

REPORT OF THE APPEALS PANEL

Date: 26 September 2011
Appellant: Strike Media
Complaint Number: 9061
Code version: Code v8.0

1 INTRODUCTION

- 1.1 This appeal was brought by the SP, Strike Media, against whom the finding was made, although the message originator in the matter is Flexicell, its IP.
- 1.2 The complaint concerned spam, in the main, but touched on issues of the appropriate opt-out mechanism, and provision of information concerning the origin of the complainant's contact information.
- 1.3 The complaint and adjudication raise important issues concerning the relationship between SPs and their IPs and their respective liability under the Code, particularly where the IP may not be a member of WASPA.
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2. HISTORY OF THE COMPLAINT

- 2.1 The complaint was lodged with WASPA on 17 March 2010 and by the 18th, the SP and IP had both taken action to terminate the sending of messages to the complainant.
- 2.2 Specifically the complainant averred that:
- 2.2.1 the originating number was not valid in that (i) he could not call the number and "no reasonable person" would attempt to send an SMS to a number which you could not telephone, and (ii) the website www.smscode.co.za did not record the number as valid;
- 2.2.2 there was no indication of the cost of sending an opt-out message;
- 2.2.3 the staff of the SP were ill-equipped to handle queries from the public regarding spam; and
- 2.2.4 it was unacceptable that the SP "ignored specific requests from him recorded on a direct marketing database and with Vodacom that he should not receive unsolicited SMSes" (sic).

- 2.3 The complainant was not satisfied with being removed from the IP's database and requested the source of his personal information (his telephone number) and the complaint was escalated.
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3. THE CODE

- 3.1 The adjudicator referred to the following sections:
- 3.1.1 section 2 (definitions) and specifically the definitions of "commercial message", "originating number", and "spam";
 - 3.1.2 section 3.9 (Information Providers) and specifically section 3.9.2 which states that "where any service provider that is not a WASPA member conducts any activity governed by the provisions of the Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the service provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and vicariously liable for any breach of the Code resulting from the acts or omissions of any such service provider";
 - 3.1.3 section 4.2 (privacy and confidentiality);
 - 3.1.4 section 5.1 (sending of commercial communications);
 - 3.1.5 section 5.1.3 (specifically the instructions for and costs of opting out by replying STOP);
 - 3.1.6 section 5.2 (identification of spam); and
 - 3.1.7 section 5.3 (prevention of spam).
- 3.2 We agree that these are the appropriate sections to apply in this case.
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4. DECISION OF THE ADJUDICATOR

- 4.1 Findings on information presented
- 4.1.1 The adjudicator noted that "in adjudicating a matter the adjudicator has to rely on the information submitted and hence presented to him/her".
 - 4.1.2 The adjudicator found that the commercial communication sent to the complainant was spam and therefore the originator had contravened the Code.
 - 4.1.3 The number from which the communication was sent was found to be valid because it was a number recorded on a server which could receive text messages (the website referred to by the complainant does not record server identification numbers).

- 4.1.4 The SP is not obliged to include the cost of an opt-out message in a commercial communication, although in circumstances where replying STOP will result in a charge greater than the lowest tariffed rate, instructions for use of the lowest tariffed opt-out rate must be included in every message sent to the customer under section 5.1.4 of the Code.
- 4.1.5 In terms of section 5.1.7, the SP is required to identify the source from which the recipient's personal information was obtained. Although Flexicell is not a member of WASPA, Strike Media should have obtained this information from them in order to satisfy the enquiry from the complainant and in terms of section 3.9, Strike Media is vicariously liable for Flexicell's conduct.
- 4.1.6 The message originator and the SP are not obliged to take account of the Vodacom and direct marketing 'do not contact' databases therefore neither party has breached any section of the Code in relation to this aspect of the complaint. The panel notes that in the future, the Consumer Protection Act will require compliance.
- 4.2 Sanctions
- The following sanctions were applied against Strike Media by virtue of section 3.9 of the Code:
- 4.2.1 The SP was ordered to confirm in writing to WASPA's Secretariat that the complainant's information had been removed from the originator's database within 5 days of notification of the adjudication;
- 4.2.2 The SP was required to provide the complainant with the source of his personal contact information if this had not already taken place, within 5 days of notification of the adjudication; and
- 4.2.3 A fine of R10,000 was imposed.

5. **GROUNDS OF APPEAL**

- 5.1 Strike Media submitted an appeal in its capacity as "communications gateway provider and content aggregator", and as a member of WASPA. The panel wishes to note 3 submissions by the SP specifically:
- 5.1.1 "Among other services, the company operates a website whereby third parties purchase credits and are then able to send SMSs to an uploaded list of cell phone recipients";
- 5.1.2 "Due to the volume of messages that are being sent at any one time, it is unreasonable to expect that the company's systems can control the exact nature of content of the messages that are forwarded by our customers to their own databases of recipients"; and

