

## REPORT OF THE APPEALS PANEL

**Date:** 9 June 2010  
**Appellants:** eXactmobile (SP)  
**Complaint Number:** 5284  
**Code version:** Code v6.2

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### 1 INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of a complaint by a member of the public who lodged the complaint after receiving a number of unsolicited commercial messages at undesirable times.
  - 1.2 The adjudicator found that the SP breached various clauses of section 5 of the Code of Conduct and consequently upheld the complaint.
  - 1.3 The SP is the appellant in this matter.
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### 2. HISTORY OF THE COMPLAINT

- 2.1 The complaint was lodged against the SP on 26 November 2008 after an initial attempt by WASPA to resolve the complaint informally was unsuccessful.
  - 2.2 The SP responded to the complaint for the first time on the 14<sup>th</sup> of December 2008, more or less three weeks after the complaint was lodged.
  - 2.3 The SP's final response to the complaint was received on the 20<sup>th</sup> of March 2009 almost four months after the complaint was lodged.
  - 2.4 The Adjudicator's Report and the SP's Grounds of Appeal were not dated.
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### 3. THE CODE

- 3.1 The adjudicator referred to sections 4.1 (Provision of information to customers), 5.1 (Sending of commercial communications), 5.2 (Identification of spam) and 5.3 (Prevention of spam) as being relevant to the complaint.
- 3.2 We agree that these are the appropriate sections to apply in this case.
- 3.3 In applying the sanction the adjudicator referred to the breach of section 5 generally, by imposing a single fine for all the perceived breaches of the

individual clauses of section 5 discussed in the decision. No sanction seems to have been imposed for the breach of clause 4.1.5 as discussed in the decision of the adjudicator, summarized below.

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#### 4. DECISION OF THE ADJUDICATOR

##### 4.1 Findings on breaches of individual clauses of the Code

- 4.1.1 The adjudicator firstly, in sympathizing with the frustrations the complainant had to endure, finds the time frames within which the SP submitted its various responses to the complaint as being 'regrettable' and 'unacceptable'.
- 4.1.2 The adjudicator continues by finding the delivery of numerous SMSs at undesirable times of the day in contravention of clause 5.1.8 of the Code which stipulates that no commercial messages may be delivered between 20h00 and 06h00.
- 4.1.3 Because there was no clear indication as to whether any of the circumstances for determining whether a message is an unsolicited commercial message as listed in clause 5.2.1 of the Code existed at the time of the adjudication (in that they had not been referred to by the complainant), the adjudicator found it uncertain whether the messages amounted to spam. This uncertainty explains the second part of the sanction imposed by the adjudicator in 4.2.3 below.
- 4.1.4 According to the adjudicator the SP was identified as the originator of the messages even though the SP could not establish the origin of the SMSs itself or even that the message did originate from one of its IPs. Because *'the Code clearly states that all commercial messages must contain a valid originating number and/or the name or identifier of the message originator'* the adjudicator consequently found that the SP failed to adhere to clauses 4.1.5, 5.3.1 and 5.3.2 of the Code.
- 4.1.5 The adjudicator also found that the SP had breached clauses 5.1.3 – 5.1.6 of the Code because the procedures for allowing a message recipient to remove him or herself from the database of the message originator, so as to not receive any further messages from that originator as prescribed by these clauses were not followed by the SP (or its IP).
- 4.1.6 The adjudicator further found that the SP breached clause 5.1.7 of the Code by not fulfilling the 'reasonable period of time' requirement for identifying the source from which the recipient's personal information was obtained as stated in this clause of the Code.

- 4.1.7 In conclusion the adjudicator stated that the SP's reasons for the delivery of the messages alone could not justify the complainant's inability to unsubscribe himself and moreover that the SP did not provide sufficient reason for not being able to respond to the complainant or identify the IP earlier. We deal with the reasons in more detail below.
- 4.2 Sanctions
- 4.2.1 In determining the appropriate sanction the adjudicator took into account the prior record of the SP with regard to breaches of the relevant sections of the Code as well as the SP's response time in this particular case.
- 4.2.2 Without assigning specific portions of the fine to the specific breaches of the Code discussed in the decision, the adjudicator ultimately fined the SP the amount of R100 000 for its breach of clause 5 of the Code.
- 4.2.3 The adjudicator, however, suspended R50 000 of the imposed R100 000 fine for a period of six months subject to the condition that the SP present the WASPA Secretariat with the source of the complainant's information, the date such information was received and the purpose for which the information was provided to the SP. It was implied that if this did not happen, the balance of the fine would be due and payable.

