



ADJUDICATOR'S REPORT

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|------------------------------------|--------------------------|
| Complaint reference number: | 14410 |
| WASPA member(s): | Opera Interactive ("SP") |
| Membership number(s): | 0068 |
| Complainant: | Public |
| Type of complaint: | Subscription Service |
| Date complaint was lodged: | 2011-08-23 |
| Date of the alleged offence: | 2011-06-28 |
| Relevant version of the Code: | 11.0 |
| Clauses considered: | 11.2, 11.3 and 11.5 |
| Relevant version of the Ad. Rules: | Not applicable |
| Clauses considered: | Not applicable |
| Related cases considered: | Not applicable. |

Complaint

The complainant, a Vodacom subscriber, contacted Vodacom on 28 June 2011 reporting the following:

Dear Sir/Madam. Today, 28/06/2011, I received one of those clip messages from a company running by the name of Zuma Mobile. I wondered what it was about and proceeded to view, but relised shortly afterward that it was garbage and stopped the fun. Imagine my surprise when about an hour later I received notification that I had subscribed to some clip art contract running at R5 perday. Subscribed? Just by opening a mail sent to me? Where was the

notification to the effect that opening the message would automatically bind me to a contract. Not only this, each and all contracts require paperwork. And the considered consent of the party who is parting with money. Zuma mobile, then, are invading a vodacom network in order to defraud the public. I phoned customer care and was told that indeed I had a contract registered against my number in favour of Zuma mobile. I have a reference number:1725XXX. I was further told that vodacom would take 48 hours to stop the extortion. Which extortion is a criminal act. Which criminal act utilises vodacom database. Which means vodacom is accessory to a criminal act. 48 hours? When there is no valid contract and YOUR reputation is at stake? This is serious stuff, Vodacom. I've been with you on a talk 240 contract for some 10 years. I need protection from this type of thuggery of the airways. Stop these people before they stop you. I want full explanation. In fact I demand it. And I want to know exactly what you are going to do about it. I want to see you bringing legal action against Zuma Mobile. I want to know which attorneys you instruct. I want to know when summons will be issued and served. Then I want to see proof the the police had been informed. You have my contact details.

I have masked the reference number the complainant quoted in his message. The complainant did not receive a response from Vodacom he was satisfied with and escalated his complaint to the National Consumer Commission and within Vodacom itself. Vodacom appears to have passed the complaint along to WASPA on the complainant's behalf.

The SP advised WASPA, later that day, that the complainant's subscription to the subscription service the complainant queried ("the service") was cancelled and a confirmation SMS was sent to the complainant. It also appears that the complainant was offered a "full refund", which the complainant appears to have refused. There is further correspondence between the complainant, WASPA, Vodacom and the National Consumer Commission in which the complainant insists that he did not subscribe to the service. One of his more emphatic communications, sent on 30 August 2011, includes the following:

That's just it. I am categorically saying that I did NOT Knowingly EVER, NOT, again NOT knowingly EVER, and again, NOT knowingly Ever Ever Ever initiate/ activate EVER.

How many times must I say this? Let's just get this straight, now and forever more. And I have told you (WASPA) this exact thing before. Many times. Stop dancing about and evading the issue. And I repeat it here. That at NO time EVER did I enter an arms length contract with any of these parasite companies. I never visited a site. I never provided my details.

If you say that I must have initiated , then how does that explain that message out of the blue from Zuma Mobile which was sent my way, inviting me to open it. At the time I had NO idea what it was, you understand. Thinking it might be something from one of my out-of-the-home sons, I Did open it, then saw that it was a stupid little clip that I certainly didn't want to clutter my phone and deleted it even before it had finished playing out.

Now I have NO intention of being called a liar, for that is what is implied here. That is criminal

slander.

