



## REPORT OF THE ADJUDICATOR

|                                   |               |
|-----------------------------------|---------------|
| <b>WASPA Member (SP):</b>         | Mobimex Group |
| <b>Information Provider (IP):</b> |               |
| <b>Service Type:</b>              | Subscription  |
| <b>Source of Complaints:</b>      | Public        |
| <b>Complaint Number:</b>          | 6303          |
| <b>Code of Conduct version:</b>   | 7.0           |
| <b>Advertising Rules version:</b> | 2.3           |

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### Complaint

Complaint #6303 was lodged on 2009-04-23 and is the escalation of unsubscribe request #16309 relating to content charges. The background to the complaint is as follows:

On 2009-04-20 the SP was informed that a particular customer was “*adamant*” that she did not subscribe to the SP’s services and wanted her monies refunded.

A reply was received from the SP on 2009-04-21 stating that:

*“The customer was unsubscribed and blocked on 14th April by sent stop. There is no refund offered, because the customer downloaded some products.”*

The following initial formal complaint was thereafter sent to the WASPA member on 2009-04-24:

*Dear WASPA member,*

*The appended unsubscribe request was logged on the WASPA unsubscribe system on 2009/04/20, but the complainant has indicated that they are not satisfied with your response.*

*Therefore, the WASPA Secretariat has no choice but to escalate this query to a formal complaint against Mobimex.*

*The user who escalated this request has provided the following reason for escalation: Client is has been using a Nokia E51 handset, since 2008 - this information does not match information supplied on your proof of subscription.*

*Details of the complaint*

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*Mobile number: [removed]*

*Actions requested:*

- *SP requested to unsubscribe customer*
- *SP requested to send an SMS confirming this unsubscribe*
- *SP requested to provide proof of subscription*
- *SP requested to contact customer regarding a refund*

*WASPA member response: Mobimex Group*

*-----*  
*Response to unsubscribe request: Unsubscribed and blocked*

*Confirmation SMS sent to the customer: Sent*

*Response to the request for a refund: No refund offered*

*Upload proof of subscription: Uploaded by WASP*

*Proof of subscription available from [removed]*

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**Response to Complaint**

In response to the formal complaint the following response was received from Mobimex on 2009-04-24:

*We ran a thorough check in our system and it only confirmed that the customer with tel number [removed] did:*

- *subscribed to our service on 1-Apr-2009 by going through the Terms and Conditions and using handset Samsung SGH-E250;*
- *downloaded 5 products, incl. pictures, 1 Java game and 1 video*
- *sent STOP on 14-Apr-2009 which unsubscribed that number from the system.*
- *confirmation SMS was sent out.*

*The same handset was used for all her interaction with our service, namely Samsung SGH-E250, as this is what we have got from the mobile aggregator STS.*

*We did not offer a refund because the customer did subscribe properly by agreeing with the terms and conditions, used our service and unsubscribed properly with sending a STOP message. However in case the the customer have not realized what she was doing on the portal (which would be strange after downloading content couple of times), then are willing to contact her directly and offer a refund.*

When contacted on 2009-04-28 regarding the SP's response the complainant rejected the attempt at informal resolution and wrote:

*Dear Waspa, please keep the complaint open as I explained in my original mail - I have never accessed any information or downloaded any videos/games. I have also never owned a Samsung phone. As per previous schedule, from another provider - it was proved that no originating sms was sent from my phone. Please contact Theon Kloppers at Nashua Mobile for more information. I look forward to your urgent response.*

The matter was then referred for formal adjudication.

