



Report of the Appeals Panel

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| Complaint number | #41661 |
| Cited WASPA members | Cookies Factory SRL (1812) |
| Notifiable WASPA members | Not applicable |
| Appeal lodged by | WASPA Compliance Department |
| Type of appeal | Written appeal |
| Scope of appeal | [X] Review of the adjudicator's decision [X] Review of the sanctions imposed by the adjudicator |
| Applicable version of the Code | 16.6 |
| Clauses considered by the panel | 24.40 |
| Related complaints considered | Complaint #41263 |
| Amended sanctions | None |
| Appeal fee | Appeal fee not to be refunded |
| Is this report notable? | Not notable |
| Summary of notability | Not applicable |

Initial complaint

The WASPA Compliance Department lodged a complaint that the Member failed to pay a fine of R10,000 imposed as a sanction for a previous complaint (#41263) which was upheld by the Adjudicator and who imposed the fine of R10,000. This would constitute an infringement of clause 24.40 of the WASPA Code of Conduct.

The Member failed to respond to the original complaint as well as to the current complaint.

Adjudicator's findings

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

24.40 If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed. WASPA itself may initiate a further complaint against a member for non-compliance with any sanctions.

The Adjudicator noted that no appeal was lodged by the Member against the findings or sanctions imposed in the Adjudicator's report on Case #41263 and that the Member has not paid the fine imposed within the period stipulated in clause 24.41.

The Adjudicator held that the Member was therefore in breach of clause 24.40 and the complaint upheld.

The Adjudicator held that the Member's lack of response to both the original complaint and the current complaint was to be taken as an aggravating factor and that there were no mitigating factors. A fine of R25,000 was imposed for the infringement.

Appeal submissions

The Member responded to the latest adjudication and made written representations. The Member claims that it did not receive the emails in respect of the original adjudication as the email addresses used by WASPA were wrong, but that this has been fixed.

It raises the defence that the adjudication in case #41661 is fundamentally wrong taking into account that it is related to the earlier complaint, #41263, which was invalid because the service in question ran through Vodacom/Mondiamedia Charge to Bill platform and that these services were excluded from the scope of the WASPA Code of Conduct according to clause 1.6A.

The Member also claims that it has been forced to stop all advertising activities for the last 7 months at least in South Africa with the services ruled under the WASPA code because of the bankruptcy of their aggregator Mira Networks. Therefore it ask WASPA to re-consider the sentence since it makes no sense to be fined when one is not even advertising one's services anymore in the market. The Member is considering re-opening its South Africa business and to continue business, but this could be impacted if it were to fined unfairly.

The Member has also taken steps to become compliant even though their services have no user base at the moment.

The Member therefore requests that the fine in this complaint be waived and that the case in #41263 also be closed as the allegations were fundamentally wrong.

The WASPA Compliance Department responded to these appeal submissions. It states that it reviewed all of the information, documentation and the adjudicators' reports with the formal complaints in cases #41263 and #41661. It submitted that the substance of their original complaint is sufficiently set out and chose not to add any additional information. However, it addressed the procedural issues raised by the Member in its appeal submissions as follows:

Complaint #41263

(i)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).

(ii) The member was duly notified of the complaint via email and provided with 5 (five) working days to respond and resolve the matter. The member failed/omitted/neglected to respond and/or resolve the complaint within the provided time.

(iii) 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. 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.

(iv) The member failed/omitted/neglected to respond to the complaint within the provided time.

(v) On the 5th of June 2019 the complaint was assigned to an independent adjudicator for review and a ruling. The member was duly notified of the assignment of the formal complaint to adjudication via email.

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

(vii) The Code states the following (own emphasis added):

“24.35. Once the adjudicator has determined whether there has been a breach of the Code, and any sanctions, the adjudicator will provide WASPA with a written report detailing these findings. WASPA will provide the respondent and the complainant with access to the adjudicator’s report.

24.37. The respondent has ten (10) working days to notify WASPA if it wishes to appeal against the decision of the adjudicator.

