



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#40485
Cited WASPA members	Smartphone T/A Smartcall (0039)
Notifiable WASPA members	n/a
Source of the complaint	Public
Complaint short description	Unsolicited marketing message
Date complaint lodged	2018-11-07
Date of alleged breach	June – November 2018
Applicable version of the Code	15.5
Clauses of the Code cited	16.4, 16.9, 16.10 (a;b), 16.11, 16.12, 16.13, 16.15, 16.16. Breach: 16.12
Related complaints considered	None
Fines imposed	R5 000 of which R2 500 suspended for 12 months
Other sanctions	
Is this report notable?	Not notable
Summary of notability	

1. Initial complaint and responses

- 1.1. On the 7th of November 2018, the complainant, Mr Willi Badenhorst, lodged a complaint against the member in the following terms:

Unsolicited SMS' sent, no option to opt out to this nonsense.

I'm being spammed by Smartcall since 21 June 2018. Just called their offices and spoke to Harold. Harold had a patronising and condescending tone when trying to resolve this. Told me that the department who is sending these SMS' do not take calls.

I called SmartCall on 011 507 4777 to be removed, but was met by resistance with Harold in their contact centre.

- 1.2. The complainant attached a screenshot of the SMS received, which is attached hereto as Annexure A.
- 1.3. The complaint was sent to the member on the 9th of November 2018.
- 1.4. On 9 November 2018, the complainant sent a further response to WASPA informing it that the member's representative had contacted him and apologised. He indicated that he noted the apology but still required WASPA to investigate the matter.
- 1.5. The member acknowledged receipt of the complaint on 10 November 2018 and informed WASPA that they spoke to the complainant on 9 November 2018 and were investigating the matter.
- 1.6. On 12 November 2018 the complainant sent a further response to WASPA noting that the member's representative had again contacted him telephonically to apologise and inform him that the person who took his call at the call centre had been given a written warning and sent for additional training. The complainant alleged that the member's telephonic contact bordered on harassment and requested the complaint be escalated to formal.
- 1.7. The member requested an extension to provide a response to the informal complaint, which extension was not granted. The member thereafter entered its response to the informal complaint on 19 November 2018.
- 1.8. The member's response, which was sent to the complainant on the same day, is summarised as follows:
- 1.8.1. The member received a call from the complainant to remove his number from its database as he alleged that the messages he was receiving are spam.
- 1.8.2. The call centre agent agitated the complainant by asking too many questions, however, the member advised that it removed the complainant's number from its database and thereafter a representative called him to apologise for the inconvenience caused when he spoke to the call centre agent.

- 1.8.3. The member indicates that it believes the matter has been resolved with the complainant as it has been explained to him why he received the messages in the first place and they confirmed his removal from the database. It is alleged that the messages sent to the complainant were not spam messages but Vodacom product service messages to a Vodacom Prepaid customer. All the messages sent included the identifier informing the receiver of who was sending the message and how to contact them. The member further states that it provides these Vodacom products to all Vodacom Prepaid customers.
- 1.8.4. The member further states that it does have appropriate procedures to facilitate the receipt of a demand from a user to opt out of messages received and alleges that the complainant did not send in any request to opt out of the messages. The first communication it received from this user to stop any messages was when he contacted the call centre, after which the user was immediately removed from the database.
- 1.9. The complainant responded on 19 November 2018 indicating that he is not satisfied with the member's response and that he is not a client of the member, did not sign up to their mailing list and did not give permission to receive any direct marketing from the member. The complainant further states that he is on the National Opt-out List and alleges the member did not verify this information before contacting him.
- 1.10. The complainant admits that he did not send an opt-out request to the direct messages as it costs money to unsubscribe and the member did not provide opt-out instructions.
- 1.11. On 21 November 2018, this complaint was escalated to a formal complaint. The member requested, and was granted, two extensions to the deadline to respond on the basis that its legal department was looking into the matter.
- 1.12. The member entered its response to the formal complaint on 21 December 2018.
- 1.13. In its response, the member indicated that during or around October 2014, Nashua Mobile closed its cellular business and all of its Vodacom subscribers were moved across to the member. As a result of this, all Nashua Mobile Vodacom Prepaid Customers, including the complainant, became customers of the member. They also informed the complainant that the messages which he had received were Vodacom Service Messages and were sent to him as a result of the fact that he is an existing Vodacom pre-paid subscriber and a customer of the member by virtue of the transfer from Nashua Mobile to the member.
- 1.14. The further relevant portions of the response will be dealt with in the decision below.
- 1.15. The member's response was sent to the complainant on 28 December 2018, where after he responded on 7 January 2019. The complainant indicated that he cancelled his contract with Nashua and went to a prepaid service before Nashua closed down and as such cannot be a customer of the member. He also further states that the "service messages" sent are all of a commercial, marketing or competition nature.
- 1.16. The members final response on 11 January 2019 reiterates that that when the complainant migrated to prepaid, Nashua Mobile was still his service provider and therefore he is a customer of theirs through the migration. They further allege that the service messages sent to the complainant all relate to similar products and services to which he is subscribed and accordingly

they were entitled to send the messages provided they adhered to the proviso's in the WASPA Code of Conduct, which they believe they did.

