



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mira Networks
Information Provider (IP):	Mobimex Group
Service Type:	Subscription
Source of Complaints:	Public
Complaint Number:	5981
Code Version (CoC and AR):	Code of Conduct 6.2
Date of Adjudication:	20 August 2009

Complaint

1. On the 03 March 2009 WASPA received an unsubscribe request from the Complainant. He alleged that he never subscribed to any service and yet Mira Networks (the SP in this matter) billed him for R105.00 in December 2008 and again for R105.00 in January 2009. He then indicated that while he entered into a competition he did not subscribe to any service and indicated that he felt MTN (presumably the applicable Mobile Network Provider) was defrauding people by debiting his account without his consent.
2. In response WASPA sent an unsubscribe request to the SP who handed the matter over to the IP on the 03rd March 2009 asking them to unsubscribe the Complainant.
3. The IP responded on the 04th March 2009 by indicating that the Complainant was unsubscribed on the 12th January 2009. It further indicated that no refund was provided as the Complainant was subscribed "normally". In addition the image (attached hereto as Annexure A) was provided by the IP.

Complainant's Reply

4. The Complainant then replied twice and indicated that he was unsatisfied with the response as Annexure A did not indicate whether any acceptance of a subscription had

#5954

occurred, but rather simply referred to his cell phone number.

5. The Complainant further indicated that he did enter into a competition to win “football goodies” and he has proof of the SMS he sent to enter into the competition (although this was not provided). He further indicated that while he did receive a reply to the request which confirmed his entry into the competition, he was never informed that this was a subscription service.
-

Second IP Response

6. The IP then responded by indicating that they do not “do any winning competitions”. The IP indicated that the Complainant was subscribed on the 11th November 2009 at 14h49 and provide the proof of the subscription as seen in Annexure A.
-

Portions of the Code of Conduct (version 6.2) considered:

7. **3.1.1.** Members will at all times conduct themselves in a professional manner in their dealings with the public, consumers, other wireless application service providers and WASPA.
8. **3.9.** Information providers
 - 3.9.1.** Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.
 - 3.9.2.** The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
 - 3.9.3.** The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.
9. **11.1.2.** Any request from a consumer 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

#5954

specific content item.

10. **11.1.4.** Consumers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.
11. **11.1.7.** Once a consumer has subscribed to a subscription service, a notification message must immediately be sent to the consumer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:
- (a) The name of the subscription service;
 - (b) The cost of the subscription service and the frequency of the charges;
 - (c) Clear and concise instructions for unsubscribing from the service;
 - (d) The service provider's telephone number.
-

Decision

12. This matter is governed by the WASPA Code of Conduct Version 6.2 due to the fact that the alleged infringements occurred before the 23rd March 2009.

PROFESSIONAL CONDUCT

13. While the IP was not overly helpful in this matter, it cannot be said that its conduct in this Complaint 5981 went so far as to be unprofessional. As a result clause **3.1.1** is not found to be breached in this complaint.

SUBSCRIPTION SERVICES

14. This matter relates to the automatic subscription of members of the public and is a particularly sensitive area of WASPA complaints.
15. In this matter the complainant alleges that he did not subscribe to the service nor was he notified of his subscription. Rather he found out about the subscription service only

#5954

after discovering the charges that were being billed to him.

16. Clearly in this case, as the IP has indicated that the Complainant was “subscribed” the onus falls on the IP to prove that this particular complainant did request a specific service at a particular date and time.
17. To this end the IP provided “proof” (see annexure A) which appears intended to indicate that the complainant did subscribe to the service on the 11th November 2008.
18. A brief look at Annexure A makes it clear that the complainants cell phone number is contained in the annexure as well as a “WAP Menu(427)”. No explanation regarding these links or codes were provided, nor was any URL provided to the adjudicator to consider the service.
19. In the circumstances the IP has failed to prove that the Complainant specifically requested to subscribe to the subscription service which was an independent transaction. As always once it has been established that the Complainant was in fact subscribed, the onus rests on the IP (or SP) to prove that the service was specifically requested. The IP has failed to discharge this onus and as such breached **11.1.2** and **11.1.4** of the CoC.

SP RESPONSIBILITY FOR ACTIONS BY IP

20. This decision comes in the light of Complaints 4755, 5696, 5816, 5888, 5954 all of which deal with the IP in this matter.
21. It is of concern that the SP in this case and in the case of Complaint 5696 by their actions appear to believe that the simple referral of the matter to the IP involved who is, as it happens, also a member of WASPA will absolve them of any liability and/or responsibility for the conduct of the IP. It would appear that this approach stems from section 3.9 of the Code of Conduct Version 7.4 which indicates:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

#5954

3.9.2. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.3. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

22. The reference to a “(WASPA) Member” seems to have been taken by SP’s in general to mean that once the IP is a member of WASPA, the SP need exercise no oversight role, nor should the SP be liable for any contravention of the WASPA Code of Conduct committed by the IP.

