

WASPA appeals panel
Complaint 10947

REPORT OF THE APPEALS PANEL

Date: 5 March 2012

Service Provider: Buongiorno SA

Appellant and Information Provider (IP): n/a

Complaint Number: 10947

Applicable versions: 9

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a unsubscribe request lodged on 26 September 2010, by an individual against Buongiorno.

1.2 The complaint relate to subscription services, which the complainant denies subscribing to. The complainant is concerned that some fraud has been committed against her.

1.3 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The clauses of the Code considered by the Adjudicator are:

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

- [service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

- (a) contain a PIN which is then confirmed or validated on the web page, or
- (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

Sections of the Advertising Rules considered

9.2 DISPLAY RULES FOR COST AND T&C INFORMATION

9.2.1 Cost OF ACCESS DISPLAY

9.2.1.1 Formatting Of Access Cost Text:

Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a nonserif font

- The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.
- The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.
- All access cost information must be placed horizontally

9.2.1.2 Position of Access Cost Text

- For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font.
- If the ad and/or offer is on a third party web site as a graphic or display text, then the display text with pricing and contact info must be displayed on immediately below, above or to the side of the access number to show the FULL cost to consumer. This includes for example, text-based ads placed on Google-based (or similar) advertisements.
- The T&C text must be placed close as possible to the unique access number.

- *T&C information must be placed horizontally.*
- ...

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “On the face of it, the dominant impression a visitor to the landing page has is likely of the service being a single item information service rather than a subscription service. There are numerous references to a subscription service so the manner in which this service is presented is somewhat confusing. The Code requires a “specific intention” to subscribe to a subscription service and confusing indicators of both a subscription service and a single item information service are not conducive to such a “specific intention”. The pale lettering used for the phrase quoted above is, however, problematic, as is the reference to terms and conditions below the field for a phone number submission which is presented in relatively dark text against a dark background. The terms and conditions and pricing text on the page in which the prospective subscriber is required to enter the PIN code, presumably sent via sms, is even less distinct. It is small, dark font on an image background comprising various bank notes in various denominations and colours. This text is virtually illegible. The landing page and PIN code confirmation pages appear to be in violation of the WASPA Advertising Rules in that they do not comply with the formatting requirements in Rule 9.2 generally.

For the reasons set out above, I uphold the complaint and further find the service in violation of the Advertising Rules..”

3.2 Sanctions

The following “sanctions” were given:

The service is in violation of the Code and the Advertising Rules and the SP is ordered to immediately cease all instances of the service as well as variations of the service which entice prospective subscribers through offers of single content items which are not clearly and explicitly identified as being part of a subscription service. It

is not sufficient to mention that a subscription service exists without explicitly linking the subscription nature of the service to the items on offer through the service. Prospective subscribers must be reasonably aware that, furnishing their phone number and requesting the item on offer, they are opting into a subscription service. Furthermore, terms and conditions text and pricing information must be presented in compliance with the formatting requirements in the Advertising Rules. The SP has failed to do so in respect of the service.

The SP is required to withdraw the Web pages intended to promote the service from public view until such time as they are compliant with the Code's and Advertising Rules' requirements as stated above.

In respect of the Complainant and her complaint, the SP is ordered to -

- send a reminder message to all current subscribers of the service that forms the subject matter of this complaint in the format specified in section 11.6 of the current version of the Code no later than 48 hours after being notified of my findings;
- immediately take steps to ensure that the SP's subscription mechanism functions as required by section 11.3.1 of the current version of the Code; and
- refund all charges levied against the Complainant's account for the period of her subscription to the extent such an order is feasible in the WASPA Secretariat's opinion.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 10947

4.1.1 Attorneys DLA Cliffe, Dekker, Hofmeyr, on behalf of the Appellant submitted detailed grounds of complaint which will not be recanvassed in full here.

4.1.2 It summarised its appeal as resting on 3 legs:

- A procedural irregularity
- An incorrect finding on the merits
- That the sanction was "grossly unreasonable"

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The Adjudicator applied Version 10.0 of the Code.

5.1.2 The Appellant has objected to this.

5.1.3 The relevant date is 26 September 2010, when the unsubscribe request was lodged.

5.1.4 **Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, therefore applies.**

5.1.5 The Appellant has, however, been unable to identify how the wrong version of the Code might prejudice them. Similarly, this Panel is unable to pick up any potential prejudice from the error.

5.1.6 This having been said, any potential prejudice would in any event now be addressed by the Panel applying the correct version of the Code.

