



ADJUDICATOR'S REQUEST FOR ADDITIONAL INFORMATION

WASPA Member (SP):	Wapbill.net
Information Provider (IP):	
Service Type:	Subscription Service
Source of Complaints:	Consumer
Complaint Number:	6752
Code of Conduct version:	7.0

Complaint

Complaint #6752 was formally lodged by the Complainant on 8 June 2009 following the escalation of an unsubscribe request and request for a refund. The Complainant's initial communication to WASPA was made on 6 June 2009 in the following terms:

It has come under my attention that I received an SMS on my MTN datacard on the 19th of April 2009 indicating that: "You have been billed R20 for your subscription to Mesomobi.com" To stop this subscription SMS MOBI STOP to 31295. 011 461 33231.I am being defrauded and would like to report this operator / fraudster and seek urgent intervention from you as my account is being billed without my consent. I have not subscribed to ANY mobile service in my life and I suspect that money is being deducted DAILY from my account. I tried phoning this number which does not exist and the website referred to is under construction or something.I therefore wish to lay a formal complaint with you regarding this unauthorized billing of my account WITHOUT my permission which constitutes theft. Please investigate and report your findings.

It is clear from the initial complaint that the Complainant alleged he had been involuntarily subscribed to a subscription service.

Response of SP

Following the formal escalation of the complaint, the SP replied on 9 June 2009 as follows:

Dear [COMPLAINANT],

Apologies that you feel with have not been efficient in the way we have handled your complaint.

When we where [sic] first made aware of your complaint we immediately unsubscribed you from the service and made several attempts to contact you, but each time had to leave a voicemails.

Please find information relating to the service below:

From 18.04.2009, at 06:54:00, our records state that there was some mobile content such as Ringtones/Mobile Games purchased.

The total amount you have been charged is R155.

The messages you received on your phone were sent as payment for this content.

In our commitment for customer satisfaction I would, on this occasion, like to offer you a full refund of R155.

We are able to refund the air time directly back onto your phone if you have a pre-pay (Pay as you go) plan with MTN.

If you have a post-pay (contract) plan with MTN the preferred refund method to minimise your inconvenience is via direct transfer to your bank account. To do this we require your bank name, account number and sort code.

Could I ask you please to reply to this email with details [sic] of your airtime plan and if required your bank details so that we can set up the transfer.

I have also put a block on your phone preventing you from being able to use our services in the future.

Regards

Wapbill Customer Support

Although further attempts were made to resolve the matter informally no such resolution was achieved and that the matter was subsequently referred to an adjudicator for formal adjudication.

Request for additional information

Having reviewed the initial complaint file, on 3 June 2010 the adjudicator requested the SP to provide the following further information in accordance with section 13.3.8 of the WASPA Code of Conduct:

1. A copy of the advertising for the service including third party banner advertisements for the service (where applicable) and, in particular, any such advertisement that the SP's records indicate that the Complainant clicked on;
2. A detail description of the subscription activation process or method used to subscribe the Complainant to the service, including clearly legible screen shots of any web pages that would have been viewed by the Complainant in the process of subscribing;
3. A copy of the subscription confirmation record for the Complainant required to be kept by service providers in accordance with section 6.2.12 of the Code of

Conduct for any transaction billed at R10 or more where initiated via WAP, USSD, web-browsing, link in an MMS or other application;

4. A copy of the full message log recording any subscription activation or subscription confirmation messages sent to the Complainant and recording the date and time of sending;
5. A statement of account recording all charges debited against the Complainant's account by the SP from the date of subscription; and
6. Confirmation of whether the refund initially offered to the Complainant was ever paid and the date of any such payment.

The SP responded by alleging that the Complainant had been refunded all of his expenditure and additionally produced copies of all messages that it alleged were sent to the Complainant. It stated further that its records revealed that the services had been subscribed for using the Complainant's SIM card in two different handset models, namely a Motorola W375 and a Nokia N73 and that the subscriber had purchased mobile content such as ringtones and mobile phones.

On 2 September 2010, at the adjudicator's further request, photographs of these two handset models were sent to the Complainant along with two further questions as follows:

1. Can you please ask the Complainant if he wishes to reply to any of the further information supplied by the WASP in response to the request for additional information? If so, any further reply must please be submitted within 5 working days (see below & attachments).
2. Can you specifically ask the Complainant if he has any comment on the allegation that his SIM / datacard was used in Nokia N73 and Motorola W375 phones - the two models are pictured in the attached files(colours may differ) and whether, to the best of his knowledge and belief, anyone who may have had access to his datacard might also have had access to these particular model phones (in April-May 2009)?

