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Case Notes

THE HALL OF SHAME — DOUBLE STANDARDS FOR SPAM

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I INTRODUCTION

The first decision of a South African court dealing with spam has revealed an industry practice as clear as dishwater. The Electronic Communications and Transactions Act 25 of 2002 ('the ECT Act'/'the Act') came into operation on 31 July 2002. The objects of the Act are among others to enable and facilitate electronic communications and transactions in the public interest and to develop a safe, secure and effective environment for consumers, business and government to conduct and use electronic transactions.[1]

The term 'spam' refers to unsolicited communications that are sent bulk to electronic addresses. The issue of spam is dealt with in section 45 of the ECT Act, within the realm of consumer protection (chapter 8 of the ECT Act). The regulation of spam is also addressed in the Consumer Protection Act 68 of 2008 ('the CPA') and, more recently, in the Protection of Personal Information Act 4 of 2013 ('POPI'). The spam provisions in the ECT Act, the CPA and POPI differ and industry regulation of spam adds its own distinctive features.

Spam is also addressed in the code of conduct of Internet service providers. An Internet service provider (ISP) is defined as 'any person providing information system services'.[2] Information system services are defined to include:

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[1] See s 2(*j*) of the ECT Act.

[2] Section 70 of the ECT Act.

> 'the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service'.[3]

Section 71 of the ECT Act provides for the recognition of an industry representative body (IRB). The Minister (in this case of Telecommunications and Postal Services) may, on application by an industry representative body for service providers, recognise such a body for the purposes of section 72 by notice in the *Gazette*.[4] The Minister may only recognise a representative body referred to in subsection (1) if the Minister is satisfied that: *(a)* its members are subject to a code of conduct; *(b)* membership is subject to adequate criteria; *(c)* the code of conduct requires continued adherence to adequate standards of conduct; and *(d)* the representative body is capable of monitoring and enforcing its code of conduct adequately.[5] The limitation of liability established by this chapter[6] applies to an ISP only if it is a member of the representative body referred to in section 71 and the service provider had adopted and implemented the official code of conduct of that representative body.[7]

The 'Guidelines for Recognition of Industry Representative Bodies of Information System Providers' (IRB Code) were promulgated in 2006.[8] The guidelines specify the minimum mandatory requirements that need to be met by the IRB. The IRB Code refers to the ECT Act and gives guidance as to what is considered international best practice and professional conduct.[9]

The following minimum requirements for a code of conduct are contained in paragraph 5 of the IRB code: professional conduct;[10] content control;[11] consumer protection;[12] privacy and confidentiality

[3] See s 1 of the ECT Act.

[4] Section 71(1) of the ECT Act.

[5] See s 71(2)(*a*)–(*b*) of the ECT Act.

[6] Chapter XI (Limitation of Liability of Service Providers) of the ECT Act.

[7] Section 72(1)(*a*)–(*b*) of the ECT Act.

[8] The guidelines were published in GN 1283 in *GG* 29474 of 14 December 2006. For a discussion and critique of these guidelines see Frans E Marx & Neil O'Brien 'To regulate or to over-regulate? Internet service provider liability: The Industry Representative Body in terms of the ECT Act and Regulations' (2011) *Obiter* 537.

[9] See para 2.4 of the IRB Code.

[10] Paragraph 5.1 of the IRB Code.

[11] Paragraph 5.4 of the IRB Code.

[12] Paragraph 5.5 of the IRB Code.

protection;[13] and spam,[14] to mention but a few. The Internet Service Providers' Association (ISPA) is a representative body and was duly recognised by the Minister of Communications in terms of section 71 of the ECT Act in 2009.[15]

Ketler Investment CC t/a Ketler Presentations v Internet Service Providers' Association[16] is the first South African court to address spam. The court made some interesting comments regarding spam and its impact upon network services but paid scant attention to the regulation of spam in South Africa. It consequently failed to note that industry self-regulation of spam is not in line with the ECT Act. Its ruling rests on a house of cards.

II THE KETLER CASE

The applicant, Ketler Investments CC t/a Ketler Presentations (Ketler), approached the court for relief to have its name removed from a webpage coined the 'ISPA's Hall of Shame'. The respondent (ISPA) created this 'hall of shame' whereupon it lists South African companies that engage in bulk email spamming.

(a) Is Ketler's listing on ISPA's hall of shame defamatory?

