



REPORT OF THE ADJUDICATOR

WASPA Member (Member):	Mobimex Group
Service Provider (SP):	Mira Networks
Service Type:	Subscription
Source of Complaints:	Consumer
Complaint Number:	# 6759
Code of Conduct version:	7.0
Advertising Rules version:	2.3

Complaint

Complaint # 6759 is an escalation of unsubscribe request # 17611. The background to this complaint is as follows:

On 2 June 2009 the complainant contacted WASPA and stated that:

"i have been billed 2 months consecutively for content download.. the phones used are not even the same make as mine..i have emailed sandra @ mobimex apparently they are responsible for the charges,i have had no joy whatsoever. billed for april R258.20 excl vat and may R98.70 excl vat.. i demand a full refund."

In reply the Member stated on 4 June 2009 that:

"Customer had two subscriptions, subscribed properly on 9-Apr-2009 and 11-Apr-2009(proof attached) with downloaded content. Subscription terminated. No refund offered because downloaded content. We are contacting the customer directly regarding refund request".

A further email was received from the complainant on 2009-06-08:

"have recieved contact from aleisha at smart call.. i explained that i did not use there service and she replied telling me what phones were used neither of them belonging to me .. i do not know what is going on and cannot afford paying these charges.. This is very frustrating for me and i am still demanding a full reimbursement

thanking you"

Following receipt of the further email from the consumer the matter was escalated to a formal complaint and the Member was advised by WASPA as follows:

Dear WASPA member,

The appended unsubscribe request was logged on the WASPA unsubscribe system on 2009/06/02, 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: 0834417534

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: 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=17611&wasp=2925>

SP Response

A written answer to the notification of the formal complaint was received from the SP on 11 June 2009 as follows:

The complainant did subscribe two times for different WAP sites on 9-Apr-2009 and 11-Apr-2009 respectively (proof attached).

Both times there were premium content downloads from the sites (as seen in the attachment). Both subscriptions were terminated upon request and proofs and information provided.

The following information was included in the SP's formal answer:

WAP Opt-in information for MSISDN: +27834417534

Date	MSISDN	Type	Menu/Prd. No:	Download(s)	Handset Details
9-Apr-2009 Thu 08:18	+27834417534	WAP Menu	410	1	IP:41.208.50.193 MOT-V360/08.B7.2ER MIB/2.2.1 Profile/MIDP-2.0 Configuration/CLDC-1.1
9-Apr-2009 Thu 08:18	+27834417534	WAP Menu	410	4	IP:41.208.50.193 MOT-V360/08.B7.2ER MIB/2.2.1 Profile/MIDP-2.0 Configuration/CLDC-1.1
11-Apr-2009 Sat 00:11	+27834417534	WAP Menu	491	1	IP:41.208.50.193 Nokia3110c/2.0 (06.60) Profile/MIDP-2.0 Configuration/CLDC-1.1
11-Apr-2009 Sat 00:11	+27834417534	WAP Menu	491	4	IP:41.208.50.193 Nokia3110c/2.0 (06.60) Profile/MIDP-2.0 Configuration/CLDC-1.1
Date	Product		Type	Session ID	
9-Apr-2009 Thu 08:18	WAP Menu(410)		WAP Menu	583192	
9-Apr-2009 Thu 08:20	Product Set (one page) - FSK16 Home Sex Tapes(467)		Product Set (one page)	583237	
9-Apr-2009 Thu 08:21	Product Set (one page) - Lesbian erotic pic pack1(712)		Product Set (one page)	583264	
11-Apr-2009 Sat 00:11	WAP Menu(491)		WAP Menu	645883	
11-Apr-2009 Sat 00:12	Product Set (one page) - FSK16 Home Sex Tapes(467)		Product Set (one page)	645903	
11-Apr-2009 Sat 00:12	Product Set (one page) - FSK16 Home Sex Tapes(467)		Product Set (one page)	645914	
11-Apr-2009 Sat 00:13	Product Set (one page) - FSK16 Home Sex Tapes(467)		Product Set (one page)	645919	

On 2009-07-08 the complainant replied as follows:

Re Resolution..

The issue has not been resolved at all.. i have never subscribed to those services and i never will.; i was charged 2 months consewuitevely for apparent content download. when asking my service provider what these extra charges where all about i was told that i need to contact mira networks, i spoke to princess an olisha they told me they were just a platform i need to speak to sandra at mobimex and i emailed her 4 times. I then spoke to aliesha at smartcall technologies not 1 of them were helpfull and would not hear my side of the story , they even told me that it was a nokia of some sort used when i told them i used another phone she then replied" mtn sometimes gives the wrong info". I would like to open a bussiness like this and just charge any1 anytime and have no consequences.

I hope that my money will be refunded shortly

thanking you

The matter was then referred for adjudication.

On 26 October 2009 the following request was made by the adjudicator:

Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #6759 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.

On 27 October 2009 the SP (Mira Networks) respond on behalf of the Member as set out below:

Good Day

Please see attached Mira MO and MT logs for the relevant number. We would also like to stress the fact that we have terminated all accounts with Mobimex.

