

REPORT OF THE APPEALS PANEL

Date:

Appellant: Viamedia (Pty) Ltd (SP) / Opportune Trading 117 CC (IP)

Complaint Numbers: 21396

Applicable versions: 12.4

1. BACKGROUND TO THE APPEAL

- 1.1. This is a joint appeal by the SP and IP against the findings of the adjudicator in complaint 21396. While the adjudicator made findings against only the SP, the appeal is made by both the SP and the IP, with the SP making its submission on its own account and behalf of the IP.
- 1.2. It is not clear from the appeal whether the Appellants are appealing the adjudicator's sanction, or the merits of the matter as well. While the Appellants state that they are only appealing the sanction, the final prayer requests that "...the decision of the adjudicator be dismissed and or a reduction of sanction imposed." In the circumstances we must give the Appellants the benefit of the doubt and assume that an appeal on the merits was also intended.
- 1.3. While the panel was in broad agreement as to the facts in this matter, it was unable to reach consensus on an appropriate finding. Accordingly the panel has published both minority and majority findings in this report. The majority reasoning and decision must be considered the decision of this panel.

2. THE APPLICATION OF THE CODE AND RULES

The Code, v12.4

- 2.1. The adjudicator correctly applied version 12.4 of the Code to this complaint.

3. The Decision of the Adjudicator

- 3.1. The complainant had alleged that he was subscribed to a certain subscription service without his consent. As is often the case, the initial complaint did not allege which clause of the Code of Conduct had been infringed.
- 3.2. The complaint as expressed by the complainant and addressed to the Appellant on the 20th of August 2013 was as follows:

The user who escalated this request has provided the following reason for escalation:

I have not subscribed to either thus it merely a claim and a wish to silence my concern

- 3.3. The complainant then responded as follows on the 29th of August 2013:

I deny subscribing to such request

Furthermore there is no time of use as well as date provided in the attachment

Lastly I find such subscription to be weird and deceptive in their manner of operation. As a general principal, when subscribing you would forward details of your account etc however in this case I note they charge through a third party and then try to justify

I had also tried contacting the company who had not responded previously and you mentioned a 5 day deadline which expired on monday response only received on thursday. This leaves questions and also compromises integrity

- 3.4. The Appellant responded that the SP's logs confirmed that the complainant had indeed subscribed. It also made detailed submissions regarding its subscription methodology.

- 3.5. The matter was referred to the adjudicator, who asked that the Appellants provide a copy of the banner and landing page for the subscription service in question. This request was made on the 22nd of October 20013 and read as follows:

Dear WASPA member

The adjudicator reviewing complaint 21396 has made the following request:

/ On matter 21396 I need copies of the banner and landing page in question please.

Please could you provide the requested information to the WASPA Secretariat at your earliest convenience, but in no later than five working days.

- 3.6. As the adjudicator puts it in her report:

In this regard, the description of the process bothered me – it claimed that a unique pin was required to subscribe to this service but I could not understand from the papers how this pin was generated, as there seemed to be no indication that it was sent to the customer's mobile in order to verify the mobile number entered is correct.

I therefore – and for the first time in the many WASPA adjudications that I have made – went through the process myself and was horrified. I went to the landing page, entered my cell phone number, and was IMMEDIATELY subscribed. The "pin" was completely non-existent.

Clause 11.3.1 states: If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either: (a) contain a PIN which is then confirmed or validated on the web page, or (b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.

- 3.7. On this basis the adjudicator found that the SP had infringed clause 11.3.1 of the Code of Conduct as the opt-in process required in that clause was not followed. She also found that the SP had deliberately misled WASPA in its response to the complaint by alleging that a double opt-in process was followed when this could not have been the case.

- 3.8. The following sanction was imposed on the SP (and not the IP):

I impose the following sanctions against the SP:

- 1. A full refund must be made to the customer within 7 days of receipt of this adjudication.*
 - 2. In respect of the breach of Clause 11.1.3[sic], a fine of R100 000,00 is imposed.*
 - 3. In respect of the breach of Clause 14.3.13, which is a breach that goes to the heart of the SP's membership of WASPA and the professionalism of this industry, a 6 month suspension from WASPA and a R100 000,00 fine is imposed.*
 - 4. In addition, I request that the Media Monitor conduct a thorough investigation in respect of the services offered by this particular IP and in particular, the subscription processes and messages, including the unsubscribe mechanisms.*
- 3.9. The reference to clause 11.1.3 in the sanction was a typographical error – the adjudicator's finding of an infringement on page 3 of her report clearly identifies clause 11.3.1.

