



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Sybase 365

Information Provider (IP)
(if any) Mobile Gate

Service Type Subscription service

Source of Complaints M Di Perna

Complaint Number 6186

Date received 9 April 2009

Code of Conduct version 7.0

Complaint

The complainant states that he received an SMS from an online dating site:
<http://www.maybemeet.me.co.za> which read as follows:

*"Hi Marcel, Claire from MATCHMAKE wants to chat and maybe meet.me! TXT YES
to CONNECT NOW ! for help 0800981229 Msg10rand60sub2endtxtstop"*

The complainant replied to the message with the intention of meeting Claire, whose profile he states he viewed on the website.

Upon receiving his cellphone bill some 3 weeks later, the complainant realized that he had been charged an amount of R8.77 for every SMS he had sent. The complainant then investigated the matter further and confirmed the details of the website from which he had received the original SMS.

The complainant acknowledges that the charge per SMS sent using the service is displayed on the website as being R8.77.

The complainant notes that the initial message sent to him was unsolicited.

The complainant states that he was led to believe that standard charge rates would apply as the number which appeared on the original SMS was began with the prefix "083". No short code number was displayed on the original message.

The complainant further argues that he has never signed any agreement or otherwise agreed to the pricing which he has been charged.

SP/IP's response

The IP alleges that the complainant used its virtual fantasy dating site (operator chat) during the period 3 February 2009 to 26 March 2009.

The IP states that the complainant entered his personal details on its website situated at www.southafrican-singles-online.com where the price of the service is clearly outlined.

The IP states further that it sent the complainant the following SMS on 3 February 2009 to confirm his acceptance into its service:

*"Hi Marcel, CLAIRE from MATCHMAKE wants to chat and maybemeet. me! =XT
YES TO CONNECT NOW! for help 0800981229 msg 10rand 60sub 2end txt stop"*

It appears from the logs provided by the IP that the complainant responded immediately with the required response "YES".

The IP maintains that it provided the complainant with the costs of its service in a direct and professional way. Firstly on its website where the complainant entered his details and, secondly when he used the keyword "YES" to reply to the IP's opt-in SMS.

Complainant's further response

The complainant replied to the IP's response by stating that the only reason why he replied to the IP's opt-in SMS was that he had previously viewed Claire's profile on the legitimate "love2meet" website and was interested in meeting her.

The complainant cannot recall entering the official "SA Singles" website. He suggests that he may have entered the site via another site and he mentions the Facebook website. However he also states that the applicable service rates were not made visible to him.

The complainant argues that the SA Singles site is offering a completely separate service to the IP's SMS service and that if there is any link between the two, this is not readily apparent.

The complainant goes on to argue that the issue is complicated further by the fact that the website referred to in the opt-in SMS he received is "maybemeet.co.za", which he also denies subscribing to.

The complainant believes that the IP has disguised the costs of the service and this shows an intention to mislead people. He again mentions the absence of a short code in the original opt-in message which was sent to him.

Sections of the Code considered*Section 2: Definitions*

Section 2.10:

A "**contact and dating**" service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.

Section 2.23:

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

Section 3.1: Professional and lawful conduct

Section 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.

Section 3.1.2:

Members are committed to lawful conduct at all times.

Section 4: Customer relations

Section 4.1.1:

Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

Section 4.1.2:

Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

Section 6: Pricing of services

Section 6.2.9:

During any calendar month, if the total cost of any service exceeds R200 for that month:

- (a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.
- (b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

Section 6.2.10:

During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.

Section 6.2.11:

The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).

Section 10: Contact and dating services

Section 10.1.1:

Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

Section 10.1.2:

Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.

Section 10.1.3:

Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.

Section 10.1.4:

Providers of contact and dating services must obtain explicit consent from a customer prior to making his or her contact information available to third parties.

Section 10.1.5:

Promotional material for contact and dating services must make clear any restrictions on the location, gender and age range of callers to the service.

Section 10.2.1:

Members must take reasonable steps to ensure that users of contact and dating services are authorised by the bill-payer to use that service.

Section 10.2.2:

Providers of contact and dating services must take reasonable steps to ensure that no children use the services.

Section 10.3.1:

When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.

Section 11: Subscription services**Section 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.

Section 11.1.2:

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.

Section 11.1.3:

An advert for a subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

Section 11.1.4:

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

Section 11.1.5:

Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Section 11.1.6:

Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

Section 11.1.7:

Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

Section 11.1.8:

Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. 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.

Section 11.1.9:

Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

Section 11.1.10:

Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].

