



## Report of the Adjudicator

Complaint number	<b>#41937</b>
Cited WASPA members	<b>Infobip Africa (0143)</b>
Notifiable WASPA members	<b>n/a</b>
Source of the complaint	<b>Public</b>
Complaint short description	<b>Misleading SMSes and harassment</b>
Date complaint lodged	<b>2019-09-20</b>
Date of alleged breach	<b>2019-08-29</b>
Applicable version of the Code	<b>16.8</b>
Clauses of the Code cited	<b>4.2., 4.3, 4.6., 4.7., 4.9 (c)., 5.4., 5.5., 5.15., 5.16., 17.1., 24.11</b>
Related complaints considered	<b>350; 3026; 4500; 6347; 10759; 20916; 23479</b>
Fines imposed	<b>R 2 500.00 fine for breach of clause 17.1. Suspended for twelve months, triggered by any other breach of these clauses in this period.</b>
Other sanctions	<b>n/a</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>n/a</b>

## 1. Initial Complaint

1.1. On the 20<sup>th</sup> of September 2019, the complainant lodged a complaint against the member in the following terms:

1.1.1. His ex-wife received continuous unsolicited SMSes on her mobile number 082 454 [redacted] from a law firm called Petterson & Pandaram Attorneys (“P&P Attorneys”) from the number 087 [redacted] during August 2019.

1.1.2. P&P Attorneys were supposedly collecting a debt on behalf of Telkom and the messages received contained information regarding a summons being issued and an emoluments order being granted against the complainant.

1.1.3. On 29 August 2019, the complainant had a telephonic discussion with Ms Bulelwa Hlophe, the Collections Paralegal at P&P Attorneys, and requested that she remove his ex-wife’s number from their system. It is alleged that Ms Hlophe admitted verbally to the complainant that the content of the SMSes were fraudulent attempts to illicit a response or action from the debtor with regards to the outstanding debt. The complaint requested a recording of this telephonic discussion but received no response from P&P Attorneys.

1.1.4. On 11 September 2019, the complainant in writing again requested that Ms Hlophe provide him with a copy of the conversation and to remove his ex-wife’s number from their system. He also indicated to P&P Attorneys that he was concerned that their system had been hacked and their consumer data had been leaked as they confirmed that no summons was issued, or emoluments order granted, but the SMSes were still being sent out. He requested the matter to be escalated to management, but he once again received no response to this.

- 1.1.5. On 20 September 2019, his ex-wife received seven further messages in the space of two minutes from P&P Attorneys and he submitted a further written request to have the number removed from their system. He alleged that no action has been taken forthwith by P&P Attorneys.
- 1.2. The complainant attached a screenshot of the SMSes received, which is attached hereto as Annexure **A**.
- 1.3. The complaint was sent to the member on the 26<sup>th</sup> of September 2019.

## **2. Member's Response**

- 2.1. The member acknowledged receipt of the complaint on 26<sup>th</sup> of September 2019 and informed the WASPA Secretariat that it had brought the complaint to its client's (P&P Attorneys) attention and requested the client to contact the complainant. The member further advised that it had given its client 24 hours to provide it with feedback and in the case where it did not receive such feedback, it would block the number on its end from receiving any further communication.
- 2.2. On the 27<sup>th</sup> of September 2019, the member provided its response to the informal complaint and advised that its client had dealt with the issue and communicated to the complainant. The member confirmed that it did not block the number as previously proposed based on the feedback from its client.
- 2.3. The member attached email correspondence between P&P Attorneys and the complainant and requested that the WASPA Secretariat advise it whether it should take any further steps.
- 2.4. The relevant information from the correspondence between P&P Attorneys and the complainant is summarised as follows:

- 2.4.1. On 29 August 2019, Ms Hlophe from P&P Attorneys sent the complainant an email attaching his outstanding Telkom invoice. The complainant responded confirming receipt and requested a copy of the audio recording of the telephone call they had, as well as a copy of the summons.
- 2.4.2. On 11 September 2019, the complainant sent P&P Attorneys a further email advising that Ms Hlophe indicated in their previous phone call that she simply invented the threat of summons to try and get clients to pay debts that they have been handed over for and that the complainant was assuming that it is the same strategy with the latest SMS received from P&P Attorneys saying that an emolument order has been granted.
- 2.4.3. The complainant, in a further email, alleged that Ms Hlophe said that the SMSes referencing summons and emolument order did not come from the office of P&P Attorneys and he suggested that she alert the management that somebody was fraudulently sending out messages purporting to be from P&P Attorneys. He also advised that he would alert the Legal Practice Council that P&P Attorneys have been hacked and their client data had been leaked.
- 2.4.4. On 20 September 2019, the complainant sent another email advising that it had been brought to his attention that P&P Attorneys have again spammed his ex-wife's phone number with multiple fraudulent SMSes and demanded again that they remove the number from their records.
- 2.5. On 27 September 2019, the managing partner of P&P Attorneys, Ms Sagree Pandaram, sent the complainant an email stating as follows:
  - 2.5.1. She attached two audio files detailing the telephonic communications the complainant had with Ms Hlophe.

- 2.5.2. She advised that the SMSes sent to the complainant's ex-wife (on the 20<sup>th</sup> of November) were a result of human error coupled with a system fault. She apologised for the inconvenience created and requested whether the complainant required an apology.
- 2.5.3. She further stated that P&P Attorneys are not a debt collection agency but a law firm and would, if necessary, institute action for the recovery of monies owed to its clients. They do not merely "threaten" to do so. She alleged that the complainant's statements are incorrect and simply false. She confirmed that prior to instituting court action, they do attempt to communicate the debtor's indebtedness by virtue of a series of SMSes and that all of the SMSes that the complainant received were indeed dispatched by their offices, and that none of the content is denied, shied away from or inaccurate. Some of the SMSes are designed to instil, strongly encourage, and warn debtors of the impending dangers of avoiding a debt for which they have not supplied a proper defence to.
- 2.5.4. She confirmed that the number 082 454 [redacted] was expunged from their records on 20 September 2019 and therefore the complaint was submitted to WASPA without receiving confirmation that they had in fact complied with the complainant's request.

### **3. Complainant's Response**

- 3.1. The complainant responded on 30 September 2019 and indicated that he is not satisfied with the member's response and that, among other things, he had requested a written apology from P&P Attorneys and that the member disclose how his ex-wife's cellphone number was added to the database (as per the WASPA Code of Conduct) as he suspects it was manually added without her permission.

3.2. The compliant was escalated to a formal complaint and the complainant provided a further update to the WASPA Secretariat on 2 October 2019 as follows:

3.2.1. P&P Attorneys' junior paralegal provided a written apology to his ex-wife; however, they did not bother to personalise it. They advised that somebody incorrectly entered the wrong information resulting in the various messages on the 20<sup>th</sup> of September 2019;

3.2.2. P&P Attorneys have declined to provide information on how his ex-wife's number was added to their database as they alleged that they are protected by attorney/client privilege and are not bound by the WASPA Code of Conduct;

3.2.3. They confirmed in writing that summons was never issued despite the content of their messages;

3.2.4. His ex-wife was added to their database to harass / intimidate him and it was not done in error. He alleged this is an invasion of her privacy;

3.2.5. No WASPA member should be allowed to distribute false / misleading statements or allow their systems to be abused by having people added to a database without their consent.

#### **4. Member's Further Response**

4.1. The member entered its response to the formal complaint on 6 November 2019, which response is summarised as follows:

4.1.1. The member acknowledged that the SMS messages were submitted via its platform to the mobile number '082 454 [redacted]'.

