



Report of the Adjudicator

Complaint number	#56446
Cited WASPA members	Ole Media Group (Pty) Ltd
Notifiable WASPA members	Managed Mobile Services (Pty) Ltd t/a MobiMedia
Source of the complaint	Public
Complaint short description	Unpaid revenue share Charged for services not rendered Subscribers charged for content not delivered Unresponsiveness
Date complaint lodged	2022-02-24
Date of alleged breach	From September 2021
Applicable version of the Code	16.6
Clauses of the Code cited	4.2; 4.3; 4.11; 5.1; 5.2; 5.6; 5.11; 5.12; 5.13; 5.14; 7.1; 15.3; 23.3
Related complaints considered	n/a
Fines imposed	R10 000 fine for breach of clause 4.1 R 5 000.00 fine for breach of clauses 5.6; 5.12 and 5.13.
Other sanctions	n/a
Is this report notable?	Not notable

Summary of notability	n/a
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1. INITIAL COMPLAINT

- 1.1. This complaint was lodged by a member of the public on the 24th of February 2022, and the member was notified of the complaint by the WASPA Secretariat on the 4th of March 2022.
- 1.2. In the complaint the complainant is referred to as a “competitor” of the member, however, I do not agree that it is indeed a competitor. The complainant does not offer any mobile application services or other WASP services directly to consumers. It merely creates the content that is distributed through a third-party mobile service provider – essentially a business-to-business services arrangement for onward provision to consumers. Based hereon, I am adjudicating this complaint as if it was lodged by a member of the public.
- 1.3. The complaint can be summarised as follows:
 - 1.3.1. The complainant creates certain content that is distributed through SMS / video subscription services – so-called Sangoma/Zangoma services. It used the member’s platform to provide this subscription content to consumers and entered into a content supply agreement with the member in 2008.
 - 1.3.2. On 2 February 2020, the complainant terminated its engagement with the member and requested that its shortcodes, links and content be transferred to another service provider, however, this did not transpire.
 - 1.3.3. Since March 2021, the member has stopped providing the content distribution services however it still continued to invoice the complainant for the services.
 - 1.3.4. The member also allegedly deducted funds from the subscribers for the complainant’s content but did not deliver the content for almost a year. This was, according to the complainant, fraudulent behaviour. The last content delivered to subscribers was on 29 October 2021. After this, the subscriptions were running with subscribers still being billed but no content was delivered.
 - 1.3.5. The member has not paid the complainant’s revenue share for using its content for 8 (eight) months and before that the complainant allegedly always had to chase the member for payments and payment order notifications.
 - 1.3.6. The member did not respond to emails or telephone calls and acted unprofessionally according to the complainant. The member also does not have a procedure that allows customers to lodge complaints regarding the services provided.
 - 1.3.7. The member does not have any contact details on its website nor any customer support contact details (including telephonic or call centre support), it merely has

a contact form that can be filled in. The telephone number listed for the member on the WASPA website does not connect to a contact person or a call centre.

- 1.3.8. The complainant has requested records and details of the source of the service initiation requests for the subscriptions and all subsequent interactions with the customers. The member has not provided this.
- 1.3.9. The complainant also sent emails to MTN, which is the delivery platform service provider for the member but received no responses.