ISPA's hall of shame was launched in 2008 as an initiative to fight against spam in South Africa.[17] The hall of shame web page includes headings such as: 'known spammers'.[18] The applicant was placed fourth on that list appearing under the heading '*parties to remain listed for 3 years for sending spam after an undertaking was returned*'[19] . The position on that list is determined by the length of time the entry has been placed there, and that is subject to change with updates, removal and re-listings.[20] At the time of writing Ketler was placed second on that list.[21]

ISPA describes Ketler on its website as follows:

[13] Paragraph 5.6 of the IRB Code.
[14] Paragraph 5.8 of the IRB Code.
[15] See ISPA 'Key milestones and victories for ISPA', available at http://ispa.org.za/about-ispa/key-milestones/ (accessed 27 October 2014).
[16] 2014 (2) SA 569 (GJ).
[17] See Rudolph Muller 'SPAM fight in South Africa' 20 September 2011, available at http://mybroadband.co.za/news/internet/33740-spam-fight-in-south-africa.html (accessed 27 October 2014).
[18] See http://ispa.org.za/spam/hall-of-shame/ (accessed 27 October 2014).
[19] See http://ispa.org.za/spam/hall-of-shame/.
[20] *Ketler* supra note 16 at para 46.
[21] See http://ispa.org.za/spam/hall-of-shame (accessed on 24 October 2014).

> 'Ketler representation has a history of sending spam to parties who did not request it with multiple submissions from ISPA members or trusted independent sources. They previously returned a signed agreement and then continued to send email messages to parties who had not opted in. They will remain listed for 3 years.'[22]

The site also lists domain names, and email addresses Ketler used to send its spam email messages.[23] It is this listing that the applicant brought before the court.

In deciding whether the listing was defamatory, the court discussed the test for defamation and stated that: (1) the test for determining if material is defamatory is not whether specific words or conduct might bear an inoffensive meaning or what the author claimed it intended to convey, but rather it is whether, on a preponderance of probabilities, the ordinary or secondary meaning of the words or conduct complained of would be understood as being defamatory to the ordinary reader, even if they are capable of a non-defamatory meaning (which was the position in *Demmers v Wyllie* 1980 (1) SA 835 (A)).[24] Words would have secondary meaning if the words are to be understood, by reason of special circumstances that are known to the recipient of the publication, to acquire a defamatory meaning by reason of the innuendo.[25]

The court noted that in the present case the word 'spammer' cannot be read in isolation, and that it is to be considered in the context in which the word appears, namely on a list of persons who are to be '*shamed*' with the innuendo that such persons deserve to be shamed in a list bearing the title 'Hall of Shame' as a spammer by an association which itself upholds a code of conduct sanctioned by the Government.[26] The court was satisfied that in this context Ketler's reputation was lowered in the estimation of at least the significant category of persons who utilise the Internet as a means of sending and receiving communications.[27]

The court further noted that the word '*spammer*', or a derivative, does not per se constitute defamatory matter.[28] There is a distinct insinuation to consumers utilising the Internet that Ketler is acting in at least a

[22] See http://ispa.org.za/spam/hall-of-shame.
[23] Ibid.
[24] See *Ketler* supra note 16 at para 47.
[25] See *National Union of Distributive Workers v Cleghorn and Harris* 1946 AD 984 at 997.
[26] *Ketler* supra note 16 at para 50.
[27] Ibid.
[28] *Ketler* supra note 16 at para 53.

morally offensive manner at the consumer's cost.[29] The term 'spam', 'spammer' or 'spamming' in the context of the overall contents of ISPA's hall of shame webpage may also have the connotation that the person referred to is acting in a manner intrusive of, and abhorrent to, the privacy rights of others.[30] The court accordingly held that listing Ketler as a '*spammer*' on the hall of shame on ISPA's webpage together with the wording of that webpage on the whole, was defamatory of Ketler in the secondary meaning.[31]

Ketler averred that section 45 of the ECT Act does not prohibit spam, but that it allows for the transmission of unsolicited commercial communications to consumers in a regulated manner. Ketler argued that it had complied fully with the requirements of section 45. The court had to determine whether Ketler had contravened the provisions of this section. The court observed that section 45 raises two questions: (i) the factual question, which was whether Ketler has indeed complied with section 45 of the ECT Act; and (ii) the legal question, which was whether the section purports to set out an acceptable means of sending unsolicited advertising material and if so whether it is to be regarded as the final word on the subject.[32]

Section 45(1) provides that any person who sends unsolicited commercial communications to consumers must provide the consumer with the following: the option to cancel his or her subscription to the mailing list of that person (section 45(1)*(a)*); identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer (section 45(1)*(b)*). These provisions allow marketers to send spam because the law does not prohibit them from doing so, unless they fail to comply with section 45(1)*(a)* and *(b)*.

