

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Exact Mobile

Service Type: Subscription Service

Source of Complaints: Consumer

Complaint Number: 3611

Complaint

WASPA received a complaint in March 2008 regarding a subscription service which the Complainant claimed he did not personally subscribe to and for which he had been billed periodically over a continuous period of approximately 2 years.

The Complainant did not aver that a subscription request message had not been sent from his mobile telephone handset to the SP nor did he aver that a further transaction confirmation message had not been sent from his handset. The essence of the Complainant's case was summarised in the following paragraphs of his written complaint:

My points are:

- 1. Simply because someone SMSed some obscure word from my phone to someone else can in no way (I believe) conclude a contract between parties.*
- 2. Simply by sending obscure SMSes every month to my phone informing me that I am now a member of some obscure club cannot imply that I would like to remain a member of same. Indeed the SMSes look remarkably like the junk-mail that fills my In-Box regularly and are, more often than not, summarily dismissed and deleted without reading more than the first word or two.*

My issue is as follows;

How can there be any binding contract between parties if the identity of the parties is indeterminate?

Surely there is an onus on Exactmobile to conduct it's business in a careful way and ensure that the clients it is happily deducting R 10 per month are indeed happy to do so - Simply sending an SMS and on the basis of there being no reply surely does not construe acceptance. - In the words of Sir Thomas Moore "Silence does not mean consent".

SP Response

The SP stated, inter alia, that:

The complainant admits that the SMS were sent from his phone to join the subscription service, admits to replying to confirm to join the club. The complainant further admits to receiving monthly reminder SMS. Therefore from a WASPA perspective no WASPA rules have been infringed.

In its response, the SP accordingly denied that its conduct amounted to a breach of any provision of the WASPA Code of Conduct ("the Code").

In an attempt to informally resolve the dispute, WASPA facilitated further written communications between the SP and the Complainant. In such communications, the Complainant maintained that even if the WASPA Code had not been breached, the conduct of the SP was, in the Complainant's view, unlawful.

The Complainant stated that he did not use his phone on a daily basis and did not read every SMS that he received, especially those that he receives after he has retired for the night. He stated further as follows:

My question is; in YOUR opinion - Does an SMS back and forth with no verification of identity from either side constitute a binding contract in LAW (The law of the country - not some code of conduct from some industry representative)?

As no satisfactory resolution of the matter was achieved informally, WASPA escalated the matter to formal adjudication.

Additional Information

After examining the communications that had passed between the Complainant and the SP, further information was requested from the Complainant in terms of section 13.3.8 of the Code. The requests for further information are set out below in bold italics and the further responses of the Complainant are set out below in italics:

1. The subscription took effect in March 2006 and the complaint was lodged in March 2008. Over what continuous period was the Complainant actually subscribed to the service?

1. Apparently I was subscribed to this service continuously from 2006.

2. To the extent that the Complainant has complained that he was unaware of the fact that he had been subscribed to a service, does he allege that Exact Mobile did not, immediately after the subscription request was received, send a notification message to his phone indicating that he had been subscribed to a service by expressly stating (i) the cost of the subscription service and frequency of the charges; (ii) clear and concise instructions for unsubscribing from the service and (iii) Exact Mobile's contact information?

2. No I do not allege that Exactmobile sent confirmations and information back and forth - only that I did not personally have sight of said correspondence and that when

sending messages to a number nobody can be sure and there is no documentary evidence that the recipient was indeed the person who would end up footing the bill.

3. Does the Complainant allege that during the period of his subscription a monthly reminder SMS was not sent to his phone containing the following:

3.1 The name of the subscription service;

3.2 The cost of the subscription service and the frequency of the charges;

3.3 The service provider's telephone number;

3.4 A statement conforming to the following format: "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".

3. Once again I do not allege that Exactmobile may have sent messages - to put things in perspective I would often switch the phone off for months at a time and only use the phone for certain occasions and, since I do not use the phone on a day to day basis, I would simply delete any and all SMSes as being nothing more than 'junk mail' - It was purely by chance that I actually read the SMS in March that alerted me to the situation which also explained the monthly charge on my Cell account that I had been querying with MTN (this too was a futile exercise).

4. If the Complainant alleges that a reminder SMS as outlined in paragraph 3 was not sent to him on a monthly basis, in what months and years or over what specific period does he allege that this was the case?

4. I cannot say which months Exactmobile may or may not have sent an SMS - I ask what proof do they have that I personally read, acknowledged and accepted any purported SMS that they sent to me? In this case and in the words of Sir Thomas Moore - "Silence DOES NOT mean consent!"

