

## REPORT OF THE APPEALS PANEL

**Date:** 5 May 2010  
**Appellant:** Opera Interactive (SP)  
**Complaint Numbers:** 4783, 4872  
**Applicable versions:** Code of Conduct v6.2 read with Advertising Guidelines v2.3

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### 1 BACKGROUND TO THE APPEAL

- 1.1 This is a joint appeal against the sanctions imposed on the Appellant by the adjudications delivered in respect of complaints 4783 and 4872.
- 1.2 See <http://www.waspa.org.za/code/download/4783.pdf> and <http://www.waspa.org.za/code/download/4872.pdf> for the full text of the adjudications in these matters.
- 1.3 In both its response to the initial complaint and the document setting out the basis of its appeal, the member accepted that it had breached the WASPA Code of Conduct in that an advertisement promoting a competition published in Heat Magazine (the Information Provider or IP) did not set out the price of entry by SMS to the specified short code.
- 1.4 It also appears that there was a typographical error in the citation of complaints, which was the cause of some confusion in the original adjudication.
- 1.5 The two complaints stem from different advertisements appearing in:
- 1.5.1 Issue 227 (30 August – 5 September), leading to the lodging of complaint 4783 on 3 September 2008; and
- 1.5.2 Issue 229 (13 - 19 September), leading to the lodging of complaint 4872 on 18 September 2008.
- 1.5.3 Screenshots of the advertisements are set out in Annexure A.
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### 2 THE APPLICATION OF THE CODE AND AD RULES

#### *The Code, v6.2*

- 2.1 The Code
- 2.2 The relevant provisions are:
- 2.2.1 4.1.1 Honest and fair dealings.
- 2.2.2 6.2.2 Full retail price.

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- 2.2.3 6.2.5 Price to appear in all instances of premium number display
- 2.2.4 9.1.1 Cost to user
- 2.2.5 9.1.2 Promotional Material
- 2.2.6 9.1.4 Promotional material

*The Advertising Guidelines (Rules), v2.3*

- 2.3 Various provisions and chapter 5 more specifically document the requirement for magazines, including the requirement that each unique access number must display the full and final cost to the consumer.
- 2.4 The panel does not consider it necessary to further detail the sections of the Code or Advertising Rules infringed because the appeal is not against these or any dispute of fact, but merely on the basis of seeking a reduction in the quantum of the fine. The Appellant is on record as having admitted the breach. The sections enumerated above are purely a summary for the record.

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**3 DECISION OF THE ADJUDICATOR**

- 3.1 The adjudicator – in respect of both matters – accepted the tendered *mea culpa* and found that the member had breached sections 6.2.2, 6.2.5, 9.1.1, 9.1.2 and 9.1.4 of Version 6.2 of the WASPA Code of Conduct and related provisions of chapter 5 of Version 2.3 of the Advertising Rules. The adjudicator further found that the cumulative impact of the conduct of the member was such that it had failed to observe the standards of conduct required by section 4.1.1 of the Code of Conduct.
- 3.2 The adjudicator imposed the following sanction in respect of complaint 4783:
  - 3.2.1 A fine of R15 000 in respect of the breaches of sections “4, 6 and 9 of the Code” as well as the related breaches of the Advertising Rules. Of this R5 000 was suspended for a period of six months “provided that no further similar complaints against this SP are made”.
  - 3.2.2 The member was required to refund entry fees to subscribers requesting a refund and to supply proof of having done so to WASPA.
- 3.3 The adjudicator imposed the following sanction in respect of complaint 4872:
  - 3.3.1 A fine of R10 000 in respect of the breaches of sections “4, 6 and 9 of the Code” as well as the related breaches of the Advertising Rules. Of this R5 000 was suspended for a period of six months

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Complaint 4783 & 4872**

“provided that no further similar complaints against this SP are made”.

- 3.3.2 The member was required to refund entry fees to subscribers requesting a refund and to supply proof of having done so to WASPA.