- 4.1.2. It found that the MT Messages originated from its client, Voyagernetz; a tailor-made debt collection and Accounts Receivable Management software provider. Voyagernetz makes use of the member's platform to convey their messages through the member's numbering range for incoming and outgoing messages in accordance with clause 17.1 of the WASPA Code of Conduct Section, which requires members to offer an opt-out facility for communications towards subscribers or end-users.
- 4.1.3. Voyagernetz is the service provider for RPP Law T/A P&P Attorneys and they send outgoing SMS messages through Voyagernetz' platform.
- 4.1.4. The complainant, as a debtor, is refusing to pay an owed debt, despite being advised by P&P Attorneys that summons is imminent. It is preposterous to bar P&P Attorneys from communicating to a debtor repeatedly.
- 4.1.5. The fact that there is a legitimate claim against an identified debtor/defendant should immediately cast aspersion on the motivation and authenticity of his complaint to WASPA. It is alleged that the complainant is not acting in good faith. None of the SMSes were manufactured or invented to scare him, they are correct and accurate.
- 4.1.6. The seven messages sent on 20<sup>th</sup> of September 2019 was the only error committed and it was human error. P&P Attorneys explained that the incorrect number was inserted and that between P&P Attorneys and Voyagernetz, they cannot say how it occurred that a multitude of SMSes were sent, aside from saying it was a computer/tech glitch.
- 4.1.7. The ex-wife's number was immediately removed on the 20<sup>th</sup> of September 2019 and no further SMSes were sent out.

4.1.8. The WASPA Code of Conduct states in section 17.2 and 17.3 that members are not obliged to honour an opt-out or block request from communications that are necessary for the conclusion of or performance of a contract to which the recipient is a party or for communications required by law.

4.1.9. It is alleged that none of the raised WASPA Code of Conduct clauses were breached by either the member or P&P Attorneys.

4.1.10. The member has taken the necessary steps to ensure that both Voyagernetz and their client, P&P Attorneys, become WASPA Affiliate Members as they both should and need to adhere to the WASPA Code of Conduct in line with their messaging service agreements.

## **5. Complainant's Further Response**

The complainant submitted a further response on 12 November 2019 indicating that if it is possible to obtain confirmation that P&P Attorneys have signed up to WASPA as a member and will be bound by the WASPA Code of Conduct, he would consider the matter as having been given a fair hearing.

## **6. Member's Final Response**

6.1. The member submitted its final response on 27 November 2019 and indicated that it has reviewed and consulted on the complainant's response and are of the opinion that it acted in good faith and has taken reasonable steps to ensure that its clients provide services in a manner consistent with the requirements of the WASPA Code of Conduct and further to ensure that its clients are covered by the Code of Conduct, and are aware of the requirements of the Code of Conduct.



- 6.2. The member requested that clause 24.11 of the Code of Conduct be considered as it deems that the complaint:
- a) falls outside the jurisdiction and mandate of WASPA,
  - b) is *prima facie* without merit, or
  - c) is vexatious, taking into account factors such as malicious motive and bad faith.

## **7. Sections of the Code considered**

- 1.1. As the conduct complained of took place on 29 August 2019, version 16.8 of the WASPA Code of Conduct applies to this complaint.
- 7.1. It is alleged that the member has infringed clauses 4.2., 4.3, 4.6., 4.7., 4.9 (c)., 5.4., 5.5., 5.15., 5.16., and 17.1 of the Code of Conduct. Clause 24.11 is also relevant. The clauses read as follows:

### *Professional conduct*

- 4.2. *Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.*

### *Lawful conduct*

- 4.3. *Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.*

### **Content control**

- 4.6. *Members must not knowingly host, transmit, publish or link to illegal content.*
- 4.7. *If a member becomes aware of illegal content under that member's control, the member must, immediately suspend access to that content. Where required to do so by law, the member must report the illegal content to the relevant enforcement authority.*

