



Report of the Appeals Panel

Complaint number	42784
Cited WASPA members	SMS Portal (Pty) Ltd (0139)
Notifiable WASPA members	N/A
Appeal lodged by	SMS Portal (Pty) Ltd (0139)
Type of appeal	Written Appeal
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	16.9
Clauses considered by the panel	3.5, 3.6, 3.7, 16.9, 16.10, 16.11 and 16.13.
Related complaints considered	41820 and 29916
Amended sanctions	None
Appeal fee	Appeal fee not to be refunded.
Is this report notable?	Not notable.
Summary of notability	N/A

Initial complaint

1. The Complainant was a client of Standard Bank Ltd. In 2010 he was declared insolvent. The court declaring the insolvency ordered that all of the Complainant's accounts had to be closed and claims raised against the insolvent estate.
2. On 18 February the Complainant received an SMS message from Standard Bank using the Member's services on his cell phone:
"Standard Bank will call you shortly with a valuable offer. Reply 1 to opt out of this offer. T&C's & Std SMS rates apply. Free & bundled SMS don't apply."
3. The Complainant's wife contacted the Member informally to obtain information on how the Complainant opted into receiving these SMS's, as provided for in clause 16.13 of the WASPA Code of Conduct. The Member's response was by way of a letter from consultants O'Keefe & Swartz, a client of the Member, who investigated the complaint on behalf of the Member. The letter makes the following submissions:
 - 3.1. It was pointed out that the Member was only the messenger, i.e. a conduit, for the messages of third parties.
 - 3.2. The marketing and promotion of financial products by O'Keefe & Swartz was not limited to their existing clients but was also on behalf of third parties. In this case it was Standard Bank.
 - 3.3. In terms of O'Keefe & Swartz's standard agreement with banks, their bank clients may forward to them existing customers to whom they are legally entitled to perform direct marketing activities.
 - 3.4. O'Keefe & Swartz refused to disclose the information requested as the information was regarded as confidential and disclosing it would be in breach of confidentiality.
 - 3.5. It was stated the O'Keefe & Swartz respect the customer's right to privacy and not to receive unsolicited marketing material. They accordingly undertook to add the Complainant's details to their do-not-contact list but required the Complainant's full names and identity number.
4. The Complainant was not prepared to provide this information to O'Keefe & Swartz with whom he had had no dealings. In addition, there are indications that Standard Bank retained the Complainant's personal details as he received regular calls from Standard Bank's lawyers claiming payment despite the insolvency proceedings.

Member's Response

1. The Member responded to the formal complaint by way of a lawyer's letter from Kerron Edmundson Inc. In the letter the following submissions are made:
 - 1.1. The member is compliant with all of the clauses of the WASPA Code of Conduct mentioned in the complaint, namely 4.3, 4.3A, 16.10, 16.11 and 16.13.
 - 1.2. The Member provides services to an entity called O'Keefe & Swartz, which in turn provides outsourced call center services to what they call a 'Bank Client', in this case Standard Bank. Since neither O'Keefe & Swartz nor Standard Bank are WASPs, they are not bound by the WASPA Code of Conduct. However, they are bound by the Member's terms and conditions of service.

- 1.3. Most WASPs are agents. Some WASPs initiate the messages themselves or directly through their own clients, but others, like SMS Portal, are reliant on large corporates which, in turn, work through their own agents. This relationship is still governed according to WASPA rules although these rules are incorporated contractually. In general WASPA rules reflect ethical practice, national legislation, regulations and codes. The requirement to obtain consent for direct marketing is contained in South African law, and the obligation to maintain confidentiality in relation to its clients, applies to financial institutions under various banking laws and policies.
 - 1.4. The Member submitted that the Complainant was correct in that Standard Bank had not removed his details from their system but used another system to generate bulk messages to its entire banking base, through its third- party agency, O'Keefe & Swartz. This arrangement was not within Member's control and neither could it have been foreseen that the Member's customer (Standard Bank) or their client (O'Keefe & Swartz) would disregard national law.
 - 1.5. The Member has not generated the content of the message and to the extent that its client, O'Keefe & Swartz, has generated the message it has done so on the understanding that its customer, Standard Bank, would be compliant with South African law.
 - 1.6. While the Member sent several thousand messages for O'Keefe & Swartz, this is the only complaint they have received in relation to one of their services.
 - 1.7. There are no other steps that can be taken by SMS Portal to remedy the situation, and it would be extremely unfair to penalise the company in these circumstances. It would be useful if WASPA could communicate the Code of Conduct to all financial institutions and other large corporates on behalf of its members, alternatively report Standard Bank to the ombudsman on behalf of the Complainant. Ultimately this is where the problem lies.
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Adjudicator's findings