4. Grounds of Appeal and Findings – Procedural

- 4.1. The panel notes the Appellant's concerns regarding the adjudicator's approach as expressed on page 2 of its appeal submission:
- 1. The Adjudicators entire decision process appears to have been based, not on the actual complaint at hand under the MSISDN 082 [redacted], but on a process in which the IP was not given the opportunity to examine, namely the "testing" of the IP service. Such "testing" was conducted from an unknown and unmentioned MSISDN to which the SP cannot determine, if there was in fact the correct information inserted or if it was infact the IPs services that the adjudicator interacted with. The IP in this instance specifically provided information to the adjudicator both by way of formal response as well as the provision of further information with regards to the matter under MSISDN 082 [redacted] which was the basis for the complaint lodged and escalated to under #21396.*
- 4.2. We were initially concerned that by requesting further information from the appellant and then running her own test of the appellant's system without referring her findings back to the Appellant for a response, the adjudicator had in effect introduced further allegations against the appellant to which it did not have the opportunity to respond during the adjudication process. If this were the case we may have upheld the appeal simply on the basis that the Appellant did not receive a fair hearing. Given the vague nature of the complaint this was a significant concern.
- 4.3. On closer examination of the record available to the adjudicator, however, it appears that the appellant made extensive submissions regarding the IP's subscription process. These submissions included information on the IP's opt-in methodology, which is just the aspect to which clause 11.3.1 refers.
- 4.4. By requesting further information as she did, the adjudicator was in effect obtaining information to substantiate the Appellant's own version. In the event the information provided was to the Appellant's detriment, but the adjudicator's subsequent testing did not amount to the introduction of further allegations against the member to which it did not have the opportunity to reply.

- 4.5. The panel is hence satisfied that the Appellant was given proper notice of the complaint against it and was given an adequate opportunity to make representations.

5. Minority Findings: Grounds of Appeal and Findings - Substantive

- 5.1. Turning now to the facts, the Appellant made a number of important submissions in its appeal, which are quoted below. On page 2 of its submission:

*a) Please be further advised that **the alleged “testing” took place during a time when this campaign was not active as it ended on the 14th of May 2014 (see point 4 below). During the time lapse between the active campaign and when the adjudication took place – significant system changes were implemented in preparation of the implementation of MTN and Cell C controlled DOI processes which rendered all previous campaigns invalid (see point 5 below). All subsequent campaigns were configured from scratch using the new PIN and DOI processes. The campaign under question was never used again after the conclusion of it on 14th of May 2014 and was therefore not updated in accordance with the new processes. The URL was still available on the system as provided but no external party can navigate to the URL without typing in the specific internal URL provided.*** (my emphasis)

- 5.2. ...and on page 3:

*4. **The impact of the campaign was nominal as it ran from the 25th of March to the 14th of May 2013** and was stopped due to a lack of responses which essentially rendered it unprofitable. A total of 2 489 subscribers were acquired as a result of the campaign of which only 14.3% are still active. To put this into perspective, the number of subscribers acquired from this campaign in May 2013 was only 2.32% of the total number of subscribers acquired in that month. The vast majority of the IPs business is based on TV advertising. WAP and WEB advertising is a new medium for the IP and which was tested during 2013. There is no advertising on WAP and WEB taking place currently. During 2013 only 15% of the IPs marketing budget was spent on both WAP and WEB campaigns.*

5. The matter regarding the non-receipt of a PIN as well as DOI was based on system functionality, of which there was a break in transmission. The reason for this was the following:

*a) Each campaign gets configured to use various system components (e.g. billing, subscriptions, PIN functionality, DOI processes, reminder messages, etc.). **Since March 2013 a lot of technical and system development work took place in preparation of the implementation of MNO-controlled DOI processes by MTN and Cell C which happened in December 2013.** The SP completely re-architected and redeveloped the Subscriptions Module in preparation of this implementation during this period which had a specific impact on the WAP campaigns that were active. **These changes resulted in the malfunctioning of the PIN and DOI processes in certain instances, specifically on this campaign for MTN and Cell C only.** The other compliance processes did function as intended (e.g. welcome and reminder messages as can be seen from the logs submitted). None of the other services or campaigns were impacted as the TV campaigns work on a different work flow to the WAP campaigns (one is initiated via a click on the WAP link while the other is initiated via the sending of a keyword to a short code). We humbly suggest that you refer to the testing of the SPs services by the Media Monitor during this period.* (my emphasis)