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**4 GROUNDS OF APPEAL**

- 4.1 The appeal is given substance in an email lodged with the WASPA Secretariat on 3 December 2008.
- 4.2 The following grounds of appeal against the sanctions imposed were raised:
- 4.2.1 The adjudicator’s reports “make reference to complaints 4781 and 4782, however neither of these relate to Opera Telecom, but to another WASP”. The Appellant is accordingly concerned that “the adjudications were made under the assumption that we had already been given a chance to rectify this issue with Heat Magazine in an earlier adjudication”. The Appellant submitted that this seemed to be borne out by the adjudicator’s statement in Complaint 4783, “that this is a repeat, repeat offence”.
- 4.2.2 The Appellant noted that only two complaints have been lodged against it in respect of competitions in Heat Magazine and that the two complaints deal with substantially the same issue: the failure to display cost of access information.
- 4.2.3 The Appellant submitted that that it is unusual that the fine imposed in respect of Complaint 4783 (R15 000 with R5 000 suspended) is higher than that imposed in respect of Complaint 4872.
- “We would have expected the fine for a 1<sup>st</sup> offence to be lower and wonder whether there is indeed confusion as to the chronology of the complaints.”
- 4.2.4 The Appellant reiterated its position that it was not “in a position to rectify the first breach in time to prevent the second” due to the fact that “the magazine containing breach # 4872 was already at the printers by the time the relevant people were informed”.

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5 The Appellant's concluded:

"For all the above reasons I would like to appeal the amount of the fines – We accept there was a breach and that sanctions should be applied, however we believe the combined sanctions imposed in the above two adjudications are unreasonable, especially given point [5.2.4] above.

We therefore appeal for the combined fines to be reduced."

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6 **FINDINGS OF APPEALS PANEL**

6.1 On viewing the grounds for mitigation in respect of seeking a reduction in the quantum of the fine, the panel finds as follows.

*Reference to complaints 4781 and 4782 and the record of the WASPA member*

6.2 The adjudicator refers to three matters – 4781, 4782 and 4783 – in the two adjudications under appeal. Complaint 4781 involves failure to display cost of access on a website and does not involve the Appellant. Complaint 4782 relates to misleading pricing around a subscription service and likewise does not involve the Appellant, nor was the matter decided by the same adjudicator.

6.2.1 The panel believes that it is likely that the adjudicator intended to refer to complaint 4872 and not to complaint 4782, i.e. that this was simply a typographical error in the text of the adjudication.

6.2.2 The WASPA complaints database also reveals that [complaint 4712](#) – involving the Appellant and considered by the same adjudicator - was lodged on 21 August 2008, i.e. at the same time that the complaints under appeal were originally submitted to WASPA.

6.2.3 In this matter the Appellant was found to have breached sections 4.1.1, 6.2.2, 6.2.5, 9.1.1 and 9.1.4 of the Code of Conduct as well as various sections of the Advertising Rules. The Appellant was fined R10 000 and ordered to affect a refund.

6.2.4 The panel believes that it is likely that the adjudicator intended to refer to this matter rather than to complaint 4781. In any event, complaint 4712 constitutes a further complaint against the Appellant of a similar nature to that found in the complaints under appeal.

*It is illogical that the fine for the first complaint is higher than that for the second complaint*

6.3 As regards the fine imposed in respect of the first offence being higher than that in respect of the second, the panel does not regard this as

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indicating any “confusion as to the chronology of the complaints” on the part of the adjudicator.

- 6.4 The panel, for reasons which will become clear below, does not find it necessary to consider further or make any finding with regard to the merits of this ground of appeal.

*The member was not able to prevent the second offence after notification of the first*

- 6.5 The Appellant further argues, as the panel understands it, that the sanctions imposed in respect of both complaints should be reduced given that the non-compliant conduct arose from the same oversight and the Appellant did not have an opportunity to remedy this prior to the second advert appearing.

- 6.6 The panel, considering the proximity of the two complaints under appeal, accepts the version of the Appellant as expressed in its response to complaint 4872, and finds that the adjudicator erred in issuing separate sanctions rather than a consolidated sanction applicable to both complaints 4783 and 4872.

