



## Report of the Adjudicator

Complaint number	<b>#57302</b>
Cited WASPA members	Inspiritum
Notifiable WASPA members	Mobixone
Source of the complaint	<b>WASPA Compliance Department</b>
Complaint short description	Adult advertising of subscription service unrelated to adult service with deceptive call to action.
Date complaint lodged	<i>06 July 2022</i>
Date of alleged breach	13 <sup>th</sup> June 2022
Applicable version of the Code	<i>17.1</i>
Clauses of the Code cited	5.4 5.5 12.1 12.2 21.4 21.11 23A.5(a),(c), (d)
Related complaints considered	<i>Complaint 52867</i>
Fines imposed	<ul style="list-style-type: none"> <li>● R5 000 for the breach of clauses 5.4 and 5.5,</li> <li>● R10 000 for the breach of clauses 8.8 and 21.4,</li> <li>● R10 000 for the breach of clauses 12.1 and 12.2,</li> <li>● R10 000 for the breach of clause 21.11,</li> </ul>

	<ul style="list-style-type: none"> <li>• R5 000 for the breach of clause 23A.5.</li> </ul> <p>Complaint 52867 suspended sanctions provided the Member was not found guilty of contravening the same clauses of the WASPA Code of Conduct in a one year period. This adjudication has found that the Member has contravened the following clauses again and as a result the sanctions are no longer suspended and the following sanctions are hereby imposed.</p> <ul style="list-style-type: none"> <li>• “R 5 000.00 for its breach of clause 5.4 read with clause 8.9:</li> <li>• R 10 000.00 for its breach of clause 12.4, 12.5, 5.7, and 5.10, taken together”.</li> </ul> <p>Total fine: R55 000</p>
Other sanctions	None.
Is this report notable?	<i>Not notable</i>
Summary of notability	<i>N/A</i>

## Initial complaint

On the 6<sup>th</sup> July 2022 the WASPA Compliance Department (the ‘Complainant’) lodged a complaint regarding Inspirtum Ltd, a WASPA member. The complaint alleged that the following sections of the WASPA Code of Conduct, (version 17.1):

5.4

5.5

12.1

12.2

21.4

21.11

23A.5(a),(c), (d)

At a high level the complaint by the WASPA Compliance Department relates to a test whereby a test was conducted on the 13<sup>th</sup> June 2022 relating to the URL of palimas.org/. Clicking on a video resulted in the tester being redirected to a ‘play video’ (see Annexure A). At the bottom of the screen the words ‘Terms & Conditions’ and below that ‘Subscription R99/week’ are visible.

The ‘Terms & Conditions’ link did not resolve to a terms and conditions page, but rather to MTN’s network hosted confirmation page (NHCP) for a service called ‘EasyFitness’ for R99.00 per week (see Annexure B).

The tester clicked on the 'Confirm' and thereafter on the 'Continue' buttons and was duly subscribed to the EasyFitness subscription service at R99 per week.

The tester then unsubscribed from the service and this unsubscription process was successful.

The summary provided by the WASPA Compliance Department is useful and is reproduced here:

*"In summary, the tester was browsing on an adult content site and clicked on an explicit adult content video with the intention to view said video. The tester was directed to a page clearly marked as 18+ which contained a video that appeared to be loading with the words 'Play Video'. At the bottom of the screen, almost not visible/illegible, there was a terms and conditions link and below that the words Subscription R99/week. The reference on the page to it being a subscription service with a related cost is neither clear, nor prominent, nor adjacent to any identifiable call-to-action button and requires closer examination. Although the pricing information is provided – at this stage for an unnamed subscription service - it is displayed in such a way as to be missed/overlooked/not seen due to the placement and design (font colour, size, background, etc.). Clicking on the 'Terms & Conditions' link – not a clear call- to-action - redirected the tester to a network hosted confirmation page for the EasyFitness subscription service. The name of the subscription service on the NHCP – EasyFitness – appears to be entirely unrelated to the explicit adult content video which the tester was trying to access. The tester was therefore misled and deceived into believing that clicking on the 'Play Video' would begin playing the adult content video - when in fact it was a dishonestly designed marketing ploy to lure the tester into subscribing to an unrelated non-adult subscription service for EasyFitness at R 99.00 per week."*

Kindly note that the pictures of adult content were present in the complaint but have omitted in this Report.

