



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mira Networks
Information Provider (IP):	TIMw.e. New Media Entertainment SA
Service Type:	Subscription
Source of Complaints:	Public
Complaint Number:	#11035 (escalation of uns request #580229)
Code of Conduct version:	9.0
Advertising Rules version:	Not applicable

Complaint

Complaint #11035 is the escalation of unsubscribe request #580229 on 8 October, 2010, the Complainant having lodged an unsubscribe request for the following actions:

- * *SP requested to unsubscribe customer*
- * *SP requested to send an SMS confirming this unsubscribe*
- * *SP requested to provide proof of subscription*
- * *SP requested to contact customer regarding a refund.*

A reminder was sent to Mira Networks, the Service Provider in this matter, on 11 October, and in turn the Service Provider actioned the request by a hand-over to the Information Provider in this matter, TIMw.e. New Media Entertainment South Africa.

WASPA logs show that the Service Provider unsubscribed and blocked the Complainant on its systems, and sent an SMS confirmation of those actions to the Complainant on 11 October.

Later the same day the Information Provider updated the WASPA system by updating its record to reflect the Complainant as 'unsubscribed', and produced a spreadsheet as its confirmation of subscription, but failed or refused to send a confirmation SMS, and refused the Complainant's request for a refund.

On 4 November, 2010, the Complainant in the matter escalated the action to a formal complaint, and WASPA formally notified the Information Provider on the following day, 5 November, while copying the Service Provider on the notification.

WASPA's records state the following on escalation: "*Consumer says that she did not subscribe to any services, she said she tried to unsubscribe from the messages she was getting. She is not happy with the outcome of the refund request.*"

The Information Provider was reminded about the escalation on 19 November, and in the absence of further submissions from the Information Provider or the Service

Provider, WASPA assigned the matter to this Adjudicator on 24 November, 2010.

SP Response

The only documentary submission from the Information Provider is the spreadsheet submitted by the Information Provider on 11 November, which is attached to this Report.

This spreadsheet was provided by the Information Provider in response to the Complainant's request for confirmation of sign-up to the Information Provider's service, and logs in chronological order messages by the Information Provider to the Complainant, commencing shortly before midday on Monday, 17 November, 2008, and concluding Thursday, 7 October, 2010, all via the Vodacom operator network.

Without exception, all entries reflect short-codes 133535 or 33535 as 'Origin', and the Complaint's cell phone number as 'Dest' (understood to mean 'destination').

The spreadsheet's opening three entry reads as follows:

- *Insert your password asquac and receive 3 Games and 1 Truetone every week. Please check T&C at www.za.natta.com/web/za/tac*
- *Click to get the coolest games now! www.za.natta.com*
- *Welcome! U have joined Games Club. 3 Games + 1 Tune per week, R4,99/day.Stop?Dial *120*33535# and follow the menu(1c/sec). Helpline:(0)11 4470357. Total TIM*

Thereafter, for the most part, the entries follow this pattern of SMS reminders from the Information Provider to the Complainant's cell phone number:

- *A monthly reminder SMS: You are subscribed to Games Club. Cost R4,99 per day! To Stop dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357.Total Tim www.za.natta.com*
- *A weekly reminder SMS: Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim*
- *A weekly reminder SMS: Click 2 get the coolest games now! www.za.natta.com*
- *A daily reminder SMS (on days on which the above reminders were not sent): Download now*

Minor discrepancies in the SMS text and frequency of the messages occur in the spreadsheet, but not to an extent that they would impact materially on the findings of this Report.

Decision

For the purpose of clarity, the Complainant lodged the initial unsubscribe request on 8 October, 2010, at which time version 9.0 of the WASPA Code of Conduct was applicable.

Though WASPA lodged the escalation on 4 November, 2010, (i.e.: after version 10 of the Code of Conduct came into effect), the initial action by the Complainant is decisive in the determination of which version of the Code of Conduct shall apply in this matter.

The service complained of falls within the ambit of the definition of a subscription service as set out in section 11 of the Code of Conduct.

