



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exact Mobile
Telephone Network(s)	Cell C MTN Vodacom
Information Provider (IP) (if applicable)	Not disclosed in complaint or SP response May be Blue Knights (BNT) / Foxii Mobile
Service Type	Adult services
Source of Complaints	Anonymous
Complaint Number	#0024

Complaint

A complaint was received from a complainant who wished to remain anonymous. The complainant appears to have an indirect association with the WASP industry.

The complaint concerned SMS messages that the complainant alleges do not identify the originator and do not include pricing for the premium rated "opt out" mechanism. The complaint did not concern the sending of unsolicited commercial messages. The complainant sent through transcripts of three examples of the SMS messages being received. Of these examples, the complainant alleged:

- two did not indicate the originator;
- all three required use of a premium rated number to remove the recipient from the sender's database; and
- two did not indicate the cost of using such premium rated number.

The complainant made further allegations concerning one or more television advertisements for "the same service" shown on E TV during its adult programming on Saturday night. The complainant alleged that the price is not clearly visible as it only appears in a very small font within the "terms and conditions" at the foot of the advertisement and further that the advertisements do not identify the WASP or IP offering the service.

The Secretariat conducted an investigation into the service offered by the SP

The following breaches of the WASPA Code of Conduct were raised:

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.4. Any mechanism for allowing a recipient to remove his or herself from a database may not be premium rated.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

The following additional breaches of the WASPA Code of Conduct were considered:

4.1. Provision of information to customers

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

6.2.4. Pricing contained in an advertisement must not be misleading.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

8. Adult services

8.1. Required practices

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit

confirmation of a user's age must be obtained prior to the delivery of an adult service.

8.2.1. Adult services must not contain references that suggest or imply the involvement of children.

SP Response

The Secretariat received a response from the SP, indicating:

- The service is provided by an IP, using the SP's "technology to deliver the content".
- The complaint originates from a business associate of the IP who "tested the system. He then forgot that it was the IP's system and did not follow the unsubscribe procedure as supplied in all the out bound communications to unsubscribe nor did he try to contact the originator. As such he made no effort to unsubscribe."
- "In the mms there is a land line support number that can be used to unsubscribe". The IP "have also only started receiving the stop DB yesterday" and as such will now be able to "remove those people who have unsubscribed from the system. He has now been unsubscribed and black listed form (sic) our system."
- "The TV advertisement has the number displayed clearly and the cost associated."
- "The gentleman is also a competitor and the other numbers are not BNT [possibly a reference to "Blue Knights] further the person has come into the system requesting content but now they are complaining but the are not following the unsubscribe process."
- "They also seem to be confusing our add (sic) with some other adds it seems."

The Secretariat requested further information from the complainant, specifically the television advertisement or advertisements referred to by the complainant, to be forwarded to the Secretariat. This was not forthcoming. The SP in its response did not contest the veracity of any of the SMS examples included in the complaint.

Investigation

The Secretariat used two of the key words and short codes referred to in the SMS message examples provided by the complainant to investigate the service offered by the IP through the SP. The first test generated a MMS message response with an adult orientated image and certain text advertising access to additional services (including images, video, live chat and a subscription service) as follows (referred to as "MMS1"):

MMS1

Date: Nov 18, 2005 3:15 PM
From: (82) 008 - 0060
To: (**) *** - ****

There is still a lot more sms ANG to 38581 to get the rest 6 sets. More of jolie next week Plus check out MAC3 Dont forget Paris on 37607 and stolen cell phone picks on 38581 also see halle berry by sending Halle to 38581 plus our hot blonds Yanna And Nikki and Cathy and Lexa and Salma and mac or want the Paris video on 37393 send paris1 to 37393 or ob1

To unsubscribe call 011 3729813 or to chat call 083 919 4949

This new service is for new service for members only. R10 per smsWant to subscribe sms the word MEM to 38581 this will be on invitation only and the images will be exclusive the foxii mobile club members. Plus there will also be great discounts and loads of free DVDs of your favorite stars. To stop sms stop to 38581 or 32226 stops at R1

The second test also generated a MMS message response with an adult orientated image and certain text advertising access to additional services (including images, video, live chat and a subscription service) as follows (referred to as "MMS2"):

MMS2

Date: Nov 21, 2005 9:09 PM
From: (82) 008 - 0060
To: (**) *** - ****

To see more you must be over 18 if not please stop.

