

## REPORT OF THE APPEALS PANEL

**Date:** 20 March 2014  
**Appellant:** Buongiorno SA  
**Complaint Number:** 16340  
**Code version:** Code v11 and 11.6

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### 1 INTRODUCTION

- 1.1 A number of appeals have considered complaints which turn on whether or not the complainant had actually subscribed to one of the SP's services. The adjudications considered to varying degrees, the compliance by the SP with the requirements of the WASPA Code, focusing to a large degree on section 11 (subscription services).
- 1.2 The level of detail required and when it should be provided does pose some evidentiary problems. The adjudication and then the appeal becomes a balancing act between according credibility to documents provided at some point by the SP or IP and according credibility to the subscriber's version that he or she did not subscribe to the service complained of. The amounts involved can often be significant.
- 1.3 This appeal falls to be considered in terms of both of v11 and v11.6 of the Code. Changes were made to section 11 of the Code, which deals with subscription services, and particularly to section 11.2 of the Code which deals with subscription processes, on and from 17 November 2011.
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### 2 HISTORY OF THE COMPLAINT

- 2.1 The complainant contacted WASPA to query deductions from his bank account, and was referred to the SP and to the operator for his bills.
- 2.2 The SP failed to make logs available to the complainant on request and rejected his request for a refund on the basis that he had in fact subscribed to a service.
- 2.3 Following escalation to WASPA, the SP submitted logs as evidence of the complainant's subscription to the service complained of. The SP did not, however, submit any evidence of compliance by it with the Code in respect of the service complained of. We note that this service was an adult content service.
- 2.4 The SP misunderstood the initial basis for the complaint, which was in fact that the complainant wanted to know where the SP had obtained his details from. Eventually the SP realised – with the Secretariat's help – what was required, and provided the logs from which we assume the SP meant that it had obtained the complainant's details because the complainant had subscribed to the service offered by it, the SP.

- 2.5 The relevant time period for consideration in this matter is the period for which the complainant was billed by the SP in question, being 23 August 2011 to the date on which the complainant requested that he be unsubscribed, which was 22 November 2011.
- 2.6 The adjudication took place at the behest of the Secretariat, which decided and notified the SP on 14 February 2012, that the failure by the SP to upload logs, alternatively to provide details to the complainant of the origin of the complainant's details, required further investigation.

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### 3. THE CODE

- 3.1 The adjudicator referred to the following sections:
- 3.1.1 section 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;*
- 3.1.2 section 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.*
- 3.1.3 section 11.10.2: *When requested to do so by WASPA, a member must provide clear logs for any subscription service customer, which include the following information:*  
*(a) proof that the customer has opted in to a service or services;*  
*(b) proof that all required reminder messages have been sent to that customer;*  
*(c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and*  
*(d) any record of successful or unsuccessful unsubscribe requests.*
- 3.2 The versions of the Code that must be applied to both the adjudication and therefore the appeal are both v11 because this version applied when the complainant apparently subscribed to the service, and also v11.6, because this is the version that applied when the complainant unsubscribed from the service. We note that the attorneys for the appellant would like us to apply a different (later) version of the Code as regards the process for appeal. This is not a common approach in adjudicating or appealing matters, unless the circumstances dictate that the procedure was inherently flawed in the earlier version, which we do not believe it was.
- 3.3 It is also relevant to note the provisions of sections 11.2.5, and 11.2.6 in v11.6 of the Code, which say the following:
- 3.3.1 “section 11.2.5: *If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message*

*must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.*

- 3.3.2 section 11.2.6: *The confirmation message described in 11.2.5 must 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].*
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#### 4. **DECISION OF THE ADJUDICATOR**

##### 4.1 Findings on information presented

- 4.1.1 The adjudicator found that the logs provided by the SP were “not sufficient proof that the complainant opted in to the service in question. The SP also does not provide any further explanation as to where it obtained the complainant’s number, despite being asked to do so”.
- 4.1.2 The adjudicator finds that the SP breached section 11.2.1 of the Code in that there is “no evidence provided that the complainant specifically opted-in to the service in question”.
- 4.1.3 Furthermore, the logs are, in the adjudicator’s view, not compliant with section 11.10.2 of the Code in that they “don’t show that the complainant opted in to the service”.

