



REPORT OF THE ADJUDICATOR

Complaint reference number:	15183
WASPA member(s):	Buongiorno SA
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2011-10-11
Date of the alleged offence:	2011-05-31
Relevant version of the Code:	10.0
Clauses considered:	3.1.1; 11.2.1, 11.2.2, 11.2.3, 11.6.1
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 26th of September 2011 the complainant sent an email to the WASPA Secretariat in the following terms:

I have phoned Vodacom, Buongiorno SA, Craig MacKay, your 011-4767710 and left message. This all at great cost to ourselves.

Lee me explain. I am 75 years old. Do not subscribe to any bells and whistles on my cellphone. In fact have a VERY old Nokia and the cheapest Vodacom contract that I could get. No camera, games or frills.

My husband and I are pensioners ... he is 81 years old and does not even know how to use a cellphone or computer.

I suddenly find a debit on my Vodacom account of R81.53 plus vat R11.41, totalling R92.94. Hence first phone call to Vodacom.

I am fuming that they can simply debit my account with a contract that I have never taken out, don't know what it is supposed to be for, and certainly never subscribed to. I do get things on my cellphone saying ... phone this number you have won R10,000 or something but I ALWAYS delete immediately. We simply cannot afford any extras in our lives ... and do not expose ourselves to scams. I am most vigilant in this regard. Have to be.

Your operators say someone must have used my cellphone. That is impossible we live alone and not even my husband uses it. It is either in my pocket or in my handbag never left in any public place as suggested by your operators. Impossible.

I picked this e-mail address up from when I phoned 011-4767710, and hopefully will get someone responsible to correct this error.

Please make sure that this entry is reversed, as certainly not a subscription I have taken out and they say I cancelled how can I cancel something I did not know exists??.

Please, please attend to this urgently and put my mind at rest.

Sincerely.

[removed]

4. The member confirmed on the 27th of September that it had previously unsubscribed the complainant from its services, and that it had not offered her a refund of charges.
5. The WASPA Secretariat accordingly escalated the complaint to a formal complaint on the 11th of October 2011 for the following reason:

Complainant requested information as to where his number was obtained - WASP did not supply this information and the secretariat believes it requires further investigation.
6. The WASPA Secretariat sent the member formal notice of the complaint on the 12th of October, and the member responded to it on the 13th.
7. The member's submission was comprehensive, with a detailed description of its subscription process for a certain subscription service with accompanying screenshots, an MO/MT log of SMS communications between the parties, and a billing record. Note that the complaint did not set out which subscription service was subscribed to.
8. 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. The submission was also virtually identical to its responses in complaints 14643 and 14644.
9. For reasons set out below, it is not necessary to set out the member's submissions in full at this stage other than to note the following:
 - 9.1. The complainant's MSSDN listed in the complaint is the same as that provided by the member.

- 9.2. The complainant subscribed to the service on the 31st of May 2011. The member sent her a PIN by SMS by means of which she was to confirm her subscription:
- >> Your CODE is 9791 << enter it in the web confirmation page and you'll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more.
- 9.3. A welcome message was sent the same day.
- 9.4. According to the member the complainant unsubscribed on the 31st of July by SMSing "STOP VIP" to the member's shortcode.
- 9.5. The member did not send the complainant a monthly subscription reminder SMS for June 2011, as required by clause 11.6.1 of the Code, and admits so in its submission.
- 9.6. The total amount charged to the complainant in respect of the service was R186.00 – R3.00 per day from the 31st of May until the 31st of July. The amount for the period 1 July 2011 (the day after the one month anniversary of her subscription) and the 31st of July was the amount of R93.00 (incl VAT), which is also the amount mentioned in the complaint.
10. The WASPA Secretariat forwarded the member's response to the complainant, who advised that she had never received a PIN code from the member as alleged. She stated that:
- I have checked my in-box, my trash, my sent and have no record whatsoever of any e-mail from Buongiorno or any record of a competition for Polo Car.
11. The above indicates that the complainant checked her emails for a record of communication from the member, when she should in fact have checked her SMS records.
12. The complainant denied having subscribed to the member's service.
13. The adjudicator requested that the WASPA Secretariat ascertain from the member whether the "POLO" promotion, by which the complainant is alleged to have been subscribed, was still active. The member advised that it was not.

Sections of the Code considered

14. The conduct complained of took place before the 8th of June 2011, so version 10.0 of the WASPA Code of Conduct is applicable to this complaint. The following clauses have relevance:
- 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.
- 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 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.

11.6.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter. The customer may not be charged for these reminder messages.

Decision

15. The complainant did not give any indication as to the content (if any) that she received pursuant to the subscription service, and so I cannot verify that the service allegedly subscribed to was indeed the "35050 VIP" service or that the "POPO" promotion had anything to do with the matter. In the absence of information to the contrary I must assume that this was indeed the case.
16. 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.
17. 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.
18. Complaint 11863 dealt with two aspects of the member's subscription process:
 - 18.1. a banner advertisement for a competition run by the member, and
 - 18.2. 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.
19. 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 which is not applicable here).
20. 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.

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21. 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.
 22. The only information I have been provided regarding the subscription process is the member's submission that describes the website and subscription process.
 23. The MO/MT logs provided by the member appear to show that the complainant subscribed to the member's service.
 24. In the facts of this matter I have no reason to doubt the veracity of the member's logs.
 25. 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. This has two effects. Firstly, the member would be most unwise to falsify its logs, and an adjudicator can assume a certain level of intelligence in the member. Secondly, unless a complainant provides compelling proof that contradicts information contained in logs, it is difficult for an adjudicator to dispute them on the basis that they have been falsified.
 26. 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 must have 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.
 27. Accordingly, the member has not infringed clause 11.2.1, or clause 11.2.2 read with clause 11.2.3.
 28. The member admits not sending the required reminder message to the complainant for June 2011, and accordingly has infringed clause 11.6.1 of the Code.
 29. One final issue raises a critical eyebrow. In its response to the complaint, the member stated the following:

We can however confirm a refund of R93, due to a failed reminder message not having been sent to the complainant in June 2011. Should the complainant agree to withdraw the formal complaint, we would be more than happy to process this refund in an informal setting.
 30. The member is making payment of a refund, which it submits is due to the complainant, subject to the complainant withdrawing this complaint. This constitutes interference with the WASPA complaints procedure, and is unprofessional at best. In the circumstances I have no option but to find that the member has infringed clause 3.1.1 of the Code by making itself guilty of unprofessional conduct.

Sanction

31. I have seen the MO/MT logs for complaint 15163, which I am adjudicating at the same time as this complaint. That complaint relates to the same service as this complaint and the member does not appear to have failed to send subscription reminder message in that complaint. Accordingly I do not see any systematic error and the present infringement of clause 11.6.1 is perhaps an isolated incident. Accordingly:
- 31.1. The member is to refund the amount of R93.00 to the complainant, as there is a significant chance that she would have unsubscribed if she had received the reminder message.
 - 31.2. The member is to ensure that its subscription reminder messages are being properly sent for all its services, and
 - 31.3. I request that the WASPA Monitor should test the member's subscription services in this regard starting 30 days from the publication of this report.
32. I do not believe that the member was acting maliciously in infringing clause 3.1.1, but in all probability the employee concerned was being overly zealous. Nonetheless, this conduct is unacceptable and must be shown to be so. I accordingly issue the member with a formal reprimand.