



## Report of the Appeals Panel

Complaint number	<b>#48942</b>
Cited WASPA members	<b>Akinga Vertical Service Provider (Pty) Ltd ('VSP') Membership number #1944</b>
Notifiable WASPA members	<b>Not applicable</b>
Appeal lodged by	<b>Member of the public</b>
Type of appeal	<b>Written appeal</b>
Scope of appeal	<b>[X] Review of the findings of the Adjudicator [X] Review of the sanctions imposed by the adjudicator</b>
Applicable version of the Code	<b>Version 16.12</b>
Clauses considered by the panel	<b>5.7, 5.8, 5.9, 5.10, 7.5, 15.3, 15.8A, 15.9, 15.18, 15.19, 15.20, 15.25, 15.28, 15.29, 15.30, 24.24</b>
Related complaints considered	<b>Complaint #48941</b>
Amended sanctions	<b>The sanctions imposed by the adjudicator is accordingly amended as follows: (a) In respect the infringement of clause 5.10 a fine of R2,000 is imposed. (b) In respect the infringement of clause 7.5 a fine of R10,000 is imposed. (c) In respect the infringement of clause 15.3 a fine of R5,000 is imposed. (d) In respect the infringement of clause 15.9 a fine of R15,000 is imposed. (e) In respect the infringement of clause 5.19 and 15.20 a fine of R5,000 is imposed.</b>

	<b>With the exception of the fine in (d), all of the fines are suspended for a period of one year provided that the Member is not held liable for an infringement of the relevant clause.</b>
Appeal fee	<b>The appeal fee is declared forfeited.</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>Not applicable</b>

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## Initial complaint

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1. The Complainant stated that he would like to report an illegal subscription from the Club app content provider. He states that the Member claimed that he subscribed to its service in September 2020. The mobile number they were billing him on was provided to the appeal panel but is removed for reasons of privacy.

2. The following actions were required of the Member:

- (a) to unsubscribe the Complainant;
- (b) to send an sms confirming un-subscription of the complainant;
- (c) to provide proof of subscription; and
- (d) to contact the Complainant regarding a refund.

3. The following actions were undertaken:

- (a) the Complainant was unsubscribed;
- (b) an sms confirming unsubscribe was not sent;
- (c) proof of subscription was uploaded; and
- (d) no refund was offered.

4. The Member attach the following customer subscription documentation:

- (a) proof of payment to MSISDN XXXXXXXX (payment notification)
- (b) DOI, Billing & Welcome SMS history (XXXXXXXX logs)  
(numbers removed for privacy reasons)

5. Upon receiving the complaint the Member undertook an internal investigation into the matter. The Member has a main service agreement with Telkom in respect of the TelkomPlus Platform. The Member discovered that Telkom Customer Care also has access to the Member's WASPA portal account and were responding to WASPA queries on the Member's behalf. Telkom

Customer Care staff were responding to some of the queries, however they failed to complete the logs. The Member only became aware of this issue on 28 January 2021.

6. The Member tried to contact the Complainant on her cell phone but was unsuccessful. It then responded to her by email offering a full refund for the all the amounts charged to her account. There was also no response from the Complainant to the email.

7. The Member eventually got hold of the Complainant and offered him a full refund which the Complainant accepted. The refund was paid to the Complainant. This was confirmed by the Complainant.

8. The Member has also followed up with Telkom and has resolved the issue of the Telkom Customer Care Call Centre responding on behalf of the Member.

9. The Member made the following submissions regarding the formal complaint's procedure:

- (a) It is a member in good standing with no other previous complaints.
- (b) The Member actively followed up with the Complainant to try and resolve the complaint.
- (c) The Member made a *bona fide* error in failing to submit the complete logs to WASPA.
- (d) Upon becoming aware of the issue with Telkom responding on its behalf, it took immediate steps to rectify the situation.

