

**WASPA appeals panel
Complaint 7246**

REPORT OF THE APPEALS PANEL

Date: August 2011
Appellant: Tanla Mobile SA (Pty) Ltd
Complaint Numbers: 7246
Applicable versions: 7.4 (Code), 2.3 (Advertising)

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicator in complaint 7246. This complaint was lodged by the WASPA Media Monitor (“the Monitor”) and alleged a number of breaches of the WASPA Code of Conduct (“the Code”) in respect of a wapsite situated at phonerotica.com relating to automatic subscription to a service, lack of age verification procedures and a number of other issues.
- 1.2 The Appellant responded to the complaint to state simply that, notwithstanding the averment that a short code assigned to it was being used, it had tested the service in question and found that the service was in no way provided or facilitated by it. The Appellant averred further that it did not operate the wapsite in question and had “no direct dealings or relationship whatsoever with www.phonerotica.com or its contents”. The Appellant denied that it provided any “Teen/children” content.
- 1.3 The Appellant at this time submitted extracts from the relevant log files which indicated that no messages had been sent to the MSISDN used by the Monitor for testing purposes on 30 July 2009. These extracts are set out below (the Panel has deleted certain columns which are not directly relevant so as to facilitate readability):

iclient acc id	vcoa	vcda	vcmessage	Submit time	Delivery Timestamp	Status	Tariff
1259	39828	27822989211	Thanx for Subscription of R7.50/4days to CherrySauce.Text STOP CH to 39828 to cancel.Download content at http://mobilecontentking.com/hotchix	7/29/2009 11:51:36	7/29/2009 11:51:17	DELIVRD	750
1259	39828	27822989211	Your weekly subscription to Cherry portal is Renewed.Charged at R7.50/4days.Send STOP to 39828 to unsubscribe.For HLP,write to help@mobace.com	8/2/2009 13:39:00	8/2/2009 13:38:08	DELIVRD	750
1259	39828	27822989211	You have been unsubscribed Content King Music Portal.Thanks for using our service.To re-subscribe,click on this link mobilecontentking.com/music	8/3/2009 8:49:31	8/3/2009 8:49:39	DELIVRD	0

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- 1.4 The adjudicator, however, found that PhonErotica was an IP “generating mobile content for transmission across services offered by [the Appellant]”. The adjudicator noted that the Cherry Sauce subscription service reflected in the table above was offered through www.mobilecontentking.com and that it “seems quite likely that this too is an IP for [the Appellant]”. The adjudicator noted what he or she regarded as the non-compliant nature of the www.mobilecontentking.com service and resolved to raise a note to the WASPA Secretariat in this regard as a process separate from the adjudication of the complaint.
- 1.5 The adjudicator then made the following further findings:
- 1.5.1 The log extracts supplied by the Appellant confirmed that it had the right of use of the short code in question.
- 1.5.2 He or she was not able to extract any further information from these extracts.
- 1.5.3 Vodacom had submitted logs which “indicated deductions of R7.50 marked to Tanla in response to activity by the Monitor’s number on two occasions, identified as the ‘Glomac” service”.
- “Although this tends to suggest an error in relation to billing, it does not detract from the fact that Tanla’s short code was presented in response to a download request by the Monitor on a third party website, and that Tanla received funds from the account belonging to the Monitor.”
- 1.5.4 That “the Monitor did in fact access a website which did in fact subscribe him to a service that he did not want to be subscribed to, and that the services did not comply with the Code in all the respects set out above”.
- 1.5.5 That the Appellant had a relationship with both PhonErotica and www.mobilecontentking.com “‘direct’ or not, and that links were established technically that enabled the transmission of messages to users referring to [the Appellant’s] short code, whether or not accessed through [Appellant]-branded or hosted services or websites. Save in the instance I mention immediately below, there is no possibility, in my understanding, of the text messages received by the Monitor being received other than as a result of a technical relationship between [Appellant] and IP. Whether or not the appropriate contractual relationship existed cannot be determined, but on all the facts the parties’ respective services would appear to be related and/or linked to one another.”
- 1.5.6 It was also possible that there had been unauthorised use of the short code, but that this did not assist the Appellant:
- “The only other possibility is that the IPs somehow obtained the short code from Tanla or used it without [Appellant]’s express permission, which

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unfortunately would still render [Appellant] liable for the associated breaches of the Code in my view given that [Appellant] is the registered user. It also appears that payment was made by Vodacom to [Appellant] on or about the relevant date in relation to access by the Monitor to the first service complained of.”