The Adjudicator found as follows:

1. The Complainant who used to be a client of Standard Bank may or may not have given consent to marketing at the time that he was a client of Standard Bank. However, that relationship was terminated in terms of a court order in insolvency proceedings. Any consent Standard Bank may have had, lapsed on the termination of Standard Bank-client agreement.
2. In terms of clause 16.13 a member must, upon request of the recipient of a direct marketing message, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. This the Member commendably did, and it also informed the Complainant, namely that the messages was originated by Standard Bank using the services of O'Keefe & Swartz. However, the Member has been unable to 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 as required by clause 16.13.

3. In terms of clause 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 in clause 16.9 and 16.10. Underlying all of these clauses is the requirement that there must have been consent or implied consent to the direct marketing. In this instance there is no proof of any such consent.
4. There has therefore been a clear infringement of the provisions of clause 16.11 read with clauses 16.9, 16.10 and 16.11.
5. In terms of clause 3.5 members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA but is providing or marketing services covered by the Code of Conduct is aware of the requirements of the Code of Conduct. Additionally, clause 3.6 requires members to ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code. The Member claims to have done so in accordance with their relationship with O'Keefe & Swartz.
6. In terms of clause 3.7 a member is liable for any breaches of the Code 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 the Code, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.
7. The submissions on behalf of the Member were either made in ignorance of these provisions or it did not address them properly. The Member should have been aware of these provisions as they were fully addressed in a well-reasoned appeal panel decision of 18 November 2016 in complaints case no 29916.
8. Other than some vague submissions on what steps the Member has taken to ensure compliance by their client O'Keefe & Swartz, the Member has not provided any substantial evidence of reasonable steps that they have taken to ensure compliance. There is therefore not a great deal of evidence on mitigation of the liability as provided for in clause 3.7.
9. The Member must suspend services to O'Keefe & Swartz until such time that O'Keefe & Swartz have demonstrated that they have taken reasonable steps to ensure compliance by them and their clients with the Code.
10. The Member must pay a fine of R30,000.

Appeal submissions

In their appeal the Member raised various arguments as set out below. Many of the arguments are not relevant and while we will mention them we will not address them further.

1. The Electronic Transactions Act (ECT Act) and the “mere conduit” argument means that the Member should not be liable being the mechanism by which the message was transported and as such a mere conduit as set out in the ECT Act.
 2. The Consumer Protection Act requires an opt-in in respect of any direct marketing and not an opt-out.
 3. Although, the Protection of Personal Information Act will require a soft opt-in as opposed to an opt-out, this is not yet law.
 4. With regards to the issue of consent, the Member states that consent was not required as the Complainant had a prior relationship with Standard Bank and as such the contact was allowed in terms of 16.13 of the Code.
 5. That Standard Bank is prohibited from providing details about any consent in terms of inter alia Standard Banks Act and FICA.
 6. The Member could not be expected to investigate compliance with the Code of all of its clients.
 7. That although the Member had not proved there was any consent, that the reverse was also true that the Complainant had not proved there was no consent.
 8. That the Code has not kept pace with technological developments and as such is unfair.
 9. The sanctions are unfair in that suspending OKS would place the Member in breach of contract.
 10. The quantum of the sanctions is too high in that the loss is too remote and there was no pecuniary loss to the complainant.
 11. That the originator of the data message was Standard Bank and as such neither the Member nor their customer could be held liable for the breach of the Code due to the wording of the 3.7 of the Code.
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Deliberations and findings

Our findings are simple in that much of the argument raised by both the Member and the adjudicator have no bearing on the facts in this matter. As such we will not address such arguments in detail as they do not apply and has such have no bearing on the outcome of our decision.