10. Due to the Member not providing complete logs to the WASPA Secretariat, the Secretariat has escalated this unsubscribe query as the member might be in breach of clauses 5.7, 5.8, 5.9, 5.10, 7.5, 15.3, 15.8A, 15.9, 15.18, 15.19, 15.20, 15.25, 15.28, 15.29, 15.30, 24.24

## Adjudicator's findings

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10. The Adjudicator found that the Member admitted that it failed to provide complete logs relating to this complaint. The Adjudicator noted the Member's explanation of why the complete logs were not supplied, but held that this did not absolve the Member from responsibility for complying with the relevant requirements of the WASPA Code of Conduct. The Member remains responsible and is liable for the actions of its third-party suppliers and service providers in terms of section 3 of the WASPA Code of Conduct.

11. The Adjudicator held that the Member failed to provide any evidence that it had taken steps to ensure that its third party service provider complied with the requirements of the WASPA Code of Conduct. The Adjudicator held that he was compelled to accept the Complainant's statement that he was illegally subscribed.

12. The Adjudicator held that:

12.1 In the absence of any proof to the contrary, I find that the Member failed to ensure that the full terms and conditions for the relevant service were made readily available to

the Complainant and, by implication, that those terms and conditions contained the relevant information required in terms of clause 5.9 of the Code of Conduct. The Member is therefore in breach of clause 5.7, 5.8 and 5.9 of the Code of Conduct and the complaint is upheld in this regard.

12.2 The Member was also not able to show that the Complainant took any specific action to confirm their consent to the Member's terms and conditions, I find that the Member is in breach of clause 5.10 of the Code of Conduct. The complaint is upheld in this regard.

12.3 The Member has admitted its failure to comply with the requirements of clause 7.5 of the Code of Conduct and the complaint is upheld in this regard.

12.4 The Member has not provided any records required in terms of clause 15.3 of the Code of Conduct and is therefore in breach of this clause. The complaint is upheld in this regard.

12.5 No information was provided to support a finding that the Member is in breach of clause 15.8A of the Code of Conduct. The complaint is dismissed in this regard.

12.6 The Member was not able to provide any evidence of the confirmation step taken for this service or any explicit response from the Complainant. The Member is therefore in breach of clause 15.9 of the Code of Conduct and the complaint is upheld in this regard.

12.7 It does appear from the information provided that a "welcome message" as required in clause 15.18 of the Code of Conduct was sent to the Complainant's MSISDN, and the message contained the required information. The complaint is dismissed in this regard.

12.8 There is no evidence that the reminder message required in terms of clauses 15.19 and 15.20 of the Code of Conduct was sent to the Complainant for each calendar month since the subscription was activated in September 2020. The complaint is upheld in this regard.

12.9 There is no evidence to suggest that the Member is in breach of clause 15.25 of the Code of Conduct. The complaint is dismissed in this regard.

12.10 There is no evidence to suggest that the Complainant was not able to terminate the subscription in the manner prescribed in clause 15.28 of the Code of Conduct or that there has been a breach of clauses 15.29 or 15.30. The complaint is dismissed in this regard.

15. To summarise, the Adjudicator found that the Member was in breach of clauses 5.7, 5.8 and 5.9; clause 5.10; clause 7.5; clause 15.3; clause 15.9; clauses 15.19 and 15.20.

16. The Adjudicator took into account that this was a first infringement of the Code and the Member responded to the complaint timeously. It was however, also held that subscription to a service without a valid opt-in is viewed in a serious light as such conduct brings the industry into disrepute.

16. The Adjudicator ordered the following sanctions:

- (a) A fine of R2,000 for each of the breaches of clauses 5.7, 5.8 and 5.9;
- (b) A fine of R2,000 for the breach of clause 5.10;
- (c) A fine of R15,000 for the breach of clause 7.5;
- (d) A fine of R5,000 for the breach of clause 15.3;
- (e) A fine of R10,000 for the breach of clause 15.9;
- (f) A fine of R5,000 for the breach of clause 15.19 and 15.20;
- (g) A fine of R10,000 for the breach of clause 15.10 read with 15.11.