The Complainant alleged that he had no record of receiving any refund and claimed that his SIM had never been inserted in any phone whatsoever and had been used exclusively in a MTN 3G Adaptor.

The Complainant persisted with his complaint that a fraud had been perpetrated against him by the SP.

Decision

The Complainant has alleged that he was involuntarily subscribed to a subscription service and that charges were unlawfully debited against his MTN account. In response, the SP has averred that charges debited against the Complainant's account were debited in respect of mobile content such as ringtones and mobile games that were purchased by the Complainant. Without any further information, it is difficult, in fact impossible, to properly resolve this apparent dispute of fact.

The Complainant did not directly answer the questions put to him whether any other persons may have had access to his SIM card and whether any such persons might also have had access to either a Nokia N73 or Motorola W375 phone. He did state that the card was not used in any phone whatsoever and it is clear that he believes a fraud has been committed against him. However, it is not beyond the realms of possibility that his SIM card was used without his consent in a mobile handset as evidenced by the SP's records. It is difficult to refute this evidence or to dismiss it solely on the basis of the averments made by the Complainant. As such, the main complaint of unethical conduct and involuntary subscription committed by the SP cannot be upheld. The Complainant is at liberty to pursue the matter using the ordinary criminal law process open to him however it is presently difficult to see on what basis a court could hold on the evidence currently produced, and without any reasonable doubt, that a fraud was perpetrated on the Complainant by the SP. Although some averments were made by the Complainant about the SP needing to prove whether a refund was in fact paid to him, certainly no such onus would arise on the SP to prove its innocence, rather the allegation of fraud is what would need to be proved.

The Complainant admits having received a subscription reminder SMS. The opportunity to unsubscribe was made available to him and, following the termination of the subscription, the SP alleges that a full refund has been paid to him. The SP is however aware of the fact that the Complainant has repeatedly alleged that he has not received any refund. Whether or not such a refund has been paid is surely something that the SP could have easily demonstrated. The SP was expressly asked during this adjudication process to confirm the date on which the refund was paid. In response to this request, the SP answered that *"the refund request was sent over to our South African aggregator partner on 11/06/09 who then paid the refund shortly after"*.

The SP appears to have made no real effort to answer the question directly put to it but advises only of the date on which it requested a third party to process the refund on its behalf. It is not completely clear whether or when this refund was actually paid. If the SP had established the precise date on which the refund was paid, the Complainant would have had a reasonable opportunity to check his records. The allegation that the third party would have paid the refund *"shortly after"* 11 June 2009 demonstrates that SP has not specifically established when the refund was actually paid. If the refund was paid, the SP could have established this date but it has not done so despite the adjudicator's request for such confirmation. In light of the fact that the payment of the refund was a point directly in dispute in this complaint, I regard the SP's answer to the question expressly put to it in this regard as vague and unhelpful in the resolution of the complaint and, as such, unprofessional. WASPA is a voluntary membership association formed to promote consumer confidence in the wireless application services industry. Consumer confidence in the industry rests squarely in the hands of the members themselves who are required by section 3.1.1 of the Code to conduct themselves at all times in a professional manner in their dealings with the public and with WASPA itself. Section 4.1.1 of the Code, dealing with the provision of information to customers, also provides that members are committed to honest and fair dealings with their customers. When a consumer expressly complains that a refund has not been received, and when an adjudicator calls for the SP to confirm the date on which the refund was allegedly paid, an SP should produce this information in a very clear and unambiguous manner in order to resolve the dispute.

The complaint of involuntary subscription is not upheld however the SP has breached section 3.1.1 of the Code in the manner described above.

Sanction

I regard the following sanction to be appropriate:

1. The SP must, within 7 days of the date of publication of this report, produce to the satisfaction of the Secretariat primary documentary evidence of payment of the refund that it alleges was paid to the consumer, failing which the SP is directed to pay:
 - 1.1 to the consumer the amount of R155 plus interest thereon at the rate of 15,5% per annum from 11 June 2009 to date of payment; and
 - 1.2 a fine of R1 500 to WASPA.