5. To the extent that the Complainant suggests that he has received messages after he retired for the night, does he allege that he received messages from Exact Mobile designed to promote the sale or demand of their goods and services after 20h00 and before 06h00?

5. The timing of the message was co-incidental in that I happened to have the phone activated that particular evening and, irritated at the interruption at that time of night, I took the trouble to read the message as opposed to my normal practise with this particular number/ phone simply delete messages. - If, for example the message had been sent at ANY time - say two days later - I may never have read that particular message at all and I would still be fleeced each month for a Service I neither want nor need.

6. To the extent that the Complainant states that his cell phone account has been debited on a monthly basis, does he alleged that these debits do not reflect that he has been debited for a subscription service and, if so, does he allege that this would have been feasible? An electronic copy of his cell phone account would be useful to receive as well.

6. The attached invoice reflects a charge for 'CONTENT CHARGE' which I have once in a while queried with MTN without any degree of success. Since the sum was small I must admit I did not pursue it vigorously. However, when I became aware of the extent and nature of the charge I most certainly determined that I would chase this down to the end.

IN CLOSING

My issue with ALL CONTENT PROVIDERS (not just Exactmobile) is

- a) That there is NO PROOF WHATSOEVER that anybody has, in fact actually read, understood and accepts the content of an SMS sent out into 'the ether'.*
- b) That the person who sends and/ or receives an SMS on a phone is necessarily the legitimate "owner" or the phone/ account. As a result simply sending and receiving an SMS cannot construe a binding contract between parties.*
- b) That MTN (I assume other service providers as well??) can simply debit a subscribers account with an arbitrary sum purely on the basis of the say so from some content provider and this without first getting signed authority from their client to do so.*

The Complainant also submitted a copy of his cell phone account which evidenced an itemised "content charge" of R8.77 plus VAT.

Decision of the Adjudicator

At the time the subscription service commenced in 2006, version 3.2 of the Code was in force. At the time the service was cancelled in 2008, version 5.7 of the Code was in force.

No claim has been made by the Complainant that the SP breached any of the detailed provisions of the Code regarding information that is required to be supplied to consumers in respect of subscription services, whether at the commencement of those services or on an ongoing basis thereafter. Furthermore, based on the information adduced in the complaint and the answers to the further questions put to the Complainant, there is no basis for a finding that the SP breached any of these detailed provisions of the Code regarding subscription services.

However, all versions of the Code in force during the period that the Complainant was subscribed to the service in question contain the following section 3.1.2:

3.1.2. Members are committed to lawful conduct at all times.

Furthermore, section 4.1.1. of the Code also requires that Members be committed to honest and fair dealings with their customers.

The only issue to be adjudicated in this matter is therefore whether the transaction method used by the SP for the subscription service itself was unlawful, unfair or dishonest. Although WASPA complaint adjudication proceedings are not equivalent to a Court of law, WASPA does have jurisdiction to sanction its members where they engage in unlawful conduct or where they act unfairly or dishonestly.

In adjudicating this complaint, it is therefore relevant to have regard for the South African common law as well as the Electronic Communications and Transactions Act No. 25 of 2002 ("the ECT Act").

According to the common law, a contract is generally formed in circumstances where there is both an offer and an acceptance of that offer and the law will not interfere with the provisions of an agreement entered into voluntarily between two parties unless that agreement is immoral or contrary to public policy.

Provided both offer and acceptance were present, it would not be unlawful or contrary to public policy for a mobile telephone subscriber to contractually authorise a network operator to debit his or her account with fees and charges incurred in respect of data or services accessed using the subscriber's handset and delivered via the network operator's network. In terms of such an agreement, it may legally be provided that where someone other than the actual consumer who entered into the agreement with the network operator used the consumer's handset (e.g. to make a telephone call) the cost of that call may still be debited to the consumer's account (contracts with the network operators generally provide for this). WASPA does not have jurisdiction to interfere with the terms of agreements entered into between subscribers and network operators, including their billing and refund policies and indemnity provisions for unauthorised use of subscriber's handsets.

WASPA is, however, able to express its own view on whether the SP's method of offering its subscription services is lawful. In this particular case, the method of subscribing to the services entailed the manual sending of a SMS from a consumer's handset containing a keyword to the SP's advertised number which would result in an automatic confirmation request message being sent back to the consumer's handset. A manual confirmation message would then be sent back to the SP and the consumer would be subscribed to the service.

In determining the lawfulness of such a method of transacting, the following provisions of the ECT Act are potentially relevant:

Section 1 defines a "data message" as data generated, sent, received or stored by electronic means and defines an "automated transaction" as meaning an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.

Section 11(1) states that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.

Section 13(5) states that where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that:

- (a) it is in the form of a data message; or
- (b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.

