



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Vending for Africa t/a Fantastic 1
Service Type	API for Bulk SMS Delivery
Source of Complaints	Public
Complaint Number	#0106

Complaint

A complaint was received from a customer of the SP. It appears that the customer approached the SP to provide a computer based SMS messaging solution, including short codes to be used for message transmission and receipt, APIs (application programming interfaces) for integration into the SP's SMS messaging interface and credits for SMS messages to be sent by the complainant.

The complainant alleges:

- About the middle of 2005 I asked for an http api to be able to connect to the gateway of the SP. Mr Nisaar Ally was told by me that we were working in asp.net and Mr Ally indicated that this was no problem for a connection. After stringing me along for 6-8 weeks he eventually told me that he was now ready to connect me and that I should deposit R4800, being the minimum amount needed for this purpose. Again some time elapsed before I was told that I could eventually get an http api for an asp script.
- What I received was a php api which was useless to me as I was using asp. I brought this to the attention of Mr Nisaar Ally and told him that I wanted a refund if I could not connect to his gateway. He replied that he could not refund the money and that I must use the credits on his site – which of course I could not.
- He refused to return my emails or phone calls and his listed number (031) 572 7414 has an answering machine on all day long. I checked his site today and it says “SUSPENDED” I also found out later that he had switched suppliers and that this was the reason for not being able to supply the http api for asp. I also was told that he dropped his original supplier and that money is still owed to this company!
- I feel that this person (Nisaar Ally) misrepresented himself to me, and I would like to know what WASPA can do about this person and the company he represents as his company is a member of WASPA.

- I have a complete record of all email correspondence as well as witnesses, all available on request. I would like to know what action your organization is prepared to take in this matter before any legal proceedings are instituted.

The following breaches of the WASPA Code of Conduct were raised:

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

It must be noted that the possible breach of Clause 4.1.1 of the WASPA Code of Conduct was raised by the complainant while the provisions of Clauses 3.1.1, 3.3.1 and 3.3.2 of the WASPA Code of Conduct have been raised by the Adjudicator and the SP has not had an opportunity to respond specifically thereto.

Investigation

The Secretariat received a response from the SP as follows:

- The Complainant was fully aware that our Software was still being developed. We did not string him along.
- The minimum was not a requirement. The lowest minimum was 1000 sms @ R.024c each. He suggested taking 20 000 SMS – that cost him R4 800. We provided him with 3 short codes as a faith of good will to use for his campaigns subject to him increasing his volumes to 100k within 6 months.
- These short codes during the live period were not even used by any of his campaigns.
- We requested his developer – Andrew Walmsley to contact our developer Evan from STOUF so they can get the proper coding in place. Andrew did not want to contact the developer.
- The SMS Solution we had operational since 1 September 2005 till 20 December 2005 had the complainants credits loaded on the system for him to use.
- He apparently only logged into the system 4 times during this period & never used the credits from the system (20 000 Credits).

- We have answered all his emails right until his last email sent to us on the 10 October 2005. Thereafter we did not receive any correspondence from him.
- Our company has been going through a merger state from the 1 September till 10 November when it was completed.
- During this time, the shareholders and investors into our company requested all our domains to be hosted within our premises and controlled by our own inhouse team. We notified the current hosting company, & are currently rectifying the problem and having them changed and hosted to our premises. Our site is <http://www.fantastic1.com> - it reflects the merger company.
- We were able to supply the api he needed. His developer Andrew Walmsley needed to contact Evan from Stouf for this.
- Monies are not owed to the original developer who could not and never delivered a solution, even though we have paid him in excess of R50 000 for desktop & web application software.
- Apparently the complainant also experienced the similar problem with this developer & was delayed by them.

The SP further provided an extensive history of e-mail correspondence between it and the complainant, which are not repeated here.

Decision

The Adjudicator had regard to the fundamental objectives of the WASPA Code of Conduct, being “to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”

The Adjudicator considered whether the complainant is a “customer” for the purposes of the WASPA Code of Conduct. The WASPA Code of Conduct defines “customer” as “a subscriber of a mobile cellular telecommunications service that has indicated a willingness to access a service provided by a wireless application service provider.” This is a significantly flawed definition, as it purports to exclude pre-paid users and potential users, such as the complainant, as the service being sought by the complainant from the SP is in no way related to his status as a subscriber of any mobile cellular network or service. However, the Adjudicator must consider this complaint in the context of this flawed definition.

The Adjudicator considered whether he was entitled to consider the possible breaches of Clauses 3.1.1, 3.3.1 and 3.3.2 of the WASPA Code of Conduct or whether the complaint should be restricted to Clause 4.1.1 of the WASPA Code

of Conduct, as this is the specific Clause of the Code raised by the Complainant. The on-line complaints form accessible from the WASPA Internet web site contains a question requesting details of the sections of the WASPA Code of Conduct the complainant alleges have been breached. As many complainants are unfamiliar with the WASPA Code of Conduct, they leave this question blank. Other complainants, such as the instant complainant, refer to one clause (or sub-clause) of the WASPA Code of Conduct when the detail of the complaint make it clear that other clauses or sub-clauses may have been breached.

