

## REPORT OF THE ADJUDICATOR

Complaint reference number: 26066

**WASPA member(s):** Cellfind (Pty) Limited (SP)

Membership number(s): 0019

Complainant: WASPA Media Monitor

Type of complaint: SMS campaign

Date complaint was lodged: 04/03/2015

Date of the alleged offence: 04/03/2015

Relevant version of the Code: 13.6

**Clauses considered:** 4.2; 5.5; 5.7; 5.8; 5.11; 5.12; 8.3; 16.4; 16.12

Related cases considered: 23479; 20887; 19043; 19630; 18971; 18757;

17872

## Complaint

1. The WASPA Media Monitor was alerted to the following SMS campaign sent by the SP on 6 December 2014:

"TODAY ONLY! Reply YES NOW; R24 FREE Vodacom airtime monthly. Get R49 airtime pm 4 only R25pm billed 2 Edgars acc for 6 months, (no blackberry/bis) Out 2optout"

- 2. The Monitor alleges that:
  - 2.1 The pricing format is incorrect "*R25pm*" should read "*R25/month*";
  - 2.2 The opt-out instruction reads "Out 2optout", which is not a clear stop instruction and could be considered difficult to understand by the average consumer;
  - 2.3 There is no identifier of who is running the promotion

- 3. When the Monitor contacted the call centre number given, after several attempts, the call centre does not work at all.
- 4. There are no terms and conditions for the service or campaign.

## Service provider's response

- 5. The SP advised that the SMS message was sent by an IP who was an affiliate WASPA member at the time the alleged breach was committed.
- 6. The SP provided the messaging functionality for the IP / affiliate member as an aggregator.
- 7. Before responding to this complaint, the SP requested the WASPA Secretariat to confirm whether the IP was a registered member of WASPA at the time the alleged breach was committed and whether the IP was still an affiliate member.
- 8. The Secretariat confirmed that the IP was no longer a member of WASPA after they cancelled their membership on 11 February 2015.
- 9. The Secretariat also confirmed that WASPA was no longer permitted to hand over the complaint to the IP as they no longer fell within WASPA's jurisdiction.
- 10. Since the SP was made aware that its customer's membership had been terminated, it has made the IP fully aware of the breach of the Code and instructed them to correct and align all line items as set out in the Code of Conduct to comply to current and any future campaigns. The SP confirmed that it still holds a commercial relationship with the IP.
- 11. The SP also made the IP aware of the problems experienced with contacting its call centre. The URL for a webpages containing the IP's contact and support centre numbers were given, as well as a webpage containing the IP's terms and conditions.
- 12. On 21 January 2015, a complaint was duly filed by WASPA against the IPrelating to the campaign in question. An Emergency Panel procedure was duly followed and a report issued to the IP on 28 January 2015, instructing the IP to *inter alia* cease and desist from conducting the SMS promotional campaign.
- 13. On 5 February 2015 and subsequent to the Emergency Panel Report being issued, the IP cancelled their membership with WASPA, resulting in the matter being unable to proceed to adjudication because WASPA lacked jurisdiction to enforce any further sanctions against the IP.

- 14. Notwithstanding the fact that the IP did not continue with the campaign and it has since been withdrawn, WASPA elected to enforce its rights by re-issuing the complaint against the SP.
- 15. The SP immediately sent the IP an e-mail, informing them that they should *inter alia* rectify all potential breaches relating to this complaint. A copy of that e-mail was annexed to the SP's response.
- 16. The complainant for the original complaint requested that the complaint be withdrawn against the SP.
- 17. The SP referred to section 24.48 of the WASPA Code of Conduct.
- 18. The campaign was stopped by the IP after they received notice from WASPA. Once the IP became aware of the breach the matter was discussed with the IP and it was confirmed that the campaign had been terminated.
- 19. The SP submitted that it had not contravened section 24.51 of the Code in that it had never permitted the IP to continue to operate in breach of the code after the initial notice was sent by WASPA.
- 20. The SP submits that it has taken all reasonable steps to ensure that the IP complies with the Code. The fact that the IP held an official membership reasoured the SP in considering reasonable steps to comply.
- 21. The SP submits that it creates a dangerous principle where an affiliate member can merely cancel their membership to WASPA to avoid liability and place reputational risk on the full member who adheres to the rules as set out in the Code.
- 22. The SP strongly recommended that the matter be addressed to protect full members of WASPA against contraventions by affiliate members.
- 23. When a complaint is issued to a member and that member is a valid member at the time of the complaint being issued to same, that member must remain liable in terms of that complaint, notwithstanding the fact that such a member may cancel their membership after receiving such a complaint.
- 24. WASPA must be able to enforce their rights by means other than lodging a complaint to full members.