Although section 45 does not define the term 'unsolicited commercial communications' (spam), the court observed that the word 'spam' on its own is descriptive of the method used to disseminate a particular category of email.[33] The noun 'spam' is defined in the present context to mean 'irrelevant or unsolicited messages sent over the Internet, typically to large numbers of newsgroups or users or newsgroups'[34]; and as a verb

[29] *Ketler* supra note 16 at paras 9 and 51.
[30] *Ketler* supra note 16 at para 51.
[31] *Ketler* supra note 16 at paras 47 and 55.
[32] *Ketler* supra note 16 at para 34.
[33] *Ketler* supra note 16 at para 40.
[34] The definition given here is an adapted version of the definition that appears in the online version of the Oxford English Dictionary, available at http://www.oxforddictionaries.com.

it bears the meaning of sending 'the same message indiscriminately to large numbers of users or newsgroups on the Internet'.[35] The parties in this case accepted Ketler's definition of 'spamming', namely 'the sending of bulk unsolicited email messages or the sending of bulk commercial email messages' — a definition they agreed conformed to the technical definition of the word that was accepted worldwide.[36]

The issue before court was that Ketler had contravened section 45(1)*(b)* of the ECT Act by failing to provide the identifying particulars of the source from which Ketler had obtained the recipient's personal information. In this regard, ISPA presented the court with evidence to show that Ketler had received a number of written requests from consumers seeking the particulars of the source from which the company had obtained their personal information.[37] The fact that Ketler failed to respond to these requests amounted to a contravention of section 45(3) of the ECT Act. The respondent also produced evidence to show that Ketler had failed to cancel the subscription of several consumers who had requested as such, which constituted a breach of section 45(1)*(a)*.[38]

ISPA was able to show that Ketler's conduct as a spammer was 'shameful' or otherwise justified having its estimation lowered in the minds of right thinking people by reason of it: *(a)* sending unsolicited email messages to someone who clearly did not fit within the category of persons relied upon by Ketler in order to explain how it had obtained the recipient's address; *(b)* misrepresenting how it came to obtain the subscriber's email address; and *(c)* failing to provide proper details of the source from which it had obtained the consumer's personal information.[39] The court observed that while the first two grounds did not amount to a wrongful act under section 45 of the ECT Act, the last one — failing to provide details of the source from which Ketler received the consumers' personal information — did.[40]

The court noted that the fact that the first two grounds did not constitute a punishable offence did not add the question of truth of content. According to IPSA it was clear it had shamed Ketler because it (Ketler) sent unsolicited bulk email messages to people without their explicit consent or where there was no prior relationship between them

[35] Ibid.
[36] *Ketler* supra note 16 at para 41.
[37] *Ketler* supra note 16 at para 58.
[38] *Ketler* supra note 16 at para 59.
[39] *Ketler* supra note 16 at para 60.
[40] *Ketler* supra note 16 at para 61; s 45(1)*(b)*.

(and the subject matter of the email message did not concern the relationship).[41] The court accordingly held that ISPA had established truth of content.[42]

The next issue the court had to address was whether the publication of the defamatory statement was in the public interest or benefit.[43] In addressing the defence of public benefit the court referred to the direct and indirect costs of spam. It noted that the efficient functioning of the Internet and its continued convenience and low cost to the consumer as well as the individual's right to privacy were all matters of public interest.[44]

The court outlined the following indirect costs incurred by consumers and ISPs as a result of spam: (i) increased transmission costs (in the form of Internet access fees, telephone call changes, and/or anti-spam software);[45] (ii) the inconvenience of receiving unwanted emails (a problem faced by users of cell phones with email functionality who end up having to pay higher subscription costs);[46] (iii) the advantages of using email (low cost; mobility; speed of communication) are adversely affected by spam;[47] (iv) dealing with unsolicited emails is a time-consuming activity;[48] (v) high volumes of spam result in additional infrastructural burdens and human resource costs;[49] (vi) email activity affects bandwidth (capacity or volume of Internet data) which requires support desk staff to facilitate spam complaints by customers and to manage spam filters.[50] (For a discussion of the financial and other costs caused by spam see the sources listed below.[51])

The court was of the view that ISPA would be able to establish truth of content and public interest by reference to the contents of Ketler's newsletter.[52] On a proper analysis of its justification and disclaimer notice, Ketler accepted that it would only be proper to have included a recipient on its bulk email list if there had been some past relationship or a referral, and implicitly accepted that if this were not so then the email

[41] *Ketler* supra note 16 at para 61.
[42] Ibid.
[43] *Ketler* supra note 16 at para 63.
[44] See *Ketler* supra note 16 at para 26.
[45] Ibid.
[46] *Ketler* supra note 16 at para 27.
[47] *Ketler* supra note 16 at para 28.
[48] *Ketler* supra note 16 at para 65.
[49] *Ketler* supra note 16 at para 66.
[50] Ibid.
[51] Guido Schryen *Anti-Spam Measures: Analysis and Design* (2007) at 25; and F Lodewijk et al 'Regulating spam: A European perspective after the adoption of the E-Privacy Directive' (2006) *IT & Law Series* 10 at 12–14.
[52] *Ketler* supra note 16 at para 62.

