



**Wireless Application Service Providers' Association**

Report of the Adjudicator

|                                |                                   |
|--------------------------------|-----------------------------------|
| Complaint number               | <b>#34146</b>                     |
| Cited WASPA members            | <b>Clickatell (Pty)Ltd (0004)</b> |
| Notifiable WASPA members       | All                               |
| Source of the complaint        | Public                            |
| Complaint short description    | <b>Premium Rated SMS</b>          |
| Date complaint lodged          | 17 June 2017                      |
| Date of alleged breach         | 19 April 2016                     |
| Applicable version of the Code | 14.7                              |
| Clauses of the Code cited      | 5,1 & 5,2                         |
| Related complaints considered  | 10048                             |
| Fines imposed                  | <b>None</b>                       |
| Other sanctions                | <b>None</b>                       |

|                         |             |
|-------------------------|-------------|
| Is this report notable? | Not Notable |
| Summary of notability   | N/A         |

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### **Initial complaint**

*The complaint was lodged with WASPA via the WASPA website and the below complaint was sent to respondent on the 07 July 2017.*

#### ***Does the complaint involve a specific mobile number?***

*No, the complaint isn't specific to a particular mobile number.*

***Please provide a detailed description of the complaint below. The more information you can provide WASPA with here, the more likely it is that we will be able to help you with your complaint***

*There is quite a lot of information so I have included this in the attached document named Air Cash Waspa Complaint Also note, we hesitant to lodge a complaint via WASPA at the \_me since the COO of Clickatell was the chairperson of WASPA and we did not feel as if we would be treated fairly. We are hoping that since he is gone that we can now get the matter resolved.*

***Does your complaint involve a specific print, radio or television advert? If so, please provide more information about where and when you saw or heard the advertisement***

*No*

#### ***Supporting documents\_ Files***

*Attached*

***Additional information:***

***Who have you already contacted regarding this problem?***

*The WASPA member responsible for the billing.*

***Please confirm any WASP affiliation you may have below***

*I am employed, or otherwise associated with one of WASPA's member companies.*

***WASPA's member company with which I am associated***

*AirCash*

***Good faith declaration***

*I hereby declare that the information provided in this complaint is to my knowledge true and correct, and that I am submitting this complaint in good faith.*

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***Member's response***

*The respondent provided a response to the complaint on 20 July 2017.*

In summary, the Respondent states the following:

Introduction:

The complaint is not within the scope of the WASPA Code of Conduct and failure to lodge the complaint within 6 months is fatal to the complaint. WASPA has no jurisdiction to decide on business to business disputes. We request that WASPA confirm clause 24.6 and 24.11 and provide written reasons for decisions.

1. Contractual dispute for a claim for payment of revenue share, the validity of the suspension of a service and finally the termination of the service in terms of an agreement. Dispute is made by

a WASPA Member holding contract with another WASPA Member. Reference is therefore made to clauses 1.3 and 1.4 of the Code of Conduct and the interpretation is that the code is aimed at providing members of the public with a forum to complain against WASPS and not intended to regulate contractual disputes.

2. There is an ongoing criminal investigation and court case pending against the complainant relating to the alleged commission of fraud (under provided CAS no), such matter is pending in the Randburg Magistrates court (case number provided). We received a subpoena to provide information to the court. Clause 4.3 is stated, in that members must conduct themselves lawfully at all times.

3. There has been a delay of more than six months and the complaint was submitted 15 months later, the reason provided by the complainant is the allegation of influence on the adjudication process. Therefore the requirements of clause 24.6 has not been met.

4. Clause 24.11 is clear on issue of jurisdiction and the entire dispute arose outside of the scope and mandate of WASPA.

5. Complaint was immediately made formal and there was no opportunity to raise the issues raised above, the merits of the complaint should not be accepted by WASPA, neither should it be placed before an Adjudicator.

6. We request that the procedural questions of whether the complaint was lodged timeously and whether WASPA has the jurisdiction to hear that matter be separated from the Substantive issued identified in the complaint and that a final decision is necessary from a WASPA appeal panel be obtained on these issued before the merits of the matter are considered.

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### **Complainant's response**

*The complainants' response was sent to complainant for a response on 24 July 2017 and on the 28 July 2017, the Complainant provided the below response:*

We have clearly shown that we are a customer of Clickatell and the reason for the late Submission has been highlighted as well so we feel as if our complaint has enough information for the adjudicator so we have nothing further to add at this moment.