(Panel’s emphasis)

1.6 The adjudicator concluded:

“There is no evidence at this point that the complainant’s version is not correct, and therefore no reason not to uphold the complaint. Given the purpose of the Code and the likelihood that intentionally or negligently, Tanla or its IPs failed to comply with the provisions in a serious and repeated way, an adverse finding seems unavoidable.”

1.7 The adjudicator explicitly notes that the adverse finding against the Appellant was made on the following basis:

“The finding in this matter has been made on a balance of probabilities. This is unusual and perhaps extreme. However, in all the circumstances and in the absence of a detailed and acceptable explanation from the SP, the conclusion is justifiable.”

1.8 The adjudicator imposed the following sanctions:

“The SP is directed to pay a fine to WASPA in the amount of R100,000 in relation to the numerous breaches of the Code by IPs in possession of or using its short codes, alternatively for the SP’s own breaches of the Code in failing to ensure that services offered using or referring to its short code, are compliant.

50% of the fine must be paid to WASPA within 7 days of date of publication of this report. The balance of the fine will be suspended for a period of 6 months but payable immediately in the event that the SP is found to have committed similar or the same breaches within that period, in addition to any other fine imposed in relation to those breaches.”

2 GROUNDS OF APPEAL

2.1 The Appellant has set out a number of detailed submissions relating to the factual and legal bases as to why the Panel should overturn the finding of the adjudicator. The Appellant has further requested the return of the deposit which it was required to pay to WASPA in order to lodge the appeal.

2.2 The Panel does not believe – for reasons which will become apparent below – that it is necessary to review the various grounds of appeal in detail. It is sufficient for the purposes of this Appeal to note that the principle ground of appeal is that the adjudicator found that PhonErotica was an IP to which the Appellant provided services, notwithstanding the clear assertion from the Appellant that it had no such relationship (or any other). The Appellant noted that there was no evidence of such relationship and that no records had been produced showing that the

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Appellant billed any downloads of movies from the www.phonerotica.com site.

“Surprised by the supposed spontaneous subscription to the CherrySauce service, Tanla Mobile performed tests the same as those conducted by the Media Monitor, but was unable to get any click on the WAP site to spontaneously subscribe to the CherrySauce service. It was pointed out in Tanla Mobile’s response that this event also was never repeated in the subsequent tests done by the Media Monitor, confirming the results of the tests conducted by Tanla Mobile.

Tanla Mobile also offered an explanation as supported by its call records (attached). Its call records indicate that a message was sent to the referenced phone number on 29 July 2009 at 11:53:09. Note that this is one day before the event. It very well could be the case that this message was sitting in the message box of the referenced phone number and was coincidentally only delivered to the phone the following day when the phone was likely turned on to test the phonerotica.com WAP site. That is a logical explanation given that neither the Media Monitor nor Tanla Mobile was able to duplicate the event.

Tanla Mobile also pointed out in its response that it does not have any relationship with the phonerotica.com WAP site and therefore the remaining three allegations in respect thereof have nothing to do with it. That Tanla Mobile has no relationship to the WAP site is supported by the fact that there are no records that Tanla Mobile billed for the downloading of the movies from the phonerotica.com WAP site.”

