



REPORT OF THE ADJUDICATOR

WASPA Member	Grapevine Interactive
Information Provider (IP) (if any)	Truworths
Service Type	Distribution list
Source of Complaints	Public
Complaint Number	6347
Date lodged	30 April 2009
Code of Conduct version	7.0

Complaint

This complaint relates to SMS messages sent to the complainant for the purpose of reminding him that he allegedly had an outstanding balance with the IP.

"I get one or two messages every day stating "Urgent payment required on your Truworths account today to avoid further action". I have received another message today "This is a reminder to honour your promised payment of R310.00 on your Truworths acct. Failure to make payment will result in further action. Tel. 011 5604628". I've made arrangements with them so believe to be receiving one or 2 messages a day threatening me is not necessary and bordering on abuse. I've phoned the above number 011-560-4628 to ask them to please stop sending me these daily messages and the lady refused saying I should just ignore them. When I repeated my request, she said she can't stop them as they're system-generated. I believe I have a right to refuse these SMS's as they are unwanted, and bordering on spam since I requested to NOT receive them. Please remove number from your mailing list."

On 2 April 2009 the IP confirmed that the complainant had been unsubscribed and that a confirmation SMS had been sent. The matter was regarded as resolved.

Notwithstanding this the complainant received further collections messages. After further investigation it appeared that the IP and its collections agency held two separate databases and that the complainants MSISDN had only been unsubscribed from one of these. The MSISDN in question was subsequently unsubscribed from both databases.

It is clear from the correspondence sent by the complainant that he regarded the sending of messages as being abusive.

“This is not even bordering on abuse, it is abuse. Some days I received 2 smses a day. They admit to sending 38 smses over a period of three months.

All I request is to be unsubscribed. I do not want these smses. They refuse the request, thereby clearly breaching the WASPA Code of Conduct.”

The IP had filed a substantive response which raises issues requiring formal adjudication and it was agreed that the matter should proceed to formal adjudication.

Response

An initial response was filed by the IP through the WASPA member, as follows:

“1. How does Truworths get the permission to send their clients account payment info? Is it part of the card contract?”

Permission to use SMS facilities as a means of communicating to a consumer for marketing purposes is obtained at opening of the account stage and if not then at the time of the first transaction.

2. Is there an unsubscribe procedure in place? If so, please describe.

There is a process in place to unsubscribe from receiving sms communication. It's a simple case of informing us and we exclude that account from future sms sends.

However, when an account is in arrears as in this case (the customer is in breach of contract), the above does not apply and the customer may not request to be excluded from communication regarding the status of the account.

Another Truworths agent added: One cannot opt out of receiving collections communications according to the NCA. You can opt out of marketing but receiving your statement and collections is exempt from these personal options.”

The WASPA Secretariat took cognisance of this reponse and thereafter provided the IP with references to precedent in matters of this nature, as set out in reports [3026](#) and [4500](#) prior to filing its response.

The IP thereafter filed a more comprehensive response – the text of which has been reproduced in full below (by way of cut and paste as the response was filed as a .pdf image)

The Customer was in arrears with his account and the account was handed over to our collecting agency, MBD Attorneys ("MBD") in December 2008.

MBD advised us that the following action had been taken:

The Total number of SMS alerts sent to the Customer between January and March 2009 amounted to 38 and was classified in class 286 (New handover Broken class)

The Customer received only "Broken" SMS alerts in January, the reason being that the Customer did not respond during January and the account was re-classified into a "DC 4/5 broken PTP" class.

SMS alerts were sent at least 3 times a week on Broken PTP's and at least 2 times a week on a PTP effect accounts (reminder calls).

The SMS alerts that the Debtor received below is for a broken arrangement.

YOU HAVE NOT PAID YOUR TRUWORTHS ACCT AS AGREED. FAILURE TO PAY IMMEDIATELY COULD RESULT IN ATTORNEY COST AND POSSIBLE LEGAL ACTION. TOTAL DUE 1170.00

URGENT PAYMENT REQUIRED ON YOUR TRUWORTHS ACCOUNT TODAY TO AVOID FURTHER ACTION

PTP Effect Accounts:

'PLEASE PAY AS PER ARRANGEMENT TO AVOID FURTHER ACTION'

URGENT PAYMENT REQUIRED ON YOUR TRUWORTHS ACCOUNT TODAY TO AVOID FURTHER ACTION

The Customer was contacted again in March (see dates below) and arrangements were made and a reminder SMS was sent thereafter. A print out of the SMS alerts sent to the Customer as from March is attached in a separate e-mail and summarized below:

24 March
13 April
1 May

5 May (acknowledging the Customer's payment)

As soon as we were notified of the Customer's complaint on 27 March 2009, we immediately sent instructions to MBD to stop all further communication with the Customer.

The instruction was forwarded to MBD on 27 March 2009 and we received confirmation from MBD that no further SMS alerts would be sent to the Customer on 2 April 2009.

We were provided with links to decisions from WASPA referred to below.

In Complaint number 3026, the Adjudicator commented as follows:

"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 was held that continuing to send SMS reminders, without actually proceeding with collection or honouring the complainant's request to desist, amounts to harassment.

It appears from this decision and the decision in Complaint no 4500 that it is acceptable to send reminder SMS alerts in respect of outstanding accounts and that these messages are not considered as "SPAM" due to the prior relationship that exists between the Customer the Creditor as defined in the Code of Conduct, provided it does not amount to "harassment".