Service provider's response

The SP conducted an investigation into the complainant's allegations and submitted a fairly detailed report to WASPA. I enclose a redacted version of this report to my report rather than repeating it. Vodacom's Jodee Farah (a senior legal advisor who became involved in the correspondence) referred to the SP's report as "compelling" and I agree. Unless the logs the SP supplied are fabrications, they support the SP's contentions that someone making use of the complainant's mobile phone browsed to the SP's mobile WAP page and initiated a subscription following the process described in the report.

On 1 September 2011, the complainant included the following in a further email:

I have one handset. It is on or near my person every minute of every day. I have not lost it, it has not been stolen. There are no children or teenagers living in this house. Just myself and my significant other. A cardiologist with own line, own handset, also with Vodacom. Meaning that these 'Cute TV' double opt-in processes could only have come via myself.

Now. I did receive an out of the blue sms from source unknown which kicked this whole issue off. A strange cartoon clip attached to a message which I didn't read, I just opened the attachment as most people would do. I mean, you are not expecting an entrapping message, are you? You are certainly not pre-primed, so you are not made aware of the danger that awaits the allegedly careless- and it seems to me that they accuse me of being so careless, dumb even. I opened the clip, saw that it was junk, and closed it before it had even played out.

An hour later I received a further sms thanking me for my custom. So . What happened to the 2nd leg of the double opt-in process? (as per 3/ above and as per Zuma Response). I didn't get it on my handset no matter how much they produce 'records' that I did in fact receive it and act upon it.

He specifically pointed out that he only has one mobile phone and that it "is on or near [his] person every minute of every day". He also mentions that he received an "out of the blue sms" which triggered this complaint.

The SP pointed out that a double opt-in is required in order to trigger a subscription to the service. Having regard to the SP's report and the relevant screenshots, the question is whether the subscription mechanism complies with the Code's requirements. That the complainant selected a video does not appear to be contentious. Instead, the complainant's subscription to the service as a result of that is.

Sections of the Code considered

The following provisions of the Code are particularly relevant:

11.2. Subscription process

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.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

...

11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

The initial page features prominent video player images prefaced by the following notice: “Download any Video! Join our club, T&Cs apply, subscription service, R5/day”. Below the 3 images is a set of terms and conditions which include a helpline phone number and email address, the words “SUBSCRIPTION SERVICE. Costs: R5/day. You will get access to all available Video downloads of the service until you unsubscribe” and so on.

The terms further include instructions how to unsubscribe (“To unsubscribe, SMS STOP to 31804”) and the information provider’s details. Each image on the landing page also has the notations “CLICK TO JOIN” and “R5/DAY” in a white bar at the top of each image. It is difficult to ascertain what the relative sizes of these elements would be on a mobile phone such as the one the complainant appears to have used but it appears clear from these notices that this is a subscription service that carries a charge of R5 per day.

There is no other content or material being promoted alongside this video content which, as I have already mentioned, appears to fall within the scope of this subscription service.

The next screen features a large, green “START” button with the following text immediately below it:

*By clicking on the start button you enter the “Cute TV” subscription service for R5/day.
Hotline: 0839163004. Access to the site requires your cellphone number.*

This text clearly indicates the consequence of clicking on the “START” button and, while I do have reservations about the button’s relative size compared to advisory text below, the text is relatively prominent and indicates that a subscription to the “Cute TV” service is the result of clicking on that button. Further, if a user were to continue scrolling down the screen, he or she would see navigation buttons and, below those buttons, terms and conditions which reiterate the salient features of the service including its subscription nature, pricing and how to terminate the subscription. This information is in plain language.

11.3. Subscription initiated via a browser (web or WAP)

11.3.2. For any subscription services that are initiated via WAP, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.3.3. The WAP confirmation page must display the following information in a clear and easy to read manner:

- (a) The name of the service and an indication that it is a subscription service*
- (b) The price and frequency of billing*
- (c) A phone number for customer support*

11.3.4. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

[Application name] has requested that your mobile number be made available.

11.3.5. The information listed in 11.3.3 and 11.3.4 above must be presented as text and not as an image.

11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.5. Welcome message

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.