After reviewing the complaint, an initial request for additional information was sent to the SP on 2009-10-26 in the following terms:

*Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #6303 within 5 days of receipt of this request, including:*

- a) proof of all required reminder messages having been sent to the customer;*
- b) detailed transaction histories indicating all charges levied and the service or content item applicable for each charge; and*
- (c) any record of successful or unsuccessful unsubscribe requests.*

The following information was received from the SP on 2009-11-04:

**Opt-in data**

MSISDN: [removed]

Date: 1-Apr-2009 Wed 05:21

IP: 41.208.50.193

Handset Details: SAMSUNG-SGH-E250/1.0 Profile/MIDP-2.0 Configuration/CLDC-1.1 UP.Browser/6.2.3.3.c.1.101 (GUI) MMP/2.0

**The process of opting in:**

The user has clicked on banner ad published in a third-party WAP site. The user has come on the Landing Page with the subscription terms and conditions and accepted them when accessed the WAP portal. A free welcome message was sent to the user. After that the below content downloads were made.

**Downloaded Content:**

| Date                 | Product                                         | Type                   | Session ID |
|----------------------|-------------------------------------------------|------------------------|------------|
| 1-Apr-2009 Wed 05:23 | Product Set (one page) - Bikini pic pack 1(372) | Product Set (one page) | 372643     |
| 1-Apr-2009 Wed 05:24 | Product Set (one page) - Bikini pic pack 1(372) | Product Set (one page) | 372650     |
| 1-Apr-2009 Wed 05:25 | Product Set (one page) - Bikini pic pack 2(373) | Product Set (one page) | 372656     |
| 1-Apr-2009 Wed 05:29 | Java Game - inlogic - Titlex-Jenny(85955)       | Java Game              | 372682     |
| 1-Apr-2009 Wed 05:33 | Video - Anabella 2(77680)                       | Video                  | 372722     |

**Billing:**

The following charges are due to the subscription service and pay-per-view billing.

|                        |          |                           |  |                               |       |            |          |
|------------------------|----------|---------------------------|--|-------------------------------|-------|------------|----------|
| DRAPPL1 -<br>OBArchive | 49935004 | 2009/04/13<br>10:26:24 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 99583602 |
| DRAPPL1 -<br>OBArchive | 49009164 | 2009/04/10<br>01:01:32 PM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 14629525 |
| DRAPPL1 -<br>OBArchive | 48984181 | 2009/04/10<br>12:14:38 PM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 90395759 |
| DRAPPL1 -<br>OBArchive | 48953786 | 2009/04/10<br>11:20:29 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 26364622 |
| DRAPPL1 -<br>OBArchive | 48796386 | 2009/04/09<br>03:57:22 PM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 86060488 |
| DRAPPL1 -<br>OBArchive | 46504175 | 2009/04/02<br>11:55:11 AM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 85134736 |
| DRAPPL1 -<br>OBArchive | 46499123 | 2009/04/02<br>11:42:01 AM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 42012368 |
| DRAPPL1 -<br>OBArchive | 46499097 | 2009/04/02<br>11:41:55 AM |  | 9 SMS Mobimex<br>Subscription | 7.50  | Successful | 93074375 |
| DRAPPL1 -<br>OBArchive | 46130158 | 2009/04/01<br>05:42:24 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 95222603 |
| DRAPPL1 -<br>OBArchive | 46129803 | 2009/04/01<br>05:39:47 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 52178433 |
| DRAPPL1 -<br>OBArchive | 46129797 | 2009/04/01<br>05:39:46 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 65977447 |
| DRAPPL1 -<br>OBArchive | 46129792 | 2009/04/01<br>05:39:45 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 91994648 |
| DRAPPL1 -<br>OBArchive | 46129779 | 2009/04/01<br>05:39:42 AM |  | 9 SMS Mobimex<br>Subscription | 15.00 | Successful | 28205415 |

**The welcome message sent to the subscriber:**

|                              |           |           |         |                           |                                                                                                                                                                                         |
|------------------------------|-----------|-----------|---------|---------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2009/04/01<br>05:38:42<br>AM | [removed] | [removed] | DELIVRD | 2009/04/01<br>05:38:56 AM | Welcome 2 African<br>Gsm.VC!Content on its<br>way!Click on it 2<br>download!Probs?<br>help@gsm.vc or<br>Call:0791444615.Txt<br>STOP to 39215 unsub.<br>(weekly Sub.Cost:R30<br>Age:16+) |
|------------------------------|-----------|-----------|---------|---------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**Unsubscribed:**