was sent in error with the assurance that Ketler did not support spamming.[53] On this basis, Ketler effectively confirmed that there was some moral reproach attached to sending bulk email that was unsolicited either from the recipient or by reason of referral.[54] Thus the court found that Ketler's claim of how it came to acquire at least some of the addresses was untrue.[55]

(b) Inhibiting trade or imparting of information

In deciding on Ketler's argument that the consequence of the defamation would detrimentally affect its reputation and standing, which would in turn adversely impact on its ability to generate or retain business, the court noted that Ketler's fear was legitimate. The court noted that Ketler might find it difficult to find an ISP to distribute its email messages because of the listing.[56] Ketler, a commercial enterprise, relied on its reputation to attract customers and ISPA has not challenged Ketler's fear that the stigma of being listed on the Hall of Shame may adversely affect the business.[57] In addressing this issue, the court considered the rights that might have been infringed by ISPA in listing Ketler as a spammer.

The court referred to the following provisions in the Constitution:[58] section 16, which deals with the right to freedom of expression, including the freedom to receive or impart information or ideas;[59] and section 22, which deals with the right to freedom of trade, occupation and profession. These rights are countered by section 14 of the Constitution, which deals with the right to privacy (which includes the right not to have one's personal information utilised by others, whether for financial gain or otherwise, without obtaining some acceptable form of consent); and section 25, which deals with the right to property.[60]

The court referred to two US court decisions: *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* (1976) 425 US 748, in which the US Supreme Court recognised the right to disseminate commercial information by means of advertising as an extension of the protection afforded by the First Amendment, and *Intel Corp v Hamidi Cal* Rptr 3d 32 (2003), which dealt with the possibility that the right to

[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] *Ketler* supra note 16 at para 54.
[57] Ibid.
[58] The Constitution of the Republic of South Africa, 1996.
[59] See s 16(1)(*b*) of the Constitution.
[60] See ss 14 and 25 of the Constitution.

property is transgressed if it creates an involuntary cost for the consumer when spam messages are sent.[61]

Having considered the above, Spilg J rejected Ketler's argument that its listing on the Hall of Shame infringed its constitutional right to freedom of expression because it (Ketler) had failed to demonstrate how ISPA's actions had affected its right to advertise.[62] Nor had it provided evidence to demonstrate that following ISPA's guidelines would have led it to incur additional costs or would have caused its advertising to be less effective.[63]

(c) Written undertaking and the right to be heard

Ketler argued that it was not a member of ISPA and therefore not subject to the association's code of conduct in so far as the code allows ISPA to list spammers on its Hall of Shame. The applicant further disputed that, on the facts, ISPA would have been entitled to list it as a spammer even if it had been an association member.[64] The applicant pointed out that although it had signed an undertaking not to send spam that undertaking was not legally binding and in any event had been withdrawn.[65] The applicant had signed the undertaking so that its promotional material could be sent via the service provider.

Ketler further stated that it had not been afforded an opportunity to deal with the reason for re-listing and that IPSA had failed to follow the complaint procedure laid out in its own code of conduct.[66] Ketler averred that it had no way of knowing if there were in fact any genuine complaints and if so, whether the spam complained of occurred before or after Ketler signed the undertaking.[67]

ISPA was of the opinion that Ketler had contravened section 45(1)(*b*) of the ECT Act as it continued to send spam after Ketler had signed an undertaking to the contrary. ISPA was of the opinion that it had been under no obligation to notify Ketler of the re-listing as it was common cause that Ketler had continued to send unsolicited mail.[68] The respondent further contended that Ketler's undertaking to desist from sending unsolicited email messages and its consent to being re-listed on the hall

[61] *Ketler* supra note 16 at paras 86–87.
[62] *Ketler* supra note 16 at para 90.
[63] Ibid.
[64] *Ketler* supra note 16 at para 7(*b*).
[65] *Ketler* supra note 16 at paras 7(*c*) and 96.
[66] *Ketler* supra note 16 at para 8; ISPA's code of conduct is available at http://www.ispa.org.za (accessed 27 October 2014).
[67] *Ketler* supra note 16 at para 8.
[68] *Ketler* supra note 16 at para 13.

of shame if it breached the undertaking, could not unilaterally be withdrawn.[69]

As Ketler did not seriously challenge that it had send spam prior to signing the undertaking, the court consequently found that Ketler did send spam after the initial removal of its name.[70] According to the court, Ketler had provided the undertaking because of the genuine complaints of spamming.[71] The court found the consent to be good and that the purported withdrawal after defamatory matter was published to be irrelevant.[72] The respondent was therefore entitled to rely on the re-listing as long as the consent was extant.[73]

The court accordingly dismissed the application with costs on 6 June 2013. A year later Ketler paid the fine that ISPA had imposed on it.[74]