*These were the first complaints involving Heat Magazine (the IP)*

- 6.7 The Appellant submits that the complaints under appeal were the only two complaints of this nature involving Heat Magazine and that this should have been taken into account in determining the sanction.

- 6.8 In considering this ground of appeal the panel took note of the quoted correspondence from the editor of Heat Magazine provided by the Appellant, which provides insight into how the breach occurred:

"Oops. It does look like it was left off. I'll make sure everyone understands what HAS to be on competitions, even when they're little ticket giveaways that we organised ourselves, like this one was. These small competitions are managed by an editorial staffer and not the sales team, who is clued up as to competition regulations. That is not an excuse, but it was an honest mistake, which, now that it's been brought to our attention, will not happen again."

- 6.9 Reviewing the documentation making up the complaints under appeal the panel is of the view that the Appellant has taken reasonable steps in educating the IP about the requirements of the Code of Conduct and that the circumstances under which the non-compliance occurred were beyond the reasonable control of the Appellant.

- 6.10 This does not alter the fact that the Code has been breached and that the Appellant – in line with a long line of precedent in WASPA adjudications and appeal panel reports – remains responsible for the non-compliance of the IP. The panel is of the view, however, that the adjudicator should

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have taken these circumstances into account in assessing the sanction(s) to be imposed.

- 6.11 The panel is of the view that the statement by the adjudicator that “this is a repeat, repeat offence” was made with reference to the Appellant and is accurate. In the context of the circumstances giving rise to the complaints under appeal, however, it is the record of the IP rather than that of the Appellant which is relevant.

*Precedent*

- 6.12 The panel examined the record of the Appellant in respect of complaints of a similar nature upheld against it prior to August 2008, the period during which the conduct leading to complaint 4783 occurred.
- 6.12.1 In complaints 4112, 4148 and 4149 – decided jointly under [complaint 4112](#) – the Appellant was found to have contravened section 9.1.4 of the Code in that required information, including cost of access, was omitted from a print advertisement for a competition in Seventeen Magazine. The Appellant in that matter acknowledged the breach and argued in mitigation that it was unintended and that further specified measures would be taken to ensure it did not reoccur. The Appellant was fined R10 000, suspended for six months subject to neither it or the IP in that matter breaching section 9.1.4 during that time.
- 6.12.2 This adjudication is dated 29 May 2008 but the WASPA complaints database reveals that the Appellant was notified thereof on 30 June 2008. The period of suspension of the fine imposed commenced on this date and accordingly ran until 31 December 2008.
- 6.12.3 The panel can find no record of this matter having been appealed. It is evident, however, that this was not taken into account by the adjudicator in the matters under appeal.
- 6.12.4 In [complaint 4190](#) - published on 7 July 2008 - the Appellant was again found to be in breach of section 9.1.4 for failing to display cost of access and closing date information in a print advertisement in a magazine promoting a competition. The Appellant again acknowledged the breach and sought to explain the circumstances under which it had occurred. On this occasion and after consideration of various mitigating factors, the adjudicator imposed a fine of R5000 suspended for a period of three months and required that all entrants to the competition be refunded.
- 6.12.5 It is worth noting that this complaint was lodged by the WASPA Media Monitor who at this stage characterised it as a repeat offence which could not be informally resolved.
- 6.12.6 Complaint 4712 has been discussed above.

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6.13 The panel further considered sanctions imposed in complaints against other WASPA members for comparable breaches.

6.13.1 The panel believes that the facts in this matter are substantially similar to those in complaint 4191, a matter in which the closing date of a competition advertised in a magazine was omitted. In that matter a fine of R5 000 was imposed, with R2 500 of this suspended for a period of six months contingent on the WASPA member not breaching section 9.1.4 of the Code.

*Order*

6.14 The panel makes the following order:

6.14.1 The appeal against the reasonableness of the sanctions imposed in respect of the complaints under appeal is upheld for the reasons set out above.

6.14.2 The adjudicator erred in not taking the suspended sanction imposed in complaint 4112 into account given the breach of the clear terms under which such sanction was suspended. The panel, notwithstanding its findings in this appeal, has no discretion with regard to the application of this suspended sanction.

