



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Sybase 365 (Mobile 365)
Information Provider (IP) (if any)	Global Moderating Associates Limited (GMA Ltd)
Service Type	Subscription, Contact
Source of Complaints	Anonymous
Complaint Number	#1317
Date received	8 May 2007
Code of Conduct version	4.92

Complaint

An anonymous Complainant raised potential breaches of sections 3, 6, 10 and 11 of the WASPA Code of Conduct. The Complainant identified two SPs, both of which are members of WASPA, against which the alleged breaches lie – Sybase 365 (previously Mobile 365) in respect of the provision of premium-rated SMS services and Mira Networks in respect of Online Billing Services (OBS). The IP is an affiliate member of WASPA.

[Adjudicator's Note: Mira Networks had no involvement other than as infrastructure provider to the SP and is not properly regarded as a respondent in this matter.]

The detailed Complaint sets out certain terms and conditions taken from the website www.chatting4you.com. These terms and conditions are specified on the website as being of specific application to South Africans.

“Unsubscribe

When you want to unsubscribe from the service, you can cancel the service as follows:

1. By sending a text message

Send a text message with the words STOP/ END, CANCEL or Unsubscribe to number 31737. After you send in this text message you will receive a (free) confirmation message that you are unsubscribed.

Costs

7, 50 Rand per received message + standard messaging fees. Other charges may apply, charged to your wireless bill.

Helpdesk

phonenumber: 0861-115152”

The Complainant provided details of the manner in which he had been billed in respect of his interaction with the service:

Sent	Received	Bill
FUN	Welcome to Chatting4You! In a moment you will be connected to an available girl. Info www.chatting4you.com. To end: send stop to 31737 only R10/rcvd sms	50c +R10
	Colleen: I'm Colleen I'm a fun and outgoing girl, what about you and what are you looking for?	R10
	Colleen: how is my sweetheart doing? Did you think of me? I would like a kiss from you or two...	R10
STOP	The chat service has been deactivated. No further charges 50c +R10 apply. If you want to enjoy our service please text FUN to 31737.Info?	50c + R10

	www.chatting4you.com	
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From the above the Complainant drew the conclusion that “Welcome, Stop messages as well as any SMS’s sent by the system’s operator are charged at R10”.

On the basis of the above the following detailed complaints were submitted:

Complaint	Code of Conduct section raised
The cost is incorrectly advertised on the Website at R7.50	6.2. Pricing of services 6.2.2. All advertisements for services must include the full retail price of that service.
The stop request is charged at R10 plus the 50c MO charge. They claim this is free	6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications 11.3.2. All subscription services must have a readily available unsubscribe facility which costs no more than one rand.
The commercial part of the SMS sent in reply to a stop (“If you want to enjoy our service please text FUN to 31737”) is in contravention as: i. it doesn’t state the price of the service or – Contravention of CoC 6.2. ii. that it’s a Subscription type service, i.e. ongoing billing on SMS’s received - Contravention of 11.1.1.	6.2. Pricing of services 6.2.2. All advertisements for services must include the full retail price of that service. 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.
The requisite “Welcome message” is charged at R10 plus MO charges – while there is no specific contravention here this is unacceptable and could be sanctioned under CoC 3.1. professional and lawful conduct, or 6.2.3 which indicates cost should not be hidden, I believe charges for system messages that one wouldn’t expect to be charged are hidden charges.	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. 6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.
The user is sent communications at a cost of R10, from an ‘operator’ trying to solicit responses (and drive up charges), when a user indicates they are not interested the operator sends a flurry of sms’s each charged at R10 – while there is no specific contravention here this is unacceptable and could be sanctioned under CoC 3.1. professional and lawful conduct. This service is clearly not a social chatting service but a operator driven service, this should also be clear in adverts. I recommend that WASPA request to see the advertising material used.	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.

<p>The pricing of the service is extremely high. This should be very, very clear in advertising. >From one case (complaint #1161 – bill attached to this complaint) it is clear the users were unaware of the cost. I recommend that WASPA request to see the advertising material used.</p>	<p>No specific section raised.</p>
<p>The service appears to be in contravention of many of the clauses in section 10 for example 10.1.1., 10.1.2, 10.2.1, 10.2.2 as none of these required measures are apparent.</p>	<p>10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.</p> <p>10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.</p> <p>10.2. Restrictions on the service</p> <p>10.2.1. Members must take reasonable steps to ensure that users of contact and dating services are authorised by the bill-payer to use that service.</p> <p>10.2.2. Providers of contact and dating services must take reasonable steps to ensure that no children use the services.</p>

The Complainant provided a screen shot of the www.chatting4you.com website and a copy of a detailed bill (relating to a separate complaint in respect of the service) in support of the alleged breaches.