III COMMENTARY

(a) The issue of spam

Ketler is a company involved in providing training courses throughout South Africa on the subjects of leadership, project management and presentation skills. These courses are marketed in a number of ways, including by means of newsletters disseminated via bulk email transmissions. The actual transmission of the emails is performed by independent ISPs with whom Ketler subscribes. Ketler provides the ISP with copies of the newsletters and a list of email addresses to send them (the newsletters) to, and the ISP sends (posts) the emails to these addresses.[75] The following standard email newsletter (which only shows the unsubscribe link and disclaimer) was sent via email to consumers by Ketler:

> *'This email was sent to Richard@wrightrose.co.za if you do not wish to receive these newsletters in the future please Click here to Unsubscribe'*
>
> *Unsubscribe Update Profile Forward Message Join KetPres'*

[69] Ibid.
[70] *Ketler* supra note 16 at para 97.
[71] Ibid.
[72] *Ketler* supra note 16 at para 98.
[73] Ibid.
[74] See Duncan Alfreds 'SA Spammer Pays Up' *Fin24* 24 June 2014, available at http://www.fin24.com/Tech/News/SA-spammer-pays-up-20140624 (accessed on 24 October 2014).
[75] *Ketler* supra note 16 at para 32.

This is followed by a justification and disclaimer notice of the spam email message as it appeared in the court proceedings[76]:

> *'You are receiving this Newsletter because you are either a* ***past delegate*** *or you may have* ***requested*** *to receive these Newsletters or you may have been referred to us.*
> ***WE DO NOT SUPPORT SPAM and if you have received this email in error*** *or should you not wish to receive any of our newsletters at all, please* ***UNSUBSCRIBE*** *now at the link above or at the end of the Newsletter or simply reply with* ***UNSUBSCRIBE in the subject box.***
> *If you would like to be kept updated with our tips on various topics, please reply to this mail with* ***SUBSCRIBE*** *in the message box.'*

In its judgment the court stated that the standard email newsletter sent to consumers contained details of the sender, date, recipient and subject matter.[77] It is not the norm for spammers to: *(a)* provide their particulars when sending spam email messages, because they try to remain anonymous; and *(b)* to provide an unsubscribe link. In most cases where the unsubscribe link is provided it is not fully functional.

The newsletter above reveals the following characteristics of a spam email: *(a)* the font size is different; some words are in bold and others in capital letters;[78] *(b)* the newsletter is addressed to the 'Reader' proving that Ketler hadn't established a relationship with the recipients (otherwise they would have been properly addressed by their names); *(c)* the newsletter is also sent in 'bulk', which shows that Ketler must have had access to a list of email recipients to whom to send the spam email messages; and *(d)* the message is advertising services, namely training courses.

Section 45 of the ECT Act covers both bulk and individual transmissions but limits itself to unsolicited commercial email messages.[79]

(b) Spam techniques and countermeasures by ISPs

The proliferation of spam is largely attributable to the number of different ways in which spam can be transmitted. Spammers make use of

[76] *Ketler* supra note 16 at para 37.

[77] *Ketler* supra note 16 at para 36.

[78] See the following websites for more characteristics and examples of spam email messages: http://www.snopes.com and http://www.policypatrol.com/top-10-spam-characteristics (accessed 24 October 2014).

[79] *Ketler* supra note 16 at para 41. For the difference between unsolicited bulk email (UBE) and unsolicited commercial email (UCE) see the following: Shumani Gereda 'The truth about spam' (2003) September *De Rebus* 51; R Buys (ed) *Cyberlaw @ SA II: The Law of the Internet in South Africa* 2 ed (2004) 160–161; and Tladi Sebo 'The regulation of unsolicited commercial communications (SPAM): Is the opt-out mechanism effective?' (2008) 125(1) *South African Law Journal* 179–180.

a number of different techniques when sending their bogus emails, which makes it very difficult for the intended recipients to establish the status of the messages they receive — to detect spam, in other words. The applicant in casu used some of these techniques when it used different domain names and email addresses. This technique is called disguising of headers or 'spoofing'.[80]

The court noted that with the expansion of the Internet industry, which benefits the economy as a whole, also comes the selling of clients' lists by merchants and banks that is now part of daily life.[81] This is irrespective of whether the issue amounts to invasion of privacy and absence of express and informed consent.[82] These lists can be harvested in other ways by those wishing to market their products or services through promotional material sent en masse by email.[83] This harvesting is done by using dictionary attacks or web-crawlers that extract personal information from public sites.[84] The court noted that in the case under discussion there was no indication of whether Ketler had created the lists; or had purchased the addresses; or had otherwise procured them from other sources. Some of the ISPs that Ketler had contracted with to transmit bulk email messages on its behalf were members of ISPA.[85]

In order to prove that Ketler had continued to send spam email messages (after having signed the undertaking) ISPA employed the following methods: *(a)* 'spamtrap' address: these addresses do not have a specific user (no natural person who could engage with the spammer) but are used mainly to trap spammers;[86] and *(b)* 'role email account', which is an 'alias email account' for one or more email addresses set up for the sole purpose of soliciting public comment.[87] Both addresses could not have been harvested by Ketler in any of the manners held out by it in its newsletter's justification and disclaimer notice.