#### Sections of the Code considered

25. The following sections of the WASPA Code were considered:

#### Section 3.1

If a customer of a member provides services covered by this Code of Conduct, those services are subject to the relevant provisions of this Code, as if that customer was a member.

#### Section 3.2

If a customer of a member is found to have breached this Code of Conduct, that member must abide by any order to suspend or terminate the services offered by that customer.

## Section 3.3

In the case of a customer who is also a member of WASPA, any complaint regarding the services provided by that customer should be directed to that customer. WASPA's members must assist WASPA in identifying services that belong to customers who are also members of WASPA.

#### Section 3.4

A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

# Section 3.5

Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.

#### Section 3.6

Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.

## Section 3.7

A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

# Section 4.2

Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

# Section 5.5

Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

## Section 5.7

A web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service.

#### Section 5.8

The full terms and conditions for any service provided by a member must contain:

- (a) the registered company name of the WASPA member providing the service;
- (b) a customer support number;
- (c) unsubscribe instructions (for subscription services);
- (d) any handset compatibility requirements for the service;
- (e) an indication that network fees may apply;
- (f) an indication of how billing errors are handled;
- (g) a statement that the service must only be used with the permission of the bill-payer (for paid services);
- (h) a statement that the service must only be used with the permission of a parent or guardian (for children's services); and
- (i) the following statement: "[member name] is a member of WASPA and is bound by the WASPA Code of Conduct. Customers have the right to approach WASPA to lodge a complaint in accordance with the WASPA complaints procedure. [member name] may be required to share information relating to a service or a customer with WASPA for the purpose of resolving a complaint. WASPA web site: www.waspa.org.za".

#### Section 5.11

Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to. (Example: support should not be limited to email if a significant number of customers do not have access to email).

## Section 5.12

Telephonic support must be provided via a South African telephone number and must function effectively. Customer support must be provided via standard rated numbers, and may not be provided via premium rated numbers. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers must not forward to full voice mailboxes.

#### Section 8.3

For a notification service, the "pricing information" consists of the cost to the customer for the notification service, including any regular and incremental costs. Examples of pricing information: "R5/notification", "R10/month plus R1/notification".

#### Section 16.4

Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an "opt-out request").

#### Section 16.12

Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

#### Section 24.48

If the adjudicator has determined that a non-member of WASPA is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the non-member may persist in such breach, the adjudicator may instruct WASPA to issue a notice to WASPA's members.

## Section 24.51

Any member permitting a non-member to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in a non-member notice), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the non-member. Such members will be subject to sanctions determined by an adjudicator.

#### **Decision**

- 26. I am satisfied that the SMS campaign, which was the subject matter of the original complaint against the IP, was in contravention of the WASPA Code of Conduct. This is borne out by the Emergency Panel ruling even though the complaint was never formally adjudicated on.
- 27. It has been confirmed that the IP was a registered affiliate member of WASPA at the date of the contravention.
- 28. In terms of section 3 of the Code, in the case of a customer who is also a member of WASPA, as was the case at the date of the contravention, any complaint regarding the services provided by that customer should be directed to that customer.
- 29. But for the IP's subsequent cancellation of its membership on 5 February 2015, any sanctions for the contravention would have been made against the IP.
- 30. This leaves open the question of the SP's liability, if any, for the contraventions of the Code by the services offered for or on behalf of the IP.
- 31. In terms of section 3.7 of the Code, the SP must demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of the Code.
- 32. What is clear from the SP's response is that it did take steps upon becoming aware of this complaint to notify the IP of the provisions of the Code notwithstanding the cancellation of its membership of WASPA.

- 33. However, no evidence has been presented as to what steps were taken by the SP to ensure that the services in question were consistent with the requirements of the Code *when they were delivered*.
- 34. It would have been a simple exercise for the SP to check that these requirements were being met before the campaign became active.
- 35. Instead, the campaign went live without proper identification of the campaign owner, the use of incorrect wording for pricing and opt-out information, a non-functioning contact number and properly worded terms and conditions.
- 36. I therefore find that the SP did not take reasonable steps in terms of section 3.7 of the Code to ensure that that IP provided services in a manner consistent with the requirements of the Code.
- 37. The SP is therefore liable for the IP's contraventions of the Code regardless of the cancellation of the IP's membership.

#### Sanction

- 38. I have taken into account the previous adjudicated complaints relating to SMS campaigns which have been upheld against the SP as an aggravating factor.
- 39. The SP is a long-standing member of WASPA and, as an aggregator, should be aware of its obligations when providing messaging services on behalf of customers, regardless of whether such customers are members of WASPA or not.
- 40. The SP is fined R10 000.00.