6.14.3 The sanctions imposed in respect of complaints 4783 and 4872 are substituted by the following sanction, which shall lie in respect of the breaches identified by the adjudicator in both of these matters.

“1. The following sanction constitutes a consolidated sanction in respect of the breaches in complaints 4783 and 4872.

2. The member is fined the sum of R5 000. Payment of R2 500 of this amount is suspended for a period of one (1) year subject to the member, acting in conjunction with the IP, not being found to have breached any of the sections of the Code of Conduct breached in this matter during that time.

3. The suspensive condition for the imposition of the fine imposed on the member under complaint 4112 has been met, and the suspended sanction of R10 000 is accordingly due and payable by the member.

4. All fines imposed on the member are to be paid within five (5) days of date of receipt of the relevant invoice from the WASPA Secretariat.”

6.15 In the circumstances the appeal fee is refundable.

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- 2.3 Various provisions and chapter 5 more specifically document the requirement for magazines, including the requirement that each unique access number must display the full and final cost to the consumer.
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indicating any “confusion as to the chronology of the complaints” on the part of the adjudicator.

- 6.4 The panel, for reasons which will become clear below, does not find it necessary to consider further or make any finding with regard to the merits of this ground of appeal.

*The member was not able to prevent the second offence after notification of the first*

- 6.5 The Appellant further argues, as the panel understands it, that the sanctions imposed in respect of both complaints should be reduced given that the non-compliant conduct arose from the same oversight and the Appellant did not have an opportunity to remedy this prior to the second advert appearing.
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*Precedent*

- 6.12 The panel examined the record of the Appellant in respect of complaints of a similar nature upheld against it prior to August 2008, the period during which the conduct leading to complaint 4783 occurred.
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- 6.12.4 In [complaint 4190](#) - published on 7 July 2008 - the Appellant was again found to be in breach of section 9.1.4 for failing to display cost of access and closing date information in a print advertisement in a magazine promoting a competition. The Appellant again acknowledged the breach and sought to explain the circumstances under which it had occurred. On this occasion and after consideration of various mitigating factors, the adjudicator imposed a fine of R5000 suspended for a period of three months and required that all entrants to the competition be refunded.
- 6.12.5 It is worth noting that this complaint was lodged by the WASPA Media Monitor who at this stage characterised it as a repeat offence which could not be informally resolved.
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6.13 The panel further considered sanctions imposed in complaints against other WASPA members for comparable breaches.

6.13.1 The panel believes that the facts in this matter are substantially similar to those in complaint 4191, a matter in which the closing date of a competition advertised in a magazine was omitted. In that matter a fine of R5 000 was imposed, with R2 500 of this suspended for a period of six months contingent on the WASPA member not breaching section 9.1.4 of the Code.

*Order*

6.14 The panel makes the following order:

6.14.1 The appeal against the reasonableness of the sanctions imposed in respect of the complaints under appeal is upheld for the reasons set out above.

6.14.2 The adjudicator erred in not taking the suspended sanction imposed in complaint 4112 into account given the breach of the clear terms under which such sanction was suspended. The panel, notwithstanding its findings in this appeal, has no discretion with regard to the application of this suspended sanction.

6.14.3 The sanctions imposed in respect of complaints 4783 and 4872 are substituted by the following sanction, which shall lie in respect of the breaches identified by the adjudicator in both of these matters.

“1. The following sanction constitutes a consolidated sanction in respect of the breaches in complaints 4783 and 4872.

2. The member is fined the sum of R5 000. Payment of R2 500 of this amount is suspended for a period of one (1) year subject to the member, acting in conjunction with the IP, not being found to have breached any of the sections of the Code of Conduct breached in this matter during that time.

3. The suspensive condition for the imposition of the fine imposed on the member under complaint 4112 has been met, and the suspended sanction of R10 000 is accordingly due and payable by the member.

4. All fines imposed on the member are to be paid within five (5) days of date of receipt of the relevant invoice from the WASPA Secretariat.”