11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear notification of the following information:

(a) The name of the subscription service;

(b) The cost of the subscription service and the frequency of the charges; (c) Clear and concise instructions for unsubscribing from the service;

(d) The service provider's telephone number.

The subscription mechanism appears to comply with the Code's requirements in clause 11.3. The welcome message similarly appears to comply with the Code's requirements.

Sections of the Advertising Rules considered [if applicable]

I did not consider the Advertising Rules.

Decision

The SP's report strongly indicates that the complainant's mobile phone was, in fact, used to initiate a subscription to the service and, coupled with the complainant's insistence that his mobile phone "is on or near [his] person every minute of every day", the probabilities are that he initiated the subscription to the service using his mobile phone.

Furthermore, the screenshots the SP supplied WASPA of the service's landing page and the subsequent page which, which visited and the appropriate button clicked, results in a subscription to the service appears to be compliant with the Code's requirements relating to subscription services, in terms of the subscription mechanism, appropriate terms and conditions and resulting messaging. I also note that the subscription was terminated on the same day the complainant complained to Vodacom and that the complainant did not attempt to invoke the mechanisms the SP made available to him to terminate the subscription. Instead, Vodacom, in concert with the SP, terminated the subscription and the SP offered to refund the complainant triple his actual cost.

Accordingly, I dismiss this complaint.

Sanctions

None.

WASPA COMPLAINTS
ATTENTION: LORRAINE HARTZER
PER EMAIL: complaints@waspa.org.za

29 AUGUST 2011

RE: WASPA CODE OF CONDUCT COMPLAINT REF: #14410

We refer to the abovementioned matter as well as your email dated 23 August 2011, the content of which has been noted.

Kindly take note that we have done an internal investigation in accordance with our company policy on behalf of the Information Provider Zuma Mobile, in order to investigate the abovementioned complaint and wish to bring to your attention the facts mentioned hereunder.

Allow us the opportunity to guide you through the process that took place which is the subject of the abovementioned complaint:

CUTE VIDEO SUBSCRIPTION SERVICE:

1. On or about the 15th of March 2011 at 19:29:35 a WAP Push Marketing Message was sent to the mobile number 082 [REDACTED] by Zuma Mobile and the message delivered successfully at 19:29:57. Refer to row 3 and 4 of the logs for the mobile number 082 [REDACTED] attached hereto and marked Annexure A.
2. However, no action was taken by Mr. [REDACTED] hereinafter referred to as the "Complainant".
3. On or about the 28th of June 2011 at 13:56:07 a WAP Push Marketing Message promoting the Cute TV Subscription Service was sent to the mobile number 082 [REDACTED] by Zuma Mobile and the message delivered successfully at 13:56:23. Refer to row 5 and 6 of Annexure A.
4. On or about the 28th of June 2011 at 13:56:47 the Complainant clicked on the link provided in the WAP Push Marketing Message and accessed the Cute TV Subscription Service WAP Landing Page. The WAP Landing Page was accessed using a Nokia 6306i Classic handset with IP address 41.[REDACTED] Refer to row 7 of Annexure A.

5. The WAP Landing Page clearly states:

- At the top of the page:
“Download any video! Join our club, T&C apply, subscription service, R5/day.”
- Every video clip clearly states the following on the top of the image:
“CLICK TO JOIN. R5/DAY.”
- The terms and conditions at the bottom:
“SUBSCRIPTION SERVICE. Costs: R5/day. You will get access to all available Video downloads of the service until you unsubscribe. Updates sent until cancelled...”

Refer to Annexure B.

6. On or about the 28th of June 2011 at 13:57:38 the Complainant requested to join the Cute TV subscription service by clicking on one of the video clips on the WAP Landing Page, that clearly states ***“CLICK TO JOIN. R5/DAY”***, and was redirected to a WAP Confirmation Page. Refer to row 8 of Annexure A.