## **Decency**

4.9. *Members must not provide any services or promotional material that:*

*(c) induces an unacceptable sense of fear or anxiety;*

## **Provision of information to customers**

5.4. *Members must have honest and fair dealings with their customers.*

5.5. *Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*

## **Privacy and confidentiality**

5.15. *Members must respect the constitutional right of consumers to personal privacy and privacy of communications.*

5.16. *Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.*

## **Opt-out facility**

17.1. *With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.*

## **Lodging of complaints**

24.11. *WASPA will not consider a complaint if it:*

*(a) falls outside the jurisdiction and mandate of WASPA,*

*(b) is prima facie without merit, or*

*(c) is vexatious, taking into account factors such as malicious motive and bad faith.*

## 8. Decision

8.1. Having reviewed the complaint, supporting communications offered by the complainant and the member's responses, I have reached the conclusions set out below.

8.2. *Do the debt collection SMSes fall within the ambit of the WASPA Code of Conduct?*

8.2.1. The SMSes sent out by a law firm to a debtor, cannot be defined as either a subscription service or notification service as described in clauses 15.1 and 15.2 of the Code. These SMSes serve the same purpose as it would an email being sent to the debtor or a telephone call being made to the debtor. The law firm, on behalf of a creditor, is trying to collect a *prima facie* debt owing by the complainant, which fact is not disputed by the complainant herein.

8.2.2. In Complaint 3026, the adjudicator found that the debt collection SMS message received did not constitute "spam" as defined in the Code and held that "*a prior commercial relationship existed between the complainant and a creditor, which has been ceded or otherwise been handed to the IP*" and that this created a direct relationship between the member and the complainant.

8.2.3. Debt collecting is not the type of "service" envisaged by the Code. The law firm in this case is merely using the member's platform to assist it in sending these SMSes to debtors in bulk. It is not a "service" the complainant signed up for as a "customer".

8.2.4. These SMSes would however fall within in the ambit of "Electronic communication" as defined in clause 16.3, however, this clause was not cited in this complaint and the complaint raised was not one of "unsolicited direct marketing".

8.2.5. Based hereon, and precedent, debt collection SMSes or communication do not fall within the ambit of clauses 15.1 and 15.2 of the WASPA Code of Conduct.

8.3. *Does the continuous sending of debt collection SMSes constitute harassment?*

8.3.1. The adjudicator in Complaint 3026 held that the member had breached the Code in that it failed to honour requests from the complainant that it cease sending SMS debt collection requests. The adjudicator held that these types of messages should not be used in a manner that constitutes harassment of the recipient. He/she held that *“continuing to send SMS reminders, without actually proceeding with collection or honouring the complainant’s request to desist, amounts to harassment.”*

8.3.2. In Complaint 10759, the adjudicator found that where the volume of messages being received by the complainant is so much that an adjudicator is able to objectively identify harassment of a recipient, this may well constitute a breach of provisions relating to general conduct of the member insofar as this section requires a member to act professional when dealing with members of the public.

8.3.3. In this case, it cannot be held that the volume of messages received by the complainant is of such a nature that it can be termed “harassment”. The issue raised that his ex-wife received seven messages in under two minutes has been dealt with as a human error and the law firm apologised for this action, which apology the complainant accepted.

8.3.4. Under the circumstances, I do not find the law firm’s actions to be harassment.

8.4. *Can the member be held directly liable for the actions of its clients and its clients’ clients?*

8.4.1. I considered the wording of clause 3.7 of the Code which states as follows:

*“A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets 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.”*

8.4.2. Based hereon, it is clear that the member remains liable for breaches of the Code resulting from services offered by its client, Voyagernetz, as this client is not a WASPA member.

8.4.3. As such, I am bound to consider the client and P&P Attorneys’ actions as the actions of the member.

8.4.4. The member raised that it has taken reasonable steps to ensure that its clients act within the ambit of the Code, however, no proof hereof or further details were provided to the writer or attached. However, practically speaking, the member could not reasonably have been expected to police the content of every SMS sent by its client to ensure that it contains authentic and reliable content. Not only is this task unfeasible but the member also does not have the insight and legal expertise to determine whether the content of such SMSes is truthful or to determine whether a person’s right to privacy has been infringed by such content.

