



REPORT OF THE ADJUDICATOR

Complaint reference number : 20264

WASPA member(s) : Inter-Active Technologies (Pty) Ltd

Membership number(s) : 0110

Complainant : Employee of Competitor

Type of complaint : Breach of Code of Conduct

Date complaint was lodged : 23rd April 2013

Date of the alleged offence : 23rd April 2013

Relevant version of the Code : Version 12.4

Clauses considered : 5.2 and 5.3.1

Complaint:

Complaint 20264 was logged by a consumer in his personal capacity who is employed by a competing WASP claiming that it had been automatically added to a mailing list and been sent unsolicited mail or spam in contravention of clauses 5.2 and 5.3.1 of the WASPA Code.

The Complainant was unable to request in terms of Section 45 of the Electronic Communication Transaction Act, Act 25 of 2002 and Section 11 of the Consumer Protection Act, Act 68 of 2008 to be removed from the mailing list and that the SP disclose where it had obtained the complainant's personal cell-phone number as the complainant is unable to ascertain who is the WASP in question.

The complaint progressed as follows:

- Complaint 20264 was logged by a consumer, with the name of Paolo Campanella with cellular number 0833247290 regarding breaches of Section 5.2 and 5.3 1 of the WASPA code as on the 23 April 2013 alleging that he had been sent unsolicited communication (SPAM) which stated that ,

“ Do you love Jesus ? REPLY YES. Get inspirational bible quotes and see your life change. “

- Furthermore complainant stated that his number 0833247290 is a Cell C number which was ported from MTN.

- The formal complaint was sent to the SP on same day and the WASP responded on 2013-05-02.

- On the 2013-05-27 WASPA provided the complainant with the WASP's response and on the 28th May 2014 stating that,

“Hi On 2 May [2013], you said this this has been escalated to a formal complaint. Now, you seem to have confused me with a "Mrs. Ward Able". Please close nothing, un-confuse yourselves, and keep my formal complaint as it was. Regards Paolo “.

- On the 28-05-2013 the WASP replied .
- On the 2013-05-2013 WASPA expedited the matter for adjudication.

WASP response:

- Susan Mokgati for Inter- Active Telecom (Pty) Limited (the SP) stated in her initial response on the 2nd May 2013 that:

“Hi Hello,We got a complaint from a Mrs. Ward Able. She is subscribed to a service and R100 odd rands has been deducted from her airtime. We are currently not running any subscription services on Cell C. Please assist in identify the WASP she is registered to. “

- Susan Mokgati for Inter- Active Telecom (Pty) Limited (the SP) stated in her second response on the 28th May 2013 that:

“Hi, I have been in contact with Mrs. Able and checked all our records her number is not subscribed to any of our services. We do not have any live campaigns with Cell C. I checked with MTN and her number has not been ported. I called Cell C and advised them to call her and assist her. “

Decision:

- The issues here is whether the WASPA Code was breached, in particular clauses 5.2 and 5.3.1 of the WASPA Code.

- I am unable to make a finding that the above sections have been contravened by the SP as there seems to be confusion on the part of the SP as to the identity of the complainant and the identity of the owner of the number where the unsolicited mail (SPAM) was sent to.

- This however does not mean that there has not been a *prima facie* contravention of clauses 5.2 and 5.3.1 which I hereby Rule.

- There seems to be an *error in persona* on one of the parties which leaves the last 2 (two) questions to be answered which is who is the correct SP and who is the correct customer in question.

1st Ruling :

The Ruling is that the complaint on merits has been deferred:

1. For further written evidence by the WASPA Secretariat, the complaint and SP on the identity of the complainant

And

2. For further written evidence by the WASPA Secretariat, the complaint and SP on the identity of the owner of the number where the unsolicited mail (SPAM) was sent to.

3. Further evidence to be provided within 7 (seven) days of receipt of this Ruling.

Sanction :

The sanction of R 10 000.00 fine is deferred until the parties have filed further evidence as requested in my Ruling.

Final Ruling :

I initially gave my final ruling on the 15 September 2014 as it seemed that the SP had not replied as requested in my previous Ruling . However on the 28 October 2014 the WASPA Secretariat advised the Adjudicator that in fact an additional response had been received that had been overlooked and given to the adjudicator. The e-mail from the WASPA Secretariat states that,

“... It has come to our attention that the Service Provider for case 20264, did in fact provide additional information to the WASPA Secretariat within the prescribed deadline. Unfortunately, this reply was overlook and not passed on to you before you completed your work on this matter. The service provider's reply for 20264 attached. Please would you be kind enough to revise your adjudicator for this matter taking the SP's reply into account “

The crisp question in law here here is whether I may consider the additional evidence / information obtained and reconsider my previous Ruling on the matter in the event were the WASPA CODE is silent. I am of the view that a request to re-open, reconsider, rescind and/or vary should not just be for the taking but should only be granted in exceptional circumstances. I also however find that the exceptional circumstances surrounding this request *for* re-consideration and / or rescission application are compelling.

I Rule that with reference to the case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*¹ the common law exception may [to re-consider ones ruling] be extended to meet the exigencies of modern times.² Entitling me to revisit either by way of rescission or reconsideration a finding or ruling of my own were my finding was void *ab origine* or was obtained by fraud or mistake, despite me being *funtus officio*. Clearly this is a matter of mistake with reference to the supposed failure of the SP to give additional information as per my previous Ruling – this was clearly a bona fide administrative error (mistake).

I also find that the additional information received by WASPA on the 22nd and 24th July 2014 was irrelevant and unfortunately did not advance SP's case nor did it constitute a defence. I wish to quote from some of the additional response to illustrate the irrelevance:

"Attention Lorraine Hartzer:

Dear Lorraine,

I write to you with reference to the complaint below. Please be advised that Susan Mokgati is no longer in our employ and as such Inter-Active Telecoms has been "wound down" due to the collapse of a relationship with our partners in India. I notice that the complaint has been deferred and as such if anything new develops please feel free to contact me.

Best regards.

Brendan van Staaden, Chief Executive Officer"

In light hereof I have no choice but confirm my previous Ruling that in favour of the complainant and give effect to the sanction of the fine of R 10 000.00 against the SP .

ADJUDICATOR

6 NOV 2014

¹ (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003) at par 4.

² Ex parte Barclays Bank 1936 AD 481 at par 485; Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 At par 503-4;