



REPORT OF THE ADJUDICATOR

Complaint reference number:	11177
WASPA member(s):	TMobileSA
Membership number(s):	0116
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2010-11-22
Date of the alleged offence:	October – November 2010
Relevant version of the Code:	10.0
Clauses considered:	11.2.1; 11.10.2
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	10511 & 10822; 10511 & 10927

Complaint and Response

1. The Complainant in this matter is a member of the public, and was subscribed to an SMS subscription service allegedly without her consent. The complainant made use of the unsubscribe facility available on the WASPA website on 10 November 2010. There seem to also be a record on the relevant log of the complainant making an unsubscribe request on 2 April 2010, but this point was not raised by any of the parties.
2. The complaint was expressed as follows:

I have had another sms from the same Tsoko cpy!!!! On 22/11/2010 at 2:10pm. They have taken R5 off my account. Please, I want to be refurbished with every cent they have taken the past 2 years, they have had NO authorisation to send me sms's and take money off my account. I call that stealing and I feel MTN should be responsible, as I have complained time and again and have had the same persistent problem for the past few years.
3. Perusal of the relevant unsubscribe log shows that the member confirmed that the complainant's MSISDN had been unsubscribed both on the 10th and

11th of November 2010. Notwithstanding, the member charged the complainant R5 on the 22nd of November 2010.

4. The complaint was escalated to the formal process and the relevant notice sent to the member on 23 November 2010. The WASPA Secretariat requested that the member provide proof of subscription indicating that the complainant had opted in to the service after being unsubscribed as above.
5. The member requested that the complainant furnish it with her banking details so that it could refund her. It is unclear whether a refund was ever given however, despite protestations of urgency on several occasions by the member.
6. A lengthy correspondence ensued between the member and complainant, during which the complainant accused the member of having deducted charges from her account for the last two years, while the member advised that it had only been in business for one year and had in fact only made one charge against the complainant's account.
7. The complainant's response was that she could show four deductions made on different dates between September and November 2010 in different amounts.
8. On 25 November WASPA confirmed these transactions by reference to the complainant's network operator's account, and advised that the matter would be sent to adjudication. This e-mail was copied to the member which immediately undertook to refund the complainant as soon as possible.
9. In response to this e-mail, the WASPA Secretariat requested that the member should provide it with proof of the complainant's subscription to the service subsequent to 10 November 2010, the unsubscribe date, given the subsequent charges against the MSISDN.
10. The WASPA Secretariat also raised an inconsistency in the member's version of how the four transactions had been charged. The member's representative telephonically advised the WASPA Secretariat that the charge put through on 22 November was due to delayed billing by the network provider; however the network provider subsequently advised the WASPA Secretariat that there was no delayed billing, that the charges came from the member, and were processed as received.
11. The member did not respond to the WASPA Secretariat e-mail until 14 December when the WASPA Secretariat wrote to it and advising it as it had not received any response it was referring the matter to the adjudicator. The member sent logs of these four transactions to the WASPA Secretariat on the same day.
12. The logs themselves did not address the complainant's or the secretariat's concerns. They contained four entries, each reflecting an SMS sent to the complainant. The contents of each of these four messages were identical, but the cost was different in each case except for the last two. In other words, the complainant was charged four times for the same SMS! Similarly, the subscription date was different for each of the messages except for the last two, which both showed a subscription date of 31 October 2010. The last message was sent on 22 November 2010, so the logs clearly did not show a

subscription between the unsubscribe date of 10 November 2010 and the transmission date of the last SMS. Moreover, the logs did not show how the complainant opted into the service.

13. The WASPA Secretariat requested that the member should provide information as to how the complainant opted into the service, as well as the required welcome, reminder messages and confirmation that the complainant had been unsubscribed.
14. No further response was forthcoming from the member.

Sections of the Code considered

15. The conduct complained of took place between 27 October 2010 and 22 November 2010. Consequently version 10.0 of the WASPA Code of Conduct applies to this complaint.
16. The following sections of the WASPA Code of Conduct are relevant to this complaint:

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.

11.10.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

Decision

17. 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.
18. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.
19. 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:

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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.
20. 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.
21. Other relevant complaints are numbers 10511 and 10927, which follow one from the other. In these complaints, the adjudicator found that the member had fraudulently contrived logs in order to mislead the WASPA Secretariat. He imposed a suspension of 30 days with a concomitant block on network services as a sanction. According to the WASPA Secretariat, the member's membership had not yet been suspended as of 29 March 2011, as it is not quite clear what a suspension would entail, an issue that is receiving attention.
22. 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.
23. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.

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24. The adjudicator finds that in its failure to provide logs as requested by the WASPA Secretariat the member breached clause 11.10.2 of the Code of Conduct.
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Sanctions

25. 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
26. In the case of the infringement of section 11.10.2, the member's failure to provide logs was due to an inability to do so stemming from a systematic failure - the member could not supply the information because it did not exist. However, the member attempted to hide this failure by infringing section 11.10.2 of the Code of Conduct. In the light of the sanction imposed in complaint numbers 10511 and 10927, this conduct pushes the member's misconduct beyond that which can be allowed for continued membership of WASPA, and the adjudicator consequently imposes a sanction of expulsion from WASPA.
27. 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.