



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Daniël Adriaan Wessels
Complaint Number:	6307
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant lodged the following complaint:

“3rd Party Content on MTN Account no: A 2830173 (072 905 2703) (Today: 2009-04-20) In the evening of 30 March 2009 my son, Corné received the following sms's while busy on MXit. Upon reading the sms he woke me up and was concerned since he knew he did not

subscribe to any service. -- We have had a similar experience on another phone (vodacom) in the past. (It was not his phone at that time). I told him he should try to unsubscribe. He then dialled the unsubscribe number stated in sms 1 but it didn't work. It said R20/20sec without an unsubscribe choice. He was busy on MXit at the time of the sms's and did not visit any site on the internet.

SMS 1: Great choice! Welcome to Club Zed your access to the latest games, ring tones & more is about to begin!

CC: 021 4255057 Unsubscribe *120*31933 30Mar. 2009 10:49PM From: +2783920018231933

SMS 2: You are already subscribed to Club Zed. Open the link you receive or go to www.clubzed.co.za to start downloading ring tones, games and much more! 30Mar. 2009 10:50PM From: +2783920018231933 SMS 3: CLUB ZED <http://wap.zed.com/zac/common/entry.do?idx=704172336485&m=1&s=1\r\n30Mar>.

2009 10:51PM (No number) Unsubscribe *120*31933 Costs R20 for 20 sec.

Although he did not download anything or follow any of the other links in the SMS's he was very concerned that money would be deducted from my account. The next morning (31 March 2009) he went to MTN to make sure my account is intact. The manager at the shop gave him a number to dial and assured him that nothing had been deducted from my account. He immediately dialled 08611166666 to cancel any content subscriptions. We thought that from then on at least no content subscription would go of my account as the lady on the other end of 08611166666 assured us. It seems we were wrong as just 13 days later (13 April 2009) he received the following SMS's.

SMS 4: Welcome! U r a member of FUN CLUB & have UNLIMITED access 2 downloads 4 ur fone! Have fun. Help: 0214178001 (SMS stop fun to 31194 to end. Subscription R10/day) 13Apr. 2009 08:28PM From: +27839200275

SMS 5: Hi! U're a member of the Fun Club! Click now 4 tones, pics & more! <http://wap.funfone.co.za/r/n13Apr>. 2009 08:29PM (No number)

SMS 6: Welcome 2 Fun Club! Click 4 ur FREE game. <http://212.239.17.193/j/j.jad?p=0904160000343914956531/r/n13Apr>. 2009 08:29PM (No number)

He was not worried as he had cancelled all content subscription. On the 15 April 2009 my account was billed with R153.98 content subscription. We have absolutely no idea where these SMS's came from or how this number got on their list. Are we supposed to cancel every SMS coming our way? This would be unacceptable since we should have the freedom of not having to constantly monitoring our phones. When signing the contract with MTN I did not sign up for 3rd party content subscription. I signed for a phone account (now for use by my son) and expected that my details would be kept private and that MTN would be the only 'person' allowed to charge on my account. I also fear that upon reacting to an unsubscribe request, will enable the receiver to know that this number is active. Then they will just send alternate subscriptions through-Am I wrong? We already cancelled the content subscription and I would like all references (or any other proof) of alleged subscribing sent (copied) to myself. I have put a R200 account limit block on this account but am not sure whether this will be able to disallow very large sums for content subscriptions to be subtracted from this account. I wish that you speedily reverse all charges (R153.98 on the 15th April - now much more already!) as soon as you can verify whether we really subscribed and do your utmost to prevent a repeat of such a situation. I would also like an option at my service provider (MTN) not to allow any 3rd party contracts unless we ask them to allow such. On the following times we got incomprehensible calls from

0730639992 30/03/09 11:17PM 00:00:02 30/03/09 10:57PM
00:00:01 30/03/09 10:52PM 00:00:01

We don't know if this has any bearing on the above. Could you please investigate the relevance of this number? The applicable number I got on the 15th April from MTN as to the content charges are 0860 11 6666 (not 08611166666?). Tonight MTN gave me these two contacts: a) Mira Networks 011 442 2735, b) World play 086 11 3109. Number a) repeatedly asks for the cell phone number followed by a hash and does not proceed any further. I accessed this from my Telkom phone. Number b) has no response!"

The Complainant provided the following reason for escalation:

"In no case do they consider me to have a valid case for complaining that we did not subscribed to these services and thus do not intend to reverse charges

for the content subscriptions. The "proof" they offer so far for internet (or WAP) traffic to their websites I consider insufficient (where Buongiorno UK has logged our cell phone number) since I have not received any logs or otherwise logging my identity (other than cellular number) on their websites (since it was not a secure connection - probably). In the first instance my son was using his phone on MXit at the time these SMS messages came through and he was unable to unsubscribe at that time. I have reason to believe that our phone identity where simulated on these web sites and therefore insists that we did not subscribe to these content services and would like the charges to be reversed."

Service provider's response

Zed Mobile replied to the informal complaint:

"I have been in contact with Daniël Adriaan Wessels and have explained how his sons subscribed to Club Zed. He is satisfied with the explanation and that his son's mobile is no longer subscribed to Club Zed."

The SP replied after the matter had been assigned to adjudication for non-reply:

"Please accept our apologies for the late response to this complaint but, due to me taking I'll we were unable to respond to complaints in a timely manner.

After investigating the matter, we have discovered that the user was subscribed via our web.

Below, are sms's sent to the user upon subscribing to the Fun Club Service as well as the media key web tracking key accessed fca_mkh987_436. These sms informed the user of the subscription as well as the price and assigned to the service. By clicking the link in the web advertisement it states that he or

she is entering into a mobile subscription service at R10/pday. These T&C are on all our web advertisements in relation to mobile marketing.

In this regard we do not deem a refund forthcoming as sms's sent to the user was informative in this regard.

Please also note that the user has been unsubscribed from all services 2009-04-22."

Sections of the Code considered

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

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.

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

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

11.1.5. 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.

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

11.1.7. 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.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

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

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same period pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, complainants uttering their frustrations with either the "IQ test", or "Brain-age" service, stating that they either did not receive a pin, or when receiving the pin, did not enter the pin and therefore did not consent to a subscription service.

In this specific matter the Complainant felt that he was misled into subscribing to a service, completing the "IQ test" under the pretense of only gaining knowledge to his IQ.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon and whether there might be a case of bundling and an instance of the SP misleading its customers?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decisions provided in Adjudication 5921, 6039, 6112 and several others, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.0 of the Code.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer:

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code;
4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;
6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;
7. The SP is fined:
 - 7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and
 - 7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.