##### 4.2 Sanctions

The following sanctions were applied after considering previous similar breaches by the SP, and the SP’s response:

- 4.2.1 The SP was required to reimburse the complainant in full for all amounts billed to his account for the period 23 August 2011 to 21 November 2011 and provide proof to the Secretariat; and
- 4.2.3 A fine of R100,000 was imposed for the breaches of section 11 of the Code.
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#### 5. **GROUNDINGS OF APPEAL AND FINDINGS OF THE APPEALS PANEL**

- 5.1 The SP’s attorneys have submitted an appeal against both the finding against the SP and the sanction imposed.
- 5.2 The basis of the “appeal/review” is, according to the SP’s attorneys, *either or both* of the following:

WASPA appeals panel  
Complaint 16340

- 5.2.1 “the adjudicator’s decision-making process was tainted by fundamental procedural flaws and was therefore irregular; and
- 5.2.2 the adjudicator made incorrect findings on the merits”.
- 5.3 This is the same set of words used in the appeal against the adjudication of complaint 16493, and again the SP’s attorneys fail to indicate which facts support which contention.
- 5.4 The SP’s attorneys note that it was not the complainant but WASPA that escalated the complaint, because no communication from the complainant was provided to the SP by WASPA. This is correct. WASPA stated in its communications with the SP that it believed the matter required further investigation, as we have set out in paragraph 2.6 above. This is perfectly in order.
- 5.5 In paragraph 20 the SP’s attorneys are at pains to point out that because of the timing of the complaint it could not have been the SP’s service that was being complained about. They then concede that there was a misunderstanding and the SP was in fact the party that the complainant was referring to, under the heading “Merits”. In paragraph 22 they also concede that the SP usually provides WASPA or the complainant as the case may be, with screenshots indicating how their service is compliant with the Code, and that perhaps it should have done so in this case as well. At the same time the attorneys repeat that this should have been the case “Notwithstanding its reasoning that the Complaint was not actually directed at it...”.
- 5.6 The attorneys then allege that this was the mechanism “by which the Complainant became subscribed to our client’s service...” and in paragraph 23.6 they continue to explain how it was that the complainant or someone using his phone, “must have” accessed and subscribed to their client’s service. In paragraph 24 they note that the adjudicator doesn’t stipulate what information would have been sufficient as proof of an opt-in by the complainant.
- 5.7 The SP’s attorneys then proceed to decide for WASPA what is and what is not relevant, by stating “...our client submits that this technical information should not be required and that the level of detail contained [sic] the information already provided by those sources listed in paragraph 25 above is sufficient.” The panel would like to make two points here – first, the information was not provided when requested and has only been provided now in the appeal, and second, it is for WASPA to decide matters on the requirements set out in the Code as it is applied to the facts, and not for the SP to decide what is relevant and when it will be provided.
- 5.8 At paragraph 29 the attorneys note that it is “interesting” that the handset used to subscribe to the SP’s services by a complainant in complaint 16354 was a Nokia and that the handset used to subscribe to the SP’s services was also a Nokia. We are not sure what turns on this – there must be thousands of Nokia users in South Africa.
- 5.9 In a related point, the attorneys point out that the same complainant lodged complaints of a similar nature against two other WASPs (16354 and 16403), and:

- 5.9.1 although separate complaints they should have been considered in light of one another, and this was not done;
- 5.9.2 “to make matters worse”, it appears to them that the same adjudicator adjudicated all three of the complaints; and
- 5.9.3 since all of the subscriptions were for adult content and two subscriptions were on the same day and two were subscribed using a Nokia handset.
- 5.10 They draw the conclusion that “Such an interpretation of the circumstances stretches even the outer most bounds of what can be considered coincidental. From an analysis of the three separate but connected adjudications it is clear that the Adjudicator did not properly apply his/her mind to these very striking facts...”. They proceed to note that this is circumstantial evidence giving an “overwhelming impression” that the complainant or someone with access to his MSISDN, did subscribe to the services. A 1939 AD case is cited in support of the use of circumstantial evidence. The panel has previously given its views on the use of case law in relation to matters before WASPA, which is a self-regulating and self-funded body. We do not agree with the conclusion drawn by the SP’s attorneys, particularly since it is entirely unclear whether or not the adjudicator applied his or her mind to those facts and the attorneys have not provided any support for these contentions whatsoever.
- 5.11 Based on this set of facts and impressions, the attorneys ask the panel to review the finding of the adjudicator as the complainant was in fact subscribed and not auto-subscribed.
- 5.12 As to sanctions, the SP’s attorneys find that the incorrect conclusion (in their view) arrived at by the adjudicator led to the severity of the fine. In addition they note that the three previous complaints considered by adjudicators against their client, the SP, were not in fact the same and the SP was found to be compliant with the Code. They argue that the “misapplication of previous convictions” is another ground on which the panel should find that the adjudicator was incorrect in his decision. In addition, they note that the adjudicator in complaint 16493 imposed a fine of only R15,000 not R100,000 on the same facts. Finally they note that section 11 is a long and detailed section containing a number of sub-sections and to base the fine on a contravention of section 11 as a whole would be unfair and unreasonable.
- 5.13 As we have noted in other reports concerning the same SP and its attorneys, the SP’s attorneys fail to take account of the facts averred by the complainant. Although they note that the adjudicator must take account of all “merits”, they seem to dismiss the possibility that the complainant’s case has any merits and that these should also be considered by the adjudicator.

