



## REPORT OF THE ADJUDICATOR

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|-------------------------------------------|----------------------------------------------|
| <b>Complaint reference number:</b>        | 11652                                        |
| <b>WASPA member(s):</b>                   | Vodacom Service Provider (VSP)               |
| <b>Membership number(s):</b>              |                                              |
| <b>Complainant:</b>                       | Competitor                                   |
| <b>Type of complaint:</b>                 | Unsolicited Communications                   |
| <b>Date complaint was lodged:</b>         | 2011 – 01 - 18                               |
| <b>Date of the alleged offence:</b>       | 2011 – 01 - 18                               |
| <b>Relevant version of the Code:</b>      | 10.0                                         |
| <b>Clauses considered:</b>                | 2.23, 2.8, 3.9.2, 5.1.3, 5.1.6, 5.2.1, 5.3.1 |
| <b>Relevant version of the Ad. Rules:</b> | Not Applicable                               |
| <b>Clauses considered:</b>                | Not Applicable                               |
| <b>Related cases considered:</b>          | # 0326                                       |

## Complaint

The formal complaint is the escalation of the initial complaint logged by the complainant on the 18<sup>th</sup> of January 2011 via WASPA's electronic complaints lodgement facility.

The complainant refers to the following message:

Happy New Year you have won an inflatable bed from Homemark. Call 0114306000 quote ref: 2003.  
Prizes excl P&P. T &C apply. Reply no 2b removed.

The complainant provided that:

- *The complainant was not a customer of the Information Provider, Homemark, and that the message received was spam;*
- *The Information Provider in question was cited in the media for previous spam messages of such nature;*
- *The message content did not include a valid opt-out direction i.e. called into question the opt-out direction of "Reply no 2b removed" versus the "STOP" direction specified in the WASPA Code of Conduct.*

The WASPA Secretariat initially logged this complaint against Always Active Technologies.

Before the Secretariat had redirected the complaint to VSP, Always Active Technologies attended to do the following in respect of the complaint which they understood to be against themselves at that time:

- *Unsubscribed the customer (complainant) from their sms list;*
- *Added the complainant to their opt out list;*
- *Contacted the complainant regarding the complaint and the steps that they had taken to resolve the matter.*

Always Active Technologies also contacted the IP, in this case Homemark, in an attempt to obtain the source of the complainant's telephone number. Homemark advised that they had obtained the complainants details during a competition which they had run in 2010, wherein entrants to the competition had to provide personal details of another family member or friend to obtain an entry into the said competition. Homemark did not record which telephone numbers were provided by which competition entrant nor did they obtain any permission from the third parties to use their information.

At this stage Always Active Technologies realised that they were in fact not the SP who had sent out this specific message and requested that the Secretariat redirected the complaint to Vodacom Service Provider (VSP). The Secretariat accordingly withdrew the complaint against Always Active Technologies and reissued the complaint against VSP.

Service provider's response

**Notwithstanding the formal complaint issued to the Service Provider on 21 January 2011 and the reminder correspondence to VSP on 31 January, the Service Provider neglected to respond formally to WASPA.**

Complainant's Reply:

The complainant was informed by the Secretariat of the mistaken allocation of the matter to Always Active Technologies as well as the reallocation of the complaint to VSP and the lack of response thereto. The complainant noted that he had received telephone calls from both VSP and Homemark but was not satisfied with their “story” regarding how they had obtained his contact number.

Sections of the Code considered

2. Definitions

**2.23. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.**

**2.8. A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.**

3.9. Information Providers

**3.9.2. Where any service provider that is not a WASPA member conducts any activity governed by the provisions of the Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the acts or omissions of any such service provider.**

5.1. Sending of commercial communications

**5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.**

The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

**5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.**

## **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 (within the last six months) 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.**

## **5.3. Prevention of spam**

**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.**

#### Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. I further note that I can only rely on the information provided relevant to the complaint at hand, i.e. the information presented by the complainant and the Service Provider, VSP (it being recorded that VSP has not formally responded to the complaint).

#### I find that:

- *Notwithstanding that Homemark, the Information Provider is not a WASPA member nor an affiliate member at this time, Section 3.9.2 of the Code provides that, VSP is liable for the conduct of the Information Provider in this matter. As such VSP is liable for the violations of the Code albeit occasioned by the Information Provider's conduct.*
- *In respect of the exceptions to the identification of spam under 5.2.1, it cannot be established from the facts that (i) the complainant had requested the message; (ii) had a direct and recent prior commercial relationship with the Information Provider, (iii) would reasonably expect to receive marketing communications from the Information Provider; or (iv) that the complainant had given the Information Provider consent for the receipt of such communications. As such the message in question as received by the complainant constituted "spam" in terms of the definitions provided in Sections 2.23 and 5.2.1 of the Code and the Service Provider has contravened Section 5.3.1 of the Code.*

- ***On the matter of the unsubscribe facility in the message, I find that VSP is in breach of Section 5.1.6 of the Code. The word “no” is not in accordance with the prescripts of the Code. Further the wording of the message does not contain “clear instructions for unsubscribing” as required by section 5.1.3 of the Code.***

**The complaint is accordingly upheld.**

Sanctions

The SP is:

- (i) ***Fined the sum of R10 000.00 payable to the WASPA Secretariat within ten (10) days of date of notification of this Adjudication***