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## **Member's response**

The WASPA member in this case – Inspiritum (Pty) Ltd – responded on the 13<sup>th</sup> July 2022 and indicated that:

- 1) There was a technical error which resulted in the incorrect promotion of 'our' Fitness service and the use of banners for another service,
  - 2) Old versions of the EasyFitness remained available to the public and this allowed their 'partner' to access and direct consumers to these old / test landing pages,
  - 3) The WASPA member has terminated their relationship with the partner (Mobixone) in order to avoid situations like this in the future,
  - 4) The old landing pages had been removed.
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## Complainant's response

The complainant was informed of the Member's response but did not wish to add any additional comment.

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## Sections of the Code considered

*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.*

*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.*

*12.1. For any web page, pricing information does not need to be displayed for services which are free or which are billed at standard rates, provided that the mobile network operator does not prescribe any specific advice of charge requirements. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed adjacent to the call-to-action.*

*12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.*

*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.*

*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.*

*23A.5. Subscription services must have a landing page prior to the confirmation step. An advert for a subscription service may not send a customer directly to a confirmation page but must link the customer to a landing page for the service. A landing page:*

- (a) must clearly show the pricing information for the service*
  - (b) ...*
  - (c) must not have a misleading call-to-action (such as "download" instead of "subscribe" or "join")*
  - (d) must not mislead by presenting examples of content not available as part of the service.*
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## Decision

From a factual perspective this complaint is clear as there are clear allegations of the contravention of the WASPA Code of Conduct by the WASPA Complaints Department which are not disputed by the Member. Indeed, the Member has implicitly agreed that there was a substantial breach of the WASPA Code of Conduct by terminating its relationship with the partner.

Consequently the Member is hereby found to have breached:

- (a) Clause 5.4 in that the apparent subscription to an adult service was in fact a subscription to a fitness service,
- (b) The Member has denied knowledge of the contravention of the WASPA code of conduct and indicated that it immediately rectified the technical error once informed of same. This raises the question as to whether the Member (or its 'partner') 'knowingly' disseminated information which was false or deceptive as required by clause 5.5 of the WASPA Code of Conduct? Whilst it can be accepted that the Member was not aware of the error, it is unlikely that the partner was unaware of the deception, nor has the partner provided any evidence to contradict this allegation. Bearing in mind that the partner is not a WASPA member, and it is trite that the WASPA member is liable for the conduct of the partner (clause 3.4 of the WASPA Code of Conduct), the Member is also found to have contravened clause 5.5 of the WASPA Code of Conduct.
- (c) Clause 8.8 in that the content of the advertising service (adult content) was not the same as the subscription service (fitness service),
- (d) Clause 12.1 for failing to provide prominent and clear pricing information,
- (e) Clause 12.2 for failing to provide pricing information that does not require closer examination and has intervening images between the call to action and pricing information (see Annexure B),
- (f) Clause 21.4 in that adult content promoting the service did not result in an adult content service,
- (g) Clause 21.11 in that the content (as provided by the WASPA Compliance Department but intentionally omitted here) was likely to be classified as 'X18' as set out in the Film and Publications Board Classification Guidelines, section 4-2(12) as found at <https://www.fpb.org.za/wp-content/uploads/2022/07/Classification-Guidelines-Effective-1-August-2022.pdf> in that there was explicit sexual conduct.
- (h) Clause 23A.5 in that there was no landing page prior to the confirmation step.