To see more of ARIA sms ARIA to 38581 or to see Angelina Jolie sms ANG to 38581 There are 26 sets of this Italian Hottie.

To see more of Jessica Simpson sms JES to 38581 there are 9 sets. Next week.

There is still a lot more so if you want to see our naked celebrities like Angelina Jolie sms ANG to 38581 to get the rest 6 sets. More of Jolie next week Plus check out MAC3 Dont forget Paris on 37607 and her lost cell phone picks on 38581 also see halle berry by sending Halle to 38581 plus our hot blonds Yanna And Nikki and Cathy and Lexa and Salma and Mac and our naughty School Girls or want the Paris video on 37393 send paris1 to 37393 or ob1

To unsubscribe call 011 3729813 or to chat call 083 919 4949

This new service is for new service for members only. R10 per sms Want to subscribe sms the word MEM to 38581 this will be on invitation only and the images will be exclusive the foxii mobile club members. Plus there will also be great discounts and loads of free DVDs of your favorite stars. To stop sms stop to 38581 or 32226 stops at R1

So on 38581 you will find

Ang
Halle
Salma
Yanna
Nikki
Cathy
Lexa

School
Jenna
Debbie

List
For your viewing please we now have a list of porn stars starting with a sms to SOPHIE on 38581 or NIKKI or BANKS or BLOND or YANA or to become a member of the exclusive members only Celebes Porn in the country sms MEM to 38581 new girls daily check the list or subscribe you wont regret it. and new stars will be added every Friday or listen to her friends and moan on 0822347474 or chat to one of her sluttish friends on 083 919 4949 live... Yes live!!!

To see slide show of any one of the girls in the list just sms there name to 37607
Paris to 37607---- --- CUM to 37607--- Amber to 37607---Chrissy to 37607 and Faust to 37607 this list will be updated every Friday with the new girls.

So keep coming back every Friday for the latest action.
To see vid clips of Paris and other girls sms ob1 to ob6 or paris1 to paris7 to get hot clips of the girls doing it live to 37393 or sms list to 38581 for more.

Following on the testing, six (6) copies of the same promotional SMS messages were received from number +27820070182 on 22 November 2005 between 10:31 am and 10:48 am. This message (referred to as "SMS1") reads:

SMS1

Date: Nov 22, 2005 10:31 AM
From: +27820070182

She has DD cups and loves to take it deep throat. See all the titi Fcuking (sic) you want sms SIMI to 38581 to c her beg for more.(R10 MMS 2 stop sms sp to 32391 R1)

It appears the IP has taken steps in respect of the issue of the pricing for the premium rated removal from the update list and is now sending messages from a valid originating number. However, on closer examination the following issues were found:

- certain of the services contain no pricing information or incorrect pricing information, even though MMS1 and MMS2 both make reference to a price of "R10 per sms":

MMS1	<ul style="list-style-type: none"> ○ 38581 is a R10 short code and the pricing is correct ○ 37607 is a R7,50 short code ○ 37393 is a R7,50 short code ○ 32226 is a R1 short code ○ 083 919 4949 is a chat service – no pricing given
MMS2	<ul style="list-style-type: none"> ○ 38581 is a R10 short code and the pricing is correct ○ 37607 is a R7,50 short code ○ 37393 is a R7,50 short code ○ 32226 is a R1 short code and the pricing is correct

