there has been no finding against the WASP in terms of the said Lotteries Act, WASPA cannot find the WASP to be in breach of 4.3;

1.5.2 In re 8.4 and 8.7 – breach by the WASP due to the fact that they excluded all pricing information from the messages and as such this constitutes misleading pricing information in breach of 8.7. 8.4 is a definition and as such there has been no breach of this clause;

1.5.3 In re 16.9, 16.10, 16.11 and 16.12 - The adjudicator agreed with the Emergency Panel that 16.9 and 16.10 set out the conditions for sending direct marketing to a consumer and that 16.11 is the clause that stands to be breached should these conditions not be met. As there was no consent to receive the messages, no consent in relation to similar products, no opportunity to object to the collection of details at the time of collection and in respect of the second message in the complaint, that there was no opt out facility provided. The adjudicator found that clause 16.11 had been breached. In addition, as neither message contains the sender's detail and the second message (as stated previously) has no opt out facility, the adjudicator also found a breach of 16.12;

1.5.4 In re 18.2 – The first message sent was charged at R1.00, the second at R5.00. As the limit for charges for sending a message in terms of 18.2 is R1.50, the adjudicator found that 18.2 had been breached by the second message but not the first;

1.5.5 In re 18.4 – The adjudicator found the WASP to be in breach of this clause in respect of both messages due to the fact that 18.4 requires that the terms of the competition be included in the messages or at least access to the same provided. As neither was done, both messages are in breach of 18.4;

1.5.6 In re 18.6 – The adjudicator found a breach of this clause which requires a closing date for the competition. As there were no terms, there was

nowhere for the closing date to be found and as such found that there had been a breach of this clause 18.6.

6. The adjudicator ruled as follows:

- 1.6.1 The Emergency Panel suspended both the WASP's membership and the use of the short codes in question. The adjudicator overturned the suspension of the WASP but not that of the short codes which were to be suspended pending the Media Monitor receiving and approving compliant material from the WASP.
- 1.6.2 The WASP must pay a fine of R 50 000.00 within 7 (seven) days of receipt of the ruling;
- 1.6.3 That campaigns in their current format remain suspended;
- 1.6.4 The suspended fine in respect of matter 26103 is not imposed as the adjudicator found the breaches in both that matter and this to have occurred concurrently and as such cannot be regarded as a further breach. Notwithstanding this, this ruling will be taken into consideration in the event of further breaches in the future.

Appeal

7. The WASP lodged an appeal to WASPA via the appeals panel mechanism in a letter, dated 24 August 2015.

8. This letter set out the following with regards to the ruled breaches:

- 6.1 That the promoters of the relevant competitions who sent the messages were in fact Laduma Trading (Pty) Ltd ("Laduma") and Batsei Investements CC ("Batsei");
- 6.2 That they utilise the WASPS platform for sending such messages and that they are responsible for uploading the MSISDN's, selecting the short codes and the content of the messages;
- 6.3 Laduma and Batsei, are not members of WASPA;
- 6.4 In terms of clause 3.4 of the Code a member can avoid being held jointly and severally liable for the acts of third parties using their infrastructure if such

third parties are themselves members of WASPA. As this is not the case the protection is not afforded to the WASP in this instance.

9. The WASP also submitted that they were in the process of taking certain measures to be more efficient in dealing with WASPA complaints and to ensure better compliance with the Code.

Complainant's response to Appeal

10. The Complainant was provided with an opportunity to respond to the member's appeal submission.
11. The panel will not go into detail as to what the Complainant 's response was save to say that the Complainant was not swayed by the argument put forward by the member and felt if anything, the appeal submission should go to the sanction and not to the finding of a breach or otherwise of the Code.

Deliberations and finding

12. Laduma and Batsei did not respond to or appeal the decision and as such the Appeals Panel is only dealing with the sections of the decision relating to the findings of the WASP's breaches.
13. The Appeals Panel agrees with the reasons and the findings of the adjudicator in all instances of findings of breach. In particular, the WASP provided no cogent information to rebut any of the adjudicator's findings.
14. The appeal fee in respect of this matter is forfeited.

Sanctions

15. The Appeals Panel adjudicators ruled as follows:

1.15.1 The Panel sees no reason to amend the decision of the adjudicator with regards to sanctions and accordingly upholds the following sanctions imposed by the adjudicator:

1.15.1.1 The WASP must pay a fine of R 50 000.00 within 7 (seven) days of receipt of the ruling;

1.15.1.2 That campaigns in their current format remain suspended;