[80] See the following for a discussion of this technique: Gerrie Ebersöhn 'The unfair business practices of spamming and spoofing' (2003) July *De Rebus*; Jeremy Poteet *Canning Spam: You've Got Mail (That You Don't Want)* (2004) 123.

[81] *Ketler* supra note 16 at para 29.

[82] Ibid.

[83] Ibid.

[84] For examples of how spammers harvest email messages, see Uri Raz 'How do spammers harvest email messages?', available at http://www.private.org.il/harvest.html (accessed 24 October 2014); Danny Goodman *Spam Wars: Our Last Chance to Defeat Spammers, Scammers, and Hackers* (2004) 51 where the author discusses the issue of how spammers obtain one's email messages; and Lodewijk et al supra note 51 at 67–79.

[85] *Ketler* supra note 16 at para 32.

[86] *Ketler* supra note 16 at para 57*(a)*. The 'spamtrap' is devised with the sole purpose of detecting a sender of bulk advertising email messages who objectively could not have acquired the address directly or indirectly in the manner held out by it.

[87] *Ketler* supra note 16 at para 57*(b)*.

While ISPA is to be commended for its condemnation of the practice of harvesting or extracting lists and its provision of guidelines in this regard,[88] there is currently no South African law that addresses the issue. In other jurisdictions the harvesting of lists is considered an aggravated violation, which is punishable. A case in point is the anti-spam provisions in Australia's Spam Act 129 of 2003, and particularly sections 19–22 (which deal with harvesting software and harvested address lists).[89]

(c) Industry self-regulation

ISPA was established on 6 June 1996 as a voluntary association representing the vast majority of ISPs in South Africa. ISPA has over the years developed a good working relationship with many governmental bodies, including among others the Department of Communications.[90] ISPA has also provided submissions and feedback to key legislations and various associated regulations, including the ECT Act and the Electronic Communications Act.[91] There are five categories of ISPA membership: large; medium; small; affiliates; and honorary.[92] At the time of writing there were 173 members affiliated with ISPA (significantly increasing almost on a monthly basis).[93]

As a self-regulatory body, ISPA has adopted a code of conduct based on the IRB Code. ISPA's code of conduct has the following items, among others: privacy and confidentiality; consumer protection and provision of information to consumers; unsolicited communications (spam).[94] All ISPA members are bound by the code of conduct.

(d) ISPA's spam provisions

The issue of spam is dealt with in articles 14 and 15 of the ISPA code of conduct, under the heading 'Unsolicited communications ("spam")':

> '14. ISPA members must not send or promote the sending of unsolicited bulk email and must take reasonable measures to ensure that their networks are not used by others for this purpose. ISPA members must also comply with the provisions of section 45(1) of the ECT Act, and must not send or promote the sending of unsolicited commercial communications that do not comply with the provisions of section 45(1) of the ECT Act.[95]
>
> 15. ISPA members must provide a facility for dealing with complaints regarding unsolicited bulk email and unsolicited commercial communications that do not comply with the provisions of section 45(1) of the ECT Act originating from their networks and must react expeditiously to complaints received.[96] '

In the first place, there seems to be a significant disconnect between the regulation of spam in accordance with the ISPA code of conduct and '*what ISPA consider to be spam*' on its hall of shame webpage. Here an opt-in approach is adopted. All unsolicited bulk email is considered to be spam unless there is a prior relationship between the sender and the recipient of the email, or unless the receiving party has explicitly consented to receive the communication. On the other hand, it also states that unsolicited commercial communications that are sent should comply with section 45 of the ECT Act. As we have noted above, section 45 of the ECT Act does not per se prohibit spam. What the section *does* prohibit is the failure of the spammer to cease sending spam upon being requested to stop, and the failure of the spammer to provide the source from which it (the spammer) has obtained the personal information of the recipient.[97] As a result of this disconnect, ISPA is regulating spam under two regimes: opt-out as contained in section 45 of the ECT Act and opt-in as contained on the ISPA webpage. It is also important to note that articles 14 and 15 of the ISPA code of conduct are based on the IRB Code's provisions in respect of spam protection.[98]

It remains an open policy question whether ISPA should be able to adopt industry standards that conflict with its own code of conduct and with section 45 of the ECT Act. Perhaps the answer lies in the process

[88] See the IPSA webpage titled 'Responsible Email Marketing', available at http://ispa.org.za/spam/responsible-email-marketing/ (accessed on 15 May 2015).