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- 5.1.3 “The company strongly discourages the sending of SPAM, and binds their customers to the WASPA Code of Conduct through their standard contract as well as via their Terms and Conditions which are located on the Company website”.
- 5.2 In addition, the SP claims to have taken “all reasonable measures” to comply with the provisions of the Code by making their clients aware of the Code and WASPA, and adding a link on its website whereby message recipients can report spam.
- 5.3 The SP notes that the complainant did not contact it initially but contacted WASPA directly and that he did not reply STOP to opt out. The SP argues that had he done so, he would “have simply been removed from the Flexicall database and received a confirmation of such as per WASPA Code...”.
- 5.4 The SP claims to have dealt with the complaint in a timely manner and to have provided the complainant with the source of his personal information.
- 5.5 In the circumstances, the sanctions are considered by the SP to be too high alternatively that it should not be sanctioned at all. Specifically:
- 5.5.1 the SP has complied with the Code “absolutely”;
- 5.5.2 general principles of delictual liability in South Africa, according to the SP, are such that usually one entity cannot be held liable for the actions of another and “in this specific complaint the company is being held liable for the conduct of another legal entity totally beyond its control. The only provision in the WASPA Code of Conduct that can be enforced against the company is the vicarious liability clause in 3.9.2 which has since been eradicated from the Code of Conduct”;
- 5.5.3 although the SP has bound Flexicell to the Code, Flexicall refuses to pay the fine to it;
- 5.5.4 the fine will have a considerable effect on the cashflow of the company which is a “small business” and makes a very small profit of 0.04c for each SMS that is sent; and
- 5.5.5 the following complaints are similar in nature to this complaint against the SP but the sanctions are far less stringent (and the SP notes 0045, 0132, 0133 and 1141).

6. **FINDINGS OF APPEAL PANEL**

- 6.1 This is an interesting matter for 2 reasons. First, the SP seeks to rely on the argument that volume of messages sent by its clients is a defence to its failure or the failure by its client to comply with the Code. Second, the SP wishes to point away from itself to its clients where liability is

concerned, despite accepting that it had an obligation to bind its clients to the Code and had in fact done so by concluding a contract with it and applying its own standard terms and conditions which presumably seek to bind its clients to the Code. We consider this in more detail below.

6.2 Grounds of appeal

6.2.1 The SP is likely to be in business because sending high volumes of messages are likely to render a reasonably good return either because a consumer will subscribe to a service, or mobile advertisements are paid for by a third party and presumably the cost of those advertisements are also worthwhile revenue. We do not presume to comment on the SP's business model save to say that the SP itself notes on its website that "Mobile is the 7th mass media; it is fast becoming a mainstream marketing channel both abroad and in South Africa. All companies should understand how they can capitalise on mobile technologies to enhance customer service and drive sales and revenue, and incorporate mobile into their overall marketing strategy". As far as the panel is aware, high volumes of messages even at 0.04cents can be a profitable business!

6.2.2 Furthermore, the SP contracts with clients who buy credits with which they send high volumes of messages. High volume services do not constitute a defence to breach of the Code by a client of the SP who has purchased credits precisely in order to send high volumes of messages. The SP is a WASPA member and therefore bound by the Code regardless of its business model.

6.2.3 By the same token, as the SP binds its clients to the Code in terms of a contract, the SP should be able to seek recompense for breach of the Code through the terms of its contract – it should have direct control over its clients through its contractual relationship. This is also not an adequate defence in our view. This panel has, in many other reports, also noted the importance of the contractual arrangements between the IP and SP and this tool should not be ignored or forgotten when concluding a relationship and when seeking to enforce it. So many respondents in appeals seem to think it sufficient to allege that there was a contract, but not to ensure that the terms of that contract are adequate to enable proper enforcement. It is not for WASPA to forgive a breach if the contract between SP and IP is not capable of enforcement. We urge members to seek proper legal advice when formalizing contracts with third parties to secure their protection.

6.3 Additional findings by the panel

6.3.1 The adjudicator rightly finds that the SP is liable on v8.0 of the Code for the acts and omissions of its service providers. Although the Code may have been different in this regard in prior versions, the version applicable at the time of the complaint renders the SP liable for the actions and omissions of its clients. The later versions of the Code continue to apply the principle, although the wording has been amended. As an aside,

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vicarious liability is a well-established principle in South African law and applicable in various forms.

- 6.3.2 The SP considers itself to have taken “all reasonable measures” to bind its client to the Code. It should therefore follow that it had taken all reasonable measures to make sure that if the client breached, there was a mechanism for claiming compensation or applying sanctions to that client, otherwise the reason for binding them to a contract is not clear.
- 6.3.3 The complainant did not reply STOP because he did not recognise the number as a regular 10-digit number. He did exercise his other rights to contact WASPA to report spam, which in the end resulted in his being removed from the Flexicell database. The complainant’s decision not to send a STOP message does not render the SP’s actions in permitting the sending of spam any more compliant.
- 6.3.4 The appeal against the amount of the sanction can be dealt with at least so as to dismiss the reliance of the SP on the fact that lower sanctions were applied in previous matters by virtue of the age of those matters, and the multiple changes in the Code since those matters were first adjudicated – in other words they have become largely irrelevant because the specific facts applying at the time are not applicable at this time (not only insofar as the Code is concerned, but the public’s interest in stamping out spam, and the general market conditions).
- 6.4. We agree with the findings of the adjudicator. The sanctions are upheld, the appeal is dismissed and the appeal fee is not refundable.
- 6.5 Members are urged to keep proper records as they will be held accountable if not under the Code, then under the Consumer Protection Act when sections concerning record-keeping are applied. From the panel’s point of view, failure to keep adequate records will be viewed negatively.