



**Wireless Application Service Providers' Association**

## Report of the Appeals Panel

Complaint number	26148 - SMSPortal
Cited WASPA members	SMS Portal Connet IT Systems (Pty) Ltd (1036) Mobile Applications / Mobivate (Pty) Ltd (1115)
Notifiable WASPA members	<i>na.</i>
Appeal lodged by	SMS Portal
Type of appeal	<b><i>Written appeal</i></b>
Scope of appeal	Review of the adjudicator's decision
Applicable version of the Code	<i>13.6</i>
Clauses considered by the panel	<i>16.12</i> <i>In context of 3.4 and 3.7</i>
Related complaints considered	
Amended sanctions	R30 000 against Mobivate only.
Appeal fee	<i>Forfeited</i>
Is this report notable?	No
Summary of notability	

## **Initial complaint**

This matter arises from a multifaceted complaint with a complex history.

The complaint relates to the following sms, which the complainant objected to on a number of basis:

“Hi. Would you like to reduce your debt/account repayments and have extra cash left over each month? SMS YES to see if you qualify :- ) or NO to optout.”

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## **Adjudicator’s findings**

We will only canvas those findings of the Adjudicator that are germane to the Appeal.

The Adjudicator found a breach of Clause 16.12 of the Code (although he erroneously referred to this clause at 16.2 at the most germane points of the ruling).

He fined Mobivate and SMS Portal an amount of R30 000 jointly and severally.

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## **Appeal submissions**

SMS Portal appealed the decision.

At the risk of over simplifying the Appellant’s submissions, the essence thereof was that they are so far removed from the original SMS, with so many other WASPA members involved, that to hold them liable for the actions of the message originator is not reasonable.

SMS Portal submitted detailed explanations of the relationships in this matter and the role that it played.

It also submitted that the Adjudicator failed to apply its mind to the sanction in this matter in relation to the factors set out in the Code.

## **Deliberations and findings**

### Condonation

The first issue in this matter is whether or not the Appeal Panel should condone the late filing of the Appeal.

Version 13.6 of the Code states as follows:

24.35. The member has ten working days to notify WASPA if it wishes to appeal against the decision of the adjudicator.

The Code provides no procedure for condonation.

At common law, two factors are considered in deciding whether or not to grant an application for condonation:

- Whether there is good cause for the delay;
- The prospects of success on appeal.

The Appellant's legal representatives note that the late filing is their own error, and they submit that there is no prejudice to the complainant in allowing the appeal, while a failure to allow the appeal will prejudice the Appellant.

In the procedure in this matter was interesting, because the Appellant first prevailed on WASPA to conduct the Appeal on its behalf. WASPA refused to do so, and gave the Appellant ten days from that decision to appeal. This is relevant because that indulgence already extended the period allowed for appeal. That notice was on 8 October 2015, making the Appeal due by close of business on 22 October 2015. While the Appellant confirmed its intention to Appeal on 22 October 2015, the actual appeal was only filed on 14 January 2016.

This Panel is torn. The delay in lodging the appeal is extreme – 12 weeks in the context of a 10 day deadline. This is aggravated by the fact that the Appellant's legal advisors completely fail to take the Panel into its confidence as to what the reasons for the delay were, save to say that there was a "miscommunication" with their client and that they "take full responsibility". We are given no insight as to what the nature of this miscommunication was, and we are given no insight as to how quickly the error was corrected after finding out about the miscommunication.

The Appellant was certainly given an absolutely clear instruction as to when its appeal was due (already an extended date). Surely at the end of this time period, at the very least, the Appellant would have contacted its legal advisor and asked if the Appeal had been filed? We can only speculate, as we are not taken into the Appellant or their advisors' confidence.

We are inclined to refuse the condonation, but have to consider the issue under appeal. What is alleged is a most severe breach of natural justice, causing some financial prejudice to the Appellant and setting a precedent if allowed to stand. We have also considered that the facts in this matter as they relate to "who did what" are particularly confusing, and that the Adjudicator's somewhat incoherent ruling did not assist the parties.

**We are therefore allowing the appeal, but given the extreme delay and the complete failure of the Appellant to provide a coherent explanation therefor, the Appellant forfeits the Appeal fee despite the outcome of this matter.**

### Merits

In moving onto the merits, this Panel must carefully consider the scope of this Appeal.

In the first place, the Appellant concedes a breach of Clause 16.12. The finding in respect of Clause 16.12 is therefore not appealed and this Panel's opinion on that finding is irrelevant.

