

REPORT OF THE APPEALS PANEL

Date: 23 September 2009
Appellant: ABSA Bank Ltd
Complaint Number: 4968
Code version: 6.2

1 INTRODUCTION TO THIS APPEAL

- 1.1 ABSA Bank Ltd has a good record of not only very few complaints against it, but also of resolving issues quickly.
- 1.2 Nonetheless the facts of the adjudication and appeal indicate that this one fell through the cracks. This does happen even with the best intentions, and the appeals panel have taken all relevant matters into account in coming to a finding.
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2 HISTORY

- 2.1 The complainant filed a complaint in October 2008 alleging that he had no relationship with ABSA but was receiving frequent texts containing various market and stock information.
- 2.2 The message did not contain a valid number to which a recipient could reply, or send a STOP message, and there was no other mechanism within the message enabling the recipient to notify ABSA that he did not wish to receive further messages.
- 2.3 The complainant filed his complaint on the %ellopeter+website which was picked up by the WASPA Secretariat.
- 2.4 Despite contacting WASPA in October and WASPA contacting ABSA within a day, and the Secretariat sending a further reminder message to ABSA, ABSA failed either to unsubscribe the complainant, or to reply to WASPA until 23 December 2008 when it unsubscribed the complainant, but did not notify WASPA.
- 2.5 The Secretariat referred the complaint for adjudication in March 2009 and a finding was made and issued to ABSA on 26 March 2009.
- 2.6 ABSA appealed on 8 April 2009.
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3 THE CODE

- 3.1 The adjudicator referred to sections 3.1 (professional and lawful conduct), 5.1 (sending of commercial communications), 5.2 (identification of spam) and 5.3 (prevention of spam) as being relevant within the Code.
- 3.2 We agree that these are the appropriate sections to apply in this case, save that section 3.1 may be of less application since ABSA had in fact unsubscribed the complainant on 23 December 2008, although neither WASPA nor the adjudicator was made aware of this at the time, and the SP appears to have a very good record of dealing with subscribers and with WASPA.
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4 DECISIONS OF THE ADJUDICATOR

4.1 *Findings on Complaints*

In summary, in the absence of any communications from the SP at the time, the adjudicator found that the SP was in breach of sections 5.1.1, 5.1.2, 5.1.3, 5.3.1 read with 5.2.1 and 5.3.2 of the Code.

4.2 *Sanctions*

- 4.2.1 A R10,000 fine was imposed on the SP, R7,500 of which was suspended for a period of 6 months provided that the member was not found to have again breached the sections referred to in 4.1 above, during the suspension period, the balance payable to WASPA within 5 days of notification of the adjudication; and
- 4.2.2 A formal reprimand was to be given to the SP for its breach of section 3.3.1; and
- 4.2.3 An order was made to take immediate steps to unsubscribe the complainant from any distribution lists and to confirm that this was done within 5 days of notification of the adjudication.
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5 GROUNDS OF APPEAL

- 5.1 The SP seeks relief on the basis that:
- 5.1.1 although WASPA was not kept informed, the SP had, on being made aware of the complaint, immediately unsubscribed the complainant;
- 5.1.2 the SP claims not to have had notice of the complaint at the time it was made or when the Secretariat notified it through the formal complaints channels;
- 5.1.3 the SP has not previously had any issues with complaints and to the extent that any queries have resulted, the SP has dealt with them expeditiously;

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- 5.1.4 no other complaints are pending against it; and
 - 5.1.5 all SMS notifications sent by the SP now include an opt out mechanism.
 - 5.2 Finally and importantly, the SP advises that the complainant was in fact affiliated to it by virtue of his work as a financial advisor who had agreements with ABSA.
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6 FINDINGS OF APPEALS PANEL

- 6.1 On the SP's own version, the SMS notification did not include an unsubscribe mechanism. This is a contravention of section 5.1. Contraventions are dealt with by adjudicators as they see fit, and adjudicators may impose appropriate penalties.
- 6.2 Given that there was a relationship with the complainant which the SP might have brought to the adjudicator's attention had it received the notice of the complaint, we have taken this into account in considering the other breaches of section 5 of the Code.
- 6.3 It is unfortunate that the SP did not have notice of the complaint and it is noted that the SP acted as soon as it received notice, to unsubscribe the complainant and liaise with him directly to his satisfaction. We also note that the SP has now taken action to update its information on the WASPA database to ensure that future contact by WASPA is addressed immediately on receipt. This will we are sure, avoid any matters in the future progressing to this point.
- 6.4 Whilst we also note and appreciate that this SP has acted promptly and professionally in the past, this does not minimise or erase the breach complained of, but has been taken into account in considering the appeal.
- 6.5 In the circumstances, the appeal is upheld in relation to the fine. Since the major part of the fine was in any event suspended and that period of suspension is now almost at an end, and given the SP's excellent history, we have no doubt that further contraventions are unlikely and therefore that the balance of the fine is unlikely to be imposed. This is of course, up to the SP to ensure. In the absence of further contraventions, only R2,500 is payable by the SP, in the manner and in the period determined by the adjudicator.
- 6.6 We assume that the third sanction in relation to the removal of the complainant from the service has been executed based on the SP's appeal and the sanction in relation to the formal reprimand is considered unnecessary and hereby overturned.
- 6.7 The appeal fee is not refundable.