



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Mira Networks
<b>Information Provider (IP)</b> (if any)	ZedMobile
<b>Service Type</b>	Subscription
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#2044
<b>Date received</b>	10 September 2007
<b>Code of Conduct version</b>	5.3

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### Complaint

The competitor Complainant in this matter, who requested and was granted anonymity, alleged a breach of section 11.1.2 of the WASPA Code of Conduct which requires any request from a customer to join a subscription service to be an independent transaction entered into with the specific intent to join the subscription service.

The details provided were as follows:

“Zed are currently running a TV advert that showcases two racing games – cars with the keyword RACE, and motorcycles with the keyword SPEED. When a users sends in one of the keywords to 31933 with the intention of requesting a specific game (i.e. RACE, as I did), they are automatically subscribed to Club Zed. This is a clear violation of the code.”

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### SP Response

It is regrettable that the complainant opted to pursue this complaint in a formal manner, rather than approaching us directly with their concerns as, I understand, has been suggested by WASPA. Had they done so we would have informed them that

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Club Zed had already voluntarily decided to pull the advert in question due to precisely the same concerns raised in this case, and that Club Zed has already replaced all of its TV advertising with new creative that addresses concerns about our (former) advertising regarding section 11.1.2.

However, since the complainant chose to opt for the formal process, herewith our formal response:

1. Club Zed is committed to adhering to the WASPA guidelines. This is the first ever formal complaint lodged against Club Zed, which we believe is indicative of our commitment to operating in accordance with the WASPA code. As will be detailed below, as soon as Club Zed had become aware of 'concerns' about the nature of its TV advertising, specifically with regard to section 11.1.2 of the WASPA code as that is what is relevant in this complaint, Club Zed undertook immediate and proactive steps to investigate and address the concerns.
  
2. The following points relate to an informal complaint that we received prior to the one in question here. We raise the points below (which refer referring to the earlier informal complaint) because they bear direct relevance to the complaint in this case. Even though the specific advertisement being complained about in the prior case is not the same as the advert in this case, our marketing approach and formula is identical in all cases of our TV advertising and therefore we believe the discussion below is fully relevant. Further, the complainant in this case is raising the identical section of the WASPA code to the earlier informal complaint. Outlining the earlier complaint will also explain why the advertisement being complained about in this case is no longer on air, nor is any other ZED TV advertising that was following the same formula. The detail below will also further reinforce how ZED's response to the first complaint serves to validate our claim that we are committed to adhering to the WASPA guidelines.
  - 2.1 On 23<sup>rd</sup> July 2007 we received an email from our connectivity aggregator (Mira) who relayed to us an email from one of our

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competitors. The competitor alerted Mira – through usage of the informal complaints route – of a concern they had relating to a club Zed advert regarding section 11.1.2. of the WASPA code.

- 2.2 That same day we responded to our connectivity partner, undertaking to urgently investigate the concerns raised [Attachment 1]. In that email I stated that it was important for us to operate in terms of the WASPA guidelines and that I was going to deal directly with WASPA in order to resolve the complaint. Additionally, I undertook that if WASPA determined that any changes to our advertising were required in terms of the guidelines, that we would apply those changes immediately.
- 2.3 That same day I sent an email to WASPA with a clip of the advert in question [attachment 2]. In the email I quoted the competitors complaint as well as the section of the code that it related to. I then provided a lengthy and comprehensive explanation on why I believed our advert did not contravene the code. It follows that if it were clear to us that our advertising did contravene the WASPA guidelines, it would not be in the market in the first instance. Consulting directly with WASPA seemed a sensible course of action to take, as WASPA are the body that produce the guidelines and are therefore most ideally positioned to interpret them and assist us in ensuring our adverts are compliant. This is not to say that we contend that WASPA are responsible for ensuring our advertising is compliant, rather it is to say that where we (Club Zed) are in doubt, that WASPA are ideally positioned to assist us in clarifying our doubts and consulting with them seemed to be the reasonable and appropriate approach in this case.
- 2.4 On 25<sup>th</sup> July I telephoned Leon Perlman to discuss the matter with him and he advised that while WASPA were not in a position to approve adverts, they could provide advice in terms of where adverts were obviously deficient. In the interests of prudence, I therefore decided to resubmit the advert in question again, and requested this specific input from WASPA [Attachment 3]. In this correspondence, I raised my concern that if I made changes to the advert without first consulting with WASPA, I could be going to the expense of redoing all of Club Zeds advertising, potentially in vain, in the event our new