24.40. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed. WASPA itself may initiate a further complaint against a member for non-compliance with any sanctions.

24.41. The respondent must provide WASPA with written confirmation of compliance with any applicable sanctions within ten (10) working days of receiving the adjudicator’s report. The respondent must pay any applicable fines imposed by an adjudicator within five (5) working days of receipt of invoice. The respondent must provide proof of payment of any applicable fines if requested to do so by WASPA.”

(viii) The member was duly advised that the member had 10 (ten) working days to comply with the ruling, or alternatively, indicate their intention to appeal the ruling. The member failed/omitted/neglected to comply with the ruling, alternatively, the member failed/omitted/neglected to indicate their intention to appeal the ruling.

(ix) As such, and in accordance with the provisions set out in clause 24.40, a further complaint was lodged against the member for non-compliance with the ruling in formal complaint #41263.

In respect of complaint #41661 it is stated that:

(i) On the 24th of July 2019, the member was duly notified of the lodging of formal complaint #41661 via email and provided with 10 (ten) working days to respond to the complaint.

(ii) The member failed/omitted/neglected to respond to the complaint within the provided time. The independent adjudicator’s ruling was finalised and provided to the member via email on the 30th of August 2019.

The Complainant makes the following representations in regard to the member contact information:

(i) Upon joining WASPA, a member is required to provide contact details for various correspondence, including 2 (two) Code representatives (primary and secondary), who will receive all correspondence relating to complaints.

(ii) All members have access to the WASPA member portal, where they can amend or update these details at any time, alternatively, they can contact WASPA to inform them of a change and request the details to be updated.

(iii) It is the members responsibility to keep this information up to date and accurate in terms of clauses 7.1 and 7.2.

(iv) All correspondence relating to formal complaint #41263 and #41661 were duly sent to the primary and secondary contacts listed as the Code representatives which were listed as follows at time of lodging the complaints:

- lorenzo@cookiesfactory.net

- paola@cookiesfactory.net
- (v) Server logs to confirm that the email notifications were duly sent to the representatives listed by the member as the Code Contacts – as well as confirmation of delivery on their server.
- (vi) The member requested to amend the Code Contacts on the 4th of September 2019.
- (vii) We therefore dispute that the member was unaware of the complaint(s) and that they did not receive the required notifications.

The Complainant makes the following representations in respect of the jurisdiction defence raised by the Member:

- (i) Cookies Factory became a member of WASPA on the 13th of December 2017.
- (ii) At the time when the complaint was lodged (29 April 2019), version 16.3 of the Code was in effect. 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.”
- (iii) As such, at the time of lodging the complaint, the member’s services – irrespective of platform – fell within WASPA’s jurisdiction.
- (iv) 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:
- (v) 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 16.8 of the Code – 28 August 2019.
- (vi) 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.

The Member was advised of these representations by the Complainant and of the further opportunity to respond to these representations. The Member chose not to or failed to make any further representations.

Deliberations and findings

Since the Member claims that it did not receive any of the complaint documents and service termination requests by WASPA before the two adjudications in question and the adjudications 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. If there should be justification for the

rescission of the adjudication in case #41263 then it will by necessary implication also affect the appropriateness of the adjudication in case #41661.

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) the court 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 claims that the emails were sent to the wrong addresses because of the problems it had with its aggregator at the time. However, the email addresses provided by the complainant seem to contradict this. The Member has also failed to address the representations made by the Complainant in this regard which therefore stands uncontested.

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 (Version 16.8), but as indicated in the submissions by the Complainant, the Code of Conduct in force at the time of the infringements (Version 16.3) 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 original complaint and adjudication in case #41263.

We agree with the Adjudicator that there was an infringement of clause 24.40, namely the failure to pay the fine imposed by the adjudicator in case #41263. Despite all of the facts provided, the Member still has not paid the initial fine.

The Member's failure to participate in the various adjudication proceedings 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 the 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.