



REPORT OF THE ADJUDICATOR

Complaint reference number: 11021

WASPA member(s): TMobileSA

Membership number(s): 0116

Complainant: Public

Type of complaint: Subscription Service

Date complaint was lodged: 2010-11-03

Date of the alleged offence: Early September 2010

Relevant version of the Code: 9.0

Clauses considered: 3.1.1; 11.2.1

Relevant version of the Ad. Rules: Not Applicable

Clauses considered: Not Applicable

Related cases considered: 10511 & 10822

Complaint and Response

1. The complainant in this matter is a company, and the MSISDN concerned is assigned to that company. The complainant is a member of the public. The complainant was charged for unsolicited subscription services, and made an unsubscribe request through the WASPA website. To quote from the relevant log:

2010-09-09 Complainant writes: Good day please investigate and remove all content subscriptions on the following company numbers: 0837998839 0837859990 0837755284

2010-09-29 Complainant writes: Good day, the below messages/websites have come as unsolicited sms's onto subscriber 0837755284 over the past few days. Messages such as these are getting more common, they are unsolicited, and although with the assistance of WASPA the "subscription" is terminated, we are still left with costs to pay, for a "service" we did not request. There must be a way to deal with this problem.

2. According to these logs, the complainant was unsubscribed on 14 September 2010. The member gave no explanation for how the complainant had been subscribed to the service.
3. On 3 November 2010 complaint was escalated to formal process due to the fact that the complainant was billed for the same service on 21st of September, 27th of October, and 31st of October.
4. On 3 November 2010, the complainant received the following SMS:

Pride closes our minds to new idea. john c. Maxwell SMS stop to 37459
5. The WASPA Secretariat asked the member for proof that the MSISDN opted in to the service after unsubscribing on 14 September 2010, and forwarded a copy of the above SMS.
6. The member responded that the SMS subscription service was not cancelled on 14 September as had previously been thought. On further enquiry by the WASPA Secretariat, the member advised that it had a problem with its system for a day and for that reason the MSISDN concerned was not unsubscribed. This information was sent to the complainant.
7. On 17 November, the complainant responded that no further SMSes had been received. However, on 9 December the complainant e-mailed the WASPA Secretariat to advise that a further R5.26 had been charged to its account with its network provider.
8. Finally, on 9 February 2011 the complainant confirmed that billing was continuing every month for the service in question. As a result, the WASPA Secretariat assigned to the complaint to adjudication. It also advised the member of the continuing debits and of the referral to adjudication.
9. As to the refund, the member advised on 3 November 2010 that it had contacted the complainant who would forward its account number for a refund. Much to-ing and fro-ing ensued, and the member apparently refunded the complainant directly to its network provider account on 14 December 2010, though the complainant only confirmed the refund on 9 February 2011.

Sections of the Code considered

10. The conduct complained of took place during early September 2010. Consequently version 9.0 of the WASPA Code of Conduct applies to this complaint.
11. The following sections of the WASPA Code of Conduct are relevant to this complaint:
 - 3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
 - 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.

Decision

12. Before deciding on the merits of this complaint, it is necessary to give some background. On 30 November 2010 a WASPA adjudicator was called upon to adjudicate on complaints 10549 and 10822 where the member was accused of subscribing an MSISDN to a subscription service and billing for provision of that service without consent. On the member's version, the erroneous subscriptions and billing were caused by a technical fault with its systems.
13. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.
14. The adjudicator in that complaint found that the member had infringed section 11.2.1 of version 9.0 of the Code of Conduct, but that it had not done so intentionally. He imposed the following sanction:
 37. The Adjudicator does not believe that the Member's infringement of section 11.2.1 is intentional, but substantial chaos and prejudice to consumers can result from the Member's conduct in this regard. Accordingly, the following sanctions are imposed in respect of the Member's infringement of section 11.2.1 of the Code of Conduct:
 - 37.1. The Member may not subscribe anyone to any of its subscription services until such time as it can demonstrate to the reasonable satisfaction of the WASPA Secretariat that it has taken reasonable steps to ensure that unauthorised subscriptions to its services do not occur.
 - 37.2. The WASPA Secretariat may at its sole instance appoint an independent technical expert to review the Member's systems to satisfy itself of compliance with the condition imposed in paragraph 37.1. This expert should be acceptable to both parties, but should no expert acceptable to the Member be found, the Secretariat may appoint an expert of its choosing, with the proviso that the expert should not be a competitor of the Member or work for one, and that the expert signs such reasonable non-disclosure agreement as the Member may require.
 - 37.3. The network operators are to block to all new subscriptions to the Member's subscription services for the period set out in paragraph 37.1, as contemplated in section 14.4.3 of the Code of Conduct. This order shall stand only if it is technically feasible in the view of the WASPA Secretariat.
 - 37.4. The Member is fined the amount of R100 000, wholly suspended for the period of six (6) months, on the condition that it does not make itself guilty of an infringement of section 11.2.1 during that period.
 - 37.5. To the extent that the Member has not done so immediately, it must refund all those subscribed to its services without their consent.
 38. Given the potential for prejudice that exists in having a backend system that is as problematic as the Member's has been shown to be, the sanctions set out in paragraphs 37.1 and 37.3 will not be suspended pending appeal.
15. The adjudicator enquired as to the status of enforcement of the above sanctions, and the WASPA Secretariat advised him on the 29th of March 2011 that Vodacom and MTN had terminated their contracts with the member by

the end of January 2010. The Secretariat speculated that the member did not have an agreement with Cell C.

16. The adjudicator in this complaint is in little doubt that the complainant was subscribed without his consent, and also that the reason for this erroneous subscription was the same as that in complaints 10549 and 10822.
17. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.
18. The adjudicator finds that in its failure to unsubscribe the complainant after its own confirmation that the complainant had been unsubscribed, the member acted unprofessionally both towards the WASPA Secretariat and the complainant, and consequently breached clause 3.1.1 of the Code of Conduct.

Sanctions

19. The adjudicator believes that to sanction the member again for conduct that has already been sanctioned under complaints 10549 and 10822 and that arose from the same set of facts would amount to double jeopardy. Consequently, no further sanction is imposed in respect of the infringement of section 11.2.1
20. The same is true of section 3.1.1, as the failure to unsubscribe the complainant doubtless sprang from the member's technical difficulties.
21. In the event that the member has not refunded the complainant, the member will refund the complainant with all funds debited as a result of the unsolicited subscription.