5.2 Audi Alterem Partem

5.2.1 The Appellant has raised as an issue that it was not given an opportunity to comment on the sections of the Code under consideration, and that this has violated its right to audi alterem partem.

5.2.2 It is not the intention of this Panel to make a finding on the extent to which the provisions of PAJA and the rules of natural justice are applicable to the WASPA process.

5.2.3 At this point, the concern falls away. In addressing the Appeal, the Appellant has now had the opportunity to address those sections of the

Code considered by the Adjudicator, and these submissions have been considered by this Panel.

5.2.4 We are therefore satisfied that, whether necessary or not, the requirements of *audi alterem partem* have now been met.

5.3 Finding

5.3.1 We start by noting that this Appeal is somewhat complicated – both for the parties and the Panel – by the fact that the Adjudicator has been rather vague about which clauses have indeed been found to be breached.

5.3.2 We have therefore followed the Appellant's grounds of Appeal and understanding of the sections that are applied in considering the matter.

5.3.3 On the complainant's version of events, she never subscribed to this service, and as soon as she realised that she was, she unsubscribed. On unsubscribing, she received a reminder message saying that she was subscribed.

5.3.4 According to the Appellant's records, the Complainant subscribed via a website on 16 April 2010. She unsubscribed on 16 September 2010. In the interim, she was sent a monthly reminder message that she was subscribed.

5.3.5 The Complainant continues to deny that she ever subscribed to this service. The Appellant's records, however, appear to be genuine. As in the case of an affidavit before a Court, the Panel is loathe to "go behind" the electronic records without very good cause.

5.3.6 The Panel therefore has to ask itself how the Complainant may have come to be subscribed without realising that she had done so. One answer is, of course, fraud, or a practical joke. It is beyond the mandate of WASPA and the investigative powers of this Panel to determine if this is the case.

5.3.7 Another, more likely answer relates to an issue raised by the Appellant. The Appellant has questioned the relevance of Clause 11.2.2 which states: Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

5.3.8 The Appellant contends that the Complainant never raised this issue. This issue could, however, explain why the Complainant so vehemently denies subscribing to a service – because by her recollection she did NOT subscribe to a service, she asked for a single content item. It may be that she has not even connected the two events.

5.3.9 We therefore consider Clause 11.2.2 to be central to the facts in this matter.

5.3.10 The initial web page in this matter looks as follows:

SUBSCRIPTION SERVICE R6/DAY

CHOOSE YOUR FAVOURITE ITEM

SUBSCRIBE TO GET THE LOTTO, LOTTOPLUS AND POWERBALL NUMBERS LIVE AFTER EVERY DRAW.

LOTTO
LOTTO 0000
PowerBall

YOU CAN WIN A LOT OF MONEY

DISCOVER IF YOU'RE THE WINNER

GET THE RESULT ON YOUR MOBILE

Your mobile:

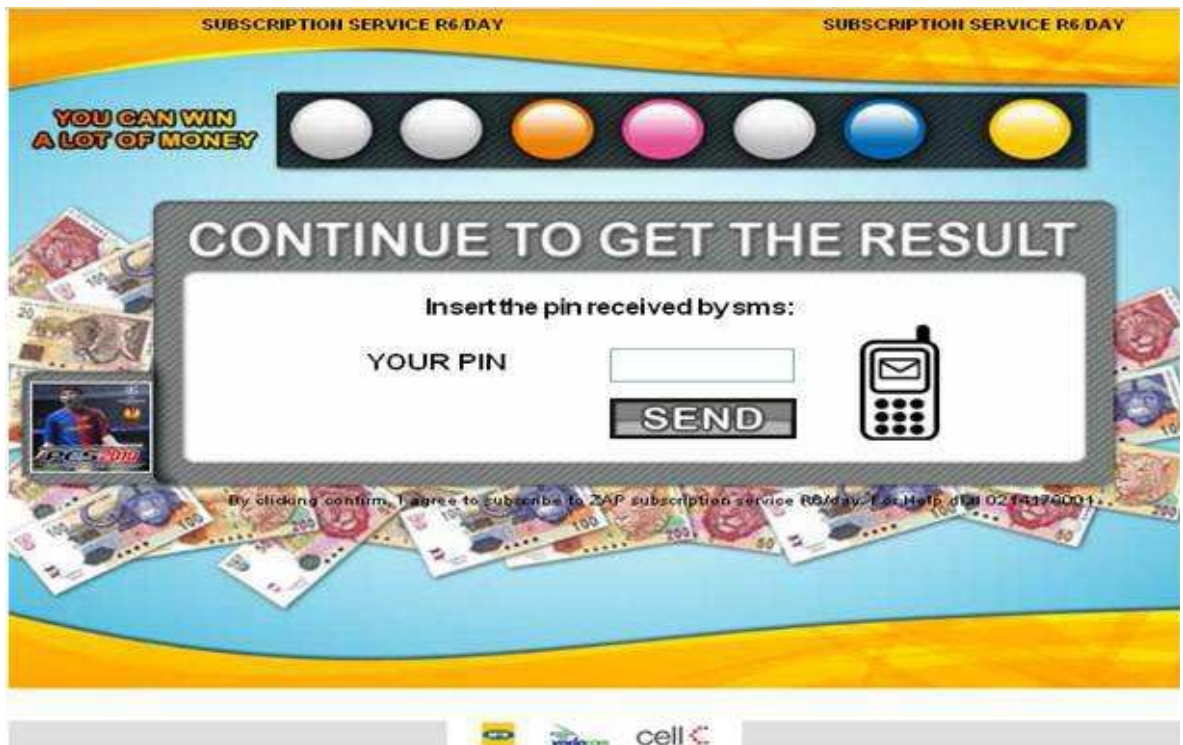
Your carrier:

SEND

Click here to the Terms and Conditions, ZAP, get inside, games and more tons...

Subscription service: ZAP. By entering the PIN that was sent to your cellphone you will be entered into ZAP subscription service, and you acknowledge that you are subscribing to the service. This subscription service is available to MTN, Vodacom and Cell C users. You will be billed R6 every day. You will receive a WAP link in your welcome messages. By clicking on the WAP link you will be able to download unlimited items for your phone. These items are not charged for separately from your daily subscription fee. Download charges apply and standard text messaging rates may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. You may stop this subscription service at any time by sending a text message with the words STOP FUN to 36000. You must be the owner of the device or you need to acquire the bill payer's permission to join this subscription service. For help call 0214178001. Your cellphone handset must be WAP enabled to download the products. You will have the option to download at

5.3.11 The next page looks like this:



Subscription service, ZAP. By entering the PIN that was sent to your cellphone you will be entered into ZAP subscription service, and you acknowledge that you are subscribing to the service. This subscription service is available to MTN, Vodacom and Cell C users. You will be billed R6 every day. You will receive a WAP link in your welcome messages. By clicking on the WAP link you will be able to download unlimited items for your phone. These items are not charged for separately from your daily subscription fee. Download charges apply and standard text messaging rates may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. You may stop this subscription service at any time by sending a text message with the words STOP FUN to 30000. You must be the owner of the device or you need to acquire the bill payer's permission to join this subscription service. For help call 0214179001. Your cellphone handset must be WAP enabled to download the products. You will have the option to download at

- 5.3.12 There are several references to subscription on these pages, and a careful reading would tell the consumer that they are subscribing to a service. However, it would certainly be a careful reading. The overpowering message is that you are getting ONE result.
- 5.3.13 This is indeed the very reason that the Code requires offers of subscription to be completely separated from offers of specific content. While this is not the “worst” breach of this section that this Panel has seen, we are still satisfied that section 11.2.2 was breached. We also believe that this addresses the disparity in the two parties versions.
- 5.3.14 We believe that this sufficiently addresses the issues raised in relation to 9.2 of the Advertising Rules, and that it is redundant to make a separate finding in that respect.
- 5.3.15 With regard to the sms sent to the Complainant after she unsubscribed, we are satisfied that this appears to have been a technical glitch. While no doubt

frustrating to the Complainant, especially in light of her doubts about the integrity of the Appellant, we do not think that it amounts to a breach of the Code.

5.3.16 We are not of the opinion that the sanction is unduly punitive, and in fact consider it to be fairly light in relation to a breach of this particular clause.

5.3.17 **We therefore confirm the Adjudicator's sanctions which are:**

- send a reminder message to all current subscribers of the service that forms the subject matter of this complaint in the format specified in section 11.6 of the current version of the Code no later than 48 hours after being notified of my findings;
- immediately take steps to ensure that the SP's subscription mechanism functions as required by section 11.3.1 of the current version of the Code; and
- refund all charges levied against the Complainant's account for the period of her subscription to the extent such an order is feasible in the WASPA Secretariat's opinion.

5.3.18 We remind the Appellant that breaches of Clause 11.2.2. are regarded most severely by this Panel and by WASPA adjudicators.

5.3.19 The cost of appeal is non-refundable.