In the second place, the Appeal is lodged by SMS Portal. The fine was imposed against SMS Portal and Mobivate jointly and severally. Mobivate has not appealed this finding or the fine, and the appeal is therefore only in respect of the finding vis-à-vis SMS Portal.

The relationships in this matter appear to be, *ex facie*:

Siyaya Debt Solutions (who turned out not to be a WASPA member) originated the message. They hired Mobivate as a service provider to distribute the message. Mobivate in turn used Connet IT as an aggregator who in turn used SMS Portal as an aggregator.

SMS Portal (being the most recent aggregator before the message reached the consumer) were the first port of call when WASPA received the complaint. On their version they responded to the informal (at that stage) complaint by referring it to their customer Connet IT. From that point on, SMS Portal was not regarded as a party, and was not asked to respond. In fact, the involvement of SMS Portal is so far before the matter came to be a formal complaint that the first response on the record before both us and the adjudicator is already from Connet IT.

Whether or not SMS Portal acted reasonably in this matter in relation to the actual content of the SMS falls away in light of the situation outlined above. SMS Portal was not asked to respond to a formal complaint, was not even implicated by the respondent (which was Mobivate) and could not reasonably have expected to have a ruling made against it.

The Adjudicator's labelling of the parties in this matter (as SP, IP and IP2), and his decision to make a finding against SMS Portal and Mobivate, but inexplicably (in the circumstances) not against Connet IT, shows that he had not properly grasped the players in this complex story.

The finding against SMS Portal in the light of the fact that it was not a party to the formal complaint and was not given an opportunity to formally respond is an absolute failure of natural justice. **On this basis alone, the finding is set aside vis-à-vis SMS Portal.**

**Amendment of sanctions**

The sanction is amended to stand as R30 000 against Mobivate only.

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**Appeal fee**

As noted above, the Appeal fee is forfeited as a result of the late filing with no good cause shown.

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**Wireless Application Service Providers' Association**

## Report of the Appeals Panel

Complaint number	26148_1
Cited WASPA members	SMS Portal Connet IT Systems (Pty) Ltd (1036) Mobile Applications / Mobivate (Pty) Ltd (1115)
Notifiable WASPA members	<i>na.</i>
Appeal lodged by	Mobivate (Pty) Ltd
Type of appeal	<b><i>Written appeal</i></b>
Scope of appeal	Review of the adjudicator's decision and sanction
Applicable version of the Code	13.6
Clauses considered by the panel	16.12 <i>In context of 3.4 and 3.7</i>
Related complaints considered	26148
Amended sanctions	na
Appeal fee	Forfeited
Is this report notable?	Yes
Summary of notability	Refusal of condonation

## **Case overview**

This matter is an appeal resulting from a complex set of circumstances.

In the matter of 26148, the Adjudicator made a finding against Mobivate (the Appellant at hand) and SMS Portal.

SMS Portal lodged an application for condonation and appeal. They were, essentially, successful.

Mobivate have now lodged an appeal. Prior to lodging the appeal, they were advised by WASPA to lodge a condonation application together with the appeal.

The question before this Panel is therefore whether Mobivate should:

- Be granted condonation
- Be successful on the merits

## **Initial complaint**

The complaint relates to the following sms, which the complainant objected to on a number of basis:

“Hi. Would you like to reduce your debt/account repayments and have extra cash left over each month? SMS YES to see of you qualify :-) or NO to optout.”

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## **Original Adjudicator’s findings**

The Adjudicator found a breach of Clause 16.12 of the Code (although he erroneously referred to this clause at 16.2 at the most germane points of the ruling) as read with Clause 3.7.

He fined Mobivate and SMS Portal an amount of R30 000 jointly and severally.

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## **Findings of the First Appeal by SMS Portal**

On the question of condonation, the Panel allowed the extremely late filing but made an adverse costs order. The reasoning of the Panel in allowing condonation was that the harm that had ex

*facie* occurred involved a breach of the basic principles of natural justice in that a finding was made against a party that was never asked for a formal response.

On the merits, the nub of the finding was:

*Whether or not SMS Portal acted reasonably in this matter in relation to the actual content of the SMS falls away in light of the situation outlined above. SMS Portal was not asked to respond to a formal complaint, was not even implicated by the respondent (which was Mobivate) and could not reasonably have expected to have a ruling made against it.*

## **The new Appeal by Mobivate**

On reading the First Appeal finding, the Appellant submitted that the finding reflected in the sentence “Siyaya Debt Solutions (who turned out not to be a WASPA member) originated the message. They hired Mobivate as a service provider to distribute the message.”