We find as follows:

1. There is currently no South African law requiring opt-in only opt-out. The message provided for opt-out functionality. This is not the issue, especially since this appeal panel is tasked with implementing the WASPA Code of Conduct and is specifically prevented from implementing South African law. In order to validly market to the complainant, the Member must either be entitled to market to the complainant in terms of cause 16.9 or 16.10 of the WASPA Code of Conduct.
2. Clause 16.9 of the WASPA Code of Conduct provides that “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.” The onus is on Standard Bank to provide this in line with the maxim of ‘he who avers must prove’. This has not been done. It is no argument to allege that the complainant has not proved a negative (i.e. that he did not provide consent) as the complainant does not bear the burden of proof.

3. Clause 16.10. provides that “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 (b) the responsible party’s own similar products or services are being marketed, and 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.”

In this context a) is not complied with as the contact details Standard Bank had from the Complainant having a prior relationship with Standard Bank were not the contact details marketed to in this message as the cell number is different. In addition b) is also not complied with as the MSISDN was never given to Standard Bank and as such the Complainant was not 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. This is required in addition to the opt out functionality in each subsequent message.

4. 16.13 provides that “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.” No proof of consent was given. In addition, no proof was provided that the contact details were provided in the context of a sale of a product or service the same as being marketed. This is relevant again as the details provided to Standard Bank during any relationship the Complainant had with Standard Bank were not the same as those to whom the direct marketing message was being sent and as such a pre-existing relationship cannot be relied upon.
5. The whole mere conduit argument is irrelevant. If the Member feels that WASPA should apply for recognition in terms of the ECT Act as ISPA has done, then they must take this up with the WASPA management committee. It is not for the appeals panel to determine what should be done and in any event, this would not change the legal position as it currently stands.
6. The appellant states that they are not the originator of the data message and as such not required to comply with the provisions of s45 (1) of the ECT Act. Whilst this appears to be

correct, it is not for the appeal panel to rule on an issue of law and so the argument is irrelevant.

7. The privacy argument is complicated but largely irrelevant. Standard Bank has to comply with law. It is bound by s45(1) of the ECT Act as stated by the Member in their appeal. The appeals panel finds this argument somewhat disingenuous on the part of all parties involved. It would be absurd if Standard Bank, a consumer facing service provider, could hide behind the legislation governing its service activities to avoid compliance with specific consumer facing legislation. In any event this places the appellant in a position that they cannot comply with the Code if they cannot ensure that their customers comply with the Code. If this is what the appellant is alleging, which amounts to impossibility of performance due to a legislative barrier, the appellant has not put forward compelling evidence of what specifically prevents them complying with this provision.
8. Although the Complainant did not raise clauses 3.5-3.7 in his original complaint, as the Member had adequate opportunity to, and did in fact respond to these clauses of the WASPA Code of Conduct, the appeals panel is of the opinion that the principles of audi alteram partem have been met. In this regard they met the minimum requirement for mitigation as set out in 3.7 in that the Member's terms provide for their customers to abide by the provisions of the Code. This is however the minimum suggested course of action to take in mitigation. It does not relieve the Member of any liability. As the Member argues in their justification as to why they cannot be held liable for the behavior of Standard Bank as they have no contractual nexus with Standard Bank, the provisions in clauses 3.5-3.7 are in the Code to provide WASPA with a mechanism to protect the industry where Member's services and infrastructure are used by non-members with whom WASPA has no contractual nexus and cannot control. The Member has the contractual nexus with their customers and is the party better placed to carry the obligation and risk and certainly should have the ability to reclaim any fines paid by it on behalf of the customer (in this case Standard Bank). WASPA does not expect their members to police each message sent but it does expect their Members to comply with the Code of conduct, including being responsible for breaches of the Code by their clients who are not members. In fact, many MNO's who are also WASPA members require their customers to be WASPA members to mitigate their risk further.
9. The Member in their appeal finally argues that they have not fallen foul of clause 3.7 of the Code as the Code requires that: "3.7. 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 a 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." The Member argues that Standard Bank was not a customer, supplier, affiliate or sub-contractor of the Member. However, the Member has not read this clause correctly, the breach can come from services offered or marketed by a customer, supplier, affiliate or sub-