## Appeal submissions

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18. The Member further explained its relationship with Telkom and the TelkomPlus platform. Between November 2019 to date, VSP has entered into Mobile Content Service Agreements with 20 different Content Providers ('CP's') in terms of which, inter alia, CP's sub-license, onboard and sell their services on the Telkom Plus platform.

19. VSP owns the infrastructure/ system (i.e. the service delivery and billing platform) which delivers the CP's services on the TelkomPlus platform and allows for customer billing, while the CP's are fully responsible for the acquisition of content, the hosting, maintenance and management of the service/s including marketing of the service/s.

20. In October 2020, VSP became a member of WASPA and encouraged our CP's to do the same in order to protect TelkomPlus customers and stakeholders. By the end of April 2021, all VSP CP's ought to have obtained WASPA membership or face suspension of their services until they comply with this requirement.

21. The Member submits that Telkom and the Member indeed submitted the logs that they were able to submit to WASPA at the time, however submitting complete logs is impossible without the complaint being directed to the relevant CP WASPA member in terms of the proper procedure in terms of clause 3.3 and 3.4 of the WASPA Code of Conduct, cited above.

22. The member submits that in accordance with clause 3.4 of the WASPA Code of Conduct, the Member, as a WASPA member is not liable for any breaches of this Code of Conduct resulting from services offered or marketed by a 'CP', if that 'CP' is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct.

23. The Member submits that the complaint has a bearing on three of its CP's services, namely GameZone by Newstor Teletek (Pty) Ltd who has applied for WASPA membership, but was not a WASPA member at the time, GameHub by Ndoto Media (Pty) Ltd who is a WASPA member and GameOMania from Formal Grand Resources (Pty) Ltd who holds affiliate WASPA membership. The Member submits that it only became aware that it should have handed over the complaints to the relevant members so that they could deal with it directly.

24. The Member submits that since Ndoto and Formal Grand Resources are WASPA members in their own right, they ought to be held liable for those breaches instead of the Member.

25. The Member submits that in regards to the findings that it did not provide evidence of taking steps that its service providers must comply with the WASPA Code, the complaints should have been directed to the relevant members.

26. The Member submits that the full terms and conditions in respect of the services are indeed readily available and provides links to those terms and conditions.

27. The member submits that on the TelkomPlus page are able to confirm their consent to join a service to the full terms and conditions by inserting their cell phone number in the available box. This completes the confirmation step.

28. The Member submits that in regard to the finding that it failed to provide the information required in terms of clause 5.7, that it indeed provided the logs it had access to at the time. The full logs should have been submitted by the relevant CP.

29. The Member submits the logs for the DOI's in respect of services were submitted by the Member in terms of which the customers would have had to insert his number in the text box as the confirmation step and/ or explicit response to join the service/s and that there is no contravention of clause 15.9.

30. The Member admits that it has no evidence of the required reminder messages that should have been sent.

## **Deliberations and findings**

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24. It is common cause that the Complainant initiated a complaint about being subscribed to a subscription service without his consent. After an initial investigation by the Member, the Member offered an apology to the Complainant and a full refund of the amounts that had been charged.

25. The Adjudicator held that in the absence of any proof to the contrary he/she was compelled to accept that the Complainant's statement that he was illegally subscribed. In its appeal submission the Member offers no proof to contradict this finding. Its only response is that it should not be held responsible since the complaint should have been handed over to the relevant CP. We also accept the fact that the Complainant was subscribed without proper compliance with the Code of Conduct's requirements. This constitutes an infringement of the Code. This fact is further borne out by the fact that the infringing subscription was never challenged and a full refund was offered to the Complainant.

26. The main defence raised by the Member is that it should not be held responsible for these infringements as these complaints should have been referred to the relevant CPs who are WASPA members. The Member submits that the complaint relates to three services offered by three different CPs, two of whom are WASPA members. The third CP is not a WASPA member and the Member therefore remains fully liable for the conduct of at least that CP in terms of clause 3.7 of the Code.