Emergency Procedure

The emergency procedure set out in section 13.7 of the Code of Conduct was invoked in response to the Complaint and an emergency panel made the following finding:

“Synopsis: Evidence was provided by the complainant that the pricing for the Chatting4You service was not correctly represented and that the service provider is charging R10+ for an unsubscribe request. The panel considered the evidence presented and found that a breach of the WASPA Code had occurred that required an urgent remedy.

Note: A letter was received from the Service Provider regarding this complaint after the initial deliberations of the emergency panel. It was not considered during these initial deliberations but was reviewed afterwards.

Remedies ordered by the Emergency Panel:

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1. The Service Provider and the Information Provider are instructed to immediately suspend the Chatting4you service pending the outcome of the formal complaint process.
 2. If the number 31737 is used exclusively for the Chatting4you service, the Service Provider must immediately suspend this number. The WASPA Secretariat should also request that the mobile networks suspend this number pending the outcome of the formal complaint process.
 3. If the number is not used exclusively for the Chatting4you service, all services associated with Chatting4you must be immediately suspended, but other services operating on that number may continue to operate. Neither the Service Provider nor the Information Provider may bill any customers further charges for the Chatting4you service pending the outcome of the formal complaint process.
 4. Existing active users of the Chatting4you service must be notified of the suspension, at no charge to the customer.
 5. The Service Provider and Information Provider are prohibited from operating this or a similar service on any other number pending the outcome of the formal complaint process.
 6. The WASPA Secretariat should notify the mobile network operators and WASPA's members that this suspension has been ordered.”

SP Response

A lengthy response was received from the SP and the IP's response was attached as a schedule thereto.

The following relevant points were raised by the SP:

- The SP takes considerable measures to ensure compliance with the WASPA Code of Conduct on the part of IP with which it contracts. These include requiring both that the IP comply with the WASPA Code of Conduct as a contractual obligation and that the IP itself become a WASPA member (and bound by the Code of Conduct). The SP reserves the right to suspend the Services where the IP does not comply with these obligations.
- The SP suspended the service within hours of having received the emergency panel notification on 10 May 2007 and prior to the convening of the emergency panel or the announcement of its decision. The SP brought

this to the attention of the WASPA Secretariat shortly before the time scheduled for the emergency panel hearing.

- The SP & IP have complied with the remedies as ordered by the emergency panel (see above) “to the best of the abilities of the parties”.
- The SP and IP were already reviewing the Services prior to the invoking of the emergency procedure and “taking steps to alter the Services. Since 11 May 2007, Sybase 365 has been liaising closely with the Information Provider in order to obtain all the necessary information, as Sybase 365 is dependent on the Information Provider for the relevant information about the Services.”

In response to specific allegations raised by the Complainant the SP states:

- The website unfortunately did show the incorrect pricing information due to an administrative error.
- The stop confirmation should have been sent for free but unfortunately due to an administrative error, the messages were inadvertently sent at a premium charge. It is not clear, however, that section 6.2.4 of the Code of Conduct applies to stop confirmation messages.
- Section 10 of the Code of Conduct relates to Contact and Dating services. The service operated by the Information Provider is not a contact or dating service but a chat service and as such does not fall within the provisions of section 10.

In conclusion the SP avers that it bears “no substantial responsibility for any breaches of the Code of Conduct that might occur and is taking all reasonable steps to ensure that the risk of any breaches is minimised”.

IP Response

The IP provided a point-by-point reply to the Complaint.

Complaint	Response
The cost is incorrectly advertised on the Website at R7.50	We do apologise for having the wrong costs at the site. This was never intentionally and on www.chatting4you.com one can read the correct costs now.
The stop request is charged at R10 plus the 50c MO charge. They claim this is free	Our system should have send these messages for free and we have put these messages now for free (standard messaging fees do apply). At this time the shortcode and the service are not live.
The commercial part of the SMS sent	i. In the free confirmation message after sending STOP we do not

