



Report of the Appeals Panel

Complaint number	<b>#41265</b>
Cited WASPA members	<b>TechVault Pte Ltd (1610)</b>
Notifiable WASPA members	<b>Oxygen8 Communications SA (Pty) Ltd t/a Dynamic Mobile Billing</b>
Appeal lodged by	<b>WASPA Compliance Department</b>
Type of appeal	<b>Written appeal</b>
Scope of appeal	<b>[X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator</b>
Applicable version of the Code	<b>16.3</b>
Clauses considered by the panel	<b>Clauses 5.5, 8.8, 21.2 and 21.11</b>
Related complaints considered	<b>There were no related complaints to be considered.</b>
Amended sanctions	<b>None</b>
Appeal fee	<b>Appeal fee not to be refunded</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>Not applicable</b>

## Initial complaint

---

The initial complaint was filed by the WASPA Compliance Department after tests were run on the services provided by the Member. The Complaint was lodged on 20 April 2019 when Version 16.3 of the Code of Conduct was in force. The tests were conducted on the Member's adult services and the banner advertising used to promote such services. The results of the Complainant's testing was attached as annexures of a series of screen shots providing graphic evidence of the Member's banners and landing pages.

In one instance, the Complainant found a specific banner advert promoting "Unlimited Games", which when clicked on, directed the tester to a landing page for an adult subscription service. The Complainant also found an adult banner promoting homo-erotic adult content, which when clicked on, directed the tester to a landing page for heteroerotic adult content services.

The Complainant alleges that the content of the relevant subscription services being offered by the Member is contrary to the reasonable expectation of consumers responding to the particular promotional banner adverts.

The Complainant alleges further that this constitutes misleading advertising and contravenes clauses 5.5, 8.8 and 21.4 of the WASPA Code of Conduct.

Further testing by the Complainant also revealed that the adult banner advert contained images which were explicit in nature and would be classified as X18 or XX by the Films and Publications Board. The Complainant alleges that the Member's use of such explicit content in its marketing material was in breach of clause 21.11 of the WASPA Code of Conduct.

WASPA notified the aggregator Member as a courtesy, indicating that the Complaint was not against the aggregator Member.

WASPA notified the Member, first via its informal complaints system, and after no response was received via its formal complaints system. After the required 10 days had expired since the notification had been sent to the Member, and no response had been received from the Member the case was sent for Adjudication where the Adjudicator dealt with the matter on a default basis.

## Adjudicator's findings

---

The Adjudicator considered the following Clauses of the WASPA Code of Conduct:

**Clause 5.5**

*Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*

**Clause 8.8**

*Content that is promoted in advertising must be the same content that is provided to the customer as part of the advertised service. Advertising must not mislead consumers into believing that it is for an entirely different service or for different content.*

**Clause 21.2**

*An “adult content service” is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.*

**Clause 21.4**

*Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.*

**Clause 21.11**

*Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.*

The Adjudicator found on the uncontested evidence provided by the Complainant that:

- (a) The Member has breached clause 5.5 of the WASPA Code of Conduct in that it has knowingly disseminated information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission by:
  - (i) promoting its adult content services using a banner advert which promotes games; and
  - (ii) promoting heteroerotic adult content services using a banner advert which promotes homoerotic content.
- (b) The Member has breached clause 8.8 of the WASPA Code of Conduct by promoting content in advertising that is not the same content that is provided to the customer as part of the advertised service. The banner advertising used is also misleading in that it misleads consumers into believing that it is for an entirely different service or for different content.
- (c) The Member has breached clause 21.4 of the WASPA Code of Conduct by failing to ensure that its services are in context with the banner adverts promoting them and in that the content of the Member’s service is contrary to the reasonable expectation of those responding to the promotion.
- (d) The Member has breached clause 21.11 of the WASPA Code of Conduct by making use of material which is classified as XX or X18 by the Film and Publication Board (or which has not yet been classified but which would likely be classified as XX or X18) in marketing material used to promote its adult content services.