	<ul style="list-style-type: none"> ○ 083 919 4949 is a chat service – no pricing given ○ 082 234 7474 is an IVR or live chat service (not tested) – no pricing given
SMS1	<ul style="list-style-type: none"> ○ 38581 is a R10 short code and the pricing is correct ○ 32391 is a R1 short code and the pricing is correct
Complaint SMS example 1	<ul style="list-style-type: none"> ○ 38581 is a R10 short code ○ 32226 is a R1 short code <p>Pricing is confusing as only a cost of R10 per sms is mentioned and it is unclear if this applies to both short codes</p>
Complaint SMS example 2	<ul style="list-style-type: none"> ○ 38581 is a R10 short code ○ 32226 is a R1 short code <p>Pricing is confusing as only a cost of R10 per sms is mentioned and it is unclear if this applies to both short codes</p>
Complaint SMS example 3	<p>38581 is a R10 short code and is used for both obtaining further content AND removing the number from the originator's database. Pricing is correct.</p>

- MMS1 and MMS2 refer to a membership. It appears that this is a subscription service, for which no pricing information is provided. In addition, the same short code (38581) is used for both content and the apparent subscription service, creating the possibility of confusion between content and a subscription service, alternatively bundling of content and a subscription service.
- MMS1 and MMS2 both contain the phrase "To stop sms stop to 38581 or 32226 stops at R1". This phrase appears 4 lines below the phrase "To unsubscribe call 011 3729813 or to chat call 083 919 4949" in both MMS1 and MMS2. SMS1, on the other hand uses the phrase "2 stop sms sp to 32391 R1". The Secretariat called the Johannesburg Telkom landline number provided at 16:41 on 22 November 2005. The request to be removed from the database was efficiently dealt with, however the person dealing with the call was unable to assist in identifying the correct SMS mechanism to deal with removals from the message database.
- The Secretariat confirmed with one of the networks that short code 38581 is strictly a R10 premium rated short code and cannot be used for a R1 premium rate service or event based billing.
- Only MMS2 indicates that the service is intended for adults as required in Clause 8.1.1 of the WASPA Code of Conduct, while neither MMS1 nor SMS1 appear to contain such an indication. The process of obtaining MMS1 and MMS2 did not show any adult verification process as required by Clause 8.1.3 of the WASPA Code of Conduct. The Secretariat furthermore took note of the possible contravention of Clause 8.2.1 of the WASPA Code of Conduct in the use of the phrase "our naughty School Girls" in MMS2.

Referrals and Ambit of Complaint

The Adjudicator considered there to be prima facie breaches of Clauses 8.1.3 and 8.2.1 of the WASPA Code of Conduct. The Adjudicator regarded himself as not being empowered to make a finding or impose a sanction in respect thereof without

giving the SP an opportunity to respond, in accordance with the *audi alteram partem* principle. The Adjudicator accordingly instructed the Secretariat to institute a complaint against the SP in respect of Clauses 8.1.3 and 8.2.1 of the WASPA Code of Conduct. As this instruction is neither a decision nor a sanction of the Adjudicator, it is not subject to appeal by the SP.

The Adjudicator further regarded the concern with the “membership” referred to in MMS1 and MMS2 being a subscription service as defined in the WASPA Code of Conduct as a possible contravention of one or more of the stipulations in Clause 11 of the WASPA Code of Conduct. The Adjudicator regarded himself as not being empowered to make a finding or impose a sanction in respect thereof without giving the SP an opportunity to respond, in accordance with the *audi alteram partem* principle. The Adjudicator accordingly referred this issue to the Secretariat for further investigation and to obtain the response of the SP. As this referral is neither a decision nor a sanction of the Adjudicator, it is not subject to appeal by the SP.

The Adjudicator noted that the SP’s response refers to “unsubscribing”. The Adjudicator assumed in favour of the SP that the term “unsubscribe” was used in its broadest context to include removal of a message recipient from a message originator’s database (as contemplated in Clauses 5.1.2 and 5.1.4 of the WASPA Code of Conduct) rather than restrictively in respect of subscription services, as defined in the WASPA Code of Conduct and specifically Clause 11.3 of the WASPA Code of Conduct.