2. MEMBER'S RESPONSE

- 2.1. On the 11th of March 2022, the member submitted its response to the informal complaint to the WASPA Secretariat and advised as follows:
 - 2.1.1. The member believed the reason for the complaint was the non-payment of the revenue share from services which used the complainant's content. This was aggravated by the member's non-responsiveness to emails and WhatsApp messages sent on or around the 7th of September 2021.
 - 2.1.2. The member alleged that it did communicate with the complainant in August 2021 and early September 2021. However, it admitted that there was no response to the complainant's last email and WhatsApp messages on the 7th of September 2021.
 - 2.1.3. The member alleged that the complainant was in contact with at least four different people within the company and this led to confusion as to who should have responded. The lack of response was due to internal miscommunication. However, there was no further correspondence from the complainant until 23 February 2022 when the complainant listed its complaints and its intention to lay a complaint with WASPA.
 - 2.1.4. The member responded to the complainant's email on 24 February 2022 within 24 hours and asked for clarification as to the specific demands.
 - 2.1.5. The member stated that it is incorrect that it has not been distributing content as supplied by the complainant after March 2021. It distributed such content up until September 2021. Subsequently, it created content in-house for distribution.
 - 2.1.6. The member confirmed that it experienced intermittent technical issues during the period the complainant alleged services were not rendered. This affected the delivery of some text message services. The issues were partly caused by the migration to a new billing and delivery platform at MTN. The member indicated that it was aware of these issues and ensured the issues were rectified. However, this was not a permanent technical issue and did not last 12 (twelve) months as alleged.
 - 2.1.7. The member further stated that it is not directly responsible for the services it provides – the services are provided by MTN, and the MTN customer support team deals with all customer queries. In this respect, the member stated that it is not a traditional "3rd party" WASP.

- 2.1.8. The last revenue payment was made by the member to the complainant on 2 September 2021 for the June 2021 revenue share. The member stated that its understanding was that the complainant terminated the content supply agreement effective from September 2021, and it owed the complainant its portion of the revenue until 30 September 2021. According to the revenue reports received from MTN, the complainant's share would be R 13 583.67, which it agreed to pay before 31 March 2022. The member also indicated that it would be happy to share all revenue reports received from MTN with the complainant.
 - 2.1.9. The member admitted that, due to personnel and systems changes, there were delays in issuing payment orders and making payments.
 - 2.1.10. The contractual relationship was between the complainant and the member. As such, MTN would be unlikely to respond to emails from the complainant directly.
 - 2.1.11. Lastly, the member stated that it was its understanding that the termination letter sent by the complainant on 2 February 2020 was rescinded and that the parties would continue the contractual relationship (as is also clear from the revenue share payments made until September 2021).
- 2.2. The member proposed a settlement of the complaint on the following grounds:
- 2.2.1. The member will make full payment of all monies owed to the complainant before the 31st of March 2022 for the share of the revenue generated from the complainant's content until the 30th of September 2021 in the amount of R 13 538.67.
 - 2.2.2. The content supply agreement between the parties will be considered formally terminated on 30 September 2021.
 - 2.2.3. The member undertakes to return all the complainant's media content and not to use any of the content going forward for any of its (and its associated companies) services.
 - 2.2.4. Both parties to sign an agreement in full and final settlement, which would include a mutual confidentiality clause.

3. **COMPLAINANT'S RESPONSE**

- 3.1. The complainant provided a response to the member's initial response on 22 March 2022 and indicated that the member's settlement proposal was unacceptable.
- 3.2. The complainant further indicated that the member's belief that this complaint only centred around the unpaid revenue shares, was incorrect. There were various issues.
- 3.3. The complainant further indicated as follows:
 - 3.3.1. There were numerous ignored phone calls, WhatsApp messages, SMS's and emails sent to the member over a long period of time - not just limited to 7 September 2021.

- 3.3.2. The service is still running and generating revenue (in March 2022). The agreement between the parties stated that a 3 month notice period will apply which means that payment would continue until the end of the 3 month period. i.e. if the agreement was terminated on 30 March, payment will be by the member made up to and including 30 June. The last payment the complainant received was for June 2021. If the agreement was officially terminated, it would mean that a final payment of 12 month's revenue plus interest would be due.
- 3.3.3. The member acknowledged that there is money outstanding but did not provide any reason as to why it was withholding the payment. An offer to pay up until September 2021 is not acceptable in the case where the services were still running up until March 2022.
- 3.3.4. The termination of the agreement between the parties cannot be backdated.
- 3.3.5. The member already previously agreed to return the complainant's content, and this has not been done.
- 3.4. On 29 March 2022, this complaint was escalated to a formal complaint.
- 3.5. There was also certain "without prejudice" correspondence between the complainant and the member which was submitted to the WASPA Secretariat. Even though I have considered such content, it does not take the on-record complaint any further and will not be dealt with in this report in detail.