27. The Member provides very little detail on how this particular subscription could relate to three different services, but there is an admission that at least one of the services to which the Complainant subscribed was offered by a CP who was not a WASPA member at the time. It is not clear whether the other two members were in fact WASPA members at the relevant time, but nothing turns on this fact, as the Member remained liable for the actions of at least one of the three CPs. In this case the complaint was correctly referred to the Member.

25. The Member should have provided full logs for the transaction at least from NewsTor Teletek. It has by its own admission failed to do so. Other than shifting the responsibility it does not provide credible evidence for the fact that it was unable to obtain full records from its CP.

26. The Member's appeal submission that complying with the requirements of the second part of the provision would absolve the member from liability cannot be sustained. The member remains liable for the infringements of the Code, it is only in regard to the remedies that the reasonable steps taken by the Member plays a role in mitigation of the sanctions imposed.

27. In regard to the complaint that the Member failed to comply with the provisions of clauses 5.7, 5.8 and 5.9 the Member in its appeal submission provides links to the relevant pages on the TelkomPlus website. Despite the fact that these complaints were specifically mentioned in the original complaint, the Member did not make those links available prior to the adjudication or address those complaints. It focused solely on the infringing subscription. There was no factual evidence before the Adjudicator in this regard other than the mention of a possible infringement of these clauses. The finding of the Adjudicator is accordingly overruled. It is held that there was no infringement of clauses 5.7, 5.8 and 5.9.

28. There was no evidence that the Complainant took any specific action to confirm their consent to the Member's or CP's terms and conditions or subscription. The complaint and subsequent handling of the complaint confirm that the Complainant was subscribed against his wishes and did not consent to any agreement. The submissions by the Member in this regard are of a general nature and does not address the specific instance. There is therefore an infringement of clause 5.10 as held by the Adjudicator. The appeal against this finding is dismissed.

29. The member has admitted that it failed to provide full logs for the transaction at least as far as NewsTor Teletek is concerned. There is therefore also an infringement of clause 7.5. This is also an infringement of clause 15.3. The appeal against these findings is dismissed.

30. We agree with the Adjudicator that the Member has provided no credible evidence on the confirmation step taken by the Complainant to subscribe. The uncontested facts on the complaint point in the opposite direction. Other than a general description on how a confirmation takes place, there is no evidence of this particular instance. There is accordingly an infringement of clause 15.9.

31. The Member admits that it cannot provide any evidence that it has complied with requirements of clauses 15.19 and 15.20. The finding of the Adjudicator that these clauses were infringed is confirmed.

32. To summarise:

- (a) The appeal against the findings of the Adjudicator that the member has infringed clauses 5.7, 5.8 and 5.9, is upheld.
- (b) The appeal against the findings of the Adjudicator that the Member has infringed clauses 5.10, 7.5, 15.3, 15.9, 15.19 and 15.20 is dismissed.

## **Amendment of sanctions**

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The adjudicator took into account that this was a first infringement of the Code by the Member, but also referred to the seriousness of subscriptions without the consent of the consumer and the fact that this brings the industry into disrepute. It is also taken as a mitigating factor that the Member took immediate action to resolve the complaint to the satisfaction of the Complainant.

The sanctions imposed by the adjudicator is accordingly amended as follows:

- (a) In respect the infringement of clause 5.10 a fine of R2,000 is imposed.
- (b) In respect the infringement of clause 7.5 a fine of R10,000 is imposed.
- (c) In respect the infringement of clause 15.3 a fine of R5,000 is imposed.
- (d) In respect the infringement of clause 15.9 a fine of R15,000 is imposed.
- (e) In respect the infringement of clause 5.19 and 15.20 a fine of R5,000 is imposed.

With the exception of the fine in (d), all of the fines are suspended for a period of one year provided that the Member is not held liable for an infringement of the relevant clause.

## **Appeal fee**

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Despite the fact that the Member's appeal has been partially successful, the majority of the complaints remain. Where the findings have been overturned this was in part due to the fact that the Member failed to provide the necessary evidence in the in initial adjudication in the original adjudication. The appeal fee is declared forfeited.