Mira Networks Report for MSISDN 27834417534									
Type	Date	Catcher	Service	Svc MSISDN	Billing Service Name	Bill Amount	Bill Status	Bill Reason	Message
SMSMT	04/05/2009 07:08	Service	Service	98981					Mobime
SMSMT	30/04/2009 12:22	Service	Service	98981					Mobime
BILLING	29/04/2009 12:30	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	26/04/2009 12:20	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	23/04/2009 14:51	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	20/04/2009 13:12	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	17/04/2009 18:08	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	14/04/2009 18:10	ex	ex	31218	00000054	1500	SUCCESS		3AE81E
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		you for
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		you for
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		using
BILLING	11/04/2009 00:16	ex	ex	31218	00000054	1500	SUCCESS		you for
BILLING	11/04/2009 00:14	ex	ex	31218	00000054	1500	SUCCESS		using
SMSMT	10/04/2009 22:14	ex	ex	31218					2 African

On 2 November 2009 the Member requested an extension to the adjudicator's request and wrote:

Dear WASPA Secretariat,

We are working on providing all the requested information on complaints 6303, 6422, 6671, 6678, 6719, 6759, 6928 and 7081.

However the WASPA unsubscribe page (<http://www.waspa.org.za/unsub/>) is not accessible for the whole day today and this prevents us from obtaining information we need in order to complete and send our reports.

I am requesting to prolong the 5 days period with at least 1 day after the WASPA site becomes accessible again.

Kindly let us know if this is possible?

The following further information was then received on 4 November 2009:

Opt-in data

MSISDN: +27834417534

Date: 11-Apr-2009 Sat 00:11

IP: 41.208.50.193

Handset Details: Nokia3110c/2.0 (06.60) Profile/MIDP-2.0 Configuration/CLDC-1.1

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
11-Apr-2009 Sat 00:11	WAP Menu(491)	WAP Menu	645883
11-Apr-2009 Sat 00:12	FSK16 Home Sex Tapes – 1/3	Video Set	645903
11-Apr-2009 Sat 00:12	FSK16 Home Sex Tapes – 2/3	Video Set	645914
11-Apr-2009 Sat 00:13	FSK16 Home Sex Tapes – 3/3	Video Set	645919

Billing:

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

29-Apr-2009 Wed 12:25	SC:31218	+2783441753 4	Cost:R15  Push	HOT Erotic Download http://7jb.in/m32935462251312254.wml	DELIVERED
17-Apr-2009 Fri 18:05	SC:31218	+2783441753 4	Cost:R15  Push	HOT Erotic Download http://7jb.in/m23629819351312254.wml	DELIVERED
14-Apr-2009 Tue 18:08	SC:31218	+2783441753 4	Cost:R15  Push	Music HITS Download http://da5.in/m29524177691312254.wml	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15  Text	Thank you for your download. This message is to inform you that new credits has been loaded to your account.	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15  Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED

Report of the Adjudicator

Complaint #6759

11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 31218 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thank you for your download. This message is to inform you that new credits has been loaded to your account.	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 31218 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 39215 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:15	SC:31218	+2783441753 4	Cost:R15	 Text	Thank you for your download. This message is to inform you that new credits has been loaded to your account.	DELIVERED
11-Apr-2009 Sat 00:13	SC:31218	+2783441753 4	Cost:R15	 Text	Thanks 4 using GsmVC! Is your lover the right one for you? Send sms LOVE name1 name2 to 31218 (R15/sms) to find out! Content on its way!Problems? help@gsm.vc	DELIVERED
11-Apr-2009 Sat 00:13	SC:31218	+2783441753 4	Free	 Text	Welcome 2 African Gsm.VC!Content on its way!Click on it 2 download!Probs? help@gsm.vc or Call:0114422735.Txt STOP to 31218 unsub.(weekly Sub.Cost:R30 Age:16+)	DELIVERED

Welcome Message:

2009/04/1 1 00:13:49 PM	27834417534	DELIVRD	Welcome 2 African Gsm.VC!Content on its way!Click on it 2 download!Probs? help@gsm.vc or Call:0114422735.Txt STOP to 31218 unsub.(weekly Sub.Cost:R30 Age:16+)
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Unsubscribed:*Manually blocked upon request.*

A second adjudicator request was then sent to the WASP 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 by the Member on 2009-11-16:

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:

ENJOY SEXY VIDS - WATCH NOW!

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

A further adjudicator request was then sent on 17 November 2009:

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.

The Member replied on 27 November 2009 as follows:

Dear WASPA Secretariat,

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 Nokia 3110, 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 31218 to
unsubscribe or send mail 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 minimum charge of 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 Ltd. may contact you via SMS with promotional information/offers from time to time. Mobimex Ltd. 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. 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 Ltd. e-mail: help@gsm.vc. Call Centre: 011 4422 735 8am to 5pm Monday to Friday. SMS STOP to 31218 to unsubscribe.

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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 they had not subscribed to the Member's services, the Member 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 Member 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 Member 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 Member 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 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, 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.

Sanctions

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 5696 and 5954 where similar breaches of the Code were upheld against the Member, as well as complaints 6303 and 6678 where 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.

I therefore have imposed the sanctions that follow in paragraphs 1 to 3 below. For the purposes of paragraph 1.3 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, Mobimex Group, 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 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 Networks, 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 27 October 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 27 October 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 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 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.