In determining the appropriate sanctions against the Member, the Adjudicator took into account previous successful complaints made against the Member in the past three years of a similar nature and generally any successful complaints of a similar nature against other Members, the nature and severity of the breach and any efforts made by the Member to resolve the matter.

The Adjudicator held that although no similar complaints were upheld against the Member in the previous three years, the Member's contraventions of the WASPA Code of Conduct are viewed in a very serious light due to the explicit nature of the services and marketing material in question. It was also held that the Member's failure to respond to or resolve the complaint, must be taken into account as an aggravating factor.

The Adjudicator fined the Member R25,000 for its breaches of clause 5.5, 8.8 and 21.4 and R45,000 for its breach of clause 21.11.

## Appeal submissions

---

In its appeal submission the Member claims that it did not receive the service and related request emails alluded to by WASPA and that it only became aware of these requests and the adjudication after the fact.

In an email dated 24 June 2019 Mr K Ahmed disputed the jurisdiction of WASPA in this matter stating:

*"our service is not WASPA service and its out of scope of waspa  
We have nothing to do with waspa"*

In its appeal submissions the Member states the following:

*With respect to above report here is our comments*

- This report is for our service on Charge to Bill, and it does not come under waspa.*
- We have not received prior mail and it came to our notice when we were launching our service in UK with the help of oxygen8 and they forwarded this report. There was some problem at mail delivery*
- When we received a mail from waspa it was already become formal complaint and we already told them, this service does not come under WASPA code of conduct but it was too late and adjudicator already created report of it*
- When it came to our notice we already did compliance and whatever it requires to be done, I have attached supporting mail as well*
- There is penalty of 70,000 ZAR which is too much for us because business in south Africa is not doing good now because of the flow imposed by South African Mobile Network operator*

- *If our service does not come under waspa code of conduct then how you can fine us so high*
- *Please remove the fine as business it too low now we cannot afford such fines.*

The Complainant responded to these appeal submissions stating that its original complaint adequately deals with the merits of the matter, but specifically addressed the procedural matters raised by the Member, namely that it did not receive the complaints emails and that WASPA has no jurisdiction in this matter. It states:

With regards to the members concerns about procedural elements in this matter, we would like to advise as follows:

*2.1 The complaint was lodged by the Compliance Department on the 29th of April 2019 and was assigned to the Informal Complaints Procedure in accordance with clauses 24.16 to 24.19 of the WASPA Code of Conduct (Code).*

*2.2 The member was duly notified of the complaint via email and provided with 5 (five) working days to respond and resolve the matter.*

*2.3 The member failed/omitted/neglected to respond and/or resolve the complaint within the provided time.*

*2.4 On the 14th of May 2019, the complaint was escalated to the formal complaint procedure in accordance with clauses 24.20 to 24.42 of the Code for resolution.*

*2.5 The member was duly notified of the escalation to the formal complaint procedure via email and provided with 10 (ten) working days to respond to the complaint.*

*2.6 The member failed/omitted/neglected to respond to the complaint within the provided time.*

*2.7 On the 5th of June 2019 the complaint was assigned to an independent adjudicator for review and a ruling.*

*2.8 The member was duly notified of the assignment of the formal complaint to adjudication via email.*

*2.9 The independent adjudicator's ruling was finalised and provided to the complainant and the member via email on the 24th of June 2019.*

*2.10 Server logs to confirm that the email notifications were duly sent to the representatives listed by the member as Code Contacts – as well as confirmation of delivery on their server – are attached and marked as Annexure "A".*

*2.11 Furthermore, in one of the members own correspondences on the 10th of June 2019 they stated that the previous email was located in the spam folder.*

*2.12 We therefore dispute that the member was unaware of the complaint and that they did not receive the required notifications.*

*3. With regards to the members concerns about WASPA's jurisdiction in this matter, we would like to advise as follows:*

*3.1 Techvault became a member of WASPA on the 17th of June 2016.*

*3.2 At the time when the complaint was lodged (29 April 2019), version 6.3 of the Code was in effect.*

*3.3 The applicable version of the Code stated:*

*"1.5. The WASPA Code of Conduct is binding on all WASPA members."*

And

*“1.6. Unless otherwise specified, this Code of Conduct applies to all mobile application services offered by WASPA members to customers in South Africa.”*