7. The abovementioned request to join the Cute TV subscription service would constitute the first opt-in request.

8. However, the Complainant was still not subscribed at this stage as a double opt-in is required to confirm a subscription. Thus, by clicking on a video clip the Complainant was not subscribed as the request to subscribe had to be confirmed by the Complainant on the WAP Confirmation Page.

9. The WAP Confirmation Page clearly states:

- At the top of the page:
“Click ‘Start’ to download the video and join our service.”
“By clicking on the start button you enter the “Cute TV” subscription service for R5/day. Hotline: 0839163004. Access to this site requires your cellphone number.”
- The terms and conditions at the bottom:
“SUBSCRIPTION SERVICE. Costs: R5/day. You will get access to all available Video downloads of the service until you unsubscribe. Updates sent until cancelled...”

Refer to Annexure C.

10. On or about the 28th of June 2011 at 13:57:51 the Complainant confirmed the request to Opt-in to the Cute TV Subscription Service at a subscription charge of R 5.00 per day by clicking on the “Start” button. Refer to row 9 of Annexure A.

11. The abovementioned request to join the Cute TV subscription service was confirmation of the first opt-in request and thus constitutes the second opt-in request and subsequently completes the double opt-in process.
12. On or about the 28th of June 2011 at 13:59:50 the Opt-in request was honoured and a Welcome Message was sent to the Complainant, which message delivered successfully. The Welcome Message confirmed the Complainant's request to subscribe to the Cute TV Subscription Service; the cost of the service; the frequency of the billing; instructions on how to unsubscribe and a customer care number:
“Welcome Message from Zuma Mobile: You are subscribed to Cute TV video service at R5/day. To stop service SMS STOP to 31804. Help? 0839163004 (VAS)”.
Refer to row 10 and 13 of Annexure A.
13. On or about the 28th of June 2011 at 13:59:56 the Complainant was subsequently billed the R 5.00 per day subscription charge in accordance with the terms and conditions of the Cute TV subscription service, which were accepted when the Complainant clicked on the 'Start' button that initiated the subscription to the Cute TV subscription service after a double opt-in process. Refer to row 11 and 12 of Annexure A.
14. On or about the 28th of June 2011 the Complainant contacted the Vodacom Customer Care line after receiving the Welcome Message from Zuma Mobile and was provided with a number for Zuma Mobile, 086 139 2114, as stated in the Complainant's complaint to Vodacom.
15. On or about the 28th of June 2011 Zuma Mobile was contacted by the Complainant on the abovementioned number and the Cute TV subscription service was cancelled, as requested by the Complainant. Refer to Annexure D. (Kindly take note that the times stated in the log in Annexure D reflect the time in Germany, and the time difference should be taken into account.)
16. On or about the 29th of June 2011 at 01:25:22 the MSISDN number 082 [REDACTED] [REDACTED] was blacklisted on the Zuma Mobile database and would not receive any marketing material for any service provided by Zuma Mobile or be able to access any such services in future. Refer to Annexure D.
17. Kindly take note that the Complainant did not unsubscribe by following the normal Unsubscribe Instructions stated on the WAP site or the Welcome Message. Thus an unsubscribe request was not sent to the provided short code and the provided customer care number was not utilized. The Complainant utilized the number provided by Vodacom.
18. Subsequently, when the Complainant spoke to Zuma Mobile, the subscription service was immediately stopped and the number was blocked on their system,

and thus an Unsubscribe Confirmation Message could not be sent to the Complainant as the number was manually blocked by Zuma Mobile.

19. On or about the 5th of July 2011 at 15:08:25 another unsubscribe request was received from the Complainant, but as the Complainant had already been unsubscribed on the 28th of June 2011 no further action was taken. Refer to row 14 of Annexure A.

MARKETING TO COMPLAINANT:

The Information Provider, Zuma Mobile, acquired the number from a database provider from whom they have a guarantee that all MSISDNs opted-in to receive direct marketing from third-parties. The Information Provider contacted the database provider to obtain the information provided at the time that the person consented to direct marketing from third-parties.