4. **MEMBER'S FURTHER RESPONSE**

- 4.1. On the 22 April 2022, the member submitted its response to the formal complaint to the WASPA Secretariat and advised as follows:
 - 4.1.1. It still believed that the complaint was primarily a commercial dispute between two business parties and remained unconvinced that the WASPA complaints process is the correct channel to address this dispute.
 - 4.1.2. It has been in direct contact with the complainant since receipt of the formal complaint in order to try and reach a settlement outside of the formal WASPA complaint process, but this has yet to be possible.
 - 4.1.3. The services were provided by the member and marketed by MTN and as such, the member did not believe that the complainant will suffer reputational damage since its name was not publicly associated with the service.
- 4.1. The member again proposed a settlement of the complaint on the following grounds:
 - 4.1.1. The member will make full payment of all monies owed to the complainant as a share of actual revenue generated from the complainant's service until 28 February 2022 and projected revenues until 31 July 2022. This is irrespective of whether the complainant's content was/is used for the services. Its records showed this to be R 28 486.13. Payment to be made before 28 April 2022.

- 4.1.2. The content supply agreement between the parties will be considered formally terminated on 31 July 2022.
- 4.1.3. The member undertakes to return all the complainant's media content and not to use any of the content going forward for any of its (and its associated companies) services.
- 4.1.4. Both parties to sign an agreement in full and final settlement, which would include a mutual confidentiality clause.

5. **COMPLAINANT'S FURTHER RESPONSE**

On the 25 April 2022, the complainant submitted a further response to the member's response and advised as follows:

- 5.1. The offer made by the member is incorrect and disputed. It did not address the complaint in full.
- 5.2. On the revenue report provided by the member, it made certain deductions that the complainant disputed. The member offered to only make payments until February 2022 however the service is still running. The complainant asked for the official detailed MTN report as it did not believe the member's break down. Prior to this offer, the member made an offer to pay up to September 2021 in the amount of R 13 000.00 - both amounts/offers were unacceptable and dishonest.
- 5.3. The member did not answer to any of the original allegations or complaints.
- 5.4. The member has not transferred the complainant's services to Mobixone as promised.
- 5.5. The complainant's service was still running, and the member owed the complainant revenue for 3 months beyond the time the services stop running. The complainant requested proof that the services have been stopped.
- 5.6. The member has not explained why, for approximately 6 months, subscribers to the complainant's content were being billed but not receiving content. This was fraud and reflected badly on the complainant's good name.
- 5.7. The member has not explained why it ignored all communications from the complainant since September 2021.

6. **MEMBER'S FURTHER RESPONSE**

- 6.1. On the 3 May 2022, the member submitted a further response to the complainant's response and advised as follows:
 - 6.1.1. It is not clear why the complainant believed the offer is incorrect and disputed.
 - 6.1.2. It has addressed every point of the complaint submission and requested that the complainant specify why it disagreed with this.