2. Sections of the Code considered

- 2.1. As the conduct complained of took place from June 2018, version 15.5 of the WASPA Code of Conduct applies to this complaint.
- 2.2. The complainant alleges that the member has infringed clauses 16.4, 16.9, 16.10 (a;b), 16.11, 16.12, 16.13, 16.15 and 16.16 of eth Code of Conduct, which read as follows:

Right to restrict unwanted direct marketing

16.4 *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").*

Rights of consumers regarding direct marketing

16.9. *A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.*

16.10. *A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:*

(a) *has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and*

(b) *has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.*

16.11. *A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.*

16.12. *Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and*

an address or other contact details to which the recipient may send a request that such communications cease.

Disclosure of source of contact details

16.13. *Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.*

Reply STOP option for SMS messages

16.15. *If technically feasible, a recipient must be able to opt out of any further direct marketing messages sent by SMS by replying to a message with the word 'STOP'. If this is not technically feasible then clear instructions for opting out must be included in the body of each marketing message.*

16.16. *If the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the member must honor the opt-out request as if the word 'STOP' had been used.*

3. Decision

3.1. "Direct marketing" is defined in clause 16.2 of the WASPA Code as follows:

"to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or (b) requesting the person to make a donation of any kind for any reason"

3.2. I do not agree with the initial submissions made by the member that the SMSes sent to the complainant were "service messages". It is clear from the content of the messages that the member was "promoting" or "offering to supply" its services to the complainant. Moreover, the fact that such a promotion of offer to supply may be indirect brings such product-linked messages within the ambit of the definition. I hold that the messages are indeed direct marketing messages.

3.3. To deal with the relevant clauses in order:

Clause 16.4

- 3.4. The member submitted that it does have the required procedure to facilitate the receipt of an opt-out request. This is also apparent from the fact that the member received and processed the complainant's request to unsubscribe – notwithstanding that its customer service may have been found wanting.
- 3.5. It is also noted that the obligation to have such a procedure in place is distinct from the obligation to provide instructions on how to utilise it in a direct marketing message and the failure to include the instructions in the message do not fall within the ambit of clause 16.4.
- 3.6. I therefore found no breach of Clause 16.4.

Clauses 16.9, 16.10 and 16.11

- 3.7. The provisions of clauses 16.9 and 16.10 qualify clause 16.11, which is mandatory and capable of infringement. Clause 16.11 draws on the provisions of clauses 16.9 and 16.10 to determine whether direct marketing can be engaged in.
- 3.8. There is no suggestion that the complainant gave either Nashua or the member his consent to send him direct marketing. From the tone of his complaint I find it most unlikely that he would have done so. Hence the member cannot rely on clause 16.9.
- 3.9. The member contends that as the complainant was “moved across” to it as a subscriber when it acquired Nashua Mobile's business, and despite the complainant having converted to a pre-paid customer before transfer it remains on of “their” customers.
- 3.10. The complainant avers that he cancelled his contract with Nashua before any transfer took place, and moved to a pre-paid arrangement (by which presumably he means his relationship thereafter was directly with Vodacom. According to the complainant then he cannot be said to have been transferred in this way.
- 3.11. If we assume for the purposes of argument that the customer had initially been a customer of the member, and had cancelled his contract with them and gone onto a pre-paid basis (whether this pre-paid arrangement was through the member or directly with Vodacom), then in terms of clause 16.10, the member could have lawfully sent “direct marketing” to the complainant on the basis that he had given them his contact details in the context of providing a service, and that he was and is given the opportunity to object to the use of such details to send him direct marketing.
- 3.12. In this case however the member contends that the complainant has been “transferred” to it. I have no reason to doubt that Nashua Mobile transferred its subscribers to the member, but I have no information on what terms this transfer was made. I also have no reason to prefer either version of events: I cannot make a decision based on the evidence as to whether the complainant converted to a pre-paid customer with a direct relationship with Vodacom or whether he continued to be subject to any relationship with the member as a “reseller”, whether knowingly or not.
- 3.13. In the event I must give the member, as the “accused” in this matter, the benefit of the doubt: that the complainant's details were transferred to it as part of a proper cession of an agreement, that it took the complainant over as a subscriber, and that it was entitled to send the complainant direct marketing. This satisfies the requirements of clause 16.10 (a).