The Adjudicator had regard to the decision of the Appeal Panel in respect of Complaint #0001 and is in agreement that an SP cannot be found in breach of the WASPA Code of Conduct, unless it has had an opportunity to respond fully to the complaint. This raises the question of what standard of fairness must be applied when considering the WASPA Code of Conduct and the actions of the Secretariat and the Independent Adjudicator in terms thereof. The Appeals panel in Complaint #0001 referred to the Constitution of the Republic of South Africa and the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

Section 33 of the Bill of Rights provisions of the Constitution provides:

Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

PAJA contains the following definitions:

'administrative action' means any decision taken, or any failure to take a decision, by -

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

According to Lawrence Baxter, *Administrative Law* (1984) 2 general administrative law consists of the 'general principles of [common] law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. While Baxter's definition pre-dates both PAJA and the Bill of Rights, it is useful as it seems to exclude a voluntary industry representative body, such as WASPA, as it is not an "administrative institution".

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5 ed) (2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure, is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution. They also indicate that some regard such a process as quasi-judicial in nature and for that reason not subject to the administrative justice rights in the Constitution (though Currie and de Waal are of the view that the epithet 'judicial' should be reserved for dispute-resolution by individuals or entities possessing constitutional judicial authority). In this regard Currie and de Waal refer to *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853 (Jockey Club's powers not 'governmental' in nature, not performing 'the business of government'). This is a more qualified and restrictive interpretation of the phrase than that proposed by Van Reenen J in *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 75 ("exercising a public power" conveys the ability to act in a manner that affects or concerns the public'). The phrase 'concerns the public' is certainly too wide. See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) para 51 which makes the point that mere public interest in a decision does not make it an exercise of public power or the performance of a public function.

PAJA does recognise that juristic persons (such as WASPA) may perform administrative acts, but only "when exercising a public power or performing a

public function in terms of an empowering provision”, bearing in mind that the definition of an “empowering act” includes “an agreement, instrument or other document in terms of which an administrative action was purportedly taken”.

Having regard to the above, it can be seen that the question of whether the WASPA Code of Conduct and the actions of the Secretariat and Independent Adjudicator in terms thereof are an administrative act or not, is a complex one. It is the view of the Adjudicator that such actions are not administrative acts, nevertheless the Adjudicator is willing to consider the standard set for administrative acts by the Bill of Rights and PAJA as a goal for the Secretariat and Adjudicator to strive towards and if possible meet or exceed, but not a requirement.

Bearing this in mind the Draft Code of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed administrative action to be given to the affected person, before the decision is taken. “Adequate notice” is defined as meaning that “the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.”

In this regard, the Adjudicator is of the view that the complaint sets out in sufficient detail the possible breaches of Clauses 3.1.1, 3.3.1 and 3.3.2 of the Code of Conduct as well as Clause 4.1.1, notwithstanding the complainant’s error in only referring to Clause 4.1.1 and not the other three sub-clauses. In addition, the SP responded to the factual allegations of the complaint and made no reference to the provisions of Clause 4.1.1 and it appears from the tenor of the SP’s response that reference to Clauses 3.1.1, 3.3.1 and 3.3.2 would have made little or no difference to the SP’s response. As such, the Adjudicator considered possible breaches of all four sub-clauses.

The Adjudicator found that there was no breach of Clause 4.1.1 of the WASPA Code of Conduct as:

- There was no indication of dishonesty on the part of the SP;
- There was no indication of unfairness towards the complainant on the part of the SP; and
- The complainant may not be a “customer” as defined in the WASPA Code of Conduct.

The Adjudicator is not a court of law and submissions by the parties are not tested by way of oral evidence or otherwise. As such the Adjudicator was not able to make a determination of a breach of Clause 3.3.1 of the WASPA Code of Conduct as there is a divergence between the complainant and the SP regarding whether the SP is in fact able to provide the service requested, or not.

However, from the information provided, it the view of the Adjudicator that there has been a breach of:

- **Clause 3.1.1 of the WASPA Code of Conduct, as:**
 - **the Complainant is a member of the public, if not a “customer” as such term is defined in the WASPA Code of Conduct;**
 - **the SP promised to provide a particular service and then attempted to substitute a variant of such service; and**
 - **the SP was not contactable for a period of time (albeit for various reasons given by the SP),**

displaying a lack of professionalism in its conduct towards the complainant.

The principle of caveat emptor (“let the buyer beware”) applies in our law and is not superseded by the WASPA Code of Conduct. In addition the complainant gives little justification for his contention that he could not use the SMS messaging credits on the SP’s site. In addition, the SP’s contention that the “complainant’s developer” did not liaise with their developer raises further concerns. In the absence of written warranties or proof of misrepresentation by the SP, the Adjudicator does not believe it appropriate to impose a punitive sanction on the SP.

However, the SP has bound himself to a higher standard of conduct than that imposed by the law, in agreeing to be bound by the WASPA Code of Conduct. As such, the Adjudicator orders the SP to pay the complainant’s reasonable and valid claim for compensation as contemplated in Clause 13.4.1.d of the WASPA Code of Conduct, by refunding all monies paid by the complainant to the SP. Such payment is to be effected within 5(five) working days of receipt of this report and proof thereof to be provided to the Secretariat.