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5.  **GROUNDS OF APPEAL**

- 5.1 The SP set out its appeal relying on seven main grounds which are set out individually below:
- 5.2 'Technology'
- 5.2.1 In averring that the adjudicator did not take into account the technologies used in delivering the messages which form the basis of the complaint, the SP sets out to explain in considerable detail the technological processes employed in delivering both SMS and MMS messages, with specific reference to the differences between the two processes. The details of the processes are noted by the panel, and duly considered in reaching our decision, but they will not be repeated here in detail.
- 5.2.2 With regards to the process followed in respect of MMS messages the SP states that it was not able to prevent SMS notifications of MMS messages being sent to the complainant at undesirable times of the day, by Vodacom. This matter, the SP states, has been discussed with Vodacom on numerous

occasions, without Vodacom seeing the need to amend the process.

5.2.3 In context of the MMS delivery process, the SP continues by explaining why the complainant's handset did not retrieve the sent MMS messages. In essence the complainant's handset was not configured to receive MMS messages because the complainant had apparently upgraded to a new handset. Also, according to the SP, the complainant was not recognized by Vodacom or notified that Vodacom did not recognize his status and consequently his handset was not enabled to receive MMS. Moreover, the SP states, regardless of various meetings with Vodacom in this regard, Vodacom is not prepared to amend this process.

5.3 'Support response to a query like this'

5.3.1 The SP's second ground of appeal simply boils down to the fact that the complainant reported receiving SMSs and not MMSs.

5.3.2 Because the complainant reported the wrong technology or service, the SP argues, the checking of its SMS service revealed that no SMSs were sent to the complainant. The SP was – it argues – not aware that the messages which form the basis of the complaint were notifications of MMSs sent.

5.4 'Delay in responding to the complaint'

5.4.1 The reason the SP provides for the delay in responding to the complaint in essence relates to the fact that the complainant reported the wrong technology or service (SMS instead of MMS) as explained in par 5.3.1 above. The SP explains that it had launched an investigation into the reasons the complainant was receiving SMS when the SP in fact was not sending SMSs. Only after these 'detailed investigations' was the SP able to ascertain that the complainant was in fact sent MMSs and not SMSs.

5.5 'Did the user receive SPAM'

5.5.1 The SP states that the first MMS in question was an advertising message from Makro, who has according to the SP, confirmed that the complainant is a regular client and that the complainant has provided his telephone number to them. MMS messages from Makro, were according to the SP, sent to the complainant on earlier occasions and were delivered successfully.

5.5.2 The SP states that the second MMS was a promotional MMS from Vodacom and that the complainant has a 'recent commercial relationship with Vodacom'. Again the SP states that the complainant

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was sent an earlier promotional MMS by Vodacom which was successfully delivered.

5.5.3 The panel would like to note that no substantiating documentation was provided to the panel with regard to the statements made by the SP in 5.5.1 and 5.5.2 above.

5.6 'Marketing Messages must have the ability to unsubscribe'

5.6.1 According to the SP all its MMS messages have the option to unsubscribe but that the complainant did not receive a MMS but a SMS and that the complainant would therefore not have been able to unsubscribe. The SP states that the SMS the complainant received is generated by the network operator and that it consequently has no control over the content of the SMS. The SP continues by explaining that in the 'majority of cases' a MMS recipient whose handset is correctly configured will not be aware of the fact that their handset has received an SMS advising the handset to retrieve a MMS.

5.7 'Identification of SMS and MMS'

5.7.1 In this ground of appeal the SP again points to the difference between the SMS and MMS technologies and states that even after thorough searches of its SMS logs no record could be found of any SMSs sent to the complainant for this reason.

