



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Nashua Mobile
<b>Information Provider (IP)</b>	MBD Attorneys
<b>Service Type</b>	Unsolicited SMS
<b>Source of Complaints</b>	Public
<b>Complaint Number</b>	#3026
<b>Code of Conduct Version</b>	5.3

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### Complaint

A complaint was received from a member of the public. The complainant states:

*Continuous spamming after it has been requested of the company to stop it. They have told me that it is computer generated and they are unable to stop it.*

*Sent to \*\*\*\*\* from +278200702405176. MBD attorneys have been spamming me to pay them ridiculous and illegal amounts of money for the last 3 years.*

The complainant referred to Clause 5.2 of the WASPA Code of Conduct, which provides:

#### **5.2. Identification of spam**

7

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 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.

Clause 5.2 must be read in the context of Clause 5.1 of the WASPA Code of Conduct.

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### SP Response

The SP provided the following response:

*I am advised by MBD Attorneys that the SMS's sent to this Complainant is in regards to an outstanding debt due to Virgin Active, which is being collected on Virgin Active's behalf by MBD attorneys. Nashua Mobile have sent MBD*

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*attorney's sms's in this regard to the complainant. The SMS is used as a debt collecting technique- currently being used in the market. Same is not in my view considered as 'spam' as alleged by the complainant and we are of the view that the sending of these sms's are not in contravention of the WASPA code.*

*MBD attorneys has requested Virgin Active to forward all information on his outstanding debt to the complainant.*

*From Nashua Mobile's perspective we deny being in breach of the code....*

*Until the outstanding debt issue is resolved, Nashua Mobile can unfortunately not unilaterally block the sms to this complainants cell phone number.*

The SP then provided a further response:

*Whereas a complaint has been lodged against Nashua Mobile (Pty) Ltd ("Nashua Mobile") on the 14th of December 2007 by \*\*\*\* (the Complainant") for allegedly contravening the sections of the WASPA Code of Conduct in that it send/ facilitated unsolicited SMS' through its gateway to the Complainant. WASPA has referred the complaint in terms of the Informal Complaint procedure in terms of Section 13.2 of the WASPA Code of Conduct ("the Code") and has subsequently referred the complaint to the Formal complaints procedure in terms of Section 13.3 of the Code on 8th of January 2008, as the Complainant was not satisfied with the resolution.*

*In terms of the complaint, Nashua Mobile is accused of contravening Section 5.2 of the Code in that it sent spam messages to the Complainant.*

*As confirmed on the 2nd of January 2008, Nashua Mobile confirms sending out SMS's through its gateway on behalf of MBD Attorneys. Our instructions are that that there is a legitimate debt outstanding hence the SMS sent to the Complainant. Whether the Complainant has consented to this means of debt collecting is not clear to us and we are unfortunately, not in a position to comment on the Complainant's response on the 8th of January 2008 in regards to the dispute, and trust that the dispute regarding the outstanding debt will be dealt with by MBD Attorneys in the normal process.*

*We undertake to set up a meeting with MBD Attorneys to discuss this matter.*

*In light of your previous ruling dated 4th of December 2007, against SMS Cellular Services (Pty) Ltd involving MBD Attorneys, (without admitting being in contravention of the Code) and in order to get some kind of resolution here, we have elected to block the complainants cell phone number on our gateway and have instructed MBD Attorneys to refrain from utilizing SMS as a means of communicating with the Complainant. MBD Attorneys has indicated to us that this Complainant's contact details have been excluded from their SMS contact list and that he would be contacted telephonically regarding this matter.*

*We trust that the response given is satisfactory to the Complainant. Please don't hesitate to contact me should you require any further information.*

**Adjudicator's Decision**

The Adjudicator noted the finding in complaint #0350 as well as the appeal report in respect thereof.

The Adjudicator is gratified that the SP has, in this complaint, provided full details of the IP as well as the background giving rise to this complaint.

The Adjudicator concurs with the SP that the messages sent to the complainant are not spam (as defined in the WASPA Code of Conduct) as a prior commercial relationship existed between the complainant and a creditor, which has been ceded or otherwise been handed to the IP. This in turn creates a direct relationship between the IP and the complainant. While not indicated by the SP, it is also likely that the complainant agreed to his creditor contacting him using supplied details, which agreement may be transferable to the IP.

**However**, this does not imply that the IP through the SP may simply ignore requests to stop sending collection requests by way of SMS. Indeed, the IP (or the creditor if the debt has not been ceded) must at some stage make a decision whether to litigate in order to recover the alleged indebtedness, or not. It cannot sit on its hands and not take legal action while justifying its actions on the basis of an alleged indebtedness. Continuing to send SMS reminders, without actually proceeding with collection or honouring the complainant's request to desist, amounts to harassment.

As such the Adjudicator dismissed the alleged breach of Clause 5.2 of the WASPA Code of Conduct however found a breach of Clause 5.1.2 of the WASPA Code of Conduct.

In the light of the SP's actions in this complaint the Adjudicator did not believe it appropriate to impose any sanction, however the Adjudicator warned the SP that consumer requests in terms of Clause 5.1.2 of the WASPA Code of Conduct must be adhered to, even if SMS messages are sent for the purposes of debt collection. The Adjudicator recognised that SMS is a useful contact tool for *inter alia* debt collection, however it must not become harassment.

It must further be noted that a Clause 5.1.2 request from a consumer will only apply to the specific matter concerned and does not imply that the IP, through the SP, may not contact that consumer again – it must only not contact that consumer by way of SMS messages in respect of the same matter.