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interpretation of the code was also viewed as deficient. In this email, I implored WASPA to provide guidance in this regard

- 2.5 On 26<sup>th</sup> July, Ant Brooks of WASPA responded to my email. The essence of his email [attachment 4] was that WASPA do not have a formal process to comment on adverts, but that they do try to when this is requested of them. He advised that this had a lower priority than handling complaints, that they were very busy and that if I had not received a response by the end of the following week, I should send a reminder to them. This email implied to me that, in a reasonable amount of time, a response would be forthcoming and in it feedback regarding where our advertising may be in deficient as regards the WASPA code.
- 2.6 By the 7<sup>th</sup> August I had not received a response from WASPA and I was no longer certain that I was going to. We therefore took the decision to proactively remove the advert from the market. Therefore following a few flightings which we could not cancel, this advert was taken off air. I communicated as such to our technology partner and the complainant in that case. In that email to them I allude to an email I had written to WASPA to notify them of our decision, and to urge them once again for feedback [attachment 5].
- 2.7 Since we clearly could not simply stop advertising owing to a complaint by a competitor, we undertook our own review of the advert and determined that the area we determined as most likely to be causing concern was the voice over. The original voice over read: "Go! Go! Go! Get behind the wheel with Formula Racing 3D, the ultimate racing experience on your mobile phone. To burn some rubber SMS go to 31933. That's Go to 31933." We changed this to: "Go! Go! Go! Rev up your mobile phone with turbo-charged games from Club Zed like Formula Racing 3D! For the best high-performance entertainment SMS go to 31933. That's go to 31933." We felt this change should completely alleviate any concerns with this advert in terms of breaching section 11.1.2 of the WASPA code.
- 2.8 In the interests of showing good faith and our commitment to adhering to the WASPA guidelines, we decided to roll-out this approach to all of our TV creative. We completed this process towards the end of

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August and since 3<sup>rd</sup> September only this new format has been flighted.

- 2.9 To date, we have still not received any feedback from WASPA.

In addressing this specific complaint, and in defense of our previous advertising formula:

3. For the reasons articulated above this advert is no longer flighted by Club Zed, nor do we use the same formula in our advertising – i.e. the voice over's in our adverts now clearly articulate that customers can obtain the products only when they join Club Zed. The keyword, therefore, is the request to join the club and – even in the absence of input from WASPA – we feel extremely confident that our manner of advertising cannot be construed as 'bundling'. We cannot provide an example of the advert in question here, as we are not currently advertising these products, however herewith 2 examples of our new voice over's:

"The fun never stops at Club Zed! Get Hilarious true tones on your phone like the cheeky chipmunk and much much more when you join. Just sms fun to 31933. That's fun to 31933."

"Prepare for glory with lands of honour and other fierce adventures when you join club zed. This is where you fight! SMS war to 31933, that's war to 31933."

- 3.1 However in terms of the complaint itself and the section of the WASPA code it refers to, i.e. section 11.1.2 dealing with 'bundling': its apparent that this section of the code is intended to protect consumers from being inadvertently, or intentionally, misled into joining a subscription model through being given the impression that their request is for a once-off purchase only. This is no doubt a valuable and necessary section of the code that we agree with. We do not, however, agree that our (former) advertising formula was in contravention of the code.
- 3.2 When we approached WASPA regarding the (former) matter alluded to in section 1 above, our perspective was, and remains, that only by viewing a single aspect of our communications (the voice over) in complete isolation from all other communications with our customers –

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could one conclude that we are at fault of bundling. Our contention was that this extremely limited view of the entirety of our communications was not the experience of the average consumer, and that they are not being misled into joining our club.

