

## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	12546
<b>WASPA member(s):</b>	Always Active Technologies (AAT) (the Service Provider or "SP") and Vodacom Service Provider (Pty) Ltd (the Information Provider or "IP")
<b>Membership number(s):</b>	0018 and 0005
<b>Complainant:</b>	Competitor - Anonymous
<b>Type of complaint:</b>	Unsolicited SMS (SPAM)
<b>Date complaint was lodged:</b>	2011-04-04
<b>Date of the alleged offence:</b>	2011-04-04
<b>Relevant version of the Code:</b>	10.0
<b>Clauses considered:</b>	5.2.1, 5.3.1, 5.1.3
<b>Relevant version of the Ad. Rules:</b>	Not applicable
<b>Clauses considered:</b>	Not applicable
<b>Related cases considered:</b>	Not applicable

### Complaint

Complaint # 12546 was lodged by an anonymous competitor on the WASPA website on 4 April 2011, regarding an unsolicited SMS. The Complainant writes that the following unsolicited SMS was received from African Bank on 4 April 2011 at 9:39AM:

**"0% Interest Loan from R1,500 to R14,000. 3, 6, 9, 12 month terms. SAVE up to R2,500! Call 0860333004 to apply. African Bank. Terms Apply. Reply NO 2 Opt Out"**

The complaint also states "***No price Point for optout reply***" and "***I've never given permission to African Bank to be contacted.***"

The formal complaint notification was sent by WASPA to the SP on 11 April 2011.

### Service Provider's and Information Provider's response

On 12 April 2011, the SP responded to WASPA, asking for the Complainant's MSISDN. WASPA responded on the same day advising the SP that the Complainant wished to remain anonymous.

It appears from the correspondence in this matter that WASPA wrote again to the SP on 6 May 2011 advising it that WASPA had not received any response from the SP, and that should no response be forthcoming from the SP's office by close of business that day, the complaint would be handed to an adjudicator without the benefit of the SP's input. The SP then copied WASPA on its correspondence with the IP, and the IP thereafter emailed WASPA directly, also requesting the Complainant's MSISDN. The matter was re-directed to the IP and the original complaint sent to the IP on 6 May 2011.

On the same day, the Complainant granted permission to WASPA to provide the IP with the Complainant's MSISDN. On 17 May 2011, the IP's client, African Bank, confirmed that the MSISDN had been unsubscribed from future campaigns. It also stated:

**“Should this person not wish to receive any unsolicited marketing, we recommend that this person exercises his/her right to register a pre-emptive block for all unsolicited marketing with the DMSA.”**

The IP's client also confirmed on 19 May 2011 that the Complainant's MSISDN had been added to its “Do not contact table”.

WASPA forwarded the above communications from the IP's client to the Complainant, and the Complainant refused resolution of the complaint on 19 May 2011, stating as follows:

**“Nope not resolved – no proof that I consented to contact and no resolution of other issues as listed in the complaint.”**

#### Sections of the Code considered

“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.”

“5.3.1. 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.”

“5.1.3. 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.”

## Decision

This complaint pertains primarily to the unsolicited nature of the SMS complained of. Section 5.2.1 of the Code states:

**“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.”**

Clearly, none of the circumstances provided for in 5.2.1(a), (b) or (c) was established by the SP or the IP. The message received by the Complainant was accordingly unsolicited, and hence spam as contemplated by clause 5.2.1 of the Code. Clause 5.3.1 of the Code states 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.”**

It should be noted that the IP (against whom this complaint was re-directed) is also a full member of WASPA. The IP is accordingly in breach of clause 5.3.1 of the Code. The fact that the Complainant's number was not on the DMSA's "pre-emptive block" list and the client's internal "Do Not Contact List" does not exonerate the IP from its obligation in terms of clause 5.3.1 of the Code. It is clear from section 5.2.1 of the Code that if the recipient has not requested the message, or does not have a direct and recent prior commercial relationship with the message originator, then the recipient's explicit consent to be contacted is required even if the recipient's number is not contained in the DMSA's "Do Not Contact List".

Section 5.1.3 of the Code provides:

**“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.”**

The section is clear that the word "STOP" should be used for a reply to stop receiving messages from any service. The word "STOP" is not used in the spam complained of. Instead, the message states:

### “Reply NO 2 Opt Out”

The word “No” does not have the same implications as the word “Stop”. A recipient could read “Reply No to Opt Out” as meaning that he/she should reply “No” to decline the offer, not to avoid receiving any other unsolicited offers. The word “Stop” is more obviously linked to an instruction to “stop” sending messages to the recipient (which should be the clear meaning of the opt-out procedure and made plainly apparent to the recipient of the message). In this regard, it is noteworthy that section 5.1.3 states specifically that “*The reply ‘STOP’ procedure should be made clear to the recipient at the start of any messaging service*” (emphasis added). In my opinion, the reply “STOP” procedure has not been made clear. Compounding this is the use of the abbreviation “2” for “to”. This is not an expressly accepted abbreviation under the Code, and is unnecessary, adding to the lack of clarity of this particular opt-out instruction.

I find the IP in breach of section 5.1.3 of the Code.

I would like to make an observation about the Complainant's allegation that there was no quoted price for the opt-out reply. The pricing requirements in the Code generally deal with providing full pricing information for services being advertised, and do not relate to the price of the opt-out reply. However, section 5.1.4 of the Code provides as follows:

**“5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying ‘STOP’ as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.”**

I have not been provided with any information to suggest that the IP's client was not charging the lowest tariffed rate for this particular opt-out.

The IP is accordingly in breach of sections 5.3.1 and 5.1.3 of the Code.

### Sanctions

1. For the breach of section 5.1.3 of the Code, the IP is reprimanded for its failure to ensure that its client, African Bank, complied with the detailed requirements of this section.
2. For the breach of section 5.3.1 of the Code, a fine of R6 000.00 is imposed jointly and severally on the SP and IP (who is also a member of WASPA).
3. In the event that the above fine is not paid to WASPA within five working days of the issue of an invoice by WASPA, the SP is directed to suspend all services to the IP until such time as the fine has been paid in full, together with interest thereon at the rate of 15,5% per annum.