6.15 In the circumstances the appeal fee is refundable.

# Win tickets!

Feel like joining the party where it all started? Well, then you're at the right place! We're giving away two VIP tickets to the EA Rock Fest at Maropeng! Just SMS **ROCK** and the answer to the question below to 34979 by 27 August 2008. **QUESTION:** Complete the venue name: Cradle Of \_\_\_\_\_



FOKOPOLISIEKAR



Shows, sales, classes or new hot spots? e-mail them to [gigs@heat.co.za](mailto:gigs@heat.co.za)

TUE 9 SEP

**CPT CHOCOLIC HEAVEN AT ELIXIR SPA**  
Elixir Spa, Mouille Point, 021 439 2266

For the whole of this month, the Elixir Spa is joining forces with Lindt chocolates to bring you a range of decadent chocolate treatments. We all love eating it, but its valuable health benefits for the skin, body and mind are well-documented. So feel like Italian Kisses and a vanilla bath? Then e-mail [info@elixirspa.co.za](mailto:info@elixirspa.co.za).



WED 10 SEP

**JHB STAND-UP COMEDY**  
Party House, Northgate, 011 794 7233

Join Darren Maule for the best in no-rules, no-holds-barred stand-up comedy. It's a weekly event with special guests and surprise acts. Get your mid-week dose of fun and laughter for only R30! Starts 7.30pm

THU 11 SEP

**JHB FOKOPOLISIEKAR**  
back2basix, Westdene, 011 726 6857

One of South Africa's greatest rock acts are back with a new album, *Antibiotika* - and they

**JHB SCRATCH MY BACK**

Sutra, Wildwaters, Boksburg, 083 987 3854

It's Sutra's famed Terrace Floor season again and it kicks off with another outrageous Columbian Events party, featuring Roger D'Lux, Benji and The Electric Mafia. R60 at the door. Starts 9pm. Get more info at [www.sutra.co.za](http://www.sutra.co.za)

**DBN 340ML LIVE**  
Zulu Jazz Lounge, 231 Smith Street, 031 304 2377

The most chilled-out act in SA has finally released their second album appropriately entitled *Sorry For The Delay*. For more info go to [www.zulujazzlounge.co.za](http://www.zulujazzlounge.co.za). Party starts at 7pm. The entrance is R50.



TRAIN EVENT

are about to unleash their aural assault upon you! The show kicks off at 9.30pm and tickets are R100 at the door. Check out [www.back2basix.co.za](http://www.back2basix.co.za) for info.



WENDY OLDFIELD

**JHB EARTH DANCE JOZI 2008**  
Fossils, on the R511 just outside Fourways, 084 511 7613

This is the 11th Earthdance in SA and it's a festival of music, family festivities, bands, and a performance by Wendy Oldfield. Doors open at 10am. Entrance R100. Check out [www.earthdance.org.za](http://www.earthdance.org.za) for info.

**JHB THE OUT IN AFRICA SA GAY & LESBIAN FILM FESTIVAL**  
Killarney Mall, Nu Metro, 021 461 4027

A screening of Jonah Markowitz's film *Shelter*, followed by the launch of the MCQP 2008 theme at the Loft Lounge at 11pm. Tickets are R50. Info at [www.oia.co.za](http://www.oia.co.za)

ALL DETAILS ARE CORRECT AT THE TIME OF GOING TO PRINT. PLEASE CALL THE VENUE ON THE DAY TO CONFIRM

FIND OF THE WEEK!

**The Rosebank**  
Rosebank, 0861 747 444, 011 448 3600  
Johannesburg has a new landmark hangout for those who prefer the finer things in life! The Rosebank hotel has been refurbished and now boasts two new restaurants, a new bar and Cafe with menus that cater for everyone!



Win tickets!

This week we've got a special treat to give away... A, wait for it, Take A Break treatment worth R590 at the Chocholic Heaven at Elixir Spa in Cape Town! Just SMS **ELIXIR** and the answer to the question below to 34979 by 12 September 2008.

**QUESTION:** In which city is the Elixir spa located?