3.3 The entirety of our communications that the consumer is exposed to in our (former) TV marketing communications includes:

3.3.1 Pricing box indicating the fact that Club Zed is a subscription model, priced at R10/5 days. Terms and conditions which further reinforce that Club Zed is a subscription model and again communicate pricing. Visually, it is quite clear that it is a subscription model is being communicated.

3.3.2 The voice over for the advert reads: "Its fast, its furious, its street race world. Strap yourself in for the ultimate no-holds barred all-out racing action. If you think you've got the right stuff, sms race to 31933. That's race to 31933 now." The second voice over says: "Glove up, jump on and give it some right hand with the ultimate speed machine. 3D grand prix bikes is about one thing, how fast you can go. If you feel the need, sms speed to 31933. That's speed to 31933." The advert concludes with Club Zeds branding and website address. The branding, i.e. "Club" Zed further reinforce the fact that this is a model that one 'joins', i.e. a subscription model. Viewed in isolation, the content of the voice over's could be construed as being misleading to consumers. However viewed in the context of the entirety of all the communication in the advert which clearly communicate that it is a subscription model, this seems a highly skeptical conclusion to reach. If the reality in the marketplace is taken as the acid test of our advertising, then the reality is that there is complete and total lack evidence in support of the complainants contention: so far as we are aware not a single complaint has been received by WASPA, Club Zed, or any other party to the effect that a consumer has felt our advertising has mislead them into joining our subscription club. We see this as compelling evidence that consumers – through the communication in our TV adverts – are in fact aware that in sending the advertised keyword to our short code, that they are joining a subscription model.

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3.3.3 Further: where the customer is with the Cell C or MTN network, the customer receives the following message in response to sending the keyword advertised: "Welcome to Club Zed! Please reply OK to this SMS to confirm that you wish to join Club Zed, where for R1 each you can access 10 products for R10 every 5 days." Therefore before actually joining or spending any money, these customers are again directly informed that they are joining a subscription model, provided with the pricing information, and also opportunity to not do so if they choose. Therefore even if a customer fails to become aware from the TV advert alone that the products are available through a subscription model, this additional facet of our communications makes it clear. Hence my assertion that the entirety of the context of our communications should be taken into account.

Where the customer is with the Vodacom network, they will receive the following 2 messages: (1) "Welcome to Club Zed, in a moment you'll receive a link to access the club, where you can download games, ring tones and much more at [www.clubzed.co.za](http://www.clubzed.co.za)." (2) "You joined Club Zed! Everything just R1 each. If you have a B&W screen, send NW to 31933. R10 every 5 days until you send STOPCLUB to 31933. CC:0214257529". At this point the customer has been billed R10. Therefore even if it has eluded them up until this point that they are joining a subscription club, they have now been clearly informed again, and have the opportunity to unsubscribe. In this, the worst case scenario, the customer determines that they do not want to subscribe to our club and wish to unsubscribe (which they are informed how to do), but have already spent R10. For their R10, however, the customer can download the product from the advert, as well as 9 other products for the total cost of R10 before unsubscribing. The equivalent retail price at prevailing market rates for either of the products in the advert in question on a direct download basis (i.e. for a high quality 3D game) is AT LEAST R30 and more realistically R50. Therefore the customer, who, upon receipt of the Club Zed Welcome messages, decides that he does not want to be a member of our club, can cancel immediately after downloading content with a retail value that greatly exceeds the cost of the joining fee. Through means of the totality of the communications the customer receives, it is clear that the customer is in no way prejudiced nor misled. On the contrary, it would appear that it is fact the customer that enjoys a significant advantage in their relationship with Club Zed.

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In conclusion:

While I have argued for the case of our old formula of advertising, I must point out that this is solely in the event that the adjudicator views this complaint in those terms. We no longer advertise using this formula, and the advert in question – and all those like it – were pulled weeks before this complaint was made known to us.