With regard the possible breach of Clause 8.1.1 of the WASPA Code of Conduct, the Adjudicator considered that the nature of the complaint and the clear indication that the complaint concerned adult services placed the issue of adult services within the purview of the SP (and in turn the IP). The possible breach of clause 8.1.1 of the WASPA Code of Conduct is apparent from a mere reading of the SMS message examples provided by the complainant and is clearly contained in the body of the complaint itself. It is not necessary for the complainant to specifically refer to Clause 8.1.1 of the WASPA Code of Conduct in the complaint for the Secretariat to investigate a possible breach of this Clause of the WASPA Code of Conduct and the Adjudicator to make a decision in respect thereof. This is clear from Clauses 13.3.7 and 13.3.8 of the WASPA Code of Conduct, which provide:

13.3.7. The adjudicator must carefully review:

- (a) **the complaint**; (Adjudicator’s emphasis)
- (b) any response the member has made to the complaint;
- (c) the WASPA Code of Conduct;
- (d) **any other material relevant to the complaint, as supplied by WASPA**. (Adjudicator’s emphasis)

13.3.8. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

In the opinion of the Adjudicator, the issue is whether the SP has been given a chance to respond to the alleged breach of the WASPA Code of Conduct, not if it did in fact respond. In the opinion of the Adjudicator, the possible breach of clause 8.1.1 is clear from the SMS message examples contained in the complaint, unlike the possible breach of Clauses 8.1.3, 8.2.1 and 11.1 of the WASPA Code of Conduct, which was only uncovered during the Secretariat’s investigations.

The overt nature of the possible breach of Clause 8.1.1 of the WASPA Code of Conduct in the SMS message examples in the complaint gave the SP an opportunity to respond thereto, in accordance with the *audi alteram partem* principle. The SP chose not to do so. The Adjudicator accordingly considered himself empowered to consider a possible breach of Clause 8.1.1 of the WASPA Code of Conduct.

Similarly, where the SP's response to the complaint (rather than the complaint itself) indicates a possible breach of Clause 5.1.2 of the WASPA Code of Conduct, the SP need not be given a further opportunity to respond to this possible breach of the WASPA Code of Conduct, as it has availed itself of this opportunity in its response, albeit possibly to its own detriment.

Decision

The Adjudicator did not uphold the complaint in respect of the television advertisement, as the complainant has not provided sufficient information to indicate a breach by the SP, nor was the Secretariat given sufficient detail by the complainant to enable the Secretariat to investigate this allegation further.

The Adjudicator upheld the complaint in regard to the SMS message examples provided by the complainant, as amplified by the Secretariat's testing of the service.

In particular the Adjudicator determined that:

- The SMS message examples submitted by the complainant as well as SMS1 are advertisements for the IP's service. In addition, content delivered by the IP in MMS1 and MMS2 contains additional material amounting to an advertisement for the IP's service.
- The pricing information in the initial SMS message examples provided by the complainant is confusing and it is unclear whether the R10 price refers to the price of a content request, or the unsubscribe option, or both. The wording of MMS1 and MMS2 indicated an even greater degree of uncertainty in referring to both a R1 premium rated number and a R10 premium rated number as being charged at R1 in the phrase "To stop sms stop to 38581 or 32226 stops at R1". This phrasing, while not grammatically accurate gives the distinct impression that removal from the message database will cost R1, irrespective of which of the short codes is used. This is a breach of:
 - Clause 4.1.1 of the WASPA Code of Conduct in that the pricing information is:
 - unfair alternatively dishonest; and/or
 - unclear alternatively inaccurately conveyed;
 - Clause 4.1.2 of the WASPA Code of Conduct in that the SP, alternatively the IP through the SP, has knowingly disseminated:
 - information that is false, alternatively deceptive; and/or