contractor. In this instance, OKS (customer) offered its services to Standard Bank (sub-contractor) and the use of such services resulted in the breach. In addition, the taking of reasonable steps does not avoid liability on the part of the Member, but can be considered as a mitigating factor in the quantum of sanctions imposed on the Member. The issue of compliance with clause 3.7 and the issues related to control that were raised by the Member (and the perceived unfairness thereof) must be balanced by the reality that where non-members utilize the service of Members, the only mechanism that WASPA has of protecting the public and controlling such non-member services is via the Member itself. It is commonplace for Members to require that their customers not only comply with the Code of Conduct but also that their end customers become members of WASPA to avoid any issues of impossibility of enforcement or perceived unfairness at being held liable for the acts of non-members.

10. The Member argues that they cannot comply with the sanction of suspending OKS as this would place them in breach of contract with OKS. This is not a valid argument. The Member is required in terms of 3.7 to have taken reasonable steps to ensure that the party that provides and markets services does so in a manner consistent with the requirements of this Code of Conduct. This should follow through with the ability to sanction such party for breaches of the Code in a similar manner as that which would be suffered by the Member itself for such breach. Failure to do so does not afford the Member with an argument for non-compliance with the Code. In determining what “reasonable steps” would constitute, the panel cannot provide an exhaustive list. However, certain commonsense actions should be taken in addition to the requirement of customers abiding by the Code. At the very least the Member should specifically require that the customer adhere to any ruling or request made by WASPA or an adjudicator or appeals panel. In this case all that the Member did was require their customers to abide by the WASPA Code as can be seen from their standard terms and conditions. However, from the Member’s own assertion, suspending a customer due to a breach of the Code by which they were meant to abide would place the Member in breach of such contract. The failure by the Member to oblige its customer to contractually comply with any ruling by WASPA would also be a failure by the Member to take ‘reasonable steps’ as required by the code.

Amendment of sanctions

1. In terms of clause 16.13 the Member has been unable to 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 as required by clause 16.13. We agree there is an infringement of clause 16.13.
2. In terms of clause 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 in clause 16.9 and 16.10. In the appeal submission there was no further proof of any consent. We concur that there has infringement of the provisions of clauses 16.11 read with clause 16.9, 16.10 and 16.11.

3. In looking at the sanctions and the quantum thereof we looked at clause 3.5-3.7 as well as cases 29916 and 41820.
4. In terms of clause 3.5 members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by the Code of Conduct, is aware of the requirements of the Code of Conduct. Clause 3.6 requires members to ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code.
5. In terms of clause 3.7 a member is liable for any breaches of the Code 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 the Code, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.
6. We have no amendment to the sanction of suspending OKS. What is reasonable in this instance would be to contract with OKS so that the Member can comply with its obligations in terms of the Code including being able to comply with any rulings against the Member. In addition the Member should undertake that their customers are familiar with the requirements of the Code be it through regular communications or training. Inserting a clause into an agreement requiring compliance with the Code may tick the minimum requirement of the Code but is paying lip service to taking reasonable steps as it does not take into account any further action in determining whether the customers will comply with the provisions of the Code.

7. The appeal was also in respect of the quantum of the sanctions. In this instance the rules of loss in terms of remoteness of a loss as referred to by the Member in their appeal and classic arguments of proving a loss do not apply. The Member is not being held liable in terms of delict or for a breach of a contract wherein loss must not be remote and must be demonstrated but rather in terms of an agreed Code of Conduct wherein the Member can be fined. As such we find the quantum of the fine to be fair bearing in mind other cases cited (namely 29916 and 41820) by the adjudicator as well as the damage to the industry caused by non-compliance by third parties using Member services contrary to the Code.

Appeal fee

No refund.
