



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (Member):</b>	Mobimex Group
<b>Service Provider (SP):</b>	Mira
<b>Service Type:</b>	Subscription
<b>Source of Complaints:</b>	Consumer
<b>Complaint Number:</b>	6671
<b>Code of Conduct version:</b>	6.2
<b>Advertising Rules version:</b>	

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### Complaint

An unsubscribe request was logged on the WASPA unsubscribe system on 18 May 2009 which caused a number of communications to be exchanged between WASPA, the Member, the SP and the consumer, the most pertinent of which are summarised below.

On 20 May 2009 the Member advised WASPA that the consumer had opted-in to the Member's South Africa Music Portal on 14 March 2009 and had downloaded content. The member advised further that the subscription had been terminated upon request and that no refund was being offered as the consumer had made use of the subscription service and content service.

On 27 May 2009 WASPA advised the Member that the consumer was disputing the charges debited against his cellphone account and was claiming not to have downloaded content.

The matter was escalated to a formal complaint which was sent through to the Member on 1 June 2009.

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### Response to Complaint

On 2 June 2009 the Member replied as follows:

*"I can confirm that the user did opt-in on 14-Mar-2009 and used our services. He has downloaded content and the proof was additionally sent. Subscription was terminated upon request. From the download log it is clearly seen when and what was downloaded, what handset was used and from which IP the user came to us.*

23 February

*Should you need any further information don't hesitate to contact me."*

The Member produced tables showing the date (14 March 2009) on which the consumer had allegedly subscribed to the services and the make of the cellular phone and IP address used to subscribe. The tables also showed a True Tone music download having been made on that date shortly after the time of subscription.

On 17 June 2009 the consumer replied and stated as follows:

*"As i told u b4 i did not subscribe and did not receive anything from mobimex. Even if i did then i was certainly deceived in doing so. So please refund me."*

The consumer also furnished WASPA with a copy of his March 2009 Vodacom invoice showing that an amount of R52.64 had been debited for content services in that month. On 15 July 2009 the complainant alleged in an email to WASPA that a total of R180 had in fact been debited against his account, allegedly by Mobimex, for services that he stated he had either not subscribed to or had been deceived into subscribing to. The total sum of R180 was presumably the total sum debited against his cell phone account for content services for the months from March to June 2009.

The complaint was referred to an adjudicator for formal adjudication.

An adjudicator's request for additional information was sent to the Member on 26 October 2009 stating as follows:

*Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #7081 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.*

*If neither the SP nor the IP are able to provide all of this detail, I would like them to explain within 5 days what message and transactional logs they do keep for these consumers and why.*

*Please could you provide the requested information to the WASPA Secretariat at your earliest convenience, but in no later than five working days."*

The Member replied to the request on 26 October 2009 stating as follows:

*I can confirm that the user did opt-in on 14-Mar-2009 and used our services. He has downloaded content and the proof was additionally sent.*

The SP, Mira, replied in more detail to the adjudicator's request on 2009-10-27 and furnished copies of all MO and MT logs relating to the consumer and added that it had terminated all accounts with the Member. The logs produced by the SP showed that R225 had been successfully debited against the consumer's account in the period 14 March 2009 until 9 May 2009.

The Member furnished further information on 4 November 2009 and provided WASPA with details of the text of all messages sent to the consumer.

The Member stated further in its reply of 4 November 2009 that:

*"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. Last charge is on May-2<sup>nd</sup>, 2009."*

On 9 November 2009 the adjudicator then made a further request for additional information as follows:

*"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?"*

On 16 November 2009, the member replied to the request for additional information made by the adjudicator as follows:

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

*New EROTIC FANTASY Videos Here!*

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

On 17 November 2009, the adjudicator then requested 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."*

*Please could you provide the requested information to the WASPA Secretariat at your earliest convenience, but in no later than five working days.*

On 24 November 2009, the member replied as follows:


*"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 SonyEricsson K550i, the pages are being displayed using WML browser.*

*Should you have any questions, please don't hesitate to contact me directly."*

(The Members message dated 24 November 2009 was delivered on 25 November 2009 after initially being rejected by an unspecified mail server).

The following images of the "Landing" and "Terms and Conditions" pages were attached:

**Welcome**



**SA Jukebox  
TOP TEN Update every  
week.**

[Enter here](#)

We provide pics, videos and games. This is a subscription service at R30 per week.

For HELP write to help@gsm.vc, Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15. Text STOP to 31218 to unsubscribe or send mail to help@gsm.vc

Service provided by Mobimex Ltd.

## Wap Menu

### Terms and Conditions

The bill payers permission is required before using the services advertised on this wap site (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.

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### Decision

The Member has alleged that the consumer subscribed to its subscription services on 14 March 2009. Although the consumer denies this, I have applied version 6.2 of the Code of Conduct (which was in force on 15 October 2008) to the facts of this dispute.

