



## Report of the Appeals Panel

Complaint number	56965
Cited WASPA members	Absa Bank Limited
Notifiable WASPA members	N/A
Appeal lodged by	WASPA
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	17.2
Clauses considered by the panel	15.29 and 16.5A
Related complaints considered	N/A
Amended sanctions	R10 000 fine for a breach of 15.29 is set aside and R5 000 fine for a breach of 16.5A is set aside
Appeal fee	N/A
Is this report notable?	Not notable
Summary of notability	N/A

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## Initial complaint

1. The complaint related to the escalation of an unsubscribe request sent by the Complainant to the Member, to which the Member failed to respond. The unsubscribe request was allegedly sent by the Complainant on 2022-03-04, and daily reminders were sent by the Wireless Service Providers' Association ("WASPA") to the Member every weekday thereafter, to no avail.
2. The complaint also related to unsolicited marketing SMS messages received by the Complainant, which he claimed he still received after messaging "STOP" to the Member and registering his mobile number on WASPA's "Do Not Contact" registry.
3. A formal complaint was subsequently lodged and sent to the Member on 2022-05-12 for an opportunity for it to respond thereto.
4. The Member's first and final formal response on 2022-05-24 highlighted that the Member was required to send its customers regulatory or contractual information from time to time. The Member illustrated the difference between informational messages and operational messages which contrasted with direct marketing messages the complaint related to.
5. The Member alleged that it concluded an investigation into the matter and found that no marketing SMS campaigns were sent to the Complainant, but 5 marketing related emails were sent to the Complainant.
6. The Member also admitted to sending 20 informational and 20 operational SMS messages to the Complainant during the period complained of. The Member further acknowledged the disproportionate number of informational SMS messages that were sent to the Complainant.
7. Regarding the informational and operational SMS messages, the Member alleged that no client related Opt-Out requests could be traced on its system.
8. The Member went on to state that it intended to take the following actions by 2022-07-11:
  - 8.1. Review the frequency of contact for informational campaigns sent to customers; and
  - 8.2. Review the classification of marketing and informational campaign types to ensure that there is no misinterpretation.

9. In response to the above, the Secretariat advised the Member on 2022-05-24 that it had misinterpreted the complaint, and that the complaint related to unsolicited marketing SMS messages received by the Complainant, and not unsolicited marketing emails. The Member subsequently failed to further respond to the Secretariat regarding the unsolicited SMS messages before the complaint was sent to adjudication on 2022-06-14.
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## **Adjudicator's findings**

10. The complaint was upheld, and the Adjudicator's report was published on 2022-06-28.
  11. The Adjudicator reiterated that the Member was first informed of the Complainant's unsubscribe request in respect of complaint number 56965 on 2022-03-04, and that notwithstanding daily reminders sent by WASPA to the Member on all weekdays, no response was forthcoming for over 3 months. Accordingly, the Adjudicator found the Member in breach of clause 5.14 of the WASPA Code of Conduct ("the Code").
  12. The Adjudicator also confirmed that the Complainant sent the words "STOP" in response to the unsolicited SMS messages he received from the Member and registered his number on WASPA's "Do Not Contact" registry. Notwithstanding, the Adjudicator concluded that the Complainant continued to receive unsolicited SMS messages from the Member, and the Member consequently breached clauses 15.29 and 16.5A of the Code.
  13. Thereafter, in line with the Adjudicator's findings, the Member was fined R5 000 for the breach of clause 5.14 of the Code, R10 000 for the breach of clause 15.29 of the Code, and R5 000 for the breach of clause 16.5A of the Code, all payable within 5 days of publication of the Adjudicator's report.
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## **Appeal submissions**

14. WASPA lodged the appeal herein. WASPA provided its appeal submission on 2022-08-05 after an extension was granted in its favour. WASPA's submission was provided to both the Member and the Complainant respectively.
15. In accordance with clause 24.38 of the Code, WASPA provided notice on 2022-07-07 of its intention to appeal the Adjudicator's decision.
16. The basis of WASPA's appeal was that the Adjudicator had erred in the finding of the breach of clauses 15.29 and 16.5A of the Code, by considering clauses of the Code which were not applicable to the facts of the complaint.

17. It is notable that the appeal is not challenging the finding on the breach of clause 5.14 of the Code.
18. WASPA's appeal submission in relation to clause 15.29 of the Code can be summarised as follows:
  - 18.1. The Complainant cited clause 15.29 of the Code in his initial complaint and the Adjudicator subsequently found the Member in breach thereof.
  - 18.2. Clause 15.29 is in the section of the Code that deals with "Subscription and Notification Services" and is situated beneath the heading "Terminating a service via SMS".
  - 18.3. Clause 15.29 reads: "If a 'STOP' reply could pertain to multiple services, either all services must be terminated upon receipt of the termination request, or the customer must be given a clear choice of services to terminate".
  - 18.4. WASPA submitted that the complaint was based on "unsolicited marketing messages" received by the Complainant from the Member.
  - 18.5. WASPA stated that the complaint did not pertain to a "subscription or notification service", and that the citation of clause 15.29 by the Complainant was inappropriate. Therefore, WASPA submitted that the Adjudicator should have ruled that the Member was accordingly not in breach thereof.
  - 18.6. WASPA acknowledged that an Adjudicator was unable to make a ruling based on a clause which had not been cited in the original complaint, however it was subsequently submitted that the applicable clause of the Code should have been clause 16.4 of the Code.
  - 18.7. Therefore, WASPA concluded that the Adjudicator's decision was incorrect in that the Adjudicator should have ruled that the Member was not in breach of Clause 15.29 of the Code on the basis that the clause was not applicable to "Direct Marketing Messages", and should have instead referred the matter back to WASPA (or the Complainant, if applicable) with a recommendation that WASPA (or the Complainant, if applicable) lodge a new complaint for a potential breach of clause 16.4 of the Code.
19. WASPA's appeal submission in relation to clause 16.5A of the Code can be summarised as follows:
  - 19.1. The complaint relates to an unsubscribe request sent by the Complainant to the Member, however, the Member continued to send the Complainant unsolicited marketing SMS messages.