The Appellant submitted that this was an incorrect reflection of the situation, saying: “Mobivate, like almost every other SMS provider in the world offers a SMS platform. Customers (like Siyaya) can open an account with Mobivate, add credit to their account and then send SMS messages. This is how the bulk SMS industry operates worldwide.” (sic)

On receipt of this submission, WASPA advised the Appellant to apply to the panel for condonation, and to submit its appeal. This was communicated to the Appellant on 28 April 2016.

A formal appeal was submitted on 17 May 2016. It did not address the issue of condonation.

## **Condonation decision**

The first issue in this matter is whether or not the Appeal Panel should condone the late filing of this Appeal.

As noted in the previous matter:

Version 13.6 of the Code states as follows:

24.35. The member has ten working days to notify WASPA if it wishes to appeal against the decision of the adjudicator.

The Code provides no procedure for condonation.



At common law, two factors are considered in deciding whether or not to grant an application for condonation:

- Whether there is good cause for the delay;
- The prospects of success on appeal.

### **Good cause for the delay**

We note that the Appellant has made no submissions on the question of condonation and we must therefore consider same on the facts already before us. The Appellant has provided no insight as to why it did not appeal the original finding or why we should condone the Appellant's extremely late appeal. It must be noted that the Appellant was not a party to the First Appeal and cannot appeal same, which is in any event a final decision. The only appeal that is possibly open to the Appellant is against the original decision.

The Appellant has certainly not presented us with any good cause for its eight month delay in filing its appeal. It has therefore not met this requirement for condonation.

### **Prospects of success on appeal**

There are two issues that differentiate this appeal, materially, from the First Appeal on the issue of condonation. These are:

- Mobivate has not lodged an appeal in response to the adjudicator's finding, but rather to SMS Portal's successful appeal.
- Mobivate was the respondent on the formal complaint and it is Mobivate's submissions that the Adjudicator in the matter *a quo* considered.

It must be understood in this regard that the Adjudicator's original finding was against Mobivate and SMS Portal *jointly and severally* in an amount of R30 000. At that point, therefore, Mobivate was potentially liable for an amount of *up to* R30 000. The First Appeal then found that SMS Portal had suffered a crippling failure of natural justice, and changed the fine to be against Mobivate only, still in an amount of R30 000.

Mobivate's liability therefore did not change, except that it now faced no chance to share the costs with SMS Portal.

This is significant because Mobivate did NOT appeal the initial adjudication, despite having been the primary respondent and despite having been exposed to a fine of up to R30 000.

The Panel in the First Appeal condoned SMS Portal's late appeal taking into account principles of natural justice which were not respected in that particular case. The Panel noted:

*We are inclined to refuse the condonation, but have to consider the issue under appeal. What is alleged is a most severe breach of natural justice, causing some financial prejudice to the Appellant and setting a precedent if allowed to stand.*

There is no such breach of natural justice in this matter. The Appellant at hand was the primary respondent in the matter *a quo* and was properly heard. It became aware of the initial finding at the same time as SMS Portal and chose not to appeal.

This present appeal was only lodged once it became aware of the findings of the Panel in the First Appeal .

The appeal itself is based on the submission that as a provider of an SMS “portal” the Appellant is not liable for the conduct of those using its portal. The Appellant made the following arguments in its initial appeal submissions on 17 May 2016:

*Mobivate, like almost every other SMS provider in the world, offers a SMS platform and/or API for customers (like Siyaya) to send SMS messages, independently.*

*Siyaya used Mobivate’s online portal to send messages without any involvement by Mobivate. Mobivate simply offered a portal and gateway to Siyaya to enable the delivery of the SMS messages. Siyaya has, to date, still not paid Mobivate for these messages and for Mobivate to get a fine for their contravention of the WASPA act is, in our opinion, not only a financial burden but unreasonable and unfair.*

*It is clear that Siyaya sent the SMS messages in contravention of the WASPA act and that the only reason that Siyaya is not getting a sanction is that they are not members of Waspa. It makes little sense to me for an innocent company to get a fine purely because the guilty party did not join the regulatory organisation.*

Clause 3.7 of the Code, on which the original Adjudicator relied, says:

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member’s liability for any breaches.

There is a wealth of precedent that WASPA adjudicators and appeal panels interpret this clause strictly. In the matter at hand, the SMS originator is clearly a non-member customer in the most traditional interpretation of the word “customer”, and it is absolutely clear from the Appellant’s submissions that it exercises no control over the customers’ behaviour, let alone taking “reasonable steps”. The prospects of success in this matter are therefore less than negligible.

**In the circumstances, we do not grant condonation of the late filing of the appeal. The Appellant’s appeal is therefore dismissed.**

Appeal costs are forfeited.