

**INTERNET SERVICE PROVIDERS
ASSOCIATION**

ATTENTION: ANTHONY BROOKS



KEVIN HYDE

In Association with
HENNIE KOTZE ATTORNEYS

PER ELECTRONIC MAIL

OUR REF: KJH/AH000-16

YOUR REF:

DATE:

11 AUGUST 2018

Dear Sirs

I act for Afrihost (Pty) Limited with reference to the below mentioned matter and tender my client's submissions in reply to the purported appeal by the Customer as follows: -

**AFRIHOST REPLYING SUBMISSIONS : APPEAL IN IPSA COC-1182
GERD W. NASCHENWENG//AFRIHOST (PTY) LTD**

INTRODUCTION

1. The Internet Service Providers Association ("IPSA") is a voluntary association notwithstanding the fact that it was formally recognised during 2009 by the Minister of Communications as an industry representative body in terms of the Electronic Communications and Transactions Act.
2. Internet Service Provider ("ISP") membership of IPSA is voluntary.
3. IPSA has, as one of its objectives, the process of resolving complaints by customers by giving the ISP a mechanism of resolving customer complaints against the ISP in an amicable manner, allowing the ISP to retain a customer who may otherwise have been lost.

4. In the event complaints are incapable of informal resolution, an independent adjudicator and review process is undertaken.
5. While IPSA members are required to adhere to and respect the constitutional rights of their customers, including those pertaining to freedom of expression and the right to privacy, IPSA *per se* has no authority nor is it within IPSA's powers to police or adjudicate and impose sanctions on any of its member who, intentionally or otherwise, infringe any such rights of the ISP customer and the self-proclaimed "victim" is obliged to seek relief in another forum.
6. The only ISP customer complaints which are deserving of investigation and attention are those made in good faith and on reasonable grounds whereas those motivated by frivolity, unreasonableness, vexatiousness or *mala fides* are undeserving of any attention from the Complaints Adjudicator.
7. IPSA's members subject themselves (voluntarily) to a disciplinary process as set out in the Code of Conduct ("COC") and a Complaints and Disciplinary Procedure, which fact should at all times be borne in mind by both IPSA as well as any Complaints Adjudicator.
8. It must thus be accepted that an ISP's voluntary submission to IPSA's COC and complaint adjudication process implies that such ISP is entitled to expect and receive fair and equitable treatment including in relation to the imposition of penalties in the case where a transgression of the COC is upheld by a Complaints Adjudicator.
9. The IPSA Complaints Adjudicator (whether of the first instance or on appeal) thus fulfils a quasi-judicial role and is therefore obliged to observe the rules of Natural Justice in that, *inter alia*, the Complaints Adjudicator's findings must be based upon all the evidence available submitted by both parties and accord with proper consideration of all the facts which he is required to receive and to properly and judiciously consider submissions by both parties to the complaint, rule on the facts accepted to have been proven.
10. In cases where a complaint is upheld by the Complaints Adjudicator, he is empowered to impose punishment/penalty in the case of proven transgressions of the IPSA Code of Conduct.
11. Any penalty imposed by the Complaints Adjudicator (of the first instance) is an exercise of his sole discretion must of necessity be a balanced

penalty which has due regard to the nature of the COC transgression and complaint, consider the ISP's conduct in the matter and any remedial steps undertaken and be fair in taking both parties' circumstances into account.

12. Where a complainant is dissatisfied with the ruling of the Complaints Adjudicator (of the first instance) the COC permits an appeal process, however, the Complaints Adjudicator on Appeal is restricted to those powers set out in clauses 7 to 11 of the COC: Complaints Procedure.
13. As a requirement of Natural Justice and on principle, a complainant who appeals a ruling of the Complaints Adjudicator (of the first instance) cannot and should not be permitted to raise, in the appeal, any matter which was not expressly contained and included in the original complaint filed by the appellant and which was the subject matter of adjudication by the Complaints Adjudicator (of the first instance).

AFRIHOST'S REPLYING SUBMISSIONS TO APPEAL

14. Mr Gerd W. Naschenweng ("the Customer") who on his own version has been a customer of Afrihost since 2013, is a repeat complainant in relation to Afrihost (Pty) Ltd.
15. The Complaints Adjudicator (of the first instance) found in favour of the customer, although this fact seems lost upon the Customer, and in imposing an appropriate penalty, was required to exercise a discretion vested in him having due regard to all the facts and in a judicious manner which excluded emotion or capriciousness.
16. The penalty ruled fair and appropriate by the Complaints Adjudicator (of the first instance) was accepted by Afrihost and complied with without delay.
17. It is submitted that the Complaints Adjudicator on Appeal is expressly bound by the provisions of clause 10 in the COC: Complaints Procedure, insofar as ruling on facts found to have been proved/rejected as well as the penalties imposed by the Complaints Adjudicator (of the first instance).
18. It is trite law that the case of punitive rulings, it is only in most extraordinary cases that any appeal body should interfere with the exercise by the Adjudicator of first instance of his discretion in imposing a penalty after consideration of all the facts and submissions received and then only in circumstances where the penalty is manifestly

disproportionate/unjust or the penalty imposed is so inappropriate as to induce a sense of shock in the Complaints Adjudicator on Appeal.

19. The Customer's objection to the quantum of the fine imposed upon Afrihost considered against: "*I do not find that the adjudicator's ruling of the R 14,000 fine sent a strong enough message for an ISPA member who was valued at ZAR 1 billion in 2016 (refer to MTN financial report where 50% of Afrihost was sold for R325m with a further R202m impairment loss - reference: <https://www.mtn.com/> MTN%20Service%20Detail%20Annual%20Reports1/booklet.*" is simply outrageous and no basis whatsoever in exercising a discretion when imposing a sanction and must be rejected with contempt.
20. To the extent that the Customer's submissions on appeal do not constitute new facts (or wild speculation for that matter) and are admissible and deserving of consideration by the Complaints Adjudicator on Appeal, it is submitted that the Customer is completely unreasonable in each and every one of his "Requested Actions" and that appeal is patently vexatious and in bad faith, seeking penalties beyond the powers of the Complaints Adjudicator on Appeal.
21. In conclusion, the Customer's purported appeal is entire without merit and must fail.
22. Kindly acknowledge receipt hereof by return.

Yours faithfully


KEVIN HYDE ATTORNEYS