I have argued that the complainant, by viewing our voice over's in complete isolation of all other communication in our marketing, it taking an extremely skeptical view. A view, which assuming the reality of the marketplace as the acid test, has absolutely no evidence with which to support itself.

We are disappointed that WASPA have not had the opportunity to respond to our correspondence with them regarding our advertising, but we wish to restate the fact that club Zed took all steps possible to resolve the issues raised with regard to our advertising and acted in good faith throughout.

We trust that the adjudicator will take into account Club Zeds exemplary track record and the actions we took in advance of any formal complaints being made against us.

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### **Sections of the Code considered**

The following sections of Version 5.3 of the WASPA Code of Conduct were considered:

2.5.1. **“Bundling”** means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.

### **11. Subscription services**

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.



11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

The following sections of the WASPA Advertising Rules were considered:

**2.3.13 SUBSCRIPTION SERVICES:** Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

**(i) Must Use The Words “Subscription Service”**

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg “S”), number, abbreviation (eg “Subs”), icon, or any other mark may be used as an alternative to the words “Subscription Service” anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

**(ii) Must Indicate Charge/s:**

The advertisement must indicate in the font size, position and type as indicated:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below] This indication must include the potential and cost of any (additional) bearer charges.

**ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:**

Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION (see s11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis. Confusion by consumers may arise in cases where a single advert may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range. If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2).

### **COST OF ACCESS TEXT DISPLAY RULES**

#### **Trigger:**

At any display of, or mention by a voice-over, of a unique access number

#### **Display Length:**

100% of the length of the advertisement

#### **Display Text Font:**

'Zurich' font

#### **Display Text Font Size:**

18 points MINIMUM

#### **Display Text Font Position:**

In a visible block or triangle in a top corner of the screen in the Title Safe Area (see diagrams)

#### **Display Text Font Colour:**

Contrasted colour superimposed on the block/triangle Block/Triangle Colour

Contrasted colour, behind the display text

#### **Display Text Type:**

- Text must be static
- No Caps (except for the first letter of the first word) or italics may be used as the display font for the word subscription.
- No italics may be used as the display font for the price text.
- No text must be placed around the access cost text that may obscure clear reading

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- The access cost text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
  - The access cost must not be part of a colour scheme that may obscure easy reading of complete details of the access cost
  - The access cost text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the cost

### **2.2.3 T&C TEXT DISPLAY RULES**

#### **Trigger:**

At any display of, or mention by a voice-over, of a unique access number

#### **Display Length:**

- Minimum 10 seconds
- If applicable, of the 10 seconds display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service.

#### **Display Text Font:**

'Zurich' font

#### **Display Text Font Size:**

15 points

MINIMUM

#### **Display Text Position:**

On bottom edge of title face of the screen

#### **Display Text Type:**

- No CAPS-only or Italics-only text is permitted for the T&C font.
- The T&C text must be static and horizontal for the requisite minimum display time, changing as is necessary to show all the T&Cs in equal time proportion
- The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
- The T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
- The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C

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- The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text.
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## Decision

The SP is thanked for its comprehensive Response. It is further noted that the WASPA Secretariat has made an additional submission to the Adjudicator in this matter which serves to verify certain actions of the SP and advances factors to be taken into mitigation in the event that the Complaint is found to be valid.

The test to be applied in matters of this nature has been developed through a series of Adjudications and rulings of the WASPA Appeals Panel.

It is, in the first place, important to note that there is no bar to the advertisement of a subscription service which utilises examples of content available through such service. Indeed this is to be expected. But it is also clear that an SP taking this route is required to exercise great caution in ensuring that they do not fall foul of the provisions of the WASPA Code of Conduct as set out in section 11.1.2. The rationale for this section is "...to protect customers and potential customers from confusing or misleading subscription services"<sup>1</sup>.

The Adjudicator of Complaint #0022 stated in that decision that:

"...the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services)."