*3.4 As such, at the time of lodging the complaint, the member’s services – irrespective of platform – fell within WASPA’s jurisdiction.*

*3.5 Separation of WASPA’s jurisdiction with regards to services that fall within the scope of application of the Code, only changed when version 16.8 of the Code was published and came into effect on the 28th of August 2019:*

*“1.6. Unless otherwise specified, this Code of Conduct applies to all mobile application services offered by WASPA members to customers in South Africa.*

*1.6A. The following platforms are specifically excluded from the scope of the Code of Conduct:*

*(a) Vodacom VLive, Vodacom Charge to Bill (CTB)*

*(b) MTN Play*

*WASPA may refer potential compliance concerns involving these exclusions to the relevant mobile network operator.”*

*3.6 Therefore, the member’s contestation that the service, which is offered on Vodacom Charge to Bill, falls outside of WASPA’s jurisdiction, would only have excluded them from WASPA’s jurisdiction from the effective date of version 6.8 of the Code – 28 August 2019.*

*3.7 At the time of lodging the complaint – 29 April 2019 - the service offered on Vodacom Charge to Bill platform, fell within WASPA’s jurisdiction in accordance with the provisions set out in Clause 1.5 and 1.6 of the Code.*

## **Deliberations and findings**

---

Since the Member claims that it did not receive any of the complaint documents and service termination requests by WASAP before the adjudication and the adjudication went ahead on an unopposed basis, we will deal with this appeal in a manner akin to an application for rescission of a default judgment in the courts.

The requirements for a rescission application to succeed is trite. In *De Bruyn & De Kock Inc and Another v Theunissen* (68433/2016) [2019] ZAGPPHC 467 (13 September 2019) sets out the requirements as follows: (a) the default must not be wilful; (b) there must be a reasonable explanation for the default; and (c) must show good cause for the rescission. Good cause in this context includes making out a case that there is a bona fide defence to the claim.

The email logs provided by WASPA clearly indicate that the Member was properly notified by email of the complaints and complaints procedures and that such emails were delivered on the Member’s servers. The Member states that the emails may have been channelled to its spam folders, but provides no actual evidence that this was indeed the case. We therefore accept on the evidence that the complaints were properly filed and that the Member probably wilfully failed to reply and participate in the adjudication process. Even if it is accepted that the default was not

wilful, the Member fails on the second leg of the requirements as it has not shown good cause for a rescission of the decision.

The member does not dispute the facts underlying the complaints in its appeal submissions, but contents itself with disputing the jurisdiction of WASPA on these complaints. The grounds for its dispute may have been sufficient under the latest version of the WASPA Code of Conduct, but as indicated in the submissions by the Complainant, the Code of Conduct in force at the time of the infringements applied to the Member and the relevant conduct. We therefore find that the necessary jurisdiction to adjudicate on these matters existed at the time of the complaint and adjudication.

We agree with the Adjudicator that there was an infringement of clauses 5.5, 8.8 and 21.2 and that these contraventions should be considered together for purposes of the sanction because it is similar conduct, even if there are multiple clauses that have been infringed. All of these clauses deal with deceptive marketing conduct. We also agree that there has been a contravention of clause 21.11. This deals with conduct and a contravention that is sufficiently different to be treated separately for purposes of sanction. This clause is not about deceptive marketing but about the use of material that is sexually explicit and specifically prohibited.

We also agree with the Adjudicator that these infringements are of a serious nature, especially the infringement of clause 21.11. The adjudicator indicated that the Member's failure to address and resolve the complaints was taken as an aggravating factor. We consider the fines imposed as appropriate even if the Member's failure to participate in the proceedings is not taken as an aggravating factor.

We confirm findings and the sanctions imposed by the adjudicator.

The appeal is accordingly dismissed.,

### **Amendment of sanctions**

---

The sanctions imposed by the adjudicator is confirmed.

### **Appeal fee**

---

As the Member's appeal failed, the appeal fee is declared forfeited.