23. In order to address this issue it behoves us to look back at earlier Complaints such as Complaints **0326**, **0213** (where the IP in question was Vodacom (Pty) Ltd), **0330** and **4781**. However the most enlightening adjudication that came to hand after examination was that of the WASPA Appeal Panel ruling in Complaint **0411** where the precise question of SP liability for IP conduct was addressed.

24. In Complaint 0411 the following was indicated when referring to clause 3.9 of the WASPA Code of Conduct Version 4.3:

24.1. *“The Appellant (i.e. the SP) is responsible for the information provider’s adherence to the Code.”* (My insertion)

25. The Appeal panel go on to indicate that:

25.1. *“While this provision does not actually state that penalties will be imposed on an SP for IP contraventions of particular clauses of the Code of Conduct, it does impose a general duty upon the SP to ensure that the IP does not contravene the Code of Conduct.”*

26. The Panel in the above matter went further and indicated:

26.1. *“There are, nonetheless, sanctions that adjudicators can apply to IPs, but even so such sanctions must by necessity be implemented by the SPs”.*

27. The Appeal Panel goes on to indicate that while the SP and IP should be assessed separately (although not necessarily treated differently) with respect to the complaint, it points out that: *“Merely to say however that because the code treats them separately*

#5954

the SP cannot be liable for actions of the IP in terms of clause 3.9 goes no way to refute the basis of SP liability as set out above."

28. While the Appeal Panel was dealing with a non-WASPA member in the above matter it is my opinion that these principles can be easily and logically expounded to include IP's who are WASPA members. The reasons underlying this position are as follows:

28.1. The SP receives a revenue share of any service that is orchestrated by the IP which is not inconsiderable. Indeed approximately a quarter of the revenue obtained for any campaign is earned by the SP.

28.2. The SP is a technological enabler for service by the IP is the SP. Quite simply without the use of the SP's systems the service could not be delivered. As such the SP is the "gatekeeper" to the allowing the service to continue.

28.3. The SP is required to contractually bind the IP to abide by the WASPA Code of Conduct in terms of clause 3.9.1 of the WASPA Code of Conduct Version 7.4. This requirement has been retained through the various versions of the WASPA Code of Conduct.

28.4. In the event that the IP absconds from South Africa or is declared insolvent, it would be unjust for the consumer to have no recourse against any person or body for any monies lost due to illegal practices (both in terms of the WASPA Code of Conduct and South African Criminal Law) by the IP. Indeed the failure to allow for the liability of the SP for the IP's conduct (whether or not the IP is a member of WASPA) has the result of allowing South Africa to become known as a jurisdiction where a foreign IP could enter the market, become a WASPA member, pillage the market by using unsavoury practices and then leave with the revenue it collected with no or little recourse available to the consumer involved. Rather it should be the SP involved who would pursue the IP in this example as the SP is a natural consolidator of all of the breaches of the WASPA Code of Conduct, and in addition, has a formal contractual relationship with the IP which is typically drafted by attorneys, rather than the often scanty and often one-sided contract between the consumer and the IP.

28.5. The above reasoning is supported by the Consumer Protection Act No. 68 of 2008 (hereafter "CPA") which takes pains to hold all the parties responsible for the

#5954

damage suffered by the consumer. See for example section 29 of the which names the “producer, importer, distributor, retailer or service provider” to be responsible for any marketing which is deceptive or fraudulent (see clause 4.12 of the WASPA Code of Conduct). While the CPA is not in force in South Africa and is only likely to be implemented in full in October 2010, the symbiotic relationship between the IP and the SP within the space of mobile telecommunications makes it clear that it is appropriate that while the SP should be “assessed separately” as pointed out above, I believe it would not be inappropriate for the SP to be liable for any sanctions directed at the IP, in the event that the IP fails to comply with the sanctions imposed by an adjudicator.