2.3 As regards the adjudicator’s finding that it had not provided a “detailed and acceptable explanation” and that nothing further than the Appellant’s use of the short code could be divined from the log file extracts provided, the Appellant noted that:

“What is clear from the logs is that Tanla Mobile sent an SMS on the 29th July 2009 to the referenced phone number welcoming the subscriber to the CherrySauce service. A charge of R7.50 was made, for four days of the service. Four days later, on 2 August 2009, Tanla Mobile sent an SMS to the referenced phone number indicating a renewal for four more days of service and charged a further R7.50. At some point, the referenced number then was unsubscribed from the service, and consequently on 3 August 2009, Tanla Mobile sent a message confirming the un-subscription. What is notable is the absence from the logs of any charge made or SMS sent on the 30th July 2009.

The Adjudicator also refers to a Vodacom log submitted to WASPA, which confirms Tanla Mobile’s log in that only two charges were made in respect of the referenced phone number. Tanla Mobile assumes that the two charges on Vodacom’s log are the same as those on the Tanla Mobile log, but it cannot be certain because those logs were never provided to Tanla Mobile either as part of the complaint or subsequently.”

2.4 The Appellant continued:

“Despite no clear evidence that Tanla Mobile had any relationship to the alleged violations, and ignoring the most logical explanation for the subscription to the CherrySauce service, the Adjudicator proceeded to decide that “on a balance of

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probabilities”, which the Adjudicator admitted was “unusual and perhaps extreme”, there was no reason not to uphold the complaint. There was no finding as to exactly which Code provisions were violated by which test events. The Adjudicator simply stated that “based on our investigations, the SP failed to comply with these provisions, or to the extent that they may have done so, it is not possible to determine this with certainty.” In the result, the Adjudicator directed Tanla Mobile to pay a fine of R100 000.”

3 THE APPLICATION OF THE CODE AND AD RULES

The Code, v7.4

3.1 The following provisions were considered:

None.

4 FINDINGS OF APPEALS PANEL

4.1 The panel agrees with the principal ground of appeal, viz. that the adjudicator erred in finding that PhonErotica was acting as IP in a relationship with the Appellant.

4.2 The panel has the following understanding of the events which led to the lodging of the complaint:

4.2.1 On 29 July 2010 the Monitor tested the Appellant’s Cherry Sauce subscription service by initiating a subscription;

4.2.2 Content purchased through this subscription service is available through www.mobilecontentking.com;

4.2.3 On 30 July 2010 the Monitor tested www.phonerotica.com.

4.2.4 During the course of this testing the mandatory welcome message for the Cherry Sauce subscription service was received by the Monitor in such a way that he associated it with the testing of www.phonerotica.com.

4.3 The relevant entries revealed in the logs provided by Vodacom – which were not provided to the Appellant at any stage – are set out below:

Date & Time	Content Provider	Service Name	Amount
7/29/2009 12:51:38 PM	Tanla	Glomac	R7.50
8/2/2009 2:39:01 PM	Tanla	Glomac	R7.50

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- 4.4 The panel agrees with the Appellant that the version it advances in explanation for how the PhonErotica service came to be associated with its short code is reasonable and is supported by the Vodacom logs indicating billing to the Monitor's MSISDN as well as the logs provided by the Appellant and the subsequent failure of any party to replicate the alleged subscription mechanism.
- 4.5 To the extent that the adjudicator in the complaint concluded that a full WASPA member can be responsible under the Code for the acts and omissions of an affiliate member or IP to which it does not provide services the panel wishes to make it clear that such conclusion is not correct.
- 4.6 The Appeal therefore succeeds.
- 4.7 The panel is further of the view that the appeal fee should be refunded as there does not appear to have been any fault or negligence on the part of the Appellant either with regard to the specifics of the complaint or the manner in which it has engaged with the complaints process.
- 4.8 The panel also wishes to have regard to the negative inference drawn by the adjudicator from the failure of the Appellant to provide a "detailed and acceptable explanation". The panel is of the view that the drawing of inferences in this manner should be exercised with caution and that adjudicators should ensure that the inferences drawn are supported by other factual evidence.