- 19.2. Clause 16.5A reads: “Members must take reasonable steps to block only direct marketing messages to numbers listed in the WASPA Do Not Contact registry and must not automatically block all messages (e.g. transactional and commercial) to those numbers”.
  - 19.3. WASPA stated that there was no submission made by the Complainant that, pursuant to sending the unsubscribe request to the Member, he was blocked from receiving all messages from the Member.
  - 19.4. WASPA submitted that the complaint pertained to a failure to honour an “unsubscribe request” and not to a failure by the Member to “take reasonable steps to block only direct marketing messages”. Therefore, WASPA submitted that the citation of clause 16.5A of the Code by the Complainant was inappropriate, and the Adjudicator should have found that the Member was accordingly, not in breach thereof.
  - 19.5. WASPA acknowledged that an Adjudicator was unable to make a ruling based on a clause which had not been cited in the original complaint, however it submitted that the applicable clause of the Code should have been clause 16.5 of the Code.
  - 19.6. Therefore, WASPA submitted that the Adjudicator’s decision was incorrect in that the Adjudicator should have ruled that the Member was not in breach of Clause 16.5A and should have instead referred the matter back to WASPA or the Complainant (if applicable) with a recommendation that WASPA (or the Complainant, if applicable) lodge a new complaint for a potential breach of clause 16.5 of the Code.
  20. Considering the above submissions, WASPA requested that the appeal be upheld and that the Appeals Panel rule that the Member was not in breach of clauses 15.29 and 16.5(A) of the Code.
  21. The Member indicated on 2022-08-25 that it did not wish to provide a further submission.
  22. In addition, the Complainant did not respond to WASPA’s appeal submission.
  23. The appeal was subsequently allocated to a WASPA Appeal Panel on 2022-09-20.
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## **Deliberations and findings**

24. Reference is made to the abovementioned complaint and to the Adjudicator’s report.
25. Clause 16.4 of the Code reads as follows: “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”)”.

26. Clause 16.5 of the Code reads as follows: “Unless the target person has expressly requested or agreed otherwise, any member authorising, directing or conducting any direct marketing must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to:
- (a) a person who has submitted an opt-out request to that member,
  - (b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or
  - (c) a person who has registered a pre-emptive block with a registry established by WASPA”.
27. Clause 15.29 of the Code cited by the Complainant and Adjudicator deals with subscription and notification services, and the termination thereof by way of SMS message. This clause does not relate to direct marketing from which the complaint emanated. Clause 16.4 of the Code deals with direct marketing and applies to the facts of the initial complaint herein. Therefore, the Adjudicator erred in ruling that the Member was in breach of clause 15.29 of the Code and should have instead referred the matter back to WASPA and recommended it lodge a new complaint against the Member citing clause 16.4 of the Code. Alternatively, the Adjudicator should have suggested that the Complainant resubmit his complaint with clause 16.4 of the Code cited therein.
28. Clause 16.5A of the Code cited by the Complainant and Adjudicator relates to the Member’s obligation to block direct marketing messages to consumers who have registered their mobile numbers on WASPA’s “Do Not Contact” registry, whilst still enabling consumers to receive relevant commercial and transactional messages relating to the service. A member will only be in breach of this clause if it automatically blocks all messages, even those necessary to conduct efficient business activities with consumers, and not only the direct marketing messages which are deemed unessential. In this instance, the Complainant did not complain that he was blocked from receiving messages from the Member in totality, but rather that he continued to receive unsolicited marketing messages even after he lodged an unsubscribe request with the Member. Therefore, the Adjudicator erred in ruling that the Member was in breach of clause 16.5A of the Code and should have instead referred the matter back to WASPA with the recommendation that it lodge a new complaint against the Member citing clause 16.5 of the Code. Alternatively, the Adjudicator should have suggested that the Complainant resubmit his complaint with clause 16.5 of the Code cited therein.
29. The Appeal Panel acknowledges that it does not have jurisdiction to consider whether the Member has breached clauses 16.4 and 16.5 of the Code. However, The Complainant is welcome to resubmit a new complaint based on the correct clauses of the Code, being clauses 16.4 and 16.5, and should provide evidence to support the allegation that the SMS messages contained direct marketing messages (as opposed to operational or information messages) should he choose to do so.
30. Considering the above, the Appeal Panel finds that the incorrect application of the Code’s clauses were cited by the Complainant, and subsequently ruled on by the Adjudicator.

31. The Appeal Panel is satisfied on the basis of the information and evidence provided, that the Member was not in breach of clauses 15.29 and 16.5A of the Code and the findings of the Adjudicator in this regard are overturned.
32. The appeal is accordingly upheld.
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### **Amendment of sanctions**

33. For the reasons set out above, the decision of the Adjudicator in respect of clauses 15.29 and 16.5A of the Code are overturned and the respective sanctions are set aside.
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### **Appeal fee**

34. Not applicable.
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