



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Nashua Mobile
Information Provider (IP) (if any)	MBD Attorneys
Service Type	SMS
Source of Complaints	Public
Complaint Number	4500
Date received	4 July 2008
Code of Conduct version	5.7

Complaint

The Complainant received an SMS on the 19th June 2008 from the IP through the SP stating the following:

"You recently received our letter of demand regarding your SABC TV LICENCES A/c. Please make a payment by month end. A/c 409821956. Balance R1495.51"

During the course of the informal complaints resolution procedure there was an exchange of correspondence between the SP and the Complainant as a result of which the Complainant's mobile number was blocked from receiving further messages but the parties were unable to resolve the issue of whether the SMS received constituted spam or not. In the words of the Complainant:

"I was never asked whether I wish to receive this type of SMSes and I doubt that I would have said yes if asked. Furthermore, the SMS did not even have an opt out for further communication let alone containing the name or identifier of the message originator."

The Complainant referenced the Code of Conduct as follows:

"I would like to point out that nowhere did I authorize MBD Attorneys/SABC to contact me via SMS."

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

There has been no 'commercial relationship' 'within the last six months' and therefore as far as I am concerned, it is 'unsolicited'.

Even though Nashua Mobile sent out the SMS on behalf of MBD Attorneys, the following still applies:

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.

and

5.1.4 (a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".

For added clarification, when I returned to ZA in January 2005, MBD Attorneys/SABC were informed and proof emailed to them in 2005 that I had emigrated to Europe for the period they claim I owe SABC License monies. And my current SABC License is paid for in advance/uptodate.

As far as I am concerned, if MBD Attorneys/SABC cannot prove that I allowed them to contact me by SMS, it is classified as SPAM/unsolicited SMS."

SP Response

The SP filed the following formal response:

“We confirm that Nashua Mobile sent out the SMS to the Complainant on behalf of MBD Attorneys for debt collecting purposes in regards to her alleged amount outstanding on her SABC account. We are however, of the view that these messages are not considered as SPAM as defined in the Code of Conduct (please see the ruling of complaint number # 3026). As pointed out in the aforesaid ruling, SMS is a useful mechanism for debt collecting purposes as long as it does not amount to harassment. The Complainant does not allege this at any stage in her complaint.

We are therefore of the view that Nashua Mobile is not in contravention of any of the sections of the Code. In order to try and come to a resolution here, (and without admission of any fault) we have provisionally blocked the Complainants cell phone number from our gateway and shall request MBD Attorneys to contact the Complainant in order to resolve the outstanding debt issue.”

Furthermore:

“Nashua Mobile are not in a position to comment on whether there was in fact a prior commercial relationship between the complainant and the SABC. We are still of the view that the sms' does not amount to 'Spam' as defined in the Code. Then, in terms of the Code "commercial message" is defined as " a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient." Considering this, we are also further of the view that the debt collecting sms sent on behalf of MBD attorneys doesn't fall within this definition.”

Sections of the Code considered

The following sections of Version 5.7 of the WASPA Code of Conduct were considered (note that this version was in force at the time that the SMS was received by the Complainant and that Version 6.1 came into force subsequent to receipt but prior to the Complaint being lodged):

2.9. A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

2.16. A “message originator” is the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly.

2.22. “Spam” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

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.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) 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 must be included at the start of any messaging service, for example: “reply STOP to opt out”.

(b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. “sms STOP to 32xxx to opt out”.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient’s contact information has the recipient’s explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

Decision

The Adjudicator, while disagreeing with the SP's argument that the SMS does not constitute a "commercial message" as defined, agrees with the conclusion that the message is not spam.

The following passage from Adjudication 3026 is approved:

"The Adjudicator concurs with the SP that the messages sent to the complainant are not spam (as defined in the WASPA Code of Conduct) as a prior commercial relationship existed between the complainant and a creditor, which has been ceded or otherwise been handed to the IP. This in turn creates a direct relationship between the IP and the complainant. While not indicated by the SP, it is also likely that the complainant agreed to his creditor contacting him using supplied details, which agreement may be transferable to the IP."

Whether or not MBD Attorneys are correct in making the claims that they do is beyond the knowledge and control of the SP. Insofar as MBD Attorneys believe in good faith that money was due and owing in respect of TV licence fees they believe in good faith that a commercial relationship existed with the Complainant. The Adjudicator appreciates the frustration experienced by the Complainant in this regard but is of the view that this should be directed at the IP in its capacity as attorneys for the SABC.

It should be noted, however, that it is implicit from the passage quoted above that the Adjudicator in Adjudication 3026 was of the view that the that the SMS in question was commercial in nature. This Adjudicator agrees.

Is it required that an SMS of this 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.

The Complaint is dismissed with regard to the alleged breach of section 5.2.1 but upheld with regard to breaches of sections 5.1.1 and 5.1.2.

In considering an appropriate sanction the following was considered:

- The fact that a similar finding of a breach was reached in Adjudication 3026 against the same IP and SP;
- The Adjudicator's view that it is the Complainant's dispute with MBD Attorneys which is the central motivation behind this Complaint and that the use of SMS is incidental to such dispute.
- The policy that consumers should have the ability to exercise choice with regard to the commercial communications they receive.

In the circumstances the following sanction is imposed:

- The SP is required to bring this Adjudication to the attention of MBD Attorneys together with a copy of Adjudication 3026;
- The SP is fined the sum of R5000, payment of which is suspended for a period of six months from date of this Adjudication subject to their being no finding of a breach of section 5.1 of the WASPA Code of Conduct against the SP acting together with the IP in this matter.