The database provider provided the following information for the MSISDN 082 [REDACTED]

Date: [REDACTED]/2010 21:45:08

Source: Hollard

Channel: WEB

Product: Funeral, Best Hospital

First name: WILLIAM [REDACTED]

Last name: [REDACTED]

Phone number: [REDACTED]

Email: [REDACTED]

This MSISDN number was obtained after a request for information on a Hollard Funeral product. However, it is apparent that the MSISDN number and the name provided, William [REDACTED] does not match the name of the Complainant. As this lead was manually captured by the individual providing the information on one of the database provider's websites, it seems as though William [REDACTED] inserted the wrong MSISDN number, as this is clearly not the Complainant, Mr. [REDACTED]

It is clearly evident that the Information Provider sent marketing material to the MSISDN number 082 [REDACTED] in good faith.

CONCLUSION:

- The Complainant Opted in to the Cute TV Subscription Service through a double opt-in process.
- The terms and conditions of the service were clearly stated on the WAP Landing Page as well as the WAP Confirmation Page.

- A Welcome Message was sent confirming the Complainant's request to join the service; the cost of the service; the frequency of the billing; instructions on how to unsubscribe and a customer care number.
- The Complainant was charged R 5.00 per day in accordance with the terms and conditions of the service.
- The Complainant requested to unsubscribe from the service, which request was immediately honoured and the Complainant's MSISDN was blacklisted on Zuma Mobile's database.

The Complainant was contacted by Zuma Mobile and offered a refund. The Complainant indicated that he was billed an amount of R 15.00, and subsequently he was offered a goodwill refund in that amount. The Complainant was in fact only billed the R 5.00 subscription fee for the day that he was subscribed to the service.

The Complainant declined the refund.

In the light of the above it is clear that the Complainant subscribed to the Cute TV subscription service after a double opt-in process and was billed the R 5.00 subscription fee in accordance with the terms and conditions of the Cute TV subscription service.

The Information Provider however places customer care as a priority and is still willing to offer a goodwill refund of R 15.00.

Kindly take note that the matter is currently pending with Vodacom. A detailed response, as well as logs and screenshots have been provided to Vodacom and the Complainant. We are still awaiting the outcome thereof.

We trust you find the above in order and look forward to your response herein.

Kind regards

Ilonka Badenhorst

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Cute tv

Download any Video! Join our club, T&C apply, subscription service, R5/day

CLICK TO JOIN RS/DRY



CLICK TO JOIN RS/DRY



CLICK TO JOIN RS/DRY



1. You must be 18+. Bill payers permission required
2. Check your phone for compatibility. Available for all networks
3. Helpline: 0839163004 or support@zuma.co.za (VAS rates. Free minutes do not apply)
4. You agree to receive promotional messages in the future
5. SUBSCRIPTION SERVICE. Costs: R5/day. You will get access to all available Video downloads of the service until you unsubscribe. Updates sent until cancelled. Network + WAP charges extra. Errors Billed. All prices incl. VAT
6. To unsubscribe, SMS STOP to 31804
7. Information provider: Zuma Mobile Limited, 83, St. Paul Street, Valletta VLT 1213, Malta

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Cute tv

Click 'Start' to download the video and join our service.

START 

By clicking on the start button you enter the "Cute TV" subscription service for R5/day, Hotline: 0839163004. Access to the site requires your cellphone number.



HOME



1. You must be 18+. Bill payers permission required
2. Check your phone for compatibility. Available for all networks
3. Helpline: 0839163004 or support@zuma.co.za (VAS rates. Free minutes do not apply)
4. You agree to receive promotional messages in the future
5. SUBSCRIPTION SERVICE. Costs: R5/day. You will get access to all available Video downloads of the service until you unsubscribe. Updates sent until cancelled. Network + WAP charges extra. Errors Billed. All prices incl. VAT
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