



**Wireless Application Service Providers' Association**

## Report of the Appeals Panel

Complaint number	28328
Cited WASPA members	Stouf Communications (Pty) Ltd (0058)
Notifiable WASPA members	N/A
Appeal lodged by	Stouf Communications (Pty) Ltd (0058)
Type of appeal	<b><i>“Written appeal”</i></b>
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator’s decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.1
Clauses considered by the panel	16.4, 16.5 (a), 16.9 and 16.11.
Related complaints considered	N/A
Amended sanctions	<i>None</i>
Appeal fee	<b><i>Appeal fee not to be refunded</i></b>
Is this report notable?	<i>Not Notable</i>
Summary of notability	

## Initial complaint

*As stated in the Adjudicator's Report, the Complainant received a number of unsolicited direct marketing messages and attempted to resolve the issue with the Respondent and Third Party (non-WASPA member, Respondent's client) involved, regarding the source of his contact details and proof of consent.*

*The Adjudicator then set out the copies of the messages in question received by the Complainant:*

*"Origin Address: +27 82 559 9724*

*Destination Address: +27 xxxxxxxxx*

*Date: 2015-11-11 16:38 GMT+2*

*Message: REFUSED a LOAN, STRUGGLING to pay your DEBTS, in ARREARS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms KJ50 to 45648 cost R1.50 or reply top std rate";*

*"Origin Address: +27 71 460 1505*

*Destination Address: +27 xxxxxxxxx*

*Date/Time: 2015-11-11 09:25 GMT+2*

*Message: LIFE INSURANCE from just R99 pm NO MEDICAL; couldn't be EASIER to get COVER; Premiums FIXED 2 YEARS; sms LIFE to 45648 cost R1.50 or reply stop opt out"; and*

*"Origin Address: +27 79 4102207*

*Destination Address: +27 xxxxxxxxx*

*Message: REFUSED LOAD, in ARREARS, STRUGGLING to pay your DEBTS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms LS48 to 45648 cost R1.50 or reply stop std rate"*

*The Complainant approached the Respondent initially (as they are the registered holder of the short code mentioned in the messages) who informed the Respondent that the messages to his handset did not originate from the Respondent's system. The Respondent then referred to Complainant to their Third Party client.*

*The Third Party submitted that it had a business associate that wanted to run a SMS marketing trial/pilot and as a result provided the associate in question with a couple of sim card numbers and the following message for testing:*

*"REFUSED a LOAN, STRUGGLING to pay your DEBTS, in ARREARS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms KJ50 to 45648 cost R1.50 or reply top std rate."*

*The Third Party confirmed that the SMSs received by the Complaint were from its business associate and assured the Complainant that he would receive no further unsolicited marketing messages from it or any of its business associate. The Third Party submitted that it and the Respondent were not responsible for sending SMSs to the Complainant and **that the Respondent merely facilitated the replies to the short code. (My highlight).***

*Following on receipt of the response by the Third Party the Respondent felt that there was little or no merit in the testimony and arguments of the Third Party and terminated all contractual relationships with them.*

*The Complainant made a formal complaint to WASPA as he continued to receive further unsolicited messages after raising this issue with the Respondent and the Third Party.*

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## **Adjudicator's findings**

*The Adjudicator considered the following issues in determining whether or not there had been a contravention on the part of the Respondent in respect of clauses of the Code raised in the original complaint:*

- 1. whether the Respondent had permitted its facilities to be used for the purpose of direct marketing to the Complainant who had given his consent;*
- 2. whether upon request by the Complainant, the Respondent within a reasonable period of time, identified the source from which the Complainant's contact details were obtained;*
- 3. whether the Respondent provided proof that the Complainant had given consent to receive the messages; and*
- 4. whether the Complainant opted out and was accordingly sent a message confirming the opt-out in the manner specified by the Code.*

*In respect of 16.5 (a) the Adjudicator found as follows:*

*"The evidence before me does not indicate and/or suggest that the Complainant ever opted-out by way of SMS (bearing in mind there was no consent ever given in the first place, which issue I deal with further on in the report). However, following some of the marketing messages received, the Complainant sent an email to the Respondent and Third Party on the 11th of November 2015 at 9:55am, requesting that "please acknowledge that my details have been removed from your list and that both Stouf and Lifeline have added these details to a pre-emptive block system in accordance with §16.4 of the WASPA code of conduct.....". Third Party responded at 11:57am on the same day indicating the following "Be assured, that you will receive no further sms marketing from us or any business associate". However, despite this communication, the Complainant received another marketing message later on in the day at 4:38pm."*

*Based on the foregoing the Adjudicator found that the Respondent had contravened clause 16.5 (a) of the Code of Conduct. The Adjudicator also found that clause 16.14., i.e. "**Confirmation of Opt-Out**", had been contravened by the Respondent in that no confirmation of opt-out SMS was sent to the Complainant following their opt-out via email.*

*In respect of clauses 16.9 and 16.11, the Adjudicator found the Respondent to have breached such clauses of the Code of Conduct but not to have breached 16.3 based on the following reasoning: "The evidence before me indicates that the Complainant never granted consent to*