Help? Call [call centre number + “(VAS)” if applicable]. To unsubscribe, [unsubscribe instructions].

Section 11.2.1:

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.

Section 11.2.2:

The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

12U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + “(VAS)” if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Section 11.2.3:

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 11.2.2.

Section 11.2.4:

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.

Section 11.2.5:

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.

Section 11.2.7:

Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

Section 11.5.1:

Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

Section 11.5.2:

Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

Section 11.5.3:

The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

Section 11.5.4:

For services where the primary means of interacting with the service is via USSD or WAP, and for which the reminder message set out in clause 11.3.1. or 11.4.1. is used, clause 11.5.2. does not apply.

Section 11.5.5:

Members must ensure that the termination mechanism is functional and accessible at all times.

Section 11.5.8:

If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

Section 11.6.1:

Members must register all subscription services with WASPA, by providing the following information:

- (a) the name of the service;
- (b) the shortcode or access method (e.g. WAP) the service uses;
- (c) the price and frequency of billing for that service;

- (d) the customer support number associated with the service; and
- (e) unsubscribe instructions for the service.

Section 12.3: Prohibited services

Section 12.3.1:

No WASPA member may provide a service described in this section or facilitate the provision of such a service by an Information Provider.

Section 12.3.2:

Prohibited services:

(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.

Decision

I have previously adjudicated on a complaint involving this IP and in particular the manner in which it advertises and/or promotes its virtual chat service through the medium of online dating sites (see adjudication report for complaint 6371 dated 26 June 2009). This complaint, although lodged later than the current complaint, was dealt with through the emergency panel procedure and was referred to me on an urgent basis.

In my report for that complaint, I made the point that visitors to an online dating site do so with the intention of genuinely meeting someone, which is clearly distinguishable from engaging in a virtual chat service where users communicate with an automated operator. Even though, in that complaint, users were also requested to expressly opt-in to use the IP's virtual chat service, this did not excuse the misleading and/or deceptive manner in which the service was promoted.

Pursuant to complaint 6371, the IP was formally warned not, in future, to promote, advertise or market its virtual chat services in any manner or form which contravenes the WASPA Code of Conduct. However, as this complaint was lodged before complaint 6371, I must deal with it on the basis that it does not constitute a contravention of the sanction handed down pursuant to my adjudication of complaint 6371.

I have attempted to access the website referred to in this complaint, i.e. www.southafrican-singles-online.com on 6 August 2009 at 14h56 and viewed the following message on the landing webpage: “**BRB (*be right back*)**”.

With reference to the current complaint, there appears to be a dispute of fact on the circumstances which gave rise to the opt-in SMS being sent to the complainant. The SP alleges that the complainant entered his personal details on the website: www.southafrican-singles-online.com. The complainant cannot recall doing so. The SP alleges that the pricing for its virtual chat service is clearly shown on this website. The complainant denies that the pricing was made visible to him.

However, regardless of whether the complainant did or did not enter his details on the site, the complainant has shown that he was misled or deceived into believing that he was interacting with a real person and not with an automated operator as part of a chat service. I am particularly concerned by the complainant’s statement that the name “Claire”, which was used in the IP’s opt-in message, was the same name as a person whose profile the complainant had previously viewed online.

I have previously ruled on the IP’s promotional tactics in my report in complaint 6371 and it is not necessary for me to address this aspect any further.

Additional contraventions of the WASPA Code

The opt-in message which was sent to the complainant by the IP does not prominently and explicitly identify the service as a “subscription service” and therefore constitutes a contravention of section 11.1.1 of the WASPA Code.

Furthermore, the linking of the opt-in request to the complainant's use of an online dating website again leads me to conclude that the complainant's request to join the IP's service cannot be regarded as an independent transaction. The IP has contravened section 11.1.2 of the Code.

There is no evidence that a confirmation message was ever sent to the complainant in terms of section 11.1.8 alerting him further to the fact that he had been subscribed to a monthly subscription service.

Sanction

In determining the sanctions to be made pursuant to this complaint, I have taken into account that this is the second complaint relating to the IP's virtual chat service that has been referred to me. Of particular concern once again is the misleading manner in which the IP has lured an unsuspecting person into joining its service.

I have also taken into account the IP's blatant disregard for the provisions of the WASPA Code of Conduct relating to subscription services.

The following sanctions will apply and such sanctions will not be suspended pending any appeal process:

1. The IP is fined an amount of R100 000.00.
2. The IP is ordered to refund all amounts charged to the complainant for his use of the IP's service from 3 February 2009 to date of termination within 10 (ten) days of receiving notice of this report.