MO

| inboxdatetime          | sourceaddress | destinationaddress | message |
|------------------------|---------------|--------------------|---------|
| 2009/04/14 08:27:32 AM | [removed]     | 36628              | STOP    |

| outboxdatetime            | sourceaddress | destinationaddress | DeliveredMessage | delivered                 | message                                                                          |
|---------------------------|---------------|--------------------|------------------|---------------------------|----------------------------------------------------------------------------------|
| 2009/04/14<br>08:28:29 AM | [removed]     | [removed]          | DELIVRD          | 2009/04/14<br>08:28:37 AM | FREE SMS:<br>You have been<br>unsubscribed<br>from our<br>service. Thank<br>you! |

Further information was then requested by the adjudicator on 2009-11-09 as shown below:

*Please request the SP/IP in this complaint to provide me with copies of all advertisements for the service that were clicked on by any consumers who have complained in this matter, including the various banner ads published in third party WAP sites that the SP/IP alleges were clicked on and which resulted in the consumer arriving on the landing page for each service containing the subscription terms and conditions?*

The following reply to this request was received on 2009-11-16:

*Hello,*

*The user has clicked on the following advertisement published in a third-party WAP site, which has led to the terms and conditions page:*

*100% Naughty Vids - Download Here!*

*Should any further information be needed, please do not hesitate to contact me directly.*

A final request for further information was then made by the adjudicator on 2009-11-17 as follows:

*Can I now also please request the SP/IP in these complaints to provide me with copies of the "landing page" that consumers would have accessed after clicking on the banner ads and the terms and conditions for the service?*

*I would request that these pages and terms and conditions be provided to me in the size and format that a consumer would have seen and accessed them.*

*If I could have this information in the requested format within 5 working days from the SP/IP please, alternatively the most suitable size or format in which they can provide them together with an explanation why they cannot furnish the information in the original size and format.*

A reply from the SP was received on 2009-11-24:

Kindly find attached the requested "Landing Page" and "Terms and Conditions" page.

Since we do not have in place the mobile phone used by the visitor, namely Samsung SGH E250, the pages are being displayed using WML browser.

## Welcome



**GET ALL THE ADULT  
CONTENT YOU WANT  
RIGHT HERE! 18+  
ONLY!**

[Enter here](#)

We provide pics, videos and  
games for members.

Subscription services at only  
R15 per 3 days. Text STOP  
to 39215 to unsubscribe or  
send mail to [help@gsm.vc](mailto:help@gsm.vc).

For HELP write to  
[help@gsm.vc](mailto:help@gsm.vc). Wallpapers  
and Screensavers cost just  
R5 each, Videos R10,  
Mobile Games R45. 150  
credits equals R15.

Additional bearer charges  
may apply.

Service provided by  
Mobimex.

## Wap Menu

### Terms and Conditions

The bill payers permission is required before using the services advertised on this wapsite (the services). The services are charged at value added services rates (free minutes do not apply). Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15. Subscription services at R15 every 3 days. All costs are VAT including. Additional bearer charges may apply. WAP enabled phones are required to play. Incorrect entries/requests will be billed in full. By utilising the services, you agree that Mobimex may contact you via SMS with promotional information/offers from time to time. Mobimex is not liable for any loss, damage or expense arising from the use by you of the services, and the services are used at your own risk. If you enter a competition then the judges decision is final, winners will be notified telephonically. All information and pricing of the services are correct at the date it is published on the web site but may be subject to changes. Participation in and/or use by you of the services constitutes acceptance by you of the Terms and Conditions; services brought to you by Mobimex. e-mail: help@gsm.vc. Call Centre: 079 144 4615 8am to 5pm Monday to Friday. SMS STOP to 39215 to unsubscribe.

Back

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**Decision**

Section 11.1.2 of the Code of Conduct deals with requests by consumers to become subscribed to a subscription service. This section reads as follows:

*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.*

The Code is clear: for a consumer to become subscribed to a service the consumer must have the specific intention of subscribing to a service and must not be intending to do anything else other than subscribe to a service at the time he or she is so subscribed.

