



## Report of the Adjudicator

Complaint number	<b>#53765</b>
Cited WASPA members	<b>Newstor FZC (1990)</b>
Notifiable WASPA members	<b>Mondia Media South Africa (Pty) Ltd (1975)</b>
Source of the complaint	<b>WASPA Compliance Department</b>
Complaint short description	<b>The advertised service was not the service provided; The subscribed service was not provided despite being charged for</b>
Date complaint lodged	<b>2021-07-19</b>
Date of alleged breach	<b>31<sup>st</sup> of May 2021</b>
Applicable version of the Code	<b>16.16</b>
Clauses of the Code cited by the complainant	<b>5.1, 5.2, 5.4, 5.5, 8.8</b>
Related complaints considered	<b>None</b>
Fines imposed	<b>R45 000</b>
Other sanctions	<b>n/a</b>
Is this report notable?	<b>Not notable</b>

Summary of notability	n/a
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## 1. Initial Complaint

- 1.1. This complaint was lodged by the WASPA Compliance Department on the 19<sup>th</sup> of July 2021, and the member was notified of the complaint by the WASPA Secretariat on the 20<sup>th</sup> of July 2021.
  - 1.2. The Secretariat also notified the service aggregator, Mondia Media South Africa (Pty) Ltd, of the complaint on the same day, but received no response.
  - 1.3. The WASPA Compliance Department included both comprehensive notes of its examination of the member's service, as well as a video record of the examination in its formal complaint. The report is comprehensive but can be summarised as follows:
    - 1.3.1. On the 31<sup>st</sup> of May 2021 the WASPA Compliance Department's tester (hereafter the "tester") visited several mobile websites of an explicit adult nature, and eventually clicked on an image on a website at URL "xxxsex.men". The link took the tester not to a landing page for a website offering explicit adult material, but to a landing page advertising non-explicit games.
    - 1.3.2. The tester then proceeded to sign-up for the member's "Go Games" game service. R7.00 was deducted from the tester's account.
    - 1.3.3. The tester received a welcome SMS and clicked on the link in the message. The tester was however unable to access the service. The tester's browser accessed the member's site, but the tester was presented with the message "we are unable to process your request (*sic*)".
    - 1.3.4. On the 1<sup>st</sup> of June the tester ascertained that another R7 had been deducted from the tester's account, and then attempted to follow the link provided in the welcome message. The tester achieved a similar result, with a different error page reading "500 Oops, something went wrong! Please check your request or try again later."
    - 1.3.5. The tester then successfully unsubscribed from the service.
  - 1.4. The above can be divided into two issues: that the advertised service was not the service provided (for which the tester alleged breaches of clauses 5.5 and 8.8 of the Code), and that the subscribed service was not provided despite being charged for (for which the tester alleged breaches of clauses 5.1, 5.2 and 5.4 of the Code).
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## 2. **Member's Response and Complainant's Rejoinder**

2.1. The member responded on the 26th of July as follows on the two issues:

### The Advertised Service was not the Service Provided

- 2.2. The member uses a combination of DSP and affiliate traffic. In the case of affiliate marketing the advertiser does not control placement of banners; in this case their advertising agency placed their banner on certain sites without the member's approval.
- 2.3. The member further advised that it had taken action against the agency, instructed it to block all traffic from that source, and also provided a copy of email correspondence with the agency to that effect.
- 2.4. The tester responded to the member's version by citing clauses 3.5, 3.6 and 3.7 of the Code, restating the facts, and noting that the member had not denied the breach.

### The Subscribed Service was not Provided Despite being Charged for

- 2.5. The member argued that for various technical reasons its system required the consumer to click on the "continue" button on the subscription confirmation page on its site after the subscription process had been completed. The member also provided a video of how this should have been done.
- 2.6. The member also argued that clear instructions to click on the continue button are given (though it was not made clear where these instructions were to be found), and that accordingly if the tester had followed instructions, the system would have worked as required.
- 2.7. The tester gave a comprehensive response and raised several points. I summarise briefly here for reasons that will become apparent.
  - 2.7.1. Firstly, consumers are in practice unlikely to take this extra step required by the member to finalise the subscription process.
  - 2.7.2. Secondly, there are several technical reasons why this approach is problematic.
  - 2.7.3. Thirdly, there are in fact no instructions requiring the consumer to take the steps that the member requires.
  - 2.7.4. Finally, the process demonstrated by the member in its video is not the same as that followed by the tester: the member's process was off-net flow which utilised a NIUSSD confirmation step, not a web confirmation page, while the tester's was an on-net web acquisition flow. The MSISDN is detected and a two-step MTN confirmation web flow process is used.
- 2.8. In response the member responded as follows:

- 2.8.1. They do not control the technical flow, which is determined by the mobile network operator.
  - 2.8.2. On the missing instructions, the member stated that these are determined by the operator. Though how this relates to requiring the consumer to click a further button is not quite clear.
  - 2.8.3. While the process flow captured in the tester's versus the member's videos may not have been the same, the purpose was to demonstrate how content access and redirection are dealt with, and this is handled the same way in both scenarios.
- 2.9. The member also mentioned that it uses an anti-fraud platform; this submission is not germane to either head of the complaint.
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### 3. Sections of the Code considered

- 3.1. As the conduct complained of took place on or around the 31<sup>st</sup> of May 2021, version 16.16 of the WASPA Code of Conduct applies to this complaint.
- 3.2. It is alleged that the member has infringed clauses 5.1, 5.2, 5.4, 5.5, and 8.8 of the Code of Conduct. Clauses 3.6, 3.6, 3.7 and 5.3 may also be relevant. The clauses read as follows:
  - 3.5. *Members must ensure that any client, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.*
  - 3.6. *Members must ensure that any client, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.*
  - 3.7. *A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a client, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If 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, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.*

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  - 5.1. *Members must not offer or promise or charge for services that they are unable to provide.*
  - 5.2. *Services must not be unreasonably prolonged or delayed.*

...

  - 5.4. *Members must have honest and fair dealings with their customers.*
  - 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.*

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*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.*

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#### 4. **Decision**

4.1. I make the following rulings in respect of the complaint.

##### The advertised service was not the service provided

- 4.2. I cannot see any indication that the website from which the member's landing page was accessed is owned or controlled by the member (I note that the tester rendered this domain as "xxxsex.me" in the report, where it is in fact "xxxsex.men"). Moreover, the member admits that the banner in question was placed by an advertiser.
- 4.3. Under clause 3.5 and 3.6, the member has a duty to ensure that its "supplier, affiliate or sub-contractor" is aware of the WASPA code and must ensure that it markets the member's services in a manner consistent with the Code.
- 4.4. What is not clear to me on these facts is why a banner advertisement for adult services would erroneously link to a non-adult service. Even if the member had no control over where the banner appeared, it could surely control the URL embedded in the banner itself before its distribution and hence the target URL when the banner was clicked.
- 4.5. No matter the precise technical issue, there is no doubt that the banner in question breached clause 8.8, in that the service provided was not even vaguely related to the content advertised. In terms of clause 3.7 of the Code, the member is liable for the advertising agent's breach in placing the banner. Accordingly, the member has breached clause 8.8 of the Code.
- 4.6. I do not find a breach of clause 5.5, as the member did not intend to be deceptive.

##### The subscribed service was not provided despite being charged for

- 4.7. Both parties to this matter expended some effort in their submissions on this point, but the essential issue is quite simple: the member required the consumer to carry out steps to confirm a subscription AFTER the subscription had already been confirmed. To do so is a breach of clause 5.4 in that it is unfair and misleading to expect a consumer to confirm a subscription service after the consumer has already been notified that the subscription service has commenced.
- 4.8. The existence or otherwise of instructions for the consumer to do so is irrelevant as this should not be a requirement. The operator's technical requirements are also irrelevant, as it is simply impermissible under the Code to require a further step. If it is not technically

possible to provide the service without requiring this further step, then the service cannot be provided without contravening the Code.

- 4.9. The complainant has alleged that the member infringed clause 5.1 in that it could not provide the services that it offered. It clearly COULD offer these services, as its demonstration video showed, but its subscription process was such that the services were not commenced (despite being charged for).
- 4.10. I don't believe that clause 5.2 has been infringed either, in that the services were neither prolonged nor delayed: they were never going to be provided at all.
- 4.11. In the circumstances however there is little doubt that the member has infringed clause 5.4 for the reasons already discussed above.

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## 5. **Sanctions**

- 5.1. This is the first complaint that has been lodged against the member.
- 5.2. I note, in respect of the members' infringement of clause 8.8 of the Code of Conduct, that the banner in question was placed by a third-party advertising agency. It is clear from the record that when the member became aware of the complaint, it took the matter up with the agency on the 26<sup>th</sup> of July and instructed it to stop all traffic sources for their campaigns. This was a week after the member was notified of the complaint and is the only step that the member demonstrated that it took to control the agency. Accordingly, I cannot find that the member demonstrated that it had taken the reasonable steps necessary for the member to benefit from the mitigating factor set out in clause 3.7 of the Code. I accordingly impose a fine of R15 000 on the member for the infringement of clause 8.8 of the Code.
- 5.3. There is no indication of the prejudice suffered by consumers generally due to the member's breach of clause 5.4. The tester was charged for two days of the member's subscription service without the service being made available, and this could very well have been the experience of many consumers. I don't believe it would be feasible to provide for a refund, as I strongly suspect that the member would not be able to ascertain which consumers were affected. Nonetheless, considering the potentially significant prejudice to consumers that the member's practice in this regard could cause, the member is fined the amount of R30 000 for its infringement of clause 5.4 of the Code.

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## 6. **Matters referred back to WASPA**

- 6.1. None
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