[89] See also ss 4 and 5 of the United States CAN-SPAM Act of 2003.

[90] See http://ispa.org.za.

[91] See http://ispa.org.za/about-ispa/ (accessed 27 October 2014).

[92] See http://ispa.org.za/membership (accessed 27 October 2014).

[93] Ibid.

[94] See http://ispa.org.za/code-of-conduct (accessed 27 October 2014).

[95] See art 14 of the code.

[96] See art 15 of the code.

[97] Section 45(1)(*a*) and (*b*) of the ECT Act.

[98] Section 5.8 (Spam Protection) of the IRB Code reads as follows:

> '5.8.1. Members shall not send or promote the sending of spam and will take reasonable measures to ensure that their networks are not used by others for this purpose.
>
> 5.8.2. Members must provide a facility for dealing with complaints about spam originating from their networks and must react expeditiously to complaints received.'

See 'Guidelines for Recognition of Industry Representative Bodies of Information System Providers' op cit note 8.

behind the drafting of the IRB Code, and ISPA's submissions. Looking at ISPA's background it becomes clear how it might have chosen the restrictive standard as opposed to what has been stated elsewhere that 'the Act (ECTA) takes a low-key approach to spam'.[99] According to Marx and O'Brien, ISPA participated in the formulation of the ECT Act and it also applied for recognition as an IRB shortly after the Act was promulgated, although the application was rejected.[100] In 2006, four years after the promulgation of the ECT Act, the IRB guidelines were published. ISPA notes that it played an important role in this process, stating that the IRB Code was adopted '*primarily due to the pressure exerted by ISPA*'.[101] It is clear from the above that ISPA has influenced not only the process of the Act but also the process of the IRB Code.

The above minimum requirements have come under scrutiny. Questions have been asked regarding the best means of regulating the industry and whether this should take the form of self-regulation; or, alternatively, a hybrid system consisting of self-regulation and external monitoring so as to reduce the risk of ISPs acting as legislator and judge at the same time.[102]

Marx and O'Brien level the following criticisms, among others, against the minimum requirements: *(a)* they disregard the objectives of the ECT Act, which demonstrates the government's failure to recognise the importance of the information economy; *(b)* the guidelines do not put South Africa in a favourable position to compete internationally; *(c)* they do not promote self-regulation; *(d)* they do not necessarily promote technological neutrality, which is one of the objectives of the ECT Act;[103] and *(e)* they are too broad.[104]

Secondly, the disclaimer notes that the Hall of Shame notification does not imply that the spam sent is unlawful or illegal, only that it and the selling of email lists is contrary to ISPA's code of conduct. The issue is further convoluted by a disclaimer with reference to its Hall of Shame notification.[105] The hall of shame notification is based on ISPA's own (opt-in) definition of spam even though this does not accord with the current section 45 of the ECT Act. ISPA's website however, has these two

[99] See Sieg Eiselen in Dana van der Merwe et al *Information Communications Technology Law* (2008) 190.

[100] See Marx & O'Brien 'To regulate or to over-regulate? op cit note 8 at 547–548 (where the authors discuss ISPA's background).

[101] Emphasis ours. See http://ispa.org.za/about-ispa/key-milestones/ (accessed 27 October 2014).

[102] Marx & O'Brien op cit note 8 at 552.

[103] Section 2(1)(*f*) of the Act.

[104] Marx & O'Brien op cit note 8 at 555–556.

[105] Available at http://ispa.org.za/spam/hall-of-shame/ (accessed 24 October 2014).

contradicting mechanisms working concurrently. The court paid scant attention to ISPA's fork-tongued approach to the regulation of spam, and upheld ISPA's ability to impose and enforce an industry standard for unsolicited messages that is far more restrictive than the legal standard. The court decided that ISPA is authorised to self-regulate on spam in accordance with the opt-out regime that has been adopted in section 45 of the ECT Act.

It is important to note at this point that section 45 of the ECT Act has been at the centre of much debate with its lack of functionality regarding the opt-out mechanism.[106] Others have opined that an opt-in mechanism would afford better protection for consumers.[107] Ironically, it seems as if South Africa is moving towards the opt-in model with its restrictive standard proposed section 45 amendment.[108] Should this Bill be enacted then section 45 will take a new face in that it will now make it illegal to send spam to consumers. The Bill introduces the opt-in mechanism requiring that a relationship be established before unsolicited communications can be sent to recipients. According to ISPA: 'it welcomes the recognition in the Bill of the benefits of an opt-in model in regulating commercial electronic communications and appreciates that it can *now* align the opt-in requirement of its own Code of Conduct with that set out in the Act'.[109] Perhaps this is an acknowledgement on the part of ISPA that it did not comply with the ECT Act's spam provisions.

