



## REPORT OF THE ADJUDICATOR

<b>WASPA Member</b>	IWS (Internal Wasp Service of MTN)
<b>Service Type</b>	Commercial SMS
<b>Source of Complaints</b>	Public
<b>Complaint Number</b>	5670 / 5671 / 5810
<b>Date lodged</b>	28 February 2009
<b>Code of Conduct version</b>	6.2

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### Complaint

In these three matters members of the public approached WASPA to assist with being unsubscribed from marketing lists (in two cases) and a daily reminder service. In all three matters the WASPA Secretariat lodged unsubscribe requests on its Unsubscribe System but the WASPA member failed to respond thereto despite prompting. Each matter was accordingly escalated to a formal complaint.

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### WASPA Member Response

No substantive action or response was taken or received from the WASPA member to the unsubscribe request or the formal complaint in any of the matters. With regard to notification of the formal complaint under 4871 the member sent a mail stating only the following:

“I have resent sent to client . will provide feedback as soon as I receive”.

No further response was filed thereafter.

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### Sections of the Code considered

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

#### 3.1. Professional and lawful conduct

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.

#### 3.10. Nominated representatives

3.10.1. Each member must supply WASPA with contact information (including at least a telephone number and an email address) for a primary and a secondary Code of Conduct representative.

3.10.2. Should the nominated representatives change, or the contact information for the representatives change, the member must notify WASPA of the changes.

## 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 (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.

## 5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

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## Decision

The failure of the WASPA member to provide any statement challenging the allegation that the SMS received by the complainant from the IP through the member was unsolicited. The version advanced by the complainant is accepted and the member is found to have breached section 5.3.1 read with section 5.2.1.

The Adjudicator further wishes to address the failure of the member to respond either to the unsubscribe request or the formal complaint. This matter should not have been escalated to the formal process – consuming capacity and resources – and would not have been so escalated had the member responded as it is required to. The addresses used by the WASPA Secretariat to contact the member are those specified by the WASP itself while the WASP has access to the Unsubscribe System. The fact that there was some reply in respect of Complaint 5671 indicates that these addresses are working.

This is not acceptable and simply serves to undermine the confidence of the public in the WASP industry.

It is evident from the failure of the member to respond the unsubscribe request that there has been a breach of section 5.3.2 of the Code of Conduct.

In Adjudication 4897<sup>1</sup> the following was stated in respect of three matters which are almost identical to the current three:

- “4. As regards the failure of the SP to respond: a failure to lodge a response is not *per se* a breach of the Code but a pattern of such behaviour may indicate an unwillingness to

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<sup>1</sup> [www.waspa.org.za/code/download/4897.pdf](http://www.waspa.org.za/code/download/4897.pdf)

participate in the complaints process, an attitude which would be at odds with the aims and objectives of WASPA as also the SP's membership thereof.

5. The Adjudicator noted that the Code requires the SP to have two nominated representatives and that it is under a continuing obligation to maintain the contact information of these representatives as lodged with WASPA.

6. There have been two prior occasions where this SP has failed to respond to a complaint. In Complaint 1982<sup>2</sup> a fine of R5 000 was imposed (payment of R3 000 suspended for 6 months) in respect of a breach of section 5.2.1 & 5.3.1 of the Code. In Complaint 2399<sup>3</sup> a fine of R5 000 was imposed in respect of the same offence, In neither matter did the SP file a response and in neither matter was any specific sanction imposed in respect of such failure as opposed to the underlying breach.

7. There are three instances currently under consideration.

8. In matters of this nature, where nothing is sought other than a straightforward unsubscribe, it is a waste of time and resources to have the matter escalated to an external adjudicator. Other WASPA members named in the same unsubscribe requests have complied therewith thereby averting the need for the investment of further time and resources.

9. It is also worth noting that an SP which fails to respond to communications from an industry body to which it belongs does not inspire confidence in its ability to handle complaints from its customers in accordance with the requirements of the Code.

10. The adjudicator regards the failure to respond as being in breach of section 3.1 of the Code of Conduct, insofar as the SP has clearly evidenced a failure to act professionally in its dealings with WASPA.

### **Sanction**

11. The SP is ordered to ensure that the unsubscribe request which is the subject of each complaint is actioned within five (5) days of notification of this adjudication. This order is not appealable.

12. The SP is ordered to verify the identity and contact details of its nominated representatives in writing to the WASPA Secretariat within five (5) days of notification of this adjudication. This order is not appealable.

13. The SP is fined the sum of R15 000 in respect of its breaches of section 5.1.2 alternatively section 11.2.2 read with 11.2.4 of the Code of Conduct. This sanction applies as a global amount for all three complaints.

14. The SP is fined the sum of R20 000 in respect of its breach of section 3.1., which fine covers all three complaints.

15. The amounts specified as fines are payable within five (5) days of notification of this adjudication.

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<sup>2</sup> <http://www.waspa.org.za/code/download/1982.pdf>

<sup>3</sup> <http://www.waspa.org.za/code/download/2399.pdf>

16. The Secretariat is requested to verify compliance with the order in 11. above and to lodge a further formal complaint in the event that the SP does not comply therewith.

The Secretariat is requested to take reasonable steps to ensure that this adjudication is brought to the attention of senior management at the SP.”

Notwithstanding the above the member now finds itself in almost exactly the same position. The problem appears to lie in the systems of the WASPA member relating to its interaction with WASPA and the problem appears to be persistent.

The member is found to have also breached section 3.1.1 of the Code.

In assessing appropriate sanctions the Adjudicator has had regard to a number of considerations, including:

- the previous findings made and sanctions imposed in respect of similar conduct on the part of the member;
- the clear directive from WASPA to take strong action against persistent offenders against the Code;
- the fact that the underlying offences relating to unsolicited commercial SMS messages should not be regarded as the central difficulty: rather it is the failure to respond to the unsubscribe request which is the primary issue;
- the fact that the failure to respond to the unsubscribe request prejudices consumers and prejudices the industry in the eyes of consumer; and
- the need to incentivise the WASPA member to properly engage with the unsubscribe and complaints process.

In the circumstances the following findings are made:

- The member is fined the sum of R25 000 in respect of the breaches of section 5.3.1 read with section 5.2.1 of the Code of Conduct. This sanction applies to all three complaints in respect of which this Adjudication lies and is payable within ten (10) days of date of notification of this Adjudication.
- The member is fined the sum of R200 000 in respect of the breaches of section 3.1.1 and 5.3.2 of the Code of Conduct, payment of R160 000 being suspended for a period of six (6) months on condition that the WASPA member is not found to have contravened sections 3.1.1. or 5.3.2 of the Code in circumstances where they have failed to respond to an unsubscribe request during that time. Payment of the balance is due within ten (10) days of date of notification of this Adjudication.