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## 6. CONCLUSION

- 6.1. The adjudicator is entitled and in fact required to make a finding on the facts before him or her, weighing prejudice to each party, considering the likelihood of

WASPA appeals panel  
Complaint 16340

- the versions presented actually reflecting the true position, or that there could even be a different version altogether. This is set out in section 14.3.14 of the Code.
- 6.2 On the SP's own version it did not present the necessary information to WASPA or the complainant at any relevant time, until the appeals stage. The adjudicator did not have these documents when considering the matter.
- 6.3 On the SP's own version, other similar complaints have been made to WASPA concerning the SP.
- 6.3.1 We would have thought this would be an aggravating factor as regards the SP rather than a consideration to count against the adjudicator, who is allocated complaints by the Secretariat on the basis of availability and capacity to consider them, and not because he or she would like to compare and contrast the subject matter.
- 6.3.2 Although the Secretariat attempts in all cases to group similar complaints or complaints against the same SP together, they are under no obligation to do this and each matter should be considered on its own facts in any event. It is however, relevant that the WASPA Secretariat escalated the complaint to the adjudications stage, rather than the complainant, believing the matter to be deserving of further consideration.
- 6.4 We agree that the SP has shown, on the face of it, that a handset that appears to be registered to the complainant activated a subscription to the service complained of. We cannot say whether or not this was intentional on the part of the complainant or accidental, or whether it was in fact the complainant who may have wished to subscribe or another person using the complainant's phone. As in other matters that this panel has adjudicated, we have assumed in favour of the complainant.
- 6.5 We do not agree that the adjudicator failed to follow due process, because it appears to us that the adjudicator followed the process set out in the Code and duly considered all the facts. As the SP's attorney has not indicated which ground they rely upon in their contentions about the adjudicator's failings or how the facts presented by them support their contentions, we do not agree that the facts presented by the SP's attorney show that the adjudicator failed to apply his or her mind, or to follow procedure as required by the Code.
- 6.6 We do not believe that it is for the adjudicator to make Code by stipulating what he would have accepted as proof of an opt-in. At the adjudication stage, this is irrelevant when the SP itself agrees that it failed to provide necessary information. Having read all the correspondence, it is clear to the panel that the complaint was made in relation to the period when the complainant could have been subscribed to a service of the SP, and therefore it is not reasonable to expect the adjudicator or this panel to accept mistake and bona fides in considering the facts.
- 6.6.1 On the facts presented to the adjudicator, the SP had failed to comply with the requirements of section 11.10.2.

WASPA appeals panel  
Complaint 16340

- 6.6.2 The SP did not present any evidence that it had complied with the Code at the relevant time and failed to comply with the Code when requested to do so by the complainant.
- 6.7 We cannot find any way to accord more weight to the complainant's case because the complainant cannot, other than by denial, prove that he or she did not subscribe to the service complained of. In light of the logs provided which we must accept to be accurate, it would appear that subscription was initiated by the complainant.
- 6.8 We agree that the fine imposed is high, although it is concerning that there are so many instances in which the same complaint has been made against the same SP.
- 6.9 The SP is in breach of section 11.10.2. The fine imposed on the SP by the adjudicator is reduced to the amount of R20,000, payable within 5 days of the date of publication of this report.
- 6.10 The appeal fee should not be refunded given the amount of work that it has taken to review and comment on the SP's submission. We wish to make the point further that had the SP provided all relevant information when asked for it and in reasonable detail, it is likely that this appeal would not have been necessary, and that the complaint might have been disposed with more easily.