At the heart of this formal complaint is the Complainant's allegation that she did nothing to sign up for the Information Provider's services.

Should her contention be true, then the Information Provider's conduct is fraudulent and unlawful, in which instance the elementary section of the code breached would be clause 3.1:

Professional and lawful conduct

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.

3.1.2. Members are committed to lawful conduct at all times.

The Complainant's evidence is that:

1. She denies subscribing to the Information Provider's services;
2. She tried to unsubscribe from the Information Provider's services, implicitly unsuccessfully.

In as much as the spreadsheet can be relied on, it does not list a single instance of the Complainant initiating a download of the content items offered by the Information Provider's services, for which she was being billed R4.99 per day, a total cost exceeding R3,000.00 for the period of subscription.

In the same manner, the spreadsheet does not reveal a single instance of an attempted 'Stop' unsubscribe action, as alleged by the Complainant. An explanation by the Information Provider of the nature of the information captured in the spreadsheet (discussed below) would have added clarity to whether this is a meaningful omission in the log, or not.

A further noteworthy aspect of the Information Provider's log is to the effect that the Complainant received an SMS from the Information Provider on a daily basis, a proposition that the Complainant has not denied. Working on the assumption that regular receipt of un-requested SMS's would frustrate most people, it is peculiar that the Complainant failed to take decisive action for a period of almost two years.

The Information Provider tendered a log of account entries as proof of its assertion of the Complainant's sign-up for its services.

The spreadsheet is unfortunately not accompanied by an explanation of what information it purports to convey, and the same document may variously be understood to represent either a log solely of SMS messages by the Information Provider to the Complainant in the larger framework of all communications between the parties, or it might reflect the sum total of all communications.

The former hypothesis would imply that the Information Provider's contention – that the Complainant did sign-up for its services – is logically plausible, while the latter would leave one no option other than to conclude that the Complainant never signed up.

If the Information Provider had better evidence to support its contention that the Complainant did sign up to its services, it failed to respond to an opportunity to present that evidence, after being invited to do so by WASPA prior to the commencement of this formal complaint.

One aspect of the Information Provider's log that is of interest, is the time lapse of 31 seconds between the originating SMS to the Complainant conveying the password 'asquac', and the Information Provider's confirmation SMS to the Complainant welcoming her as a subscriber.

Though it is not conceptually impossible for the Information Provider to initiate the transmission of an SMS message to the Complainant containing a password, for her to access the message, to note or copy the password, to key or paste the password into the service sign-up facility and conclude her sign-up to the Information Provider's service, for the Information Provider to be notified of that sign-up and to initiate the transmission of a sign-up confirmation message to the Complainant - all in 31 seconds – such an averment does stretch credulity.

The final reference that the Adjudicator has is to the Information Provider's past conduct in the context of formal complaints laid against it, in the context of subscription services.

In bare numbers, a total of 26 formal complaints have been lodged against the Information Provider in the past 22 months in the context of or including specific reference to subscription services, of which 20 complaints were upheld, and two further complaints were partially upheld. The Information Provider has lodged appeal proceedings against 12 of the complaints upheld, in terms of the WASPA Code of Conduct.

The Adjudicator has carefully reviewed the complaint; the Information Provider's response to the complaint; the WASPA Code of Conduct and other material relevant to the complaint as supplied by WASPA, and, on the basis of the evidence presented, the Adjudicator finds that the Service Provider has breached the following clauses of the Code of Conduct:

1. Clause 11.2.1: Customers may not automatically be subscribed to a subscription service without specifically opting in to that service; and
2. Clause 3.1.2: Members are committed to lawful conduct at all times.

Sanction

In determining appropriate sanctions, and with regard to factors in mitigation of sanctions, the Adjudicator orders the following sanctions:

1. The Information Provider is ordered to refund the Complainant, within 7 (seven) days of receiving notice of this decision and in a form acceptable to her, all amounts which were debited to the Complainant's account per its logs; and
2. The Information Provider is fined the sum of R 25 000.00.