*the Respondent and/or Third Party in this regard. The Respondent and Third Party do not dispute this fact or produce evidence that proves otherwise. Evidence indicates that on the 3rd of November 2015 the Complainant notified the Respondent by way of an email, of a direct marketing message which he received and requested the Respondent to identify the source from which his contact details were obtained, and proof that he consented to receive that message. The Respondent failed to provide proof of consent until the Complainant lodged a formal complaint on the 12th of November 2015. However, insofar as identifying the source from which the Complainant's contact details were obtained, I believe this has been done and cannot be taken any further, even though it may have not been done within a reasonable time."*

*The Adjudicator sanctioned the Respondent R30 000.00 together with a warning for a breach of sections 16.5 (a), 16.9 and 16.11 and 16.14. It is unclear what portion of the fine relates to which breach.*

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## **Appeal submissions**

*The Respondent appealed the decision and sanction of the Adjudicator as follows. Only the sections relevant to the clauses which the Adjudicator found the Respondent to have breached have been included and not those in respect of which the Adjudicator found the Respondent not to have contravened:*

*"Clause 16.9. and 16.11 Stouf understands that the only manner in which it may have contravened any clauses , could possibly be the item "A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing" This however is not clear cut. Stouf's systems were not used to send the SMS, Stouf had no control at all over the Opt in or Opt out of future SMS's to the complainant. The short code was used merely as a conduit via its short codes for the communication, after the fact.*

*This would imply that the recipient of the SMS was invited, if interested, to send an SMS to the Stouf short code and somebody would get back to them. That very act of sending an SMS to the short code would have implied consent by the complainant. We recognize however that the complainant did not need to go that far, as that was not the complaint. Again...None of Stouf's systems were used for the initial Direct Marketing communication.*

*Clause 16.13 and Clause 16.14*

*These paragraphs make no reference to Stouf's facilities being used (as in para 16.11). Stouf did not send the SMS to the complainant and had absolutely no control of the Opt out request. Stouf can therefore not be seen to be complicit in this act, and can therefore not be found guilty of contravening it."*

*In respect of the quantum of the sanctions the Respondent felt the R30 000.00 fine was excessive and that the termination by them of their relationship with the Third Party involved should be seen as a mitigating factor. They also queried whether this Third Party had been investigated and sanctioned.*

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## Deliberations and findings

*First off we wish to point out that version 14.1 of the Code of Conduct and not version 14.3 applies but that there is no material difference which would impact on the initial decision.*

*After reviewing and deliberation upon the material before it, the Appeal Panel has come to the following reasoning and decision:*

*In respect of 16.5 (a) regarding consent, we do not regard the Respondent's arguments as cogent. Respondent provided no evidence that the SMS received by the Complainant was the result of a response which triggered a call to action. We conclude that no consent was given and the Respondent breached clause 16.5 (a).*

*If no consent was given, we need to look at the issue of what the Respondent correctly defines as the critical wording in clauses 16.9 and 16.11, namely "permit their facilities to be used." The Respondent and the Third Party have made it clear that the Respondent only provided the short codes and was in no other way involved in the sending of the SMS's in question. The Respondent argues that as they didn't send the actual SMS's and had no control over the sending thereof that their facilities were not used. Firstly, the panel finds that although they may not have sent the actual SMS the control they did have was to stop their short code being used, which they did ultimately by terminating the services with the Third Party. We also find that the Code must consider any aspect of the ability to send SMS's as being part of what facilitates the sending of such message and accordingly that the Respondent's short code was part of their facilities and therefore they did permit their facilities to be used as set out in clauses 16.9 and 16.11 of the Code. The panel agrees that such sections were breached. This is also the approach that has been taken in the past by other adjudicators and appeal panels where a third party who is not a WASPA member is involved.*

*The panel does not regard that the Respondent breached clauses 16.13 and 16.14 due to the fact that it did not send the actual SMS's, as pointed out by the Respondent. However, and although not specifically ruled on by the Adjudicator, clause 16.4 was raised in the initial complaint and the Respondent had the opportunity to address the merits thereof and as such the panel is also entitled to rule on this clause. Clause 16.4 requires: "Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an "**opt-out request**")."*

*The panel finds that the Respondent was authorizing the Third Party to conduct direct marketing by allowing them to use the short code having seen the SMS in question. Accordingly, they were required to "implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication". This in our view should at a minimum have meant that the Respondent required proof of an opt-out in the template SMS's to be sent out. They failed to do*

*anything to implement or even enquire as to whether this was being done. Accordingly we find the Respondent to be in also breach of clause 16.4.*

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### **Amendment of sanctions**

*The panel will not be amending the sanctions. WASPA only has the ability to sanction its members. For this reason, it is essential that its members uphold the Code of Conduct, particularly when they are in any way allowing the use of any of their facilities to non-members providing services. The Respondent has been found to have breached clauses 16.4, 16.5 (a), 16.9 and 16.11. If one looks at the Code of Conduct archives at the annotated version of the Code of Conduct, it is easy to see previous sanctions that have been imposed as a result of various breaches of a particular clause. Clause 16.4 which the Adjudicator failed to rule on specifically has carried a sanction of R50 000.00. Clause 16.11 has carried a sanction of between R2500.00 and R50 000.00. Due to the facts on hand, together with the fact the Adjudicator failed to set out how the sanctions were apportioned to the breaches, we regard a fine of R30 000.00 together with a warning is a fair sanction.*

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### **Appeal fee**

*The appeal fee is forfeited by the Respondent.*

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