

# REPORT OF THE ADJUDICATOR

Complaint reference number: 14643

WASPA member(s):

Buongiorno SA

Membership number(s): 0002

Complainant: Public

Type of complaint: Subscription Service

Date complaint was lodged: 2011-08-30

Date of the alleged offence: 2011-06-30

Relevant version of the Code: 11.0

Clauses considered: 11.1.1, 11.2.1, 11.2.2, 11.2.3, 11.2.5

Relevant version of the Ad. Rules: Not applicable

Clauses considered: Not applicable

Related cases considered: 11863

## **Complaint & Response**

- 1. The complainant in this matter alleges that the member subscribed her to a subscription service and charged her without her consent.
- 2. The member is a full member of WASPA, and the complainant is a member of the public.
- 3. On the 27<sup>th</sup> of July 2011 an unsubscribe request was made in respect of a subscription service operated by the member, using WASPA's unsubscribe facility. The member confirmed on the 31<sup>st</sup> that it had unsubscribed the complainant from the service in question, and that it had not offered her a refund of charges. The member also provided on request a MO/MT log of its interactions with the complainant.
- 4. The complainant requested that the matter be escalated to a formal adjudication on the 30<sup>th</sup> of August on the basis that she did not request to be subscribed to the service, and had paid for something she did not ask for.

5. The complainant also submitted that MTN had told her that she would be refunded. As the relationship between MTN and the complainant falls outside the jurisdiction of WASPA, I will not deal with this aspect.

- 6. The WASPA Secretariat sent the member formal notice of the complaint on the 31<sup>st</sup> of August, and the member responded to it on the 6<sup>th</sup> of September.
- 7. The member's submission was comprehensive, with a detailed description of its subscription process with accompanying screenshots, and another copy of the MO/MT log mentioned above. In its submission the member referred to the adjudicator's report in complaint number 11863 in support of its contention that its subscription process was in compliance with the Code of Conduct. For reasons set out below, it is not necessary to set out the member's submissions herein in detail.
- 8. The complainant rejected the member's submission on the 7<sup>th</sup> of September, and repeated her demand for a refund.

#### Sections of the Code considered

- 9. The conduct complained of took place after the 8<sup>th</sup> of June 2011, so version 11.0 of the WASPA Code of Conduct is applicable to this complaint. The following sections have relevance:
  - 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.
  - 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.
  - 11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be reasonably clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.
  - 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].

### **Decision**

10. If the complainant's allegations are well-founded, the member has infringed section 11.2.1, alternatively section 11.2.2 read with section 11.2.3 of the Code of Conduct.

- 11. On closer inspection of complaint number 11863, I found that it dealt with exactly the same subscription service operated by the member, and that the subscription process as described by the member in its submission in this complaint is the same as that examined in that one.
- 12. Complaint 11863 dealt with two aspects of the member's subscription process:
  - 12.1. a banner advertisement for a competition run by the member, and
  - 12.2. the website that the user was taken to on clicking on the banner advertisement, through which the user would be subscribed to the member's service.
- 13. The adjudicator in complaint 11863 found that the banner advertisement used by the member to funnel traffic to its website infringed section 11.1.1 of the Code of Conduct. The website itself, however, and the subscription process that was effected through it, were found to be compliant with the Code of Conduct (apart from an infringement of section 11.2.5, of which more later).
- 14. I have read the report in complaint number 11863, and am in agreement with it. As that report is in respect of the very service and subscription method complained of here, it is not necessary to analyse the member's submissions in this matter regarding its subscription system.
- 15. The member in its submission says that the complainant subscribed to the service via its website, which would have then been in the manner examined in complaint number 11863. There is no indication however that the complainant was directed to the website by means of a banner ad as in complaint 11863, so I do not apply that aspect of the adjudicator's report.
- 16. The only information I have been provided regarding the subscription process is the member's submission that describes the website and subscription process.
- 17. The MO/MT logs provided by the member show that:
  - 17.1. A confirmation code was sent to the complainant's MSISDN on the 30<sup>th</sup> of June 2011. The message reads:
    - >> Your CODE is 2888 << enter it in the web confirmation page and youll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more.
  - 17.2. A welcome message was sent the same day.
  - 17.3. An unsubscribe confirmation was sent on the 29<sup>th</sup> of July 2011.

18. Unfortunately, nothing in the complainant's submission gives me cause to doubt the information contained in the member's logs. While members have been known to falsify logs, this is a serious breach of the Code of Conduct, and members who are found to do so are dealt with harshly. However, unless a complainant provides compelling proof that contradicts information contained in logs, it is difficult for an adjudicator to disregard them.

- 19. Accordingly, in the light of the information provided, I must conclude that the member's subscription process for the service in question was compliant with the Code of Conduct, and that the complainant subscribed to the service by following the steps set out in the member's website. It is very possible that she was attracted by the promotional competition advertised by the member and did not pay close enough attention to the statements on the website that she was subscribing to a subscription service, or to words to that effect in the confirmation SMS quoted above. However, I am satisfied that the content of the website and the subscription process followed gave her sufficient notice that she was in fact subscribing to a subscription service.
- 20. Accordingly, the member has not infringed section 11.2.1, or section 11.2.2 read with section 11.2.3.
- 21. The adjudicator noted in his report in complaint 11863 (at paragraph 19.3) that the member had breached section 11.2.5 of the Code:

After entering his or her MSISDN a customer would receive an SMS reading: "Your CODE is 3908. Enter it in the web confirmation page and youll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more". This was tested by the adjudicator. Notwithstanding the fact that this message is not completely compliant with section 11.2.5 of the Code due to the omission of the name of the service provider, it is substantially compliant in the sense that it explicitly sets out that by entering the code into the confirmation webpage the customer will be joining a subscription service charged at R3 per day.

- 22. The above report was published on the 6<sup>th</sup> of June 2011, some three weeks <u>before</u> the complainant subscribed to the service, but the member's confirmation message in this matter (as quoted above) is still in breach of the section. The name of the service provider is still not provided.
- 23. The member has breached section 11.2.5 of the Code, as it has had ample opportunity to modify its message in line with the order of the adjudicator in complaint 11863.

### **Sanctions**

- 24. The infringement of section 11.2.5 of the Code is relatively minor, but the member was ordered by the adjudicator to ensure that it comply with that section and failed to do so. The former is a mitigating and the latter is an aggravating factor.
- 25. Consequently the following sanction is imposed on the member:
  - 25.1. The member is fined the amount of R 5 000; and
  - 25.2. The member is ordered to comply with the provisions of section 11.2.5 of the Code of Conduct.

26. The WASPA Monitor is requested to monitor the member's compliance with this order, and to bring a complaint in terms of section 14.3.22 if the member does not comply.