8.4.5. Based hereon, the member cannot merely broadly be held liable for the faults of its client in all circumstances.

8.5. To deal with the relevant clauses of the Code raised in this matter in order:

8.6. Clause 4.2

8.6.1. From the various responses provided by the member herein, its dealings with both the complainant and WASPA and the consideration on whether these SMSes constitute harassment, I cannot find that the member acted in an unprofessional manner.

8.6.2. I do not find a breach of clause 4.2.

8.7. Clause 4.3

8.7.1. No allegation was made as to the member not conducting itself lawfully and from the facts provided, I cannot see any illegal activity.

8.7.2. I do not find a breach of clause 4.3.

8.7.3. If the complainant believes that the debt collection strategy used by P&P Attorneys is inappropriate or illegal, he should take this matter up with the relevant branch of the Legal Practice Council.

8.8. Clauses 4.6 and 4.7

8.8.1. No allegation was made as to the hosting or publishing of illegal content. I cannot find a breach of either clause 4.6. or 4.7.

8.9. Clause 4.9 (c)

8.9.1. As already stated, the SMSes cannot be seen as a “service” in terms of the Code, and as such, I cannot find a breach of clause 4.9 (c).

8.10. Clauses 5.4 and 5.5

8.10.1. I do not believe that the complainant can reasonably be labelled a “customer” of the member under these specific circumstances, and as such, I cannot rule that there is a breach of clause 5.4.

8.10.2. The information dispatched in the SMSes can certainly be seen as false and an exaggeration as the complainant is threatened with legal action that has not actually been taken. Should P&P Attorneys have said that summons *will be* issued (as it did in the message on 20 September 2019), that is a different situation than saying a summons has already *been* issued (as it did in the message on 27 August 2019).

8.10.3. However, as the member had no means of verifying the content in the SMSes sent by its client, the member cannot reasonably be held liable for this breach.

8.10.4. Based hereon, I do not find that the member breached clause 5.5.

#### 8.11. Clauses 5.15 and 5.16

8.11.1. Firstly, it must be considered whether the member's client has breached the complainant's right to privacy by sending information regarding his outstanding debts to his ex-wife without his consent.

8.11.2. The messages received can certainly link the outstanding debt to the complainant and it is not acceptable for a law firm to contact family members or acquaintances when they are unable to get hold of the debtor. Based hereon, I do believe that the complainant's right to privacy has been breached.

8.11.3. Secondly, the member's client did not obtain the complainant's ex-wife's contact number with her consent and refused to inform her where they obtained her information.

8.11.4. The member had no means of verifying whether or not the content in the SMSes sent by its client breaches any privacy laws, nor was the member privy to whether the SMSes were sent to someone other than the complainant. The member cannot reasonably be held liable for this breach by its client.

8.11.5. It is noted that the member indicated that it had the opportunity to block the ex-wife's number from receiving any further messages when this issue was raised, and it decided not to do so under the circumstances. The fact that the member had the capacity to block the number and was willing to do this at some point does however not place an implied duty upon the member to do so.

8.11.6. Based hereon, I do not find the member to be in breach of clause 5.15.

8.11.7. As already established, the complainant is not a customer of the member, and as such there can be no breach of clause 5.16.

#### 8.12. Clause 17.1

8.12.1. In Complaint 4500, the Adjudicator held that, having found that a debt collection SMS was a "commercial message" for the purposes of the Code, it should accordingly provide an opt-out mechanism as also an identifier or originating number.

8.12.2. As the version of the Code considered for this matter does not include the definition of a "commercial message", the same line of thinking cannot be applied here, however, clause 17.1 specifically mentions "bulk SMS services" and I do believe this type of debt collection will fall within this ambit and as such, this clause needs to be complied with.

