



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mobimex
Information Provider (IP):	
Service Type:	Subscription
Source of Complaints:	Consumer
Complaint Number:	# 6678 (initially incorrectly dealt with using complaint reference # 6679 – corrected 5 June 2009 by WASPA Secretariat)
Code of Conduct version:	7.0
Advertising Rules version:	1.6

Complaint

Complaint # 6678 is an escalation of unsubscribe request # 17016 which was logged on the WASPA site on 2009-05-15.

The initial correspondence from the complainant indicated that the consumer was in the United States of America at the time the alleged subscription commenced and did not know how the subscription process occurred.

On 20 May 2009, Mobimex Group advised WASPA as follows:

Customer subscribed properly on 9-Apr-2009 (proof attached) and downloaded content. Subscription terminated. No refund offered because downloaded content. We are contacting the customer directly regarding refund request.

Following this the complainant was contacted by WASPA on 1 June 2009 and advised as follows:

Dear

An unsubscribe request for mobile number 083-717-6568 was logged with WASPA on your behalf on 2009-05-15.

We forwarded this request to the following WASPA member(s):

- Mira Networks*
- Smartcall Technology Solutions*
- Mobimex Group*

According to our records, all of these WASPA members have confirmed that they have either unsubscribed your number from any of the services they run, or they have confirmed that you were not subscribed to any of their services. Based on this,

we think that your request has therefore been resolved.

If you are not completely happy with the resolution of this matter, please contact the WASPA team using unsubscribe@waspa.org.za, and we will try to assist you further.

WASPA Secretariat

In response, the complainant the same day replied to WASPA as follows:

Hi,

I appreciate that you have unsubscribed me. Part of my problem was that I was subscribed, the other part was how I got subscribed? I never subscribed to any services and believe I was billed illegally. I got charged R166 for "services" in April. When I contacted the WASPA members they told me I subscribed to the services on the 9th of April from a Samsung phone. This is impossible as I was in America at the time and didn't take my cellphone with me nor do I own a Samsung.

No one can tell me how I got subscribed, I am willing to show proof of my passport and cellphone bill that I didn't make any data or sms charges from my cellphone from the 4th of April until the 2nd of May. Whenever I tell anyone this and request a refund I get told they need to look into the matter more carefully and then never hear anything back.

Another concern is that it seems every time I phone MTN and request information regarding my bill, I am subscribed to a new service. When asked how I can make sure that no-one ever subscribes me again. I get told to just phone every 2 weeks to find out if I am subscribed to any new services and then cancel them. I don't think it is fair that I have to phone every 2 weeks to find out whether I have been subscribed to something illegally or not.

In all of this I have never once gotten an sms from whoever's subscribing me saying at least that to confirm my subscription I need to reply saying yes. I consider the messages with ringtones or whatever else they sent to my phone without my consent as spam. The fact that I got sent pornographic material as well is highly offensive to me seeing as I am married as well as a Christian.

I believe that none of these service providers have proper proof that I ever subscribed. If I made a query with Telkom or iBurst or any other service provider they would at least be able to show me a contract or an SMS originating from MY phone or something else legit with my acceptance requesting the service. Not, "we are pretty sure you went to one or other website".

I am annoyed that I have to spend time and money on phone calls to try and proof my innocence, and to try and get my refund from these unlawful deductions.

So in short, I am not happy about just being unsubscribed. I want a refund of the money taken. I want to know how I got subscribed illegally. I want to know how to stop them from doing it again in future.

I trust you can sympathize with my frustration.

Initial complaint

The initial complaint was sent to the WASP on 1 June 2009 and is shown below:

The appended unsubscribe request was logged on the WASPA unsubscribe system on 2009/05/15, 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 Group.

--- A copy of the unsubscribe request follows below ---

Details of the complaint

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

Confirmation SMS sent to the customer: Not sent

Response to the request for a refund: No refund offered

Upload proof of subscription: Uploaded by WASP

Proof of subscription available from <http://secure.ff.co.za/unsubscribe/proof.php?action=view&id=17016&wasp=2925>

SP Response

The WASP, Mobimex, replied to the initial complaint on 4 June 2009 as set out below:

This number did opt-in two times in April as seen in the attachment. In both of the subscriptions there are downloads, which means that the customer browsed the sites and downloaded content (seen on the attachment) [the WAP Opt In screenshots containing the consumers number have been removed from this report]. On the opt-in log it is seen the phone type and the IP from where the request was made as well as the times (CET). This is what our system gets from the MTN in this case. There was also a free spending notification sent on 26-Apr-2009, providing all the information how to unsubscribe.

The two memberships were terminated immediately upon request on May-13 and May-15.

Should any further information be needed just let us know.

WASPA informed the complainant of the responses of Mobimex and enquired whether the matter had been satisfactorily resolved. However, the complainant refused informal resolution attempts on 5 June 2009 writing as follows:

Hi,

The provider has agreed to refund my money. As for the log that is attached, it says that I subscribed with a Motorola V360 and a Samsung SGH E250. I don't even own a Motorola or a Samsung, I have a Nokia N95. As for the log that shows I subscribed on the 9th of April. I wasn't even in the country on the 9th of April. I have attached my invoices from MTN for both April and May 2009. You will see that from the 5th of April to the 2nd of May I didn't make any calls or data transactions as I was in America. There is definitely nothing for the 9th of April.[Copies of the consumer's cellular phone invoices have been removed from this report].