5.8 'What has Exactmobile done to prevent further incidences of this error'?

5.8.1 The SP continues by explaining that it has now 'installed' a process whereby all requests to be removed from marketing lists are checked against SMS and MMS lists and this process now includes a so-called 'blacklist' which covers both SMS and MMS marketing lists and that the likelihood of 'this reoccurring is therefore rare'.

5.9 Conclusion

5.9.1 In conclusion the SP states that it is being harshly punished for an offence 'for which it is not guilty', because it submitted its MMSs during normal daytime hours and because of the fact that the complainant was eligible to receive marketing messages from Makro and Vodacom.

5.9.2 The SP argues that it should not be penalized for the fact that Vodacom is not able to control when the MMSs are delivered should retries occur.

- 5.9.3 The SP admits it erred in not being able to identify the source of the complaint, but that it only closed the matter once the source of the SMS was found.

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## 6. FINDINGS OF APPEALS PANEL

- 6.1 This panel has often mentioned the public interest in previous appeals because we consider this to be the primary objective of the Code and an overriding and significant factor in applying the Code. WASPA, WASPA adjudicators and this panel are required to take the public interest into account when considering any complaint. The public interest should similarly be uppermost in the minds of members of WASPA when providing services which are subject to the Code.
- 6.2 Essentially this appeal turns on the different processes employed for delivering SMS and MMS messages and whether or not this can be relevant in determining the responsibility of an SP under the Code. The difference between these two processes is the reason forwarded by the SP for not being able to respond to the complaint in a timely fashion; for not having control over the content of the messages received by the complainant and for the messages being delivered at inconvenient times of the day. We have taken careful note of the process employed in delivering MMS messages, as well as of the difference between this process and the process for delivering SMS messages, as explained in detail by the SP in its first ground of appeal.
- 6.3 In considering the SP's explanation for the breaches of the Code resulting from the apparent flaws in the MMS delivery processes used, the panel can not help but be troubled by the fact that both the network provider, Vodacom, and the SP, seem to have little regard for the provisions of the Code. Both seem to insist on providing a service knowing full well that critical aspects of the technological processes employed in delivering the service could potentially lead (and have on numerous occasions by the SPs own admission led), as was the case in this complaint, to a number of serious breaches of the Code. The panel makes a serious request, for both the SP and WASPA, to again bring to the attention of the network operators the potential consequences of the flawed message delivery processes. Serious breaches of the Code, a Code to which the SP subscribes, and in which Vodacom has a vested interest, can simply not be condoned and overlooked because the parties responsible claim to be held ransom by technological processes.
- 6.4 The complainant, and other members of the public, should in all fairness not be exposed to breaches of the Code by reason of their having upgraded to a new handset. The fact remains that the service delivered by the SP breached clauses 5.1.3 – 5.1.6 and clause

5.1.8 of the Code and for this the SP must take responsibility. We, however, as stated in 6.3 above, acknowledge the possible role of the network provider, Vodacom, in contributing to the breaches of the Code.

- 6.5 With regards to the SP's second ground of appeal, the panel can appreciate the fact that the SP did not at first realise that the service complained of was in fact an MMS and not an SMS as was stated in the query received by the SP. However, being the service provider of these services and having explained in great detail in its grounds of appeal the processes by which these messages are delivered, which by its own account the SP admits could include a SMS in the case of MMS messages, the SP should have foreseen the obvious possibility that the service complained of could have been a MMS service. It was a service provided by the SP and it should surely be possible for the SP to ascertain that they in fact sent the messages, irrespective of which service was mentioned in the complaint. The ineffectiveness of the SP's internal systems should not be detrimental to consumers and it is definitely not an excuse for breaches of the Code. This ground of appeal is not upheld.
- 6.6 The panel also appreciates that the SPs 'investigation' into the complaint could possibly have taken some time. But asking this panel to believe that it took the SP close to four months to complete its 'investigation' is far fetched. The Code very clearly puts an onus on members to acknowledge complaints 'expeditiously' and deal with complaints 'within a reasonable period of time'. By no stretch of the imagination can a response time of close to four months be considered expeditious or reasonable. In this regard the panel agrees with the adjudicator in that the SP breached clauses 4.1.5 and 5.1.7 of the Code. This ground of appeal is not upheld.
- 6.7 Apart from the statements made by the SP in its appeal document to the effect that the complainant had previously received similar messages from Makro (because the complainant regularly purchases from them and provided his 'mobile number to them') and from Vodacom (with which the complainant has a recent commercial relationship), this panel was not provided with any further information or with documentary evidence regarding the question of whether the complainant in fact received spam. We are further not aware that the SP complied with its obligation of submitting a report to WASPA which details the information requested by the adjudicator and which was a condition for the lifting of the fine of R50 000 imposed by the adjudicator. Although the sending of spam is a serious breach of the Code and the panel could reasonably insist on the SP providing detailed answers and documentary evidence to the questions posed by the adjudicator we reluctantly accept the statements made by the SP to the effect that it was justified in sending the commercial messages to the complainant. This ground of appeal is therefore upheld. The SP is, however, warned to fully comply with imposed sanctions in future,