The term "Spam" in the Code means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

In the above decision, the SMS alerts did not qualify as "spam", however, it was decided that continuous SMS reminders without proceeding with legal action did amount to "harassment"

No definition for the term "harassment" was provided in the decision nor is it defined in the WASPA Code.

Finally, in terms of section 129 of the National credit Act 34 of 2005, If the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing.

There is no definition in the Act for "written", however, it can be interpreted that a SMS alert qualifies as "written".

Conclusion

We are of the view that Truworths has not breached the Code as we immediately reacted to the Customer's complaint and took action to stop all further SMS alerts. The frequency of the SMS reminders sent to the Customer does not qualify as "harassment". If the Customer had responded to the SMS alerts sent by MBD in January, then there would have been no justification for further SMS reminders.

We trust that the above explanation is sufficient to discharge the complaint.

In a third response submitted after the complaint had been reinvigorated following unsubscription from one database only, the IP stated that:

- Communications to customers in the form of SMS messages are also sent to customers if they fall into arrears (default) with their account. These act as payment reminders and are used to prevent customers from falling further into arrears and to encourage them to either pay their account or to make suitable payment arrangements to do so.
- Consumers are fully entitled to opt in or out of marketing messages, but the IP believes that it is fully within its rights to continue to send SMS messages to customers who are in arrears and have defaulted on their contractual obligation to pay their account.
- Section 129 of the National Credit Act 34 of 2005 holds that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing.

The IP submitted that it was acting within this framework as the content of the messages sent highlighted the current default status of the complainant, i.e. that its correspondence fell within the ambit of the National Credit Act.

The IP further submitted that it did not believe it was in contravention of the WASPA Code of Conduct.

Sections of the Code considered

The following sections of version 7.0 of the WASPA Code of Conduct were considered:

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent.

Decision

1. It is clear that there is no question that the SMSs received by the complainant from the IP and its collection agency were unsolicited (see in this regard the Adjudication under complaint #3026 and the passage therefrom quoted with approval in the Adjudication in respect of complaint #4500). The issues to be resolved in this matter relate to:
 - 1.1. whether the IP was bound to observe any request from the complainant to be unsubscribed from the relevant distribution lists and to provide a mechanism facilitating the effecting of unsubscribe requests; and
 - 1.2. whether the messages sent constitute harassment of the complainant.
2. According to the IP there is an unsubscribe procedure in place but this is not applied where the recipient is in arrears with his or her account or has defaulted on an agreement to repay such arrears. The IP argues that it is entitled to continue to send such messages

in these circumstances and that this flows from section 129(1)(a) of the National Credit Act.

3. Section 129(1)(a) of the National Credit Act reads as follows:

129. Required procedures before debt enforcement

- (1) If the consumer is in default under a credit agreement, the credit provider-
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; “
- 3.1. As noted by the IP section 129(1)(a) states that a credit provider – such as the IP – may notify a consumer of a default and such notification may be in writing, which includes SMS.
- 3.2. There is, of course, nothing new about this and there has never been any obstacle to such a notification being provided to a consumer in default.
- 3.3. In interpreting this provision care must be taken not to read more into it than was intended by the Legislature in enacting it. There is, for example, no explicit statement in section 129(1)(a) that the credit provider is not bound by any other applicable law, regulation or code which may apply to the sending of such messages.
- 3.4. It is furthermore evident that, while the IP wishes to rely on this provision, it has not in fact sent the messages for the purpose of drawing the attention of the recipient to the debt **and** proposing that they refer the credit agreement to a debt counsellor, dispute resolution agent or consumer court or ombud with jurisdiction.
- 3.5. It is accordingly not clear to the Adjudicator how this section comes to the assistance of the IP in refuting the complaint.
4. The Adjudicator is satisfied that the messages sent by the IP and its debt collection agency are required to comply with sections 5.1.1, 5.1.2 and 5.1.3 of the Code.
- 4.1. The following passage from Adjudication #4500 is quoted with approval:
- “Is it required that an SMS of this [commercial] nature must have an opt-out and the message originator’s details/identifier? Having found that the message is commercial in nature it follows that the balance of the provisions of section 5.1 of the Code must apply.”
- 4.2. Although the IP has not disputed that the messages sent were of a commercial nature the Adjudicator is satisfied that the messages fall within the definition of a commercial message as set out in section 2 of the Code.

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5. Where there is compliance with the balance of section 5.1 of the Code then the question relating to whether the messages constitute harassment becomes irrelevant, given that the recipient has the opportunity at any stage to opt out therefrom.
 6. The IP, and by association the SP, is accordingly found to have breached sections 5.1.2 & 5.1.3 of version 7.0 of the WASPA Code of Conduct.
 7. For the sake of clarity: notwithstanding the provisions of the National Credit Act as quoted above it is not acceptable under the WASPA Code of Conduct to continue to send reminder messages to a customer who has opted out from receiving such messages, even if that customer remains in arrears with an account or does not otherwise respond to the substance of the messages.
 8. The Adjudicator, noting the good faith engagement of the SP and the IP with the complaints process as also the pressure on credit providers in the current economic climate, does not believe that a punitive sanction is warranted in this matter. Nevertheless the IP and the SP are requested to review their practises to ensure that these are compliant with the Code and particularly section 5.1 thereof.
 9. In the circumstances the IP, through the WASPA member SP, is issued with a reprimand and explicitly warned that any further breach of the provisions relating to commercial SMS messages will be more harshly dealt with.
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