- 5.3. The Appellant's explanations for the shortcomings were detected by the adjudicator. There is apparently no evidence which contradicts the Appellant's version in this

regard, and it is accepted. Taking the Appellant's submissions into account, the following salient facts and conclusions are arrived at:

- 5.3.1. The subscription service to which this complaint relates was "live" from the 25th of March 2013 until the 14th of May 2013.
- 5.3.2. The complainant was subscribed to the service on the 7th of May 2013.
- 5.3.3. The complaint was lodged at WASPA on the 20th of August 2013, and the adjudicator would have tested the system sometime after this date – in other words after the subscription service was no longer "live".
- 5.3.4. The SP undertook technical and system development from March 2013 which "resulted in the malfunctioning of the PIN and DOI processes in certain instances, specifically on this campaign for MTN and Cell C only."
- 5.3.5. Any changes to the SP's system would have affected the operation of the IP's campaigns, which are run using the SP's system.
- 5.3.6. The landing page provided to the adjudicator could not be accessed accidentally by any consumer after the campaign "closed", and the consumer would have to manually enter the URL in question in order to access it.
- 5.4. The Appellant notes that the SP's ongoing development rendered previous campaigns invalid, and goes on to say that the campaign complained of was not updated to take account of these system changes as it was "closed". It is not clear from the appeal submission whether or not these technical changes had an effect on the campaign while it was "live" or only afterwards.
- 5.5. Accordingly the banner and landing page would have ceased to operate as required sometime after March 2013 – perhaps during the period of the campaign and perhaps after it. This issue would have affected MTN and Cell C subscribers only.
- 5.6. Note that the complainant's MSISDN begins with "082" which is a prefix generally assigned to Vodacom subscribers. However the unsubscribe request included in the original complaint pack seems to indicate that the complainant's MSISDN was in fact allocated to MTN. If this is the case, then the technical issue may have affected the complainant if it occurred during the period when the complainant was subscribed.
- 5.7. If we accept that the complainant was on the MTN network, then the difficulty is that it does not appear from the record when the technical issue would have affected the campaign concerned. Technical development took place from March 2013 which resulted in certain faults with the opt-in process for campaigns. However according to the Appellant's submission this system development would have been an ongoing process, and would not have been implemented all at once on a particular date. Thus it would be difficult for the Appellant to determine when in fact the campaign was affected. If the Appellant in fact knew this it would in all likelihood have included the information in its submission.
- 5.8. Moreover it is not known what the complainant's experience with the opt-in process was – the complainant makes a bare denial that he ever subscribed and does not

allege that he did not pass through a double opt-in process as described in clause 11.3.1.

- 5.9. The adjudicator's test of the campaign does not assist us in this regard, as it took place some months after the complainant was subscribed and when the campaign was already "closed". The technical issue was certainly evident at that stage, but the adjudicator's test does not indicate whether it affected the campaign on the date that the complainant was subscribed.
- 5.10. As a result of the above it is not known when the technical issue manifested itself and accordingly it is not possible to say that at the time the complainant was subscribed the Appellant was not complying with clause 11.3.1. We also cannot say that while the campaign was "live" the Appellant was infringing the clause. The evidence before this panel simply does not support a conclusion either way.
- 5.11. Of course if the complainant was NOT on the MTN network, then the technical issue would not have applied to him under any circumstances and the above reasoning would not be relevant.
- 5.12. As a result we are back to the common and unfortunate position where a complainant seeks to deny that he subscribed to a subscription service. It is difficult for a complainant to show that he did not do so, as very few of us keep a record of our interactions with WASPs. The complainant here has only made a bare denial, while the Appellant has produced logs that show the subscription.
- 5.13. As a result, in the absence of evidence to the contrary it cannot be found that the Appellant infringed clause 11.3.1 by failing to follow the prescribed double opt-in process.
- 5.14. However the Appellant is not off the hook entirely. While on the Appellant's version no consumer could access the landing page visited by the adjudicator without manually typing it in (which is most unlikely to occur in practice), the Appellant nonetheless had a landing page open to the internet which could theoretically be accessed by consumers resulting in unintended subscriptions. This is technically an infringement of clause 11.3.1 of the Code of Conduct; however it is extremely unlikely that this would occur, and it would be petty to find an infringement in these circumstances.
- 5.15. The Appellant is strongly advised to tie up its loose ends in future.
- 5.16. In light of the above the adjudicator's finding in respect of clause 14.3.13 cannot stand.
- 5.17. The appeal should be upheld in its entirety.

