

WASPA APPEALS PANEL FINDINGS FOR COMPLAINT NO. 0213

COINTEL

Appellant

5 December 2006

DECISION

Background:

This is an appeal against the whole of decision of the Adjudicator in complaint 0213. The complaint itself stemmed from the receipt by a consumer of 12 messages on 10 March 2006 which the consumer regarded as being unsolicited commercial messages. On investigation of the matter, it was discovered that delivery of the messages was facilitated by the Appellant on behalf of Vodacom.

The complainant alleged that the messages constituted unsolicited commercial messages sent in contravention of clause 45 of the Electronic Communications and Transactions Act No. 25 of 2002 ("the ECT Act") and furthermore breached clauses 3.1.2, 5.1.1, 5.2.1 and 5.3 of the WASPA Code of Conduct ("the Code").

The Adjudicator's ruling:

The adjudicator upheld the complaint and found that the Appellant had breached clauses 3.1.2, 5.1.1, 5.2.1 and 5.3 of the Code. The Adjudicator imposed no sanctions for the breach of clause 3.1.2 of the Code. The Adjudicator held that the wording of the Code is unclear as far as clause 5.1.1 is concerned and held that the Appellant is required to include in future messages both the originating number and identifier of the message originator. The Adjudicator did not impose any sanctions in respect of the breach of clause 5.2.1 due to insufficient

evidence. In respect of the breach of clause 5.3 the Adjudicator held that the Appellant had not taken all reasonable steps to ensure that the originator did in fact have permission from the recipient to send the message. The Adjudicator held that the Appellant had acted unlawfully and the Appellant was ordered to pay a fine of R3 000.00.

Grounds of Appeal:

The Appellant denies breaches of clauses 3.1.2, 5.1.1, 5.2.1 and 5.3 of the Code.

The Appellant's grounds of appeal are as follows:

Ground 1 of the appeal: lack of jurisdiction to adjudicate

The Appellant contested the jurisdiction of WASPA to adjudicate on the complaint and argued that Vodacom as a network operator was not subject to the provisions of the Code.

The Appellant also denied any specific breach of the Code by itself or Vodacom.

Ground 2 of the appeal: member did not act unlawfully

It was stated that the Adjudicator erred in finding that the member had acted unlawfully and it was denied that the messages constituted spam.

Ground 3 of the appeal: interpretation of clause 5.1.1

It was stated that the Adjudicator erred in finding that clause 5.1.5 of the Code requires BOTH the name or identifier of the message originator and the originating number, OR at least the name or identifier of the message originator.

Ground 4 of the appeal: error in identifying the message originator

It was stated that the Adjudicator erred in finding that the member was the originator of the message.

Ground 5 of the appeal: promotion of spam and failure to take reasonable measures to prevent spam

It was stated that the Adjudicator erred in finding that the member had promoted the sending of spam and had failed to take reasonable measures to prevent spam as the message was not spam in the first place.

Findings of the appeals panel and reasons

Ground 1 of appeal – lack of jurisdiction

The Appeals Panel will deal first with the contention that WASPA has no jurisdiction to adjudicate on this complaint and then with the Adjudicator's decision in respect of the each of the alleged breaches of the Code.

Clause 1.4 of the Code provides as follows:

“Unless otherwise specified, this Code of Conduct applies to all wireless application services accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator.”

A wireless application service provider (“WASP”) is defined in clause 2.22 of the Code to be *“any person engaged in the provision of a mobile service, including premium-rated services, who signs a WASP contract with a network operator for bearer services enabling the provision of such services”*. It appears to have been common cause that Cointel is, in fact, a WASPA member and subject to the provisions of the Code. Clause 2.11 of the Code defines an *“information provider”* to be *“any person on whose behalf a wireless application service provider may provide a service, and includes message originators.”* Although Vodacom is a network operator, to the extent that it causes a WASP to provide a service on its behalf it can be regarded as a *“message originator”* and an *“information provider”*.