- 6.1.3. It requested that the complainant specify which deductions it disputes in the revenue share schedule. The calculation was based on MTN's revenue reports received and the deductions was as per the agreed revenue share model since the service commenced plus a projection till the end of July 2022, based on the average monthly revenue generated for the past 11 months, which worked to the complainant's advantage.
- 6.1.4. The payment of R 13 000.00 referred to was actual revenue owed until 30 September 2021 and was due and owing. The member did not dispute this amount.
- 6.1.5. The member has agreed to the complainant's request to terminate the agreement on 31 July 2022. The proposed settlement payment included projected revenue until this date. Should the complainant prefer, the member can pay the revenue share based on actual revenues until 31 July 2022.
- 6.1.6. The member will make available to the complainant the actual revenue reports received from MTN.
- 6.1.7. The member had a meeting with Mobixone and MTN to discuss the migration of the complainant's services and are waiting for Mobixone to specify how they would like the transfer to be actioned.
- 6.1.8. It did not dispute the Sangoma/Zangoma service is still running, however, it is no longer using the complainant's content. It has also confirmed that it will continue to pay the complainant for three months beyond the termination date of the contract (30 April 2022). The complainant will receive a share of the revenue generated from the Sangoma/Zangoma service until 31 July 2022, even though the member has sourced content elsewhere.
- 6.1.9. The member disputed that the Sangoma/Zangoma service is the complainant's intellectual property - it is a generic Sangoma service. Only the complainant's content is its intellectual property.
- 6.1.10. It has investigated the allegation that the subscribers to the content were billed for 6 months without receiving content and do not believe this is the case. The complainant did not provide any evidence of this allegation.
- 6.1.11. It disputed that the complainant suffered reputational damage, since the complainant's name was never publicly associated with the service.
- 6.1.12. It has no record of direct communication from the complainant between 9 September 2021 and 22 February 2022.
- 6.1.13. It requested that the complainant specify what it requires from the member to resolve this commercial dispute.
- 6.2. The member again reiterated its settlement of the complaint on the following grounds:
 - 6.2.1. It has stopped using the complainant's content.
 - 6.2.2. It has accepted termination of the agreement on 30 April 2022.

- 6.2.3. It has agreed to pay the share of revenues generated from the Sangoma/Zangoma services on the MTN platform (including projected revenues) until 31 July 2022.
- 6.2.4. It has calculated (and committed to pay) the amount owed as R 28 486.13 based on reports and revenues received from MTN and the existing commercial agreement.
- 6.2.5. It has agreed to share the MTN revenue reports.
- 6.2.6. It has agreed to return and/or transfer the complainant's content to Mobixone.
- 6.2.7. It has acknowledged poor communication and apologised (and tried to explain why this came about).
- 6.2.8. It has investigated the claim of non-delivery of content and do not believe that no content was delivered for six months.
- 6.2.9. It has explained the relationship with MTN and why marketing and the selection of content to be promoted was not within its control.

7. SECTIONS OF THE CODE CONSIDERED

7.1. As the conduct complained of took place from September 2021, version 16.16 of the WASPA Code of Conduct applies to this complaint.

7.2. It is alleged that the member has infringed clauses 4.2; 4.3; 4.11; 5.1; 5.2; 5.6; 5.11; 5.12; 5.13; 5.14; 7.1; 15.3; and 23.3 of the Code of Conduct. The clauses read as follows:

Professional conduct

4.2. *Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.*

Lawful conduct

4.3. *Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so. A relevant finding by a statutory or regulatory body is required to support an allegation of unlawful conduct by a member.*

Fraud prevention

4.11. *Members must take reasonable steps to prevent their networks and systems from being used in a fraudulent manner, including:*

- (a) *complying with WASPA's published best practices for fraud prevention;*
- (b) *...*
- (c) *reporting any fraudulent activity identified on their networks or systems to WASPA within a reasonable period of time.*

Service levels

- 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.*

Provision of information to customers

5.6. *Each member must provide contact details on their main corporate web site, which must include the member's registered company name, telephone number and email address.*

Customer support

- 5.11. *Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to. (Example: support should not be limited to email if a significant number of customers do not have access to email).*
- 5.12. *Telephonic support must be provided via a South African telephone number and must function effectively. Customer support must be provided via standard rated numbers, and may not be provided via premium rated numbers. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers must not forward to full voice mailboxes.*
- 5.13. *The option of speaking to a call centre consultant (or leaving a message for a call centre consultant) should be obvious to the caller and available during business hours.*
- 5.14. *Members must have a procedure allowing customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.*

Nominated representatives

- 7.1. *Each member must supply WASPA with contact information (including at least a telephone number and an email address) for a primary and a secondary Code of Conduct representative.*

Record keeping

- 15.3. *For all subscription and notification services the member must keep a record of the source of the service initiation request, and all subsequent interactions with the customer. Those records must be made available to the customer, on request. Records must be kept for a period of at least three years after the customer terminates the service.*