- information that is likely to mislead by inaccuracy alternatively ambiguity alternatively exaggeration or further alternatively omission.
 - Clause 6.2.4 of the WASPA Code of Conduct in that pricing contained in the various advertisements (SMS1, MM1 and MMS2 and the SMS message examples contained in the Complaint) are misleading.
- Two of the three SMS examples submitted by the complainant did not indicate the message originator (a breach of Clause 5.1.1 of the WASPA Code of Conduct).
- Neither the three SMS examples submitted by the complainant, nor SMS1 indicate the name of the WASP or the information provider providing the service (a breach of Clause 6.2.6 of the WASPA Code of Conduct). MMS1 and MMS2 contain a reference to the “foxii mobile club” which was not considered sufficient to be regarded as compliance with Clause 6.2.6 of the WASPA Code of Conduct.
- The mechanism for a message recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator requires use of the R1 premium rated number 32226 in the case of two of the SMS message examples supplied and the R10 premium rated number 38581 in respect of the third SMS message example supplied. Both numbers are given in MMS1 and MMS2, without indicating the R10 charge for using the number 38581 (as referred to above). In addition, SMS1 makes use of the R1 premium rated number 32391. Use of a premium rated number (irrespective of whether such premium rate is R1 or R10), is a breach of Clause 5.1.4 of the WASPA Code of Conduct.
- Neither the three SMS examples submitted by the complainant, nor SMS1 and MMS1 indicate that the service is an adult service (a breach of Clause 8.1.1 of the WASPA Code of Conduct).

Regarding the SP’s submission concerning the identity of the complainant, the Adjudicator has previously found that the identity of the complainant is of limited relevance in respect of a complaint. Similarly, the identity of the SP is of limited relevance other than in terms of Clauses 13.3.8 and 13.3.10(a) of the WASPA Code of Conduct, which are not in issue here. The limited relevance of the identity of the complainant concerns the alleged prior commercial relationship between the complainant and the IP for the purposes of Clauses 5.2.1(b) and 5.3 of the WASPA Code of Conduct. Notwithstanding the lack of any substantiation of the allegations of the SP, the Adjudicator has accepted these allegations as having been made “in good faith”. As such no breach of Clause 5.3 of the WASPA Code of Conduct was found.

Portions of the SP’s submission amount to an admission that it has breached the WASPA Code of Conduct. In particular, the statement that “We have also only started receiving the stop DB yesterday [being 21 September 2005] and as such will now be able to remove those people who have unsubscribed from the system” is a clear admission of a breach of clause 5.1.2 of the WASPA Code of Conduct, not raised in the complaint itself. Nevertheless, as this is an issue raised by the SP, the Adjudicator confirmed the breach of Clause 5.1.2 of the WASPA Code of Conduct during the period 1 September 2005 to 20 September 2005.

Sanctions

In respect of the breaches of the WASPA Code of Conduct that have been identified, the Adjudicator imposed the following sanctions:

- The SP is reprimanded for the large number of breaches of the WASPA Code of Conduct raised in this complaint, whether by the SP or the IP;
- The SP is ordered to terminate the services of the IP in accordance with Clause 3.9.2 of the WASPA Code of Conduct.
- The SP is required to notify the Secretariat of such information as is in its possession regarding the IP, including (without limitation) the full name of the IP, the name or names of any business, partnership, company or other entity with which the IP is associated, the national identity number or registration number of the IP and the IP's full contact details, so that other WASPA members may be notified of the IP's identity and conduct.
- The SP is order to remedy the breaches identified in this report in all future advertising, in particular SMS advertising, whether relating to the SP's services or the services of any of its information providers.
- The SP is ordered to pay a fine of:
 - R10 000,00 in total in respect of the breaches of Clauses 4.1.1, 4.1.2 and 6.2.4 of the WASPA Code of Conduct (R30 000,00 in total);
 - R1 500,00 in respect of each breach of Clauses 5.1.1 and 6.2.6 of the WASPA Code of Conduct (R3 000,00 in total);
 - R5 000,00 in respect of the breach of Clause 5.1.4 of the WASPA Code of Conduct; and
 - R3 000,00 in respect of the breach of clause 8.1.1 of the WASPA Code of Conduct,

being R41 000,00 in total.

The fines in respect of the breaches of Clauses 5.1.1, 6.2.6 and 5.1.4 of the WASPA Code of Conduct (R8 000,00 in total) are suspended for a period of twelve (12) months from date of this Report; provided that no further breaches of the Code of Conduct in any of the respects identified in this report are found in such twelve (12) month period from the date of this Report.

No sanction is imposed in respect of the breach of clause 5.1.2 of the WASPA Code of Conduct, as the IP, through the SP has taken steps to remedy such breach, even though such steps have involved further breaches of the WASPA Code of Conduct

The balance of the fine (R33 000,00) is payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole

or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.