



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	15397
<b>WASPA member(s):</b>	Buongiorno SA
<b>Membership number(s):</b>	0002
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Subscription Service
<b>Date complaint was lodged:</b>	2011-10-31
<b>Date of the alleged offence:</b>	2011-08-11
<b>Relevant version of the Code:</b>	11.0
<b>Clauses considered:</b>	11.2.1, 11.2.2, 11.2.3; 11.5.1; 11.6.1
<b>Relevant version of the Ad. Rules:</b>	Not applicable
<b>Clauses considered:</b>	Not applicable
<b>Related cases considered:</b>	11863

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### Complaint & Response

1. The complainant in this matter alleges that the member subscribed him to a subscription service and charged him without his consent.
2. The member is a full member of WASPA, and the complainant is a member of the public.
3. This complaint originates from the WASPA unsubscribe facility. The record shows that the complainant requested a refund and proof of subscription from the member on the 12<sup>th</sup> of October 2011. The member in its turn unsubscribed the complainant from a subscriptions service to which he was allegedly subscribed on the 13<sup>th</sup>.
4. On the 25<sup>th</sup> of October 2011 the following was logged from the complainant on the unsubscribe facility:

I need to bring to your attention that my prepaid phone payments to Vodacom for airtime have been depleted @ R 5 per day for a substantial period of time, costing me hundreds of rands.

This was only discovered on 10 October when the company doing this SMS'd me to tell me that I was subscribed to their Buongiorno 35050 GOLD costing R 5/d ! I certainly did no such thing and what they were doing was stealing from the money I paid into my Vodacom account. I believe this was totally fraudulent and I am entitled to be refunded the full amount taken. I think Vodacom should have been aware of this activity going on and should shield their customers.

I reported the matter to your Constantia Shop who logged the complaint no. S2EON28-8KU3K on Tuesday 11 October but no body has called me back.

On 12 October I went back to the Constantia shop and they advised that the matter had been escalated to WASPA for further investigation and that I would hear from them 72 hours later. I have heard nothing a week later! I am also concerned that the same can happen again.

Please advise me what actions i have to take to get some positive response. I want my money back or the equivalent in airtime.

5. The member advised on the 26<sup>th</sup> of October that it had previously unsubscribed the complainant from the service in question. It did not offer a refund to the complainant.

6. The complainant then submitted the following on the 31<sup>st</sup> of October:

Attached please find correspondence in connection with a service allegedly supplied by Buongiorno to my cell phone which I deny having subscribed to. It is clear that I did not request any of their services nor did I use any of their services such as ringtones, wallpapers and games for which they subtracted R5 per day from each of my prepaid Vodacom airtime account causing them to be depleted without my knowledge and consent since 11th August 2011. When I discovered the reason for the airtime being used up a considerable amount of money had been withdrawn. This was only discovered when Buongiorno SMS me on 10th October 2011. Since this money was taken from my account I believe illegally I would like to be re-imbursed the full amount taken. Your assistance and successful actions would be appreciated. If this matter is not resolved I reserve the right to take the matter further.

7. The WASPA Secretariat accordingly escalated the complaint to a formal complaint on the 31st of October 2011.
8. The WASPA Secretariat sent the member formal notice of the complaint to the member on the 2<sup>nd</sup> of November, and the member responded to it on the 3<sup>rd</sup>.
9. The member's submission was comprehensive, with a detailed description of its subscription process for the subscription service with accompanying screenshots, a MO/MT log of SMS communications between the parties, and a billing record.
10. 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, 14644, 15163 and 15183.
11. 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:

- 11.1. The complainant's MSSDN listed in the complaint is the same as that provided by the member.

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- 11.2. According to the MO / MT logs provided by the member, the complainant subscribed to the service on the 11<sup>th</sup> of August 2011. The member sent him a PIN by SMS on that date by means of which he was to confirm his subscription:
- >> ur CODE is 0907 << enter it in the web confirmation page & you will be subscribed to 35050 GOLD from Buongiorno at R5/day 4 Top Apps, MP3 hits & tons more!
- 11.3. A welcome message was sent the same day per SMS.
- 11.4. According to the member's logs, reminder messages were sent to the complainant per SMS on the 10<sup>th</sup> of September and the 10<sup>th</sup> of October.
12. The complainant responded to the member's submissions on the 24<sup>th</sup> of November.
- 12.1. Hi denied having ever received the relevant service on his phone.
- 12.2. He advised that he had checked his email and denied having received the screenshots attached to the member's submission on his computer. He also submitted that his cellphone is not used to receive email. He argued that he could consequently not have received the PIN code referred to above as he never accessed the "landing pages".
- 12.3. The first reminder message was sent to his MSISDN only on the 10<sup>th</sup> of October, upon which he began the unsubscribe process.
13. The above indicates that the complainant misunderstood the member's explanation for the sign-up process. He checked his emails for copies of the "landing page", not realising that these were in fact accessed via an internet browser on the internet. In the circumstances it is possible that he would have found a record of a visit to the website in question in his browser history.
14. The adjudicator ascertained that the "POLO" promotion, by which member submits the complainant was subscribed, was no longer active, and so was unable to test it.

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### Sections of the Code considered

15. The conduct complained of took place after the 8<sup>th</sup> of June 2011 but before the 17<sup>th</sup> of November 2011; accordingly version 11.0 of the WASPA Code of Conduct is applicable to this complaint. The following clauses have relevance:
- 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.

11.5.1. 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.

11.6.1. 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.

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## Decision

16. If the complainant's allegations are well-founded, the member has infringed clause 11.2.1, alternatively clause 11.2.2 read with clause 11.2.3 of the Code of Conduct.
17. The complainant confirmed in his email of the 25 of October that the member had indeed subscribed him to the "35050 GOLD" service. There is however no corroboration to the member's claim that the complainant was entered into the service through his interaction with the "POLO" promotion. In the absence of information to the contrary however I must assume that this was indeed the case.
18. 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 complaint 11863.
19. Complaint 11863 dealt with two aspects of the member's subscription process:
  - 19.1. a banner advertisement for a competition run by the member, and
  - 19.2. 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.
20. The adjudicator in complaint 11863 found that the banner advertisement used by the member to funnel traffic to its website infringed clause 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 clause 11.2.5 which is not applicable here).
21. 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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22. 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.
  23. The only information I have been provided regarding the subscription process is the member's submission that describes the website and subscription process.
  24. The MO/MT logs provided by the member appear to show that the complainant subscribed to the member's service.
  25. In the facts of this matter I have no reason to doubt the veracity of the member's logs.
  26. 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.
  27. 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 he was attracted by the promotional competition advertised by the member and did not pay close enough attention to the statements on the website that he 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 him sufficient notice that he was in fact subscribing to a subscription service.
  28. Accordingly, the member has not infringed clause 11.2.1, or clause 11.2.2 read with clause 11.2.3.
  29. The complainant suggested that he at no stage received any service from the member, but in the case of a service such as the one complained of, the subscriber pays a certain amount for availability of the service, and can download content from the service provider while the subscription service is current. The fact that the complainant did not utilise the service in question has no bearing on whether the subscription was a valid one.
  30. The complainant also alleges that he first received notification of his subscription to the service on the 10<sup>th</sup> of October 2011 by way of a reminder SMS from the member. If this were so, then the member would have infringed clauses 11.5.1 and 11.6.1 by not sending an initial welcome message and a monthly reminder message for the month of September 2011. Once again, the member's logs do not bear the complainant's version out, and in the reasons set out above I am obliged to take the view that the SMSes were sent but were not received or were ignored by the complainant.
  31. The complaint is dismissed.