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 he had not subscribed to the Member's services, the Member furnished a reply stating that the consumer had "*clicked on the following advertisement published in a third-party WAP site, which has lead to the terms and conditions page*". This sentence can be reduced to the following steps that the Member alleges the consumer to have taken:

1. the consumer clicked on an advertisement in a third-party site; and
2. the consumer arrived at a terms and conditions page.

Having reviewed the subscription process described by the member, it is difficult to establish where in the above process the consumer would have expressly transacted to become a subscriber to the services.

It would be very strange if a subscription service for music should have been advertised by a link in a third party site saying "*New EROTIC FANTASY Videos Here!*" as has been alleged by the Member, however a succession of complaints very similar to the present matter have been lodged against the Member and it is quite possible that the wrong link description has been added by the member to its reply as it has dealt with all of these complaints in a fairly offhanded manner.

The advertisement produced for the services by the Member (which does at least appear more musically orientated than the link description outlined above advertising adult videos) 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. Furthermore, it appears from the process description and the evidence put up by the Member that the subscription transaction mechanism must have been 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 Member'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 member to also have breached sections 3.1.1, 4.1.1 and 4.1.2 of the Code of Conduct.

The SP in this matter, being a member itself, is also obliged in terms of section 3.9.1 to bind information providers with whom they contract for the provision of services to

ensure that none of the services contravene the Code of Conduct. In terms of section 2.13 an “*information provider*” is “*any person on whose behalf a wireless application service provider may provide a service, and includes message originators.*”

I have had regard for the findings of the Appeals Panel in complaint 411 in which the Panel found (in paragraphs 24 and 25 of its decision) that an SP was responsible for an IP’s adherence to the Code of Conduct. I have also had regard for the finding of the adjudicator in complaint 5981 that this should remain the case even where the information provider in question is also a member of WASPA.

As the service in question has been shown to have been operated in breach of the Code, the SP should also not be in a position to benefit commercially from the service. Benefitting as the SP has in this matter from a service provided in breach of the Code amounts to a breach of sections 3.1.1 (referenced above) and, in the circumstances of this matter - where no binding contract appears to have been concluded between the complainant and the Member - section 3.1.2 of the Code which requires members to be committed to lawful conduct at all times.

I have accordingly imposed sanctions against both the Member and the SP as set forth below.

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### **Sanction**

The breaches of the Code committed by the member 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 member 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 Member including in complaints 6303, 6678, 6759, 6928 and 7081 where identical or near-identical breaches were upheld against the Member. 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 member has repeatedly breached the Code in a very serious manner.

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 member or which has one or more directors, members or senior executives in common with the member.

1. The Member 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 R225 plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from 9 May 2009 until date of payment, such payment to be made into a bank account within 5 days of the consumer furnishing the Member with details of its nominated bank account;

failing which the Member's and any related entity's memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the Member'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. The SP, Mira, is directed that in the event that the Member does not pay the fines and compensation provided for in paragraphs 1.2 and 1.3 above within 5 days, or cause such fines and compensation to be paid, then the SP shall:
  - 2.1 immediately compensate the consumer as provided for in paragraph 1.3 above and make all necessary arrangements with the consumer to comply with the provisions of this sub-paragraph;
  - 2.2 within 10 days furnish WASPA with a historical statement of account detailing all revenue received by it in respect of all subscription services provided to Mobimex prior to 12 March 2009 and specifying the SP's service fees in respect of such services and the SP's share of any revenue generated by such services;
  - 2.3 permit WASPA to appoint an independent person to audit the accuracy of the statements to be furnished in terms of paragraph 2.2 above including by having reference to the SP's message records, transaction records and bank statements;
  - 2.4 provide WASPA and the auditor with all requested written consents that may be required to facilitate the conduct of the audit referred to in paragraph 2.3, including a consent to permit any network operator to furnish WASPA and the auditor with copies of all relevant records reasonably required for the purposes of such audit including relevant message and transaction records held by any such network operator;
  - 2.5 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;
  - 2.6 pay over to WASPA the SP's service fees and the SP's revenue share paid to it by any cellular network operator in respect of all subscription services provided to Mobimex prior to 12 March 2009 until such time as WASPA has received payment in full of the penalty specified in paragraph 1.2.
3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1, 1.2 and 2.2 to 2.6 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.

4. In the event that any appeal is lodged is then interest on the compensation to be paid to the consumer in terms of paragraph 1.3 and 2.1 shall not be interrupted pending such appeal but shall continue to run.
5. In the event that any appeal is substantially successful, then any fine paid by the Member in terms of paragraph 1.2 or by the SP in terms of paragraph 2.6 shall be refunded to the relevant party concerned subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.