6. **Majority Findings**

Based on admissions made by the SP and IP, a majority of the Panel find that this appeal should be dismissed for the following reasons:

- 6.1. The IP has produced a message log showing a subscription welcome message was sent to the Complainant on 7 May 2013.

- 6.2. It appears to be common cause from the facts of this complaint that the complainant was, in a technical sense at least, subscribed to the service.
- 6.3. However, what the Complainant effectively alleges is that he did not intend to become subscribed.
- 6.4. The message log submitted by the IP is evidence that the Complainant was technically subscribed.
- 6.5. However, the message log does not disprove the Complainant's averment that he did not intend to become subscribed.
- 6.6. The SP conceded that "from March 2013", changes were being implemented to their system that "resulted in the malfunctioning of the PIN and DOI [double opt-in] processes in certain instances, specifically on this campaign for MTN and Cell C only".
- 6.7. It is clear from the message log that the Complainant became technically subscribed after March 2013, i.e. after the point from which the SP conceded that the PIN entry and double opt-in had begun malfunctioning for MTN customers.
- 6.8. The unsubscribe request included in the original complaint pack indicates that the Complainant's MSISDN was an MTN number.
- 6.9. In response, the SP and IP do not expressly state that their PIN and double opt-in subscription mechanism was working properly.
- 6.10. Although the SP alleged that a pin code would have had to have been inserted into the designated area of the subscription service landing page (positioned below the cell phone number) and that "confirm" would have had to have been clicked for the subscription to be processed, the landing page submitted to the Adjudicator showed no area for entering a PIN and no "confirm" button. It only shows a "Continue" button and then the welcome message is shown next.
- 6.11. Based on the admissions of the SP and IP, we find that there is sufficient evidence to reach a conclusion that section 11.3.1 of the Code has been breached in that the SP and IP failed to maintain a properly functioning double-opt in subscription mechanism as required by that section. As a result, we uphold the decision of the Adjudicator and dismiss the appeal on the merits.
- 6.12. Insofar as the Adjudicator's further finding of a breach of 14.3.13 is concerned, we have noted that the Adjudicator took the fact that no PIN was required during testing of the marketing page for the service to be an indication that the SP had deliberately misled WASPA when it stated that the process in fact required a PIN.
- 6.13. However, we have also noted that the tests performed by the Adjudicator on the IP's marketing materials took place at a point when the marketing campaign had already ceased. Based on the SP's clear admissions on appeal that the subscription mechanism was malfunctioning from March 2013 and the uncontested submission that the tested materials were inactive at the time of testing, we find that the SP has not intentionally misled WASPA, although its responses to the initial complaint were sufficiently vague to lead the Adjudicator to the understandable conclusion that

14.3.13 had been breached. However, we overturn this particular finding on appeal for the reasons stated above.

7. Majority Decision on the Sanction

- 7.1. The Adjudicator imposed a fine of R100 000 for the breach of section 11.3.1 of the Code.
- 7.2. With regard to the appropriateness of this sanction, we have noted that the Appellant has stated that “a total of 2 489 subscribers were acquired as a result of the campaign of which only 14.3% are still active. To put this into perspective, the number of subscribers acquired from this campaign in May 2013 was only 2.32% of the total number of subscribers acquired in that month”.
- 7.3. If 2 489 subscribers for this service represents only 2.32% of the total number of new subscribers for the IP in May 2013, it can be safely concluded that the IP acquired 107 284 new subscribers in just the month of May. It is clear that the IP subscription services are very large commercial services and it is clear that the breach of the Code was a very serious breach.
- 7.4. We can find no basis for interfering with the sanction imposed by the Adjudicator for breach of section 11.3.1 and the appeal against this specific sanction is dismissed.
- 7.5. As the appeal has been substantially unsuccessful, we direct further that the appeals fee be forfeited.