8.12.3. The complainant, upon request, has provided screenshots of the content of the SMSes received, attached hereto marked Annexure **B**. It is clear that the SMSes sent by P&P Attorneys do not contain a functional opt-out procedure nor the option to reply 'STOP' to the SMSes.

8.12.4. At this point, I also took into consideration the exceptions listed in clauses 17.2 and 17.3 respectively. It must be noted



that these exceptions do not circumvent the requirement in clause 17.1 that notifications must have an opt-out procedure, it merely states that there are certain circumstances in which the member will not be obliged to *honour* an opt-out request.

8.12.5. In this case, the complainant's ex-wife was not a party to the Telkom contract resulting in the debt owed, nor is there a requirement in our law that SMSes *must* be sent to a debtor. As such, I cannot see how these exceptions will apply even if there was a functional opt-out procedure in place.

8.12.6. Based on the above, I find a breach of clause 17.1.

### 8.13. Clause 24.11

8.13.1. I do not believe that this complaint falls outside of WASPA's jurisdiction or mandate, nor that it is *prima facie* without merit.

8.13.2. However, the member rightfully states that the complainant is aware of his outstanding debt which is the catalyst for the SMSes being sent by P&P Attorneys. It does seem that the complainant is trying to circumvent the attorneys' debt collection process by handing this matter over to WASPA, and this might be considered bad faith by the member. Notwithstanding this, the fact remains that the complainant had valid reasons to submit this complaint to WASPA.

8.13.3. I have in any case taken this clause into consideration when making my ruling as requested by the member.

## 9. **Sanctions**

9.1. In determining the sanction, I take account of the member's prior record. There have been a few formal complaints against the member prior to this complaint, however, none of the previous complaints relate to the same subject matter.

9.2. Consequently, the following sanctions are made against the member for the infringement of clause 17.1 of the WASPA Code of Conduct:

9.2.1. A fine of R 2 500.00 which is suspended for 12 (twelve) months, provided that the member does not infringe any of the provisions breached during this period.

9.2.2. The member is urged to enforce more stringent control over its clients who are not WASPA members.









## **10. Matters referred back to WASPA**

10.1. None

Edit



# Messages

-  **+27 872406532** 08:57 >  
WE HAVE TO DATE NOT HAD ANY...
-  **+27 872406534** 08:57 >  
Emoluments Order: The employer...
-  **+27 872406538** 08:57 >  
ASHTON MARC Contact P&P Atto...
-  **+27 872406505** 08:57 >  
You might have been listed on the...
-  **+27 872406502** 08:56 >  
Make payment on your Telkom ac...
-  **+27 872406517** 08:56 >  
PROCEED WITH SUMMONS ON R...
-  **+27 872406528** 08:56 >  
Banking details for Telkom payme...
-  **+27 872406523** 08:52 >  
Your outstanding Telkom account...

18:36 ↗

4G 🔋

< 62



+27 872406509 >

Text Message  
Tue, 27 Aug, 10:53

ASHTON MARC Summons has been issued and will be served on you. Please note that payment will interrupt service. Ref 40A010642. Tel [039 317 3094](tel:0393173094) P&P Attorneys

Yesterday 15:53

Emoluments Order: The employer of the judgment debtor is obliged to pay a portion of the debtor's earnings to the judgment creditor. Call [0393173094](tel:0393173094) 40A010642



Text Message



15:59

4G

95



+27 872406534

Text Message  
Fri, 20 Sep, 08:57

Emoluments Order: The employer of the judgment debtor is obliged to pay a portion of the debtor's earnings to the judgment creditor. Call [0393173094](tel:0393173094) 40A010642



Text Message



16:01 ↗

4G 🔋



+27 872406502 >

Text Message  
Fri, 20 Sep, 08:56

Make payment on your Telkom account by close of business today or SUMMONS will be issued and we will proceed. P&P Attorneys [0393173094](tel:0393173094) REF: 40A010642



Text Message