IV OVERLAPPING SPAM REGIME

The court observed that ISPA as a recognised representative body under the ECT Act also has extended responsibilities under the Consumer Protection Act ('CPA'), and that ISPA's code applies until such time as an industry code is prescribed under the CPA, which covers matters arising from that Act.[110] Section 11 of the CPA covers the protection of consumers in regard to direct marketing. Section 11 deals with the right

[106] Buys *Cyberlaw @ SA II* op cit note 79 at 164–166; Tladi 'The regulation of unsolicited commercial communications (SPAM)' op cit note 79 at 185–188.

[107] For a discussion of the opt-in mechanism, see ML Geissler *Bulk Unsolicited Electronic Messages (SPAM): A South African Perspective* (LLD thesis, UNISA 2004) 391–392.

[108] See Electronic Communications and Transactions Amendment Bill published in GN 888 in *GG* 35821 of 26 October 2012.

[109] See ISPA 'ISPA Submissions on the Electronic Communications and Transactions Act Amendment Bill, 2012', available at http://ispa.org.za/wp-content/uploads/2012/06/ISPA_Submissions_the ECT Act_Amendment_Bill_20121207.pdf (accessed 27 October 2014); emphasis added.

[110] See *Ketler* supra note 16 at para 79.

to privacy and provides that every person has a right to privacy including the right to require another person to discontinue sending unwanted mail and also to pre-emptively block any communication to the consumer, if that communication was primarily for the purpose of direct marketing.[111] In order to facilitate the realisation of consumers' right to privacy, and enable consumers to efficiently protect themselves, a register is established in which a pre-emptive block may be registered.[112] Regulation 4 of the CPA sets out the minimum requirements for the pre-emptive block and what information needs to be provided by consumers in order to stop the unsolicited communications. This block is still not in existence six years after the fact.

The court was of the opinion that the provisions of both the ECT Act and the CPA are to be applied concurrently, and if it is not possible to harmonise the two then the greater consumer protection prevails or consequently common law rights are preserved by section 2(10) of the CPA.[113] Where there appears to be an overlap, the code of conduct provided for in the ECT Act is intended to serve the same purpose as contemplated in the CPA until amended or supplanted by a code of conduct prescribed under section 82 of the CPA. According to this provision, the Minister will prescribe an industry code, on the recommendation of the National Consumer Commission, having the effect of interacting between or among persons conducting business within an industry.[114]

The court also referred to POPI (then the Protection of Personal Information Bill), which provides that direct marketing by means of unsolicited electronic communication may only be undertaken if a prior relationship exists and the data subject consented to receive the communication.[115] This provision is more restrictive than section 45 of the ECT Act. Although certain sections POPI came into effect on 11 April 2014, the direct marketing provision has not yet come into effect. Once POPI comes into effect ISPA's spam provisions will be aligned to national law.

[111] See s 11(1)(*b*) and (*c*) of the CPA.
[112] Section 11(3) of the CPA.
[113] *Ketler* supra note 16 at para 79(*b*).
[114] Section 82(2) of the CPA.
[115] See s 69 of POPI.

V CONCLUSIONS

This first spam case has shown that the regulation of spam in South Africa leaves vast room for improvement. First, spam should be regulated in accordance with international best practices.[116]

Opt-in is widely regarded as being superior to an opt-out regime. When the spam provisions of POPI become operational there will be an effective opt-in regime for online direct marketing. The regulation of non-commercial spam should also be addressed. The harvesting of addresses undermines the privacy of consumers. Its harmful effects also hamper the use of the Internet and the confidence of consumers. Legislative amendments should be adopted to address this and other harmful spam practices.

Secondly, the regulation of spam in South Africa should be aligned nationally. Currently the spam provisions contained in the ECT Act and the CPA are incongruent. The position will not be much clearer once POPI becomes effective. POPI will only address spam that is sent for the direct or indirect purpose of promoting or selling goods or services or to solicit a donation. Direct marketing is also addressed in the CPA in a similar manner. Countless forms of harmful spam fall outside the ambit of 'direct marketing'. According to section 110 of POPI, section 45 of the ECT Act will be repealed once it becomes effective. The fact that the Electronic Communications and Transactions Act Amendment Bill, 2012 proposes an amendment to section 45 of the ECT Act is perhaps the best illustration of the legislative misalignment.

Thirdly, *Ketler* highlights the disparate legal and industry standards for spam in South Africa. It goes without saying that industry self-regulatory standards should be aligned with national legislation. The willy-nilly adoption of practices that are in conflict with legislative provisions is the swansong of effective co-regulation. This anomaly would surely have come to light if the court had considered ISPA's defence of qualified privilege (the defence of which rests in part on a finding that the defamatory matter was published in the discharge of a duty).

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[116] See S Papadopolous 'Are we about to cure the scourge of spam? A commentary on the current and proposed South African legislative intervention' (2012) 75 *THRHR* 223.