

REPORT OF THE ADJUDICATOR

WASPA member(s):	Mira Networks (SP); Big Cat SL (IP)
Source of Complaint:	Public
Type of complaint:	Subscription
Nature of complaint:	Unsubscribe Request and Escalation to Formal Complaint
Relevant version of the Code:	12.4

Summary of Complaint

The complaint is an escalation of an unsubscribe request (#5889549) and grievances, in particular with the payment of subscription service charges. The complainant raised additional information related to the SP's conduct and business practices. The WASPA Secretariat assessed that this complaint is associated with the service provider (SP) and the information provider (IP) otherwise referred to as the affiliate member. Both the SP and the IP were duly contacted and their responses, together with the complaints, requests, and response(s) are reflected here below.

Date of Subscription to service	-
SMS from WASP pertaining to subscription	2014-04-03
Unsubscribe Request	2014-05-06
Response to unsubscribe request	2014-06-05
Complainant response to IP resolution	The complainant refused resolution on 2014-07-14.
Formal Complaint Notification to IP	2014-06-03
IP Response to Formal Complaint	2014-07-15
Formal Complaint Notification to SP	2014-06-03
SP Response to formal Complaint Notification	-

Initial Unsubscribe Request

In the main, the Complainant asserted that he did not subscribe to the subscription services for which he was being billed by the Service Provider.

According to the complainant:

The complainant queried with Vodacom the cause of his airtime depleting rapidly, The result of the query was the establishing that Mira Networks (Pty) Ltd had been deducting R7.00 per day without his knowledge which was the cause of his airtime depleting as fast as it was. The complainant contacted Mira Networks and in the complaint attached copies of the correspondence exchanged by email. The complainant avers that the correspondence reveals that Mira has standard responses in relation to complaints concerning unauthorised deductions from their “numerous other victims”. The complainant denies having subscribed to the service noting that he has “no recollection whatsoever of having subscribed to any service”. The complainant notes that he is sensitive to cell-phone costs and would “never knowingly have subscribed to such an expensive service.”

The complainant does refer to an SMS received was on 3/4/2014 which reads as follows:

Reminder ur (sic) subscribed to NuDigits. 1 updates (sic) waiting <http://bzm.tv/s/BE05D96EF> 2 read cost R7/sms max 28 sms/m help? 0213002327. To unsub sms stop to 41489.

The complainant contends that he ignored the SMS as he believed that spam. Furthermore, the complainant submits a grievance that the contents of the sms “are nonsensical.” For instance, according to the complainant, the words “2 read cost R7/sms max 28 sms/m” were meaningless.

The initial unsubscribe request was sent to the IP and requested that:

- The complainant be unsubscribed (from the relevant service)
- An SMS be sent to the complainant confirming the unsubscribe
- The complainant be provided with proof of subscription
- The complainant be contacted regarding a refund

The complainant raised **additional complaints**:

The complainant referred to and attached extracts of content from website sources, including a customer complaints website concerning complaints with the SP’s services where he discovered “page after page” of complaints. The complainant submits on the basis of the extracts provided that, Member is engaged in the following:

- Deceptive and dishonest marketing
- Unfair and dishonest dealing
- Charging unfair prices
- Unwarranted direct marketing

- Failing to provide a cooling off period
- Failing to refund their victims who have received their unsolicited services
- Marketing their services by negation option methods
- Fraudulent activity

In respect of the additional complaints, the complainant requested that WASPA investigate the matter fully, take steps to compel Mira Networks and/or their directors to refund their victims and institute criminal proceedings where there has been any fraudulent activity.

The complainant wished for Vodacom (the network operator) to be included in the complaint as he believed that cell phone providers should not allow their billing systems to be utilised in this manner and on this basis the operator should also be investigated (by WASPA) implication.

IP Response to Unsubscribe Request

The IP responded indicating that: the complainant's number had been blocked on our system i.e. the complainant was unsubscribed, the requested Confirmation SMS was sent to the complainant, a full refund was offered to the complainant and proof of subscription was not provided (albeit requested).

Complainant's Responses

The complainant advised the WASPA Secretariat that "Mira" had offered to refund the money "unlawfully" from the complainant. The complainant responded to advise the IP that he will settle for an additional R500.00 being "solarium" for the extreme inconvenience and annoyance suffered. Hence this issue remains unresolved and it appears that no monies have been paid over to the complainant.