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### **Member's further response**

*The respondent then made a further response on the 31 July 2017, as advised below:*

We have nothing further to add. We believe the feedback below does not require additional information.

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### **Sections of the Code considered**

The following sections of the WASPA Code of Conduct, version 14.7, were considered:

5.1. Members must not offer or promise services that they are unable to provide.

5.2. Services must not be unreasonably prolonged or delayed.

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### **Decision**

Allow me to begin my submission with the assumption made by the Complainant that the Adjudication process is somewhat flawed / biased, it must be noted that as an Adjudicator , my view is legal and taken from the necessary legislative guidelines as well as the founding document which is the code of conduct. Adjudicators are independent third parties who adjudicate based on the facts before them, as I have done in this instance. We are in no way partial to a particular WASP due to the individual or individuals who may have influence or not, in WASPA. All complainants must be ensured that their matter is dealt with ethically and without undue prejudice.

My submission, after careful consideration and analysis of the facts is that I as an Adjudicator have no jurisdiction to make a determination in this matter and therefore this matter falls to be dismissed. My reasoning must be accepted in terms of the Code of Conduct which in its preamble states, *“The WASPA Code of Conduct was developed as part of an industry self-regulatory framework.”* It is neither a tribunal nor a court of law. I am therefore obligated to ensure that reference is made to Clause 24.11(a) of the Code of Conduct, in that it is clear on this issue, *WASPA will not consider a complaint if it: (a) falls outside the jurisdiction and mandate of WASPA.*

This complaint has essentially the complainant, the respondent and the network. The WASP being the body / organization dealing directly with the network in this instance, VODACOM and in terms of the Customer Care Service Level Agreement between a WASP and VODACOM, the WASP must always have honest and fair dealings with their Service Users. In the instance presented before me the Respondent was the one with a direct line to the service users, I reserve to say no more regarding this matter as here I submit that the issue for determination in this matter is one that derives from the Law of Contract and in South Africa (outside of arbitration) litigation is more adept at ensuring an amicable outcome of the dispute. *In the broadest definition, a contract is an agreement between two or more parties who enter into it with the serious intention of creating a legal obligation. Contract law provides a legal framework within which persons can transact business and exchange resources, secure in the knowledge that the law will uphold their agreements and, if necessary, enforce them.* [[https://en.wikipedia.org/wiki/South\\_African\\_contract\\_law](https://en.wikipedia.org/wiki/South_African_contract_law)].

In consideration of Adjudication Report #10048, I align myself with the decision and / or forte of the Adjudicator who stated:

*“In my view the SP has no contravened the Code or the Advertising Rules and in terms of that should not be sanctioned. I find myself in a difficult position in determining whether or not I am mandated and empowered to decide anything differently based on the third allegation set out above, namely that the international routing of these SMS’s was in contravention with Vodacom’s contract with the SP. I have come to the conclusion that the Code itself does not deal with the international routing of Vodacom messages and that same would be a private contractual relationship between Vodacom and the SP. WASPA is not a party to the contract nor is it privy thereto. As a WASPA adjudicator I have no jurisdiction to rule on the contract and to pronounce a verdict on the SP into his forum based on an allegation around a contract that I have not seen*

*and that is not part of the evidence in this dispute would be exceeding my powers and accordingly ultra vires. Should the SP be breaching their contract with Vodacom that is a matter for Vodacom and Vodacom's legal team to address."*

My further submission is that the contract entered into between the Complainant and the Respondent is not a contract wherein WASPA is a party ( *A third-party beneficiary is an individual / company for whose benefit a contract is created even though that person/company is a stranger to both the agreement and the consideration* ) and an Adjudicator cannot make a determination herein. The reason for this is that the attachments provided by the complainant in summary amount to, outstanding payment of revenue share by the Respondent, the validity of the suspension of a service (by the Respondent in accordance with the agreement held between it and the Network) and finally the termination of the service in terms of an agreement (again between the Respondent and the Network).

I am of the view that there has been no contravention of clauses 5.1 and 5.2 of the Code of Conduct.

In light of the foregoing, the complaint is accordingly dismissed.

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### **Sanctions**

None.

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### **Matters referred back to WASPA**

NONE.

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