I would still like to know how I got subscribed? Mobimex hasn't been able to tell me how this happened. Is this an issue with Mobimex or with MTN? And how do I stop from being subscribed unlawfully in future?

Thanks

Following this the matter was referred for formal adjudication.

A request for further information was sent to the WASP on behalf of the adjudicator on 26 October 2009 and stated as follows:

Dear WASPA members

The adjudicator reviewing complaint # 6678 has made the following request:

Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #6678 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 WASP replied on 4 November 2009 as follows:

Dears,

*Kindly find the requested information attached.
Should you have any questions please do not hesitate to contact me.*

*This number did opt-in two times in April as seen in the attachment.
In both of the subscriptions there are downloads, which means that the customer browsed the sites and downloaded content (seen on the attachment). On the opt-in*

log it is seen the phone type and the IP from where the request was made as well as the times (CET).

Wap Opt-in

ID	Date	Msisdn	UserAgent	Application	Page
19730	2009/04/09 11:19:37 PM	27837176568	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	Adult Portal	

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
9-Apr-2009 Thu 23:20	WAP Menu(410)	WAP Menu	607309
9-Apr-2009 Thu 23:21	Product Set (one page) - PORN GRATIS Video(304)	Product Set (one page)	607346

Billing:

The following charges are due to the subscription service.

APPL1 OBArchive01	61774656	2009/05/12 02:06:02 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	61280995
APPL1 OBArchive01	61403545	2009/05/11 06:19:57 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	35409326
APPL1 OBArchive01	61325419	2009/05/11 02:50:23 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	90309432
APPL1 OBArchive01	59179037	2009/05/06 10:21:00 AM	Removed	9 SMS Mobimex Subscription	15.00	Successful	56685557
APPL1 OBArchive01	58109652	2009/05/03 02:55:29 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	32892960
APPL1 OBArchive01	56675018	2009/04/30 11:50:28 AM	Removed	9 SMS Mobimex Subscription	15.00	Successful	91614333
APPL1 OBArchive01	55342572	2009/04/27 09:45:30 AM	Removed	9 SMS Mobimex Subscription	15.00	Successful	97825991
DRAPPL1 - OBArchive	54271098	2009/04/24 01:46:31 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	10749874
DRAPPL1 - OBArchive	53090660	2009/04/21 06:07:13 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	73121511
DRAPPL1 - OBArchive	51890632	2009/04/18 02:53:40 PM	Removed	9 SMS Mobimex Subscription	15.00	Successful	54188053
DRAPPL1 -	49657089	2009/04/12	Removed	9 SMS Mobimex	15.00	Successful	45778722

OBArchive		12:32:35 PM		Subscription			
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The welcome message sent to the subscriber:

2009/04/09 11:21:49 PM	2783930017672	27837176568	DELIVRD	2009/04/09 11:22:01 PM	Welcome 2 African Gsm.VC! Content on its way!Click on it 2 download!Probs? help@gsm.vc or Call:0791444615.Txt STOP to 39215 unsub.(weekly Sub.Cost:R30 Age:16+)
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Unsubscribed:*Manually Blocked*

A second request for information was sent on behalf of the adjudicator on 9 November 2009 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?

The following reply was received from the WASP on 16 November 2009:

Hello,

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.

A third request for additional information was sent on behalf of the adjudicator to the SP on 17 November 2009 as shown below:

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.

A reply was received on 2009-11-24 and the message and requested information are reproduced below:

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.

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

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.

For HELP write to
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

Decision

It is very difficult to resolve two completing conflicting versions of events when recourse is only had to documents. In this matter, the two versions put forward by the complainant and the service provider are so remarkably different that at least one of their versions cannot be true. In a matter such as this, the factual enquiry that would need to be undertaken to establish the veracity of the two versions put forward is likely to be disproportionate in time and expense when measured against any

compensation that might be ordered to the consumer if his version were proven to be true.

However, the primary purpose of the Code is to promote consumer confidence in the wireless application services industry as a whole and to provide a mechanism for consumers to seek redress for consumer rights infringements. I have therefore determined it appropriate to first see whether this complaint is capable of some resolution by adopting an approach based loosely on the approach of the South African courts when faced with conflicting statements contained in affidavits made by an applicant and respondent in the course of application proceedings (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (AD)). Such an approach generally entails ascertaining whether the application ought to be granted based on statements made or admitted by the respondent. For present purposes I have confined my analysis to statements made the service provider only.

In response to the complaint by the consumer that he 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.

However, 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.

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 the present matter, a reasonable consumer would not be intending to transact by clicking on the "Enter" button, accordingly the method by which consumers were subscribed to the SP's service breaches section 11.1.2 of the Code of Conduct on the service provider's version alone.

It is not necessary in my opinion to factually determine whether the consumer clicked on the "Enter" link or not. If the consumer did, he would be entitled to compensation by virtue of the link breaching section 11.1.2 of the Code. If he did not, he would be entitled to compensation by virtue of the fact that he would then have been subscribed to the service for no reason.

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.

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 have also noted the considerable time and effort which the consumer has had to go to in managing this complaint.

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.