<p>in reply to a stop ("If you want to enjoy our service please text FUN to 31737") is in contravention as:</p> <p>i. it doesn't state the price of the service or – Contravention of CoC 6.2.</p> <p>ii. that it's a Subscription type service, i.e. ongoing billing on SMS's received - Contravention of 11.1.1.</p>	<p>refer to re-entering the service again. This is the message: Free: The free messages have been stopped. No further charges apply. You will not receive any messages. Info? www.chatting4you.com or call 0861 115152</p> <p>ii. the service is no longer a subscription service anymore.</p>
<p>The requisite "Welcome message" is charged at R10 plus MO charges – while there is no specific contravention here this is unacceptable and could be sanctioned under CoC 3.1. professional and lawful conduct, or 6.2.3 which indicates cost should not be hidden, I believe charges for system messages that one wouldn't expect to be charged are hidden charges.</p>	<p>We hereby confirm that the Welcome Messages will be send out for free.</p>
<p>The user is sent communications at a cost of R10, from an 'operator' trying to solicit responses (and drive up charges), when a user indicates they are not interested the operator sends a flurry of sms's each charged at R10 – while there is no specific contravention here this is unacceptable and could be sanctioned under CoC 3.1. professional and lawful conduct. This service is clearly not a social chatting service but a operator driven service, this should also be clear in adverts. I recommend that WASPA request to see the advertising material used.</p>	<p>We hereby confirm that the updates which will be send to the end-user will be free messages.</p>
<p>The pricing of the service is extremely high. This should be very, very clear in advertising. >From one case (complaint #1161 – bill attached to this complaint) it is clear the users were unaware of the cost. I recommend that WASPA request to see the advertising material used.</p>	<p>In the advertising material the consumer tariff is shown on screen. We have had even compliments from several TV channels that we were the only advertiser who puts the consumer tariff so big and clear on screen.</p>
<p>The service appears to be in contravention of many of the clauses in section 10 for example 10.1.1., 10.1.2, 10.2.1, 10.2.2 as none of these required measures are apparent.</p>	<p>The service is been put 100% to all your requests and to all Code of Conduct guidelines.</p>

Decision

It is apparent from the above that a number of breaches of the WASPA Code of Conduct have been admitted by the IP and acknowledged by the SP. The Adjudicator has noted the lengths taken by both parties to emphasise the remedial work done in respect of the service. While this can be taken into account in mitigation of any sanction which may be imposed, it cannot influence any investigation as to the nature and characteristics of the service as at the time the Complaint was submitted to WASPA.

Each element of the Complaint is dealt with individually below.

Pricing

The IP is in breach of section 6.2.2 of the Code of Conduct which requires that advertisements for services must include the full retail price of that service. The advertised price of R7.50 per message received is at odds with the billed price of R10 per message received. The unintentional or administrative nature of this error cannot excuse the occurrence of the breach.

Pricing of unsubscribe facility

The IP has breached sections 6.2.4 and 11.3.2 of the Code of Conduct. The advertising of the facility as “free” when it is billed at R7.50 is misleading and the breach of section 11.3.2 is clear.

The SP raised the argument that it is not clear that section 6.2.4 applies to stop confirmation messages. This is not accepted on the basis that the use of the word “free” is an indication of pricing which appeared in an advertisement and which was misleading, meeting the requirements of the section.

Pricing and use of “subscription service” in advertisement

Notwithstanding the fact that the recipient of such an advertisement contained within an unsubscribe message could reasonably be expected to be aware of the cost and subscription nature of the service, the failure of the IP to include the cost and the words “subscription service” is a breach of sections 6.2.2 and 11.1.1 respectively. This is based on the version of the message as received by the Complainant.

Professional conduct & pricing of welcome message

The IP is found to have breached sections 3.1.1 and 6.2.3 of the Code of Conduct by charging R10 in respect of a welcome message – a billing event which would not reasonably be expected by a user or potential user. The message is, in any event, obligatory for the IP to send as a result of the subscription nature of the service.

Professional conduct

The gist of the Complaint in this regard is that the service is operator driven in such a way that users incur costs as a result of the operator attempting to generate further revenue by sending messages to the user at R10 per message received. The Adjudicator's understanding is that this approach is considered unprofessional due to the inability of the user to control costs – the IP is able to drive these up of its own volition.

The IP's response in this regard – “We hereby confirm that the updates which will be send to the end-user will be free messages” – amounts, in the opinion of the Adjudicator, to an admission that the previous approach was problematic.

The IP is found to have breached section 3.1.1 in this regard.

High pricing

No section of the Code of Conduct is raised by the Complainant in this regard and the Adjudicator does not regard the formulation of this element of the Complaint as being of a suitable nature for adjudication under the Code of Conduct.