Customer support

- 23.3. *Telephonic customer support for premium rated services must be provided using a toll free number, if the relevant mobile network offers this as a service to members.*

8. Decision

- 8.1. Having reviewed the complaint, supporting communications offered by the complainant and the member's responses, I have reached the conclusions set out below.
- 8.2. Firstly, I wish to deal with whether WASPA has the necessary jurisdiction to deal with this complaint. In terms of clause 1.6 of the Code, the Code applies to all mobile application services offered by WASPA members to customers in South Africa. If the complaint falls outside of the mandate of WASPA, I cannot consider it.
- 8.3. It is clear that there is a business-to-business services arrangement in place between the complainant and the member. The complainant does not provide WASP services, it provides content that is distributed by the member as a WASP. The dispute between the two parties relating to the payment of the revenue share in terms of the content supply agreement as well as the termination of such contract, is not a consumer dispute and is also contractual of nature. WASPA's mandate only covers consumer disputes as far as it relates to the provision of WASP services. It is also not within a WASPA Adjudicator's jurisdiction to decide on a contractual dispute between parties.
- 8.4. Based hereon, I cannot apply the Code to the relationship between the member and the complainant. I can only consider an alleged breach of the Code insofar as the complainant has shown that the member has not complied with the Code when the member interacts with consumers directly.
- 8.5. Should the contractual dispute between the parties remain unresolved, I would suggest the complainant seeks legal redress through the court system or an arbitration process.

- 8.6. In as far as allegations of breach are raised in this matter, I will deal with the relevant clauses of the Code in order:

Clause 4.2

- 8.7. As already mentioned, it is not within a WASPA Adjudicator's jurisdiction to decide on a contractual dispute between parties, merely to determine if the WASPA Code of Conduct has been breached. I am only able to consider whether the member conducted itself in a professional manner in terms of clause 4.2 when providing services to consumers.
- 8.8. That being said, the WASPA Code requires a member to act professionally in its dealings with customers and the public. In this case I have to consider the fact that the member 1) admitted that there was a period during which subscribers did not receive content they paid for as a result of a system migration; and 2) shifted its obligations (and some of the blame) to its service provider MTN.
- 8.9. The dispute between the parties seems to be as a result of reasons beyond this complaint and the parties longstanding business relationship. That in itself is not a reason to believe that the member does not act professionally towards consumers. It does not appear that the member has had any other WASPA complaints lodged against it.
- 8.10. Even though the member admitted that it experienced a system issue that resulted in content not being delivered, it stated that the issue was fixed immediately. The member did not confirm whether subscribers were still billed while content was not delivered – this would be a cause for concern as the complainant alleged that this is the case. Without the member disclaiming this, it can be assumed that the subscribers were billed. This is certainly not professional conduct.
- 8.11. I don't believe any of the other allegations levelled by the complainant is substantiated to result in unprofessional conduct on the side of the member when it provides services to consumers. However, based on the issue relating to subscribers being billed for content not delivered (no matter how limited the period was and what the reason was), I am of the opinion that there is an element of unprofessional behaviour from the member.
- 8.12. Accordingly, I find a breach of this clause.

Clause 4.3

- 8.13. The only averment made by the complainant to suggest that the member may have acted unlawfully, is possibly the allegation of fraud. However, there is no evidence submitted to support this allegation. There is no averment made that the member has not co-operated with law enforcement authorities or a relevant finding of a statutory body.
- 8.14. The member has not infringed on any intellectual property rights as far as I can see.
- 8.15. Accordingly, I cannot find a breach of this clause.

Clause 4.11

- 8.16. There is no averment made that the member has allowed its networks or systems to be used in a fraudulent manner. If the complainant listed this clause in relation to its believe

that the member itself acted in a fraudulent manner by not providing content, that is not dealt with under this clause.

8.17. Accordingly, I cannot find a breach of this clause.

Clauses 5.1 and 5.2

8.18. The member admitted that there was a period during which it was unable to provide content to subscribers. It did not deny that subscribers were still charged for such content even though the member was unable to deliver the content. This in itself is not professional behaviour but has been dealt with under clause 4.2 already.