and to properly substantiate statements made when responding to complaints against it.

- 6.8 The statements made in 6.3 and 6.4 above similarly apply for the SP's ground of appeal stating that the SP had no control over the content of the SMS delivered to the complainant. We, however, as stated in 6.3 above, acknowledge the possible role of the network provider, Vodacom, in contributing to the breaches of the Code
- 6.9 With regard to the SP's ground of appeal in which the SP again refers to the fact that the complainant complained of receiving SMSs instead of MMSs we refer to our comments made in 6.5 above. This ground of appeal is not upheld.
- 6.10 The panel takes note of the fact that the SP has now installed a process whereby all requests to be removed from the marketing lists are checked against SMS and MMS lists, or a so-called 'blacklist' which covers both SMS and MMS marketing lists. It begs the question as to why such a list was not kept from the start if the SP was aware of the fact that the MMS process, explained to this panel in detail, could also include the sending of SMSs.
- 6.11 The panel takes note of the SP's arguments in conclusion of its appeal. All of these arguments have already been discussed in detail above and will not be referred to again.
- 6.12 The appeal panel's task is to apply the WASPA Code of Conduct to the facts of a complaint. While it is not the appeal panel's function to assess WASPA complaints on the basis of South African law generally, we point out that the WASPA Code exists within the broader South African legal and regulatory framework, with which the Code must be, and is, consistent. It might be useful for Members of WASPA to know that our ICT legislation is technology- and format-neutral. The following points deserve attention as they are an important part of our determination of this appeal:
- 6.12.1 This complaint relates to "spam", more properly defined in the Electronic Communications and Transactions Act, 25 of 2002 (ECT) as "unsolicited commercial communications" The same definition as clause 2.20 of the Code. The same statute defines "data", as "electronic representations of information in any form", and "data messages" as "data generated, sent, received or stored by electronic means..".
- 6.12.2 The issues in this complaint and the grounds for the appeal hinge on facts relating to differences in SMS and MMS. In terms of the ECT Act, both are "data messages" with the result that in law, there is no difference between an SMS and an MMS, both are data messages and either might constitute spam.

6.12.3 The WASPA Code cannot be inconsistent with this, with the result, that a difference in the technology employed, is no defence against spam. It follows that none of the reasons for the appeal relating to technological functions are accepted by the panel. Business processes should supplement what technology can and can't do. Additionally, agreements between SPs and the network service providers such as Vodacom should be entered into to provide for obligations, liability and the like.

## 6.12 Sanctions

6.12.1 The fine imposed by the adjudicator of R100 000 (of which R50 000 is suspended in terms of 6.12.3 below) is retained. This amount includes the sanctions for the breach of clauses 4.1.5, 5.1.7 and 5.3.2 of the Code which this panel regards as serious. Taking into consideration our acknowledgement of the possible role of the network provider, Vodacom, in contributing to the breaches of clauses 5.1.3 – 5.1.6 and clause 5.1.8 of the Code we suggest the SP recover from Vodacom any part of the loss suffered by the SP to which Vodacom contributed. If contractual terms to this effect do not form part of the SPs current agreements with Vodacom it is suggested that the SP negotiates contractual terms to this effect to form part of any future contracts concluded with a network provider.