29. The only remaining issue regarding SP liability stems from Chapter XI of the Electronic Communications and Transactions Act No 25 of 2002 (the “ECT Act”). This chapter is designed to allow Service Providers who are members of a representative body (such as the Internet Service Providers Association – ISPA) to avoid liability for the actions of a customer (“recipient”) due to the fact that they are a “mere conduit” and are not actively involved in the modification of the data. Section 73(1)(a-d) reads as follows:

73. (1) A service provider is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control, as long as the service provider-

- a. does not initiate the transmission;*
- b. does not select the addressee;*
- c. performs the functions in an automatic, technical manner without selection of the data; and*
- d. does not modify the data contained in the transmission.*

30. It is arguable whether the SP can be said not to perform the above actions in this matter and, moreover, whether the SP does or does not in some way perform one or many of the above actions would have to be assessed on a case by case basis. However at present WASPA is not a recognised body as required by section 71 of the ECT Act and as such this protection is thus unavailable to the SP.

31. As a result of the above factors I find it appropriate to place the SP in the position where it is liable for the actions of an IP who is a member of WASPA in the event that the IP

#5954

does not honour its obligations in terms of the WASPA Code of Conduct.

CONCLUSION

32. This adjudication comes after the adjudication of complaints 4755, 5696, 5816, 5888 and 5954. In Complaint 5696 a significant fine and sanction was imposed. As a result of the fact that the adjudication is currently being appealed it is premature to indicate that the IP has failed to rectify the problems listed in Complaint 5696. However there are several strikingly similar aspects to this Complaint which underline the need for the IP to take the WASPA Code of Conduct seriously and conduct itself in a professional manner. Reference should be made to the above complaints.

Mitigation/Aggravation

AGGRAVATION

33. In aggravation of the circumstances (please refer to Complaint 5696):

- 33.1. It is noted that the IP in this matter was sanctioned for extremely similar subscription model in terms of Complaint 5816. In this adjudication the adjudicator admonishes the SP and IP to be more forthcoming with regard to the facts of the matter. Moreover clauses 11.1.2 and 11.1.4 were also apparently breached in this adjudication.

MITIGATION

34. In **mitigation** of the circumstances:

- 34.1. The IP has appealed the breaches of the CoC identified in Complaint 5696.

Sanction Imposed

#5954

35. The following sanctions are imposed:

35.1. The IP is directed to refund the Complainant in this matter in the amount of R210.00, this being the amount that the Complainant indicated was deducted from his monthly account.

35.2. Due to the fact that the IP is appealing Complaint 5696, the IP is fined the amount of R20 000.00 for the breaches of clauses 11.2 and 11.4 of the CoC.

35.3. Should the IP fail to pay this fine within the required five day period then the SP will be liable to pay the said fine. The requirement placed on the SP to pay the fine if the IP defaults in payment is suspended pending the outcome of the appeal panel ruling of complaint 5696. Should the Appeal Panel in that matter find the SP liable for the actions of the IP (in the event of the IP defaulting on its obligations) then the WASPA secretariat will inform the SP in this matter accordingly and this directive will come into force. In the event that the Appeal Panel in that matter finds that the SP is not liable for the actions of the IP then the WASPA secretariat will inform the SP that this requirement is void.

35.4. As indicated in Complaint 5696 it should be noted that the breaches identified in this section are serious and repeated. Should the IP fail to show the necessary commitment to compliance with the WASPA Code of Conduct as evidenced by future complaints, it would be appropriate for the termination of the membership of the IP to be considered.

Appeal

Please note that should the SP or complainant wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.6 of the Code of Conduct version 7.4.

#5954

Annexures

Annexure A

WAP Opt-in information for MSISDN: 427 427 100					
Date	MSISDN	Type	Menu/Prd. No.	Download(s)	Handset Details
10-Nov-2008 Sun 07:04	+228 427 427 100	WAP Menu	427	1	IP:41.200.50.133 release500u/2.0 (04.04) ProfileWSP-2.1 Configuration/CUDC-1.1
10-Nov-2008 Tue 08:29	+228 427 427 100	WAP Menu	427	1	IP:41.200.50.133 release500u/2.0 (04.04) ProfileWSP-2.1 Configuration/CUDC-1.1
10-Nov-2008 Tue 12:42	+228 427 427 100	WAP Menu	427	1	IP:41.200.50.133 release500u/2.0 (04.04) ProfileWSP-2.1 Configuration/CUDC-1.1
11-Nov-2008 Tue 14:49	+228 427 427 100	WAP Menu	427	1	IP:196.11.241.37 release500u/2.0 (04.04) ProfileWSP-2.1 Configuration/CUDC-1.1
Date	Product		Type	Session ID	
10-Nov-2008 Tue 12:42	WAP Menu(427)		WAP Menu	2832577	
11-Nov-2008 Tue 14:49	WAP Menu(427)		WAP Menu	1877579	
2-Dec-2008 Tue 08:02	WAP Menu(427)		WAP Menu	2275501	

SP response to provide proof that the complainant subscribed to the service. Complainant's cell phone number removed by adjudication for privacy reasons.