Clause 3.9.1 of the Code provides further that WASPA *“[m]embers must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.* Furthermore, clause 3.9.2 provides that *“[t]he member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.”*

It is therefore clear that WASPA does have jurisdiction to adjudicate this complaint and to investigate whether any services provided by a WASPA member on behalf of an information provider contravene any of the provisions of the Code. If so, the WASP may be ordered to comply with the provisions of clause 3.9.2 of the Code and to suspend or terminate the provision of services to the information provider.

The Appeals Panel accordingly rejects this ground of appeal.

Ground 2 of appeal: member did not act unlawfully

Clause 3.1.2 provides that “[M]embers are committed to lawful conduct at all times”. Although messages that do not appear to comply with the provisions of section 45 of the ECT Act may be prima facie evidence of unlawful conduct, the Appeals Panel is not convinced that this, in itself, demonstrates conclusively a lack of commitment by the WASP to lawful conduct at all times. If a WASP were to discover that an information provider was using its services to send messages unlawfully and thereafter failed to take steps to suspend or terminate the provision of such services as required by clause 3.9.1 of the Code, such failure would indicate a lack of a commitment to lawful conduct at all times. This was not alleged in this matter and, for reasons dealt with more fully below, the Adjudicator’s finding of a breach of clause 3.1.2 of the Code was incorrect.

The Appeals Panel accordingly upholds this ground of the appeal.

Ground 3 of appeal: interpretation of clause 5.1.1

Clause 5.1.1 of the Code provides that “[a]ll commercial messages must contain a valid originating number and/or the name or identifier of the message originator.” The Adjudicator held (on page 4 of the Report) that clause 5.1.1 “...requires BOTH the name or identifier of the message originator and the originating number OR at least the name or identifier of the message originator”. The Appeals Panel respectfully disagrees with the interpretation of the Adjudicator in this regard and finds that the use of the words “and/or” in this specific context should be interpreted as permitting the sender of a commercial message to elect to include with the message either a valid originating number (on the one hand) or the name or identifier of the message originator (on the other hand) or both an valid originating number and the name or identifier of the message originator.

The Adjudicator did not rule that the Appellant contravened clause 5.1.1 of the Code but held that the member is required to include BOTH the number of the originator of the message AND the name or other identifier of that originator in

future messages, from date of publication of the finding. As pointed out above, this is not required by the Code.

The Appeals Panel accordingly upholds the third ground of the appeal and holds that the direction of the Adjudicator should be set aside.

Ground 4 of appeal: error in identifying the message originator

Clause 5.2.1 provides as follows:

“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.”*

A “message originator” is defined in clause 2.13 of the Code to include “*the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages*”. The Adjudicator accepted the Appellant’s contention that it provided the messaging service on Vodacom’s behalf and also accepted the further contention that the recipient had a prior commercial relationship with Vodacom. The Adjudicator erred in not concluding that Vodacom was the message originator. If the message originator had been correctly identified, it would follow that the messages could not be regarded as unsolicited as the recipient had a direct and recent prior commercial relationship with the message originator. In such circumstances, the enquiry into whether the organisation supplying the originator with the recipient’s contact details did so with his express consent would be irrelevant.

The Appeals Panel accordingly upholds the fourth ground of the appeal.

Ground 5 of appeal: promotion of spam and failure to take reasonable measures to prevent spam

Clause 5.3 of the Code provides as follows:

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.”

In light of the finding that the messages should not have been regarded as unsolicited or “spam”, it follows that the member cannot be held to have breached clause 5.3 of the Code.

The Appeals Panel accordingly upholds the fifth ground of the appeal.

Decision

We find that the Appellant did not contravene clauses 3.1.2, 5.1.1, 5.2.1 and 5.3 of the Code. The findings and sanctions of the Adjudicator are accordingly set aside.

The appeals fee is fully refunded.

The Appeals Panel

31 January 2007.