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<sup>1</sup> Adjudication #0022 available from <http://www.waspa.org.za/code/download/0022.pdf>

The Adjudicator of Complaint #0590 provided the following formulation:

“In considering the use of specific content items in the marketing of subscription services the approach adopted in the Adjudicator’s Report in respect of Compliant #0022 is approved and applied.

The following test has been set in these complaints;

- Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:

- o The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.

- o The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.

- o The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.

- o The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.

- o Whether there is a mix of content items and a subscription service being advertised or only a subscription service.

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o Whether the same short code or access number is used for both content items and a subscription service.

o Whether similar key words are used for content items and a subscription service.

o The clear differentiation between the content examples or indicators and the subscription service itself.

There accordingly must be a comparison of the indicators the IP provides to customers and potential customers to show that the service being advertised is a subscription service as against the indicators that may potentially confuse a customer or potential customer in the advertisements which are the subject of the two complaints.”

We turn now to an assessment of the indicators provided in the advertisement against which the Complaint has been levelled. The Adjudicator considered the following after viewing the advertisement and reviewing the Complaint and Response:

1. The use of a single keyword in the advertisement.
2. The fact that no content is intended to be advertised, i.e. this is not dual advertising of a subscription service and individually-available content in a single advertisement.
3. The finding by the Adjudicator that the indication that the service being advertising is a subscription service is not sufficiently clear or prominent (visual, auditory or otherwise), particularly in comparison with the indication (visual, auditory or otherwise) of the content example. In making this finding the Adjudicator considered:
  - a. The fact that the words “subscription service” are not mentioned at all in the voice over. The Adjudicator does not agree with the assertion by the SP that the use of the word “Club” of itself creates an understanding on the part of viewers of the advertisement that the service is a subscription service. Indeed the use of the word “Club” has been held in previous adjudications not to give such an understanding and the WASPA Code and Advertising Rules are

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explicit about the requirement for a subscription service to be communicated as exactly that and using exactly those words.

- b. It should be noted that the Adjudicator is not viewing the voice-over in isolation in drawing this conclusion but is rather evaluating the voice-over as one of the elements which creates a general impression as to the nature of the service in the minds of viewers.
- c. The Adjudicator is further not satisfied that the text displaying the terms and conditions of the service has been executed in a manner which complies with section 2.2.3 of the WASPA Advertising Rules. Section 2.2.3 states, inter alia, that “[t]he T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscure easy reading of complete details of the T&C text”.

The Adjudicator is of the opinion that the mobile phone graphic used in the advertisement does have the effect of obscuring easy reading of the complete details of the T&C text and that this is readily apparent on a viewing of the advertisement. It is correct that the text stating that the service is a subscription service is at first clear but only for approximately one second in the case of the RACE service advertisement and no more than 4 seconds for the SPEED advertisement.

4. The fact that the cost of access display text in the top right hand corner does comply with the relevant sections of the Advertising Rules.

In the circumstances it is the finding of the Adjudicator that the advertisements forming the subject of the Complaint are sufficiently confusing as to constitute a breach of section 11.1.2 of the Code of Conduct. The finding of a breach of section 2.2.3 of the Advertising Rules is subsumed within the finding of a breach of section 11.1.2 of the Code.

In assessing an appropriate sanction the Adjudicator had reason to consider:

- The impeccable record of the IP
- The immediate corrective steps taken by the IP
- The efforts of the IP to obtain clarity with regard to the advertising

- The Adjudicator's acceptance of the bona fides of the IP and its belief that the advertisement was compliant with the Code and Advertising Rules
- The fact that only a "few flightings" of the advertisements took place which, according to the IP, could not be cancelled
- The evident lack of clarity amongst industry players as to what and what does not constitute bundling
- Sanctions imposed on other WASPA members for breaches of section 11.1.2.

The Adjudicator imposes the following sanction:

The IP, which is an affiliate member of WAPA, is fined the sum of R10 000, payment of which is suspended for a period of six months subject to the IP not being found to be in breach of section 11.1.2 of the WASPA Code of Conduct or section 2.2.3 of the WASPA Advertising Rules.

No sanction is raised against the SP.