The complainant raised concerns with WASPA Secretariat concerning the regard afforded to the additional information comprising the initial unsubscribe request and "the huge amount of evidence I provided you which gives rise to the almost inescapable inference of wrongdoing on the part of your member". The complainant was dissatisfied with WASPA's attention to such information and "evidence" and queried why "disciplinary proceedings". In this regard, the complainant requested information concerning WASPA's response to the additional matters raised by the complainant.

The complainant further requested that the adjudicator should give serious consideration to referring this matter to the police for further special investigation.

Escalation to Formal Complaint

Formal Complaint Notification to the IP

The IP was notified that the complainant was not satisfied with the IP's response and that the unsubscribe request has been escalated to a formal complaint against the IP. In addition to other notifications in the formal complaint notification, the WASPA Secretariat recommended that the IP's response include as much as possible of the following information that is relevant to this complaint:

- Logs as stipulated in clause 11.10.2. of the Code of Conduct pertaining to the service in question; and
- Information on how the relevant service was or is advertised.

IP Response

The IP referred to various correspondences with the complainant from the unsubscription request. In particular the IP noted the offer to refund the complainant as a gesture of good will - a refund totalling R266. According to the IP this was notwithstanding that they had advised the complainant that they had followed the subscription procedure as set out within the WASPA Code of Practice and also the Mobile Network verification processes as administered by the complainants network Vodacom, whereby the complainant independently had to confirm the subscription with the network prior to us receiving confirmation details in order to subscribe the user.

The correspondence referred further to:

Disputes on the settlement fee – the complainant responded to the offer of refund requesting that the matter could be settled if an additional amount of R 500 as solatium for the inconvenience occurred. The IP responded that it would not pay the additional amount. The complainant then requested settlement for no less than R1200.00. The IP believed that the complainant was being “extortive” in that he was threatening to bring the case to WASPA and offering to us the “easy” solution to avoid the process currently in place as per Code of Practice. The IP restated that it would not pay the additional amount. Following receipt of the formal complaint, the IP again made contact with the complainant where according to the IP, the complainant verbally accepted the full refund of R 266. The IP informed WASPA of the acceptance as per normal procedure and WASPA crosschecked the complaint status with the complainant to which the complainant responded by turning down again the full refund offer and asking again for compensation. The final correspondence from the IP the complainant reiterated that no compensation would have been paid for a “fully compliant subscription” and that the refund offer itself was a pure gesture of goodwill.

No logs were or additional evidence were produced by the IP.

Formal Complaint Notification to Service Provider

The Monitor notified the Service Provider on 2014-06-03 of the formal complaint sent directly to the Affiliate member and duly attached the formal complaint notification sent. The SP was informed that WASPA Secretariat believes that the Affiliate member involved was making use of the SP's infrastructure to provide the service and was thus making the SP aware of this complaint.

The notice to the SP provided that the SP may:

1. Choose to allow the relevant Affiliate member to respond to this complaint, and not provide any response of their own; or
2. Provide a written response to the complaint, which will be considered by the adjudicator in addition to any response provided by the relevant Affiliate member.

Furthermore that the SP may wish to take further steps regarding the service that is the subject of the complaint which should be communicated to the WASPA Secretariat. As a formal complaint notification to the SP, in terms of clause 14.3.3 of the WASPA Code of Conduct, independent adjudicator will treat the SP as a respondent for this complaint, and sanctions may be imposed on the SP and/or hold you liable for the actions of the Affiliate member in the event that that IP does not comply with any sanctions imposed on that member by the adjudicator.

Service Provider's Response

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Sections of the WASPA Code of Conduct Considered

2.24. "**Spam**" means unsolicited commercial communications, including unsolicited commercial messages as referred to in clause 5.2.1.

2.25. A "**subscription service**" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

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.

5.2. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications
 - (i) at the time when the information was collected; and
 - (ii) on the occasion of each communication with the recipient; or
- (c) the organisation supplying the originator with the recipient's contact information has the

recipient's explicit consent to do so.

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.11, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

3.9.4. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

11.1. Promotion of subscription services

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.

11.6. Reminder messages

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.

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description].

Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

or

Reminder: You are subscribed to [name of service provider] [content/service description].

Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

11.6.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.6.2.

11.6.4. The content/service description must be text describing the content, promotion or service (e.g. “tones” or “poems”). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

11.6.5. The cost of service and frequency of billing must use the format “RX/day”, “RX/week” or “RX/month” (or RX.XX if the price includes cents). No abbreviations of “day”, “week” or “month” may be used.

14.1.1. Any person may lodge a complaint against any member who, in the view of the complainant, has acted contrary to the provisions of this Code.

14.4.2. For all other clauses of the Code, possible sanctions that may be imposed on a member found to be in breach of the Code of Conduct are one or more of the following:

- (a) a requirement for the member to remedy the breach (including ordering a refund);
- (b) a formal reprimand;
- (c) an appropriate fine on the member, to be collected by WASPA;
- (d) suspension of the member from WASPA for a defined period;
- (e) expulsion of the member from WASPA;
- (f) a requirement for the member to disclose the identity of any information provider found to be acting in breach of this Code of Conduct;
- (g) a requirement for the member to suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct;
- (h) a requirement to withhold a specified amount or portion of money payable by the member to the information provider.

14.4.4. In addition, possible sanctions against a member in breach of the Code include advising the relevant network operators or that member's aggregator to do one or more of the following:

- (g) issue a blanket refund to the customers of a service found to be in breach of the Code of Conduct.

14.4.6. Where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

14.9.1. WASPA may employ a Media Monitor, whose role it is to monitor WASPA members' advertising and services for compliance with the WASPA Code of Conduct and Advertising Rules.

14.9.2. The Media Monitor may lodge complaints with WASPA using the procedure outlined in sections 14.1, 14.2 and 14.3 of the Code.

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

Decision

There is no contention between the IP and the complainant regarding the nature of the service which is clearly characteristic of a subscription service. Notwithstanding the IP's claim that the complainant had in fact subscribed to the service and the reference to available logs, in the absence of logs or additional evidence such as the promotional material for the service, from the IP to substantiate this claim,

I find that the IP has breached 3.1.1 of the Code and 5.1.2 of the Code in that:

- (a) the IP has engaged in unprofessional conduct in subscribing the complainant to services that the complainant has not requested; and
- (b) that the IP has not satisfied any of the exceptions to the identification of unsolicited commercial communications.

Furthermore, the IP has not complied with 11.6 of the Code in that the reminder message:

Reminder ur (sic) subscribed to NuDigits. 1 updates (sic) waiting <http://bzm.tv/s/BE05D96EF> 2 read cost R7/sms max 28 sms/m help? 0213002327. To unsub sms stop to 41489.

violates:

- (a) 11.6.2 for the reason that it does not adhere exactly to the following format, flow, wording and spacing:
Reminder: You are subscribed to [name of service provider] [content/service description].
Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].
nor
Reminder: You are subscribed to [name of service provider] [content/service description].
Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

- (c) 11.6.3 for the reason that the entire reminder message includes any additional characters other than those specified in 11.6.2.
- (d) 11.6.4 for the reason that the content/service description does not describe the content, promotion or service (e.g. “tones” or “poems”).
- (e) 11.6.5 for the reason that the cost of service and frequency of billing must use the format “RX/day”, “RX/week” or “RX/month” (or RX.XX if the price includes cents). Specifically, no abbreviations of “day”, “week” or “month” may be used and the IP’s message uses abbreviations.

Hence, the IP has acted in breach of the Code as set out above.

I have evaluated the sections of the Code pertaining to the SP’s conduct in governance of the IP relationship visavis the primary grievances of the complainant and conclude I have no cause to find a violation of the Code by the SP.

Regarding the additional complaints, I am bound by 14.1.1 of the Code and cannot make any determination visavis the network operator, Vodacom.

Regarding the additional complaints against the IP and SP, and the complainant’s call for additional action by WASPA, the adjudicator is bound by the parameters of this complaint and the associated subscription service.

Sanctions

In the circumstances, the complaint is upheld.

- The IP is ordered to refund the Complainant the amount of R 266.00
- The IP is consequently fined R25, 000.00.

The adjudicator is not at liberty to order the IP to pay an additional amount, over and above the abovementioned refund, to the complainant, as requested, notwithstanding whether the request was of an extortive nature or not.