Section 20 states that in an automated transaction:

- (a) an agreement may be formed where an electronic agent performs an action required by law for agreement formation;
- (b) an agreement may be formed where all parties to a transaction or either one of them uses an electronic agent;
- (c) a party using an electronic agent to form an agreement is, subject to paragraph (d), presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement;
- (d) a party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation;

(e) no agreement is formed where a natural person interacts directly with the electronic agent of- another person and has made a material error during the creation of a data message and

(i) the electronic agent did not provide that person with an opportunity to prevent or correct the error;

(ii) that person notifies the other person of the error as soon as practicable after that person has learned of it;

(iii) that person takes reasonable steps, including steps that conform to the other person's instructions to return any performance received, or, if instructed to do so, to destroy that performance; and

(iv) that person has not used or received any material benefit or value from any performance received from the other person.

Section 22 states that:

(1) An agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.

(2) An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.

Section 24 states that as between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that-

(a) it is in the form of a data message; or

(b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.

Section 26 provides as follows:

(1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

(2) An acknowledgement of receipt may be given by

(a) any communication by the addressee, whether automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.

Section 43(2) states that where a supplier enters into a transaction with a consumer electronically, the supplier must provide a consumer with an opportunity

(a) to review the entire electronic transaction;

(b) to correct any mistakes; and

(c) to withdraw from the transaction, before finally placing any order.

While the Complainant might have grounds for complaining that he did not actually enter into the agreement himself, there is no basis for a finding that the SP has acted unlawfully or dishonestly based on the evidence that is before me. The ECT Act expressly provides that an agreement may be entered into by exchange of data messages, even where an agreement is entered into in an automated fashion by one or both of the parties thereto. The SP would accordingly be entitled to offer its services in the manner and fashion that it has. It would furthermore not be unlawful or unreasonable for the SP to infer that a communication from the handset may be attributed to the owner of the handset or a person authorised by the owner to transact using the handset (in the same way that an online merchant is not acting unlawfully by accepting a credit card that does not belong to the purchaser). The WASPA Code places a higher standard of consumer protection than is strictly

required in law and requires members to send regular detailed reminders to subscribers of the services for which they are subscribed, however the ECT Act only requires a vendor to provide the consumer with the ability to review and confirm a transaction before any such transaction can be taken to have been concluded.

If the Complainant's version of events is true (there is no basis for assuming otherwise) then the Complainant may be entitled to other forms of relief not provided for or governed by the WASPA Code of Conduct. Entitlement to certain forms of relief may be influenced by whether the Complainant has contractually assumed the risk of unauthorised use of his handset with his network operator or whether he has contractually agreed that billing disputes be raised within a limited period of time failing which charges may be deemed in terms of the contract to be correctly debited. His remedies would therefore be confined to those afforded to him contractually and dependent upon who bears the contractual risk of unauthorised use of his account, as well as his right of action against the person who used his cell phone to transact (possibly fraudulently) on his account.

In other words, depending on the provisions of his network subscription agreement, the Complaint may be entitled to relief akin to that granted to a consumer whose credit card has been used without his permission to effect a transaction. In such circumstances the credit card holder may be entitled to a refund, but this would be in accordance with his or her agreement with the issuer of the credit card.

The Complainant may also be in a position to lodge a criminal complaint against the person who transacted on his handset and account. However, there is no basis for finding that the SP in this matter has acted unlawfully and the SP cannot be held to be in breach of sections 3.1.2 or 4.1.1 of the Code.

One final point remains to be considered, i.e. whether the SP ought to be held to be in breach of section 11.1.3. of the Code which stipulates as follows:

“Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.”

A copy of the complainant's monthly invoice reveals an itemised “content charge” of R8.77 plus VAT but there is no mention that this is a “subscription” content charge.

A finding of a breach of section 11.1.3 requires a factual enquiry into whether it is practically “possible” for the SP to request that the itemised billing of a network operator reflects that a particular service is a subscription service. The SP was accordingly asked to respond to this aspect of the complaint. In its response, the SP produced a copy of a revenue statement produced by MTN which describes different billing requests submitted by the SP using MTN's event based billing system. In this revenue statement, it is apparent that subscription billing requests submitted by the SP contain the word “subscription” or “club” in them, but that this information is then aggregated as “content charges” on a subscriber's mobile telephone account. Informal enquiries made with other SPs established that this is a common problem with MTN billing in that it does not accurately itemise a consumer's invoice to reflect subscription charges. In the circumstances, and until such time as MTN's event based billing system is improved for the benefit of its subscribers, the SP cannot be held to be in breach of section 11.1.3 of the Code.

The complaint against the SP is accordingly dismissed.