- 3.14. It appears that the complainant was given an opportunity to object to the continued use of his contact details for this purpose, as he contacted the member's call centre and was in fact removed from their database. This satisfies the requirements of clause 16.10 (b).
- 3.15. Hence, I cannot find a breach of clause 16.11.
- 3.16. Note that the National Opt-out List (by which I assume the complainant means the National Opt-Out Database operated by the DMASA) in its current form is not the same as the opt-out list contemplated in clause 16.5(b).

Clause 16.12

- 3.17. The messages listed in Annexure A are all sent from the same identifying number, however not all the messages contain the identity of the member. For example, the SMSes received on 3, 13, 20 and 28 September read as follows:

*"Stand a chance to win R2 000 this week when you Buy Vodacom airtime, data or sms bundles by dialling *130*321#. T/Cs apply"*

- 3.18. Nowhere in the above message can it be seen what the identity of the sender is. The member insists that I rely on the fact that all the messages are sent from the same number but that is not the context of this clause. However, clause 16.12 also allows messages to contain the identity of the person on whose behalf a message is sent (Vodacom in this case). So far so good.
- 3.19. Clause 16.12 also requires that an address or contact details be provided in message which would allow recipients to unsubscribe. In the case of the SMSes sent in the member's name a URL is given, and this may have contained unsubscribe information (I did not see it necessary to check given what follows). However, in the case of the Vodacom SMSes, no such address or contact details are given as required by clause 16.12.
- 3.20. Accordingly, I find a breach of clause 16.12.

Clause 16.13

- 3.21. This clause has two requirements: that the member should be able to identify the source from which it obtained the complainant's contact details, and (in this case) to furnish proof that such details were provided in the context of the sale of a product or service.
- 3.22. The member gave the origin of the complainant's contact details when asked.
- 3.23. The complaint agrees that he was at one stage a subscriber to Nashua Mobile, and this establishes the existence of a relationship between Nashua and the complainant – it is proof enough of such a relationship as contemplated in this clause. As I have discussed above, I am prepared to accept the member's contention that it took over the complainant as a subscriber from Nashua Mobile.
- 3.24. I do not find a breach of clause 16.13.

Clause 16.15 and 16.16

- 3.25. The member confirmed that recipients of direct marketing communications can reply 'STOP' to opt-out. The complainant acknowledged that he did not try and opt-out by using this technique.
- 3.26. Further, the member confirmed that all requests to opt-out of receiving any messages are processed irrespective of the exact word used.
- 3.27. I found no breach of Clauses 16.15 and 16.16.
- 3.28. Based on the foregoing:
- 3.28.1. The complaint in respect of clauses 16.4, 16.9, 16.10, 16.11, 16.13, 16.15 and 16.16 of the WASPA Code of Conduct is dismissed.
- 3.28.2. The complaint in respect of clause 16.12 is upheld.

4. Sanctions

- 4.1. In determining the sanction, I take account of the member's prior record. There have been no formal complaints against the member prior to this complaint.
- 4.2. Consequently, the following sanctions are made against the member for the infringement of clause 16.12 of the WASPA Code of Conduct:
- 4.2.1. A fine of R 5 000.00 of which R 2 500.00 is payable immediately and R 2 500.00 is suspended for 12 (twelve) months, provided that the member does not infringe any of the provisions related to unsolicited direct marketing during this period.
- 4.3. I do not have sufficient information in the supporting documentation to this complaint to make a finding on the nature of the transfer of subscribers from Nashua Mobile to the member – I do not know if the member stepped into the shoes of Nashua Mobile through a formal assignment or whether the arrangement was somewhat more casual. Whatever the case, I strongly advise the member to ensure that when direct marketing to former Nashua Mobile subscribers that it complies with both the provisions of the WASPA Code of Conduct and the Consumer Protection Act.

5. Matters referred back to WASPA

- 5.1. None

Annexure A

You are invited to join SmartClub(<https://www.smartclub.co.za>), a SmartCall rewards portal where Vsp2Users gets rewarded more.

2018/07/31, 09:39

Pay as little as R1.32 per GB for high speed pre-paid LTE internet. No contracts, no paper work. Visit www.smartcall.co.za/store TC's Apply

2018/09/03, 11:11

Stand a chance to win R2 000 this week when you Buy Vodacom airtime, data or sms bundles by dialling *130*321#. T/Cs apply

2018/09/13, 12:42

Stand a chance to win R2 000 this week when you Buy Vodacom airtime, data or sms bundles by dialling *130*321#. T/Cs apply

2018/09/20, 12:29

Stand a chance to win R2 000 this week when you Buy Vodacom airtime, data or sms bundles by dialling *130*321#. T/Cs apply

2018/09/28, 14:34

Stand a chance to win R2 000 this week when you Buy Vodacom airtime, data or sms bundles by dialling *130*321#. T/Cs apply

Today, 15:21

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