6.12.2 The appeal is upheld with regards to the breach of clause 5.3.1 of the Code.

6.12.3 The suspended sanction of R50 000 imposed on the SP by the adjudicator is retained, intact, for a further 6 months, with effect from the date of this appeal report, in order to ensure that the SP's processes are in fact workable and working in relation to the possibility of similar issues arising in the near future.

6.12.4 Payment of the amount of R50 000 must be made immediately.

6.13 The appeal fee is not refundable.

Statement: Reconsideration of Appeal 5284

The WASPA Appeals Panel would for the sake of good order like to make the following statement regarding our decision for the Appeal of Complaint 5284. This should in no way be considered to constitute a precedent nor will the panel necessarily reconsider findings in any other case.

In the matter at hand the SP (eXactmobile) claims that the fact that a number of breaches resulted from a service provided by the SP were not due to any action or fault on the part of the SP – but that these breaches were due to technical intricacies associated with the systems employed for the delivery of the messages (which formed the subject of the original complaint) by the network provider, Vodacom. According to the SP, the SP could therefore not be held responsible for the breaches and that no sanctions should have been imposed on the SP in terms of these breaches.

We have on request from WASPA investigated the matter further in that we have:

1. requested expert clarification on the technical issues involved;
2. considered the letters submitted by both the SP and Vodacom after the publication of the Appeal Report, with care;
3. approached the WASPA Mancom for guidance; and
4. reviewed our original Appeal Report in context of the additional information received.

After much deliberation and careful consideration of all the issues involved we would hereby like to state that we are steadfast in our belief that a breach of the Code, even if technical in nature, is still a breach. We therefore stand by the decisions reached in our original Appeal Report. This panel is unfortunately in the untenable position of being entrusted with the diligent enforcement of the Code, while in the process being held to ransom so to speak by technological processes which facilitate not only breaches of the Code (of which we are custodians) but which are also in conflict with other consumer protection measures applicable in South Africa. It is crucial that the mobile industry, which includes service providers, network operators and WASPA seriously consider ways of resolving this conflict or run the risk of consumers not only losing confidence in the Code but in the mobile industry in general. How this is to be done is not for this panel to speculate on – save for saying that barring any amendment of the Code (such as the inclusion of a clause to the effect of the answer provided by Mancom to our request for guidance below) which brings about a clear understanding in the minds of consumers and adjudicators alike that certain breaches of the Code will be excused because of the inability (or unwillingness) of network providers to configure their technical systems in such a way that breaches do not occur – this panel must regard a breach of the Code as a breach.

Having stated our position we have however taken heed of the WASPA Mancom's answer to our request for guidance in this matter. WASPA Mancom is of the opinion that no penalty should be imposed on a member that is able to provide clear documentation from a third party that a technical error was outside the control of the member. Although

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we stand by our findings that the Code was breached, we are in terms of the guidance received from Mamcom and in the interest of fairness persuaded to alter our decision only with regards to the amount of the fine imposed on the SP. We hereby alter our original Appeal Report in that the SP is sanctioned to the amount of R25 000 for the breaches found to have been within its control (sections 4.1.5, 5.1.7 and 5.3.2). The suspended sanction to the amount of R 50 000 is similarly reduced to R25 000. We reiterate that the SP breached sections 5.1.3 – 5.1.6, as well as section 5.1.8 of the Code, although no sanction is imposed regarding these breaches. The balance of our findings and our order remain intact.

We note too, that where technical matters result or are likely to result in breaches of the Code, every attempt should be made by all parties concerned – particularly where as in this case, it is clear that breaches will result when this sort of technology is deployed – to address the shortcomings of the technology or to use an alternative. Consumers should not be prejudiced by an apparent inability or unwillingness of WASPs and network operators, to reconfigure their arrangements so as to ensure compliance with the Code. Bear in mind that the Consumer Protection Act does not tolerate this.

The WASPA Appeals Panel