8.19. I do not believe that this is a general issue in respect of this member, i.e. that this member is offering services it cannot provide. The member is clearly perfectly capable of providing the services that it promised and charged for. There was a period during which the services were temporarily unavailable due to a technical issue, but the member is otherwise capable of providing the services to consumers.

8.20. No averment is made that any services were unreasonably delayed or prolonged. The delay in paying the revenue shares to the complainant has no bearing on a delay in provision of services.

8.21. Accordingly, I cannot find a breach of clauses 5.1 or 5.2.

Clause 5.6; 5.11; 5.12; 5.13 and 5.14

8.22. The member does not list contact details on its website. It does not state its telephone number or email address. Consumers use this website to engage with the member regarding the services it offers, including the WASP services.

8.23. No averment was made that the member's customer support is not easily available. However, the only contact medium is the contact form on the member's website. No telephonic support is available and there is no option to speak to a call centre consultant as far as I can tell. The member indicated that customer support is dealt with by MTN – this is not acceptable as the member needs to implement its own customer support system in accordance with the WASPA Code.

8.24. The only procedure allowed for customer complaints seems to be the same contact form on the member's website. No averment was made that this procedure does not work, nor that the member does not acknowledge complaints expeditiously and responds within a reasonable time.

8.25. Accordingly, I find a breach of clauses 5.6; 5.12 and 5.13. I don't believe the member is in breach of clauses 5.11 and 5.14.

Clause 7.1

8.26. There is no averment made that the member has not supplied WASPA with contact information for a Code of Conduct representative.

8.27. Accordingly, I cannot find a breach of this clause.

Clause 15.3

- 8.28. There is no averment made that the member does not keep a record of the source of the service initiation request, and all subsequent interactions with the customer. It was alleged by the complainant that these records were requested from the member and never provided but there is no evidence provided to substantiate this. The member requested clarification as to which records the complainant wished to see but this was never responded to.
- 8.29. Accordingly, I cannot find a breach of this clause.

Clause 23.3

- 8.30. There is no averment made that the services provided by the member to the complainant is premium rated services as defined in the WASPA Code. As such, this clause is not applicable to this complaint.
- 8.31. Accordingly, I cannot find a breach of this clause.
- 8.32. In summary, I find that the member breached clauses 4.1; 5.6; 5.12 and 5.13.

9. Sanctions

- 9.1. This is the first complaint that has been lodged against the member.
- 9.2. I note, in respect of the members' infringement of clause 4.1 of the Code of Conduct, that the services in question are provided to consumers through MTN's delivery platform, and the member stated it does not have control over these services. However, the member has not demonstrated what reasonable steps it has taken to ensure that MTN provides the services in accordance with the Code. From what the member has stated in its responses, it basically wants to shift all liability for the services to MTN, but this is not in line with the Code – at the end of the day, the member is the service provider to the consumers, not MTN. The member did not allege that the non-delivery of content was as a result of MTN, instead it said that the non-delivery was a result of an internal system issue and a "migration" to MTN.
- 9.3. 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 3.4 of the Code.
- 9.4. There is no indication of the prejudice suffered by consumers generally due to the member's breach of clause 4.1. There is no clear time period evidenced by either the complainant or the member for the non-delivery of content while subscribers were being charged. 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 prejudice to consumers that the member's practice in this regard could have caused I impose a fine of R10 000 on the member for the infringement of clause 4.1 of the Code.

9.5. There is no indication of the prejudice suffered by consumers generally due to the member's breach of clauses 5.6; 5.12 and 5.13 and no evidence was led relating to any prejudice suffered as a result of the member not having contact details and proper customer support in place. Irrespective, this is a breach of the Code and can indeed lead to future prejudice. Accordingly, I impose a fine of R 5 000.00 on the member for the infringement of clauses 5.6; 5.12 and 5.13 of the Code.

10. **Matters referred back to WASPA**

10.1. None.