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## Sanctions

Before the question of sanctions is considered it is necessary to consider the prior conduct of the Member in the form of any prior contraventions of the WASPA Code of Conduct and any mitigating or aggravating circumstances.

The only prior report for this Member was complaint 52867 (<https://reports.waspa.org.za/download.php?file=52867.pdf>) where the Member was found to have breached several sections of the WASPA Code of Conduct, including clauses 5.4, 12.4 and 21.4. Notably that complaint also dealt with an adult content service (Playboy) which also resolved to the EasyFitness service. As such there is a remarkable similarity between the present complaint and the complaint in matter 52867. In that matter the adjudicator found that there were the mitigating factors of responding timeously, not having encountered the problem elsewhere, willingness to accept responsibility and a large portion of the blame lying with the partner (in that complaint the partner was Worldplay). All of these mitigating factors exist in the present matter with the exception of, 'the Member had not encountered the problem elsewhere'. It should also be noted that the termination of the relationship between the Member and Mobixone is a mitigating factor.

On the side of aggravation, the Member certainly had encountered a highly similar problem in complaint 52867 which was also deceptive in nature.

Complaint 52867 suspended the payment of the breach for clauses 5.4, 8.9, 12.4, 12.5, 5.7, 5.10, 15.7 and 15.18 provided that the Member was not found guilty of an infringement of the relevant clauses within a period of a year from the date of the adjudication which was published – being the 12<sup>th</sup> August 2021. This decision has found the Member guilty of breaching clause 5.4 and 12.4 again within the said one year period. As a result of the finding of this adjudication some of the suspended sentences imposed in that adjudication are no longer suspended, namely:

- a) *“R 5 000.00 for its breach of clause 5.4 read with clause 8.9:*
- b) *R 10 000.00 for its breach of clause 12.4, 12.5, 5.7, and 5.10, taken together”.*

(Note that the fine imposed in terms of clause 21.4 was not suspended in complaint 52867 and thus is not considered).

On balance – and despite the mitigating factors referred to above - it would be inappropriate for the Member to be fined an amount less than were imposed in complaint 52867. Thus, in addition to the imposition of the fines that were previously suspended in complaint 52867 (above), the following fines are imposed on the Member:

- 1) R5 000 for the breach of clauses 5.4 and 5.5,
- 2) R10 000 for the breach of clauses 8.8 and 21.4,
- 3) R10 000 for the breach of clauses 12.1 and 12.2,
- 4) R10 000 for the breach of clause 21.11,
- 5) R5 000 for the breach of clause 23A.5.

This translates to a fine of R15 000 for complaint 52867 and a fine of R40 000 for the present complaint, with the total amount being R55 000.

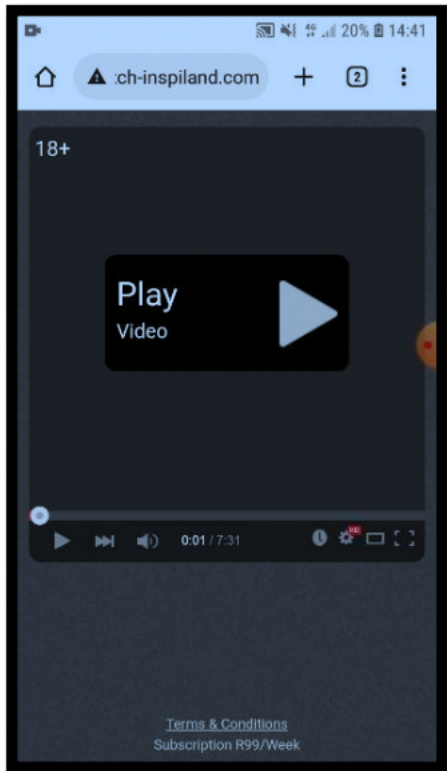
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**Matters referred back to WASPA**

None.

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Annexure A





Annexure B