In response to the complaint by a consumer that she had not subscribed to the SP's services, the SP stated that the consumer had *"clicked on banner ad published in a third-party WAP site. The user has come on the Landing Page with the subscription terms and conditions and accepted them when accessed the WAP portal"*. This sentence can be reduced to the following steps that the SP alleges the consumer to have taken:

1. the consumer clicked on a banner ad;
2. the consumer arrived at a landing page with subscription terms and conditions; and
3. the consumer accepted the terms and conditions when accessing the WAP portal.

The copy of the landing page produced by the SP does not correlate with its version of the subscription process it alleges the consumer would have followed. In particular, the landing page does not contain any terms and conditions and does not afford a consumer the ability to accept any terms and conditions. The landing page appears to be a further advertisement for the services and does not have the appearance of a transaction page. The only button available to the consumer is a button headed "Enter here". Unless there are other indications of an intention to transact, an invitation to "Enter" a site is considerably different from an invitation to transact on a site. It appears from the process description and the evidence put up by the SP that the subscription transaction mechanism is activated by clicking on a button that appears to be a navigation button rather than a transaction button. A reasonable consumer would not be intending to transact by clicking on that button and the method by which consumers were subscribed to the SP's service breaches section 11.1.2 of the Code of Conduct.

Section 3.1.1 of the Code requires members to *"at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA"*.

Furthermore, sections 4.1.1. and 4.1.2 of the Code state as follows:

*"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.*



*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.”*

In light of my finding regarding the nature of the subscription activation process, I find the SP to also have breached sections 3.1.1, 4.1.1 and 4.1.2 of the Code of Conduct.

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## Sanction

The breaches of the Code committed by the SP in this matter are of a very serious nature. The primary purpose of the WASPA Code of Conduct is stated in section 1.2 thereof as follows:

*The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.*

The breaches by the SP go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the SP including in complaints 5696 and 5954 where similar breaches of the Code were upheld against the SP. I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the SP has repeatedly breached the Code in a very serious manner.

I therefore have imposed the sanctions that follow in paragraphs 1 to X below. For the purposes of paragraphs 1.3 and 2 below, a “related entity” shall be any entity in which any of the beneficial ownership of such entity is held directly or indirectly by any of the owners of the SP or which has one or more directors, members or senior executives in common with the SP.

1. The SP is directed to:

- 1.1 immediately suspend all of its subscription services offered in South Africa and all billing for any such services;
- 1.2 pay over to WASPA a fine of R350 000 within 5 days of the delivery of this report; and
- 1.3 pay to the consumer compensation in the amount of R1 000 into a bank account within 5 days of the consumer furnishing the SP with details of its nominated bank account;

failing which the SP’s and any related entity’s memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the SP’s and any related entity’s access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days or until such time as the fines imposed in paragraphs 1.2 and 1.3 above have been paid in full, whichever period is the longer.

2. All other WASPA members providing any subscription services to, for, on behalf of or in conjunction with Mobimex or any related entity are directed that pending receipt in full by WASPA of the penalty provided for in paragraph 1.2 above, they shall:
  - 2.1 withhold any payments currently or at any time becoming due by it to Mobimex or any related entity as contemplated by the provisions of section 13.4.1(i) of the Code;
  - 2.2 preserve and retain all revenue paid to it by any cellular network operator in respect of any service offered by Mobimex or any related entity and to refrain from dissipating such revenue in any way other than as contemplated by the provisions of paragraph 2.4 below;
  - 2.3 furnish WASPA with monthly statements of account ("the statements") detailing all revenue received by the member that is to be paid over to Mobimex or any related entity;
  - 2.4 pay over to WASPA such portions of the revenue due to the SP or any related entity as WASPA may direct until such time as the fine provided for in paragraph 1.2 has been paid in full.
3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1 and 2 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report. In the event that any appeal lodged is substantially successful, then any fine paid by the SP in terms of paragraph 1.2 shall be refunded to the SP subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.