No finding is made in regard to this element.

Breaches of section 10 – Contact and dating services

The Complainant raised possible breaches of sections 10.1.1, 10.1.2, 10.2.1 & 10.2.2, all of which relate to requirements in respect of contact and dating services.

The SP raises the argument that the service operated by the Information Provider is not a contact or dating service but a chat service and as such does not fall within the provisions of section 10. No substantive response to this element was provided by the IP.

The definition of a “contact and dating” service as set out in section 2.11 of the Code of Conduct is as follows –

“A ‘**contact and dating**’ service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person”.

It does not appear necessary, on the undisputed facts of the matter, to pursue the SP’s argument any further and it is found that the service in question falls within the definition of a contact and dating service and therefore needs to comply with section 10 of the Code of Conduct.

The section raised by the Complainant read as follows –

10.1. Provision of information

10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.

10.2. Restrictions on the service

10.2.1. Members must take reasonable steps to ensure that users of contact and dating services are authorised by the bill-payer to use that service.

10.2.2. Providers of contact and dating services must take reasonable steps to ensure that no children use the services.

No attempt has been made by the IP to comply with sections 10.1.2, 10.2.1 & 10.2.2. The position as regards compliance with section 10.1.1 is not clear on the facts placed before the adjudicator.

Accordingly a finding is made that the IP has breached sections 10.1.2, 10.2.1 & 10.2.2 of the WASPA Code of Conduct.

Position of the SP

Notwithstanding the belief on the part of the Adjudicator that even the most basic of sanity checks would have sufficed to indicate some of the problems with the service it is found that the SP has acted in accordance with its obligations under sections 3.9.1 and 3.9.2 of the Code of Conduct.

Nevertheless, while the prompt remedial action taken by the SP is to its credit in this regard, the fact remains that the SP was aware of the non-compliance of the service with the Code of Conduct prior to receiving notification of the emergency procedure but chose not to suspend the service at this stage. As stated above the nature of the non-compliance was blatant and it is the Adjudicator's position that remedial action should have been adopted with a far greater degree of urgency. This is particularly so should the SP wish to live up to the expressions of commitment to dealing with matters of this nature as expressed in its Response.

Order

The inescapable conclusion to be drawn in this matter is that the service was launched with scant regard to the obligations of the IP in respect of its contractual relationship with the SP and its membership of WASPA. The nature of the service was such that consumers could easily be confused by the manner in which it operated and find themselves out of pocket. Indeed it is difficult to avoid the inference that the service was designed to take advantage of a naïve market for the purposes of unrestrained revenue generation.

In the circumstances the following Order is made:

- The Service Provider and the Information Provider are instructed to continue the suspension of the Chatting4you service pending the resolution of all breaches of the Code of Conduct raised in this Report and full compliance with this Order.
- If the number 31737 is used exclusively for the Chatting4you service, the Service Provider must continue the suspension of this number. The WASPA Secretariat is requested to confirm such suspension with the mobile networks.
- If the number is not used exclusively for the Chatting4you service, all services associated with Chatting4you must continue to be suspended, but other services operating on that number may continue to operate.

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- The Service Provider and Information Provider are prohibited from operating this or a similar service on any other number pending the resolution of all breaches of the Code of Conduct raised in this Report and full compliance with this Order.
 - The SP is issued with a formal reprimand.
 - The IP is ordered to reimburse all users of the service in respect of the following:
 - All charges levied due to the receipt by the user of a welcome message;
 - All charges levied due to the receipt by the user of any other message pushed onto the user as updates;
 - The difference between the advertised price of R7.50 and the billed price of R10 in respect of all messages received by users using the service prior to its suspension, other than welcome and update messages as specified above;
 - The difference between the billed unsubscribe cost of R10 and the advertised cost of R0 in respect of all users who unsubscribed from the service prior to its suspension.
 - The IP is issued with a formal reprimand in respect of the breaches of the Code of Conduct outlined above.
 - The IP is fined the sum of R200 000 in respect of the breaches of sections 3.1.1., 6.2.2, 6.2.3, 6.2.4, 10.1.2, 10.2.1, 10.2.2, 11.1.1 and 11.3.2, with payment of an amount of R125 000 suspended for a period of 12 months subject to the IP not breaching such sections of the Code of Conduct during that period. Payment of the balance is to be made to the WASPA Secretariat within five days of receipt of notification by the IP of this Order. The prompt response of the IP and its cooperation with the WASPA procedures has been taken into account in mitigation of sanction.
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