



## REPORT OF THE ADJUDICATOR

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| <b>Complaint reference number:</b>        | 14586   |
| <b>WASPA member(s):</b>                   | Peach Mobile aka Plum Solutions (IP) (1068)<br>Integrat (SP) (0030) |
| <b>Membership number(s):</b>              | See above   |
| <b>Complainant:</b>                       | Competitor  |
| <b>Type of complaint:</b>                 | Spam  |
| <b>Date complaint was lodged:</b>         | 2011-08-25  |
| <b>Date of the alleged offence:</b>       | 2011-08-25  |
| <b>Relevant version of the Code:</b>      | 11.0  |
| <b>Clauses considered:</b>                | 5.2.1 and 5.3.1.  |
| <b>Relevant version of the Ad. Rules:</b> | N/A   |

### Related cases considered:

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### Complaint

Complaint 14586 was logged by a complainant regarding an unsolicited sms message he received.

The complaint progressed as follows:

- Complaint 14586 was logged on 2011-08-25 by a competitor regarding unsolicited sms.
- The formal complaint was sent to the SP on 2011-08-25. The SP requested redirect on 2011-08-25.
- The IP responded on 2011-08-26.
- The SP requested extension on behalf of the IP on 2011-08-29 which was granted.
- The complainant provided feedback on 2011-09-02 after the IP made contact with him.
- The SP requested extension again on 2011-09-09 which was granted.
- A reminder message was sent to the IP on 2011-09-26.
- The SP responded on 2011-09-26 but no response was received from the IP.

The Complainant alleges that he received the following unsolicited sms (spam) on his number 0833247290 on Thursday 25 Aug 2011: \"R80k car insured from only R280pm. No excess! Premiums never increase! Affordable car insurance from Prime Meridian. Reply YES for info or STOP to opt out\".

In summary the complaint sets out the following sections of the Code have been breached:

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.

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### **Service provider's response**

The SP referred the complaint to the IP.

### **Information provider's response**

The IP provided a lengthy response setting out that they had complied with the Consumer Protection Act which does not require opt-in but merely an opt-out provision which they did provide.

They stated further that the sending of direct marketing is regulated in terms of the Consumer Protection Act and as they had complied with the legislation they were not in breach of anything.

In addition they provided the Complainant with details of the Direct Marketing Association's opt-out register as well as the opt out register to be maintained in line with the Consumer Protection Act.

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### **Decision**

Although the IP is of the view that they are fully compliant they fail to recognise that as members of WASPA they are contractually obligated to comply with the provisions of the Code of Conduct. Furthermore, the Consumer Protection Act is clear in its interpretation section that the Consumer Protection Act must never be utilised to afford a consumer fewer rights than they would otherwise have.

Whilst it would be correct to state that any organisation engaging in direct marketing, not obligated by contract or any other piece of regulation or legislation, would only need to comply with the provisions of the Consumer Protection Act with regards to the direct marketing, it is not correct to state that the IP does not have to comply with the WASA Code and what it mandates around spam and the sending of unsolicited marketing messages.

The IP has admitted that the message was unsolicited and stated that they are not in breach because they complied with the Consumer Protection Act and provided an opt-out

mechanism for the consumer. Accordingly I am not going to go into great detail on whether or not the message was unsolicited as the IP has admitted this fact.

Unfortunately the IP also agreed to comply with the provisions of the WASPA Code when they became members of WASPA which states that:

5.2.1 Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications-
  - (i) at the time when the information was collected; and
  - (ii) on the occasion of each communication with the recipient; 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.

### **Sanctions**

I am not going to sanction the SP.

The IP is in breach of section 5.3.1 of the Code in that they sent an unsolicited message (as defined in section 5.2.1) to the Complainant.

Due to the fact that the IP has been provided with incorrect legal advice and at least attempted to comply with the law the IP is fined R10000. R5000 payable immediately and R5000 to be suspended pending the IP amending their direct marketing processes and ensuring compliance with section 5.2.1 and 5.3.1 of the Code.

The IP is also formally reprimanded.