



REPORT OF THE ADJUDICATOR

Complaint reference number:	11287
WASPA member(s):	TMobileSA
Membership number(s):	0116
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2010-12-01
Date of the alleged offence:	2010-11-30 & 2010-12-01
Relevant version of the Code:	10.0
Clauses considered:	5.1.7; 11.2.1; 11.5.1; 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. In this complaint, the complainant is an employee of WASPA. Notwithstanding, he is acting in his personal capacity and is thus classified as a member of the public for these purposes. The complaint revolves around subscription to an SMS subscription service without the complainant's consent.

2. The complaint itself was lodged on 1 December 2010 in the following terms:

Message received 30 November 2010 from +27839300366

"The mark of great leaders is the ability to understand the context in which they are operating and act accordingly - Nelson Mandela"

A further message was sent today from the same number:

"It is important to surround yourself with strong and independent personalities, who will tell you when you are getting old- Nelson Mandela"

This complaint must go formal and I request an emergency panel hearing.

3. Formal notice of the complaint was sent to the member on 3 December 2010.
4. On the same date, the WASPA Secretariat sent an e-mail to the complainant's network provider advising that the complainant had been charged by the member "out of the blue", and asked the network provider to investigate the matter as the complainant had no prior relationship with the member and had not requested the subscription.
5. The network provider forwarded the WASPA Secretariat e-mail to the member, which provided logs of the messages concerned.
6. These logs show that the complainant was subscribed to the service on 15 November 2010 and received the messages as quoted above on 30 November and 1 December 2010 at a cost of R3 each.
7. The complainant was not satisfied with this response, and advised that the logs did not explain how he subscribed in the first place. He demanded a detailed explanation of how he was subscribed with supporting logs, as well as information on where his MSISDN was obtained and why they were no opt out or welcome messages. He also requested formal adjudication.
8. The WASPA Secretariat requested that the member should provide proof as to how the complainant requested subscription, as well as proof of the "double opt-in". The member was also required to provide proof that the complainant received welcome messages for the service.
9. On 6 December the WASPA Secretariat followed up with the member, which assured the secretariat that it would provide the requested information.
10. On 9 December, the member e-mailed the WASPA Secretariat, with the assurance that it would provide the requested information by close of business on that day.
11. No further response was received from the member.

Sections of the Code considered

12. 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.
13. The following sections of the WASPA Code of Conduct are relevant to this complaint:

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

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.

11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This

welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.

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

14. 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.
15. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.
16. 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.
17. 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.
18. In complaints 10549 and 10822, the adjudicator also found that the member had infringed section 5.1.7 of the Code of Conduct by failing to disclose the source of the complainant's personal information, and imposed a formal reprimand and a fine of R2000 for each instance, for a total of R4000.
19. 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.
20. 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.
21. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.
22. 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.
23. Further, in failing to disclose the source of the complainant's personal information, the member infringed section 5.1.7 of the Code of Conduct.
24. Finally, the allegation was made that the member sent no welcome message to the complainant as required by section 11.5.1. The member had the opportunity to rebut this allegation, but made no response; consequently the adjudicator has little choice but to accept, in the circumstance of the matter, that no welcome message was sent and that the member has infringed section 11.5.1 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. The infringement of sections 5.1.7, 11.10.2, and 11.5.1 was in the adjudicator's view a result of the failure of the member's systems – the member could not supply the information because it did not exist. However, the member attempted to hide this failure by infringing further sections 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.