

REPORT OF THE ADJUDICATOR

WASPA Member (SP): MobileGate

Information Provider (IP): Not applicable

Service Type: Subscription contact/dating service

Complainant: Member of the public

Complaint Number: #6875

Code Version: 7.4

Advertising Rules Version: 2.3

Complaint

The complainant, a member of the public, lodged a complaint with WASPA against the member's service, which appears to be a combination of a subscription service and a contact or dating service. The complainant incurred costs of roughly R2 000 in sms charges connected to the service and claims he was unaware that he was not communicating with a live person and further that he was unaware of the service's charges.

The complainant further claimed that he "suddenly" received a message from what appeared to be a woman who began chatting with him via sms. The complainant further contends that the service is misleading as the "person" he was communicating with was not what it/he/she purported to be. A refund was requested.

Service provider's response

The member indicated that the complainant "opted into our Website which is a Fantasy chat site on the 3/2/09". The member further contended that the member "received our subscribed message and our spend notification". These contentions gave rise to WASPA's requests for the member's logs substantiating these contentions.

The member initially failed to respond to WASPA's requests for logs and to its 5 reminders and this prompted WASPA to escalate the complaint. It finally furnished WASPA with further detail a day after the complaint was escalated to a formal complaint on 24 June 2009. The member's email response is annexed to this report, marked Annexure "A".

The member's response indicates the following:

1. The complainant received an opt-in message on 3 February 2009 containing the following text:

Hi Riaan, CLAIRE from MM wants to chat and maybe meet. me! TXT YES TO CONNECT NOW! for help 0800981229 R10 msg + R60sub 2 end txt stop

- 2. The complainant apparently responded in the affirmative; and
- 3. The complainant then received an opt-in message on 3 February 2009 containing the following text:

Your chat partner will reply to you shorty. Welcome to maybemeet.me 4 help 0800981229 r60subscriptionpw 2end txt stop

The complainant also apparently received the following message at an unspecified time and date:

Remember, if you have any problem with your chat partner you can contact customer support on 0800982186 No action is required zasmsclub! R300spent

WASPA forwarded the member's response to the complainant on 8 July 2009. The complainant responded on 13 July 2009 as follows:

Hi, I am not satisfied this has gone on for a very long time without any progress. If we look at the messages send between me and lady you can see its a setup to make me send as many smsse as possible this is un ethical. She even admitted in the last few messages to me that she does this nomally.

The member does not appear to have submitted any further information to WASPA.

Sections of the Code considered

This complaint was filed prior to the most recent update to the Code to version 8.0. I have accordingly considered versions 7.4 and 8.0 for the purposes of this report in order to determine compliance with the Code (referencing version 7.4) and the remedy for non-compliance (referencing version 8.0). Having regard to the issues raised in this complaint, I have also considered other sections of the Code, which are pertinent.

I have therefore considered the following sections of the Code:

Code version 7.4	Code version 8.0			
2.10: A "contact and dating" service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.	2.10: A "contact and dating" service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.			
2.23 : A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.	2.23: A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.			
3.1.1 : Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.	3.1.1: Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.			
3.1.2: Members are committed to lawful conduct at all times.	3.1.2: Members are committed to lawful conduct at all times.			
4.1.1 . Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.	4.1.1 . Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.			

omission.

Code version 7.4	Code version 8.0			
4.1.2. Members must not knowingly	4.1.2. Members must not			
disseminate information that is false or	disseminate information that			
deceptive, or that is likely to mislead by	deceptive, or that is likely to			
inaccuracy, ambiguity, exaggeration or	inaccuracy, ambiguity, exag			

- **6.2.9**. During any calendar month, if the total cost of any service exceeds R200 for that month:
 - (a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.
 - (b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.
- 6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.
- 6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9

- knowingly is false or mislead by ambiguity, exaggeration inaccuracy, omission.
- **6.2.9**. During any calendar month, if the total cost of any service exceeds R200 for that month:
 - (a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.
 - (b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.
- 6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.
- 6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9

Code version 7.4	Code version 8.0			
(b)).	(b)).			
10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.	ongoing incremental cost, must, a reasonable intervals, inform the customer of any additional costs, and must require the			
10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.	10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.			
10.1.3 . Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.	10.1.3 . Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.			
10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.	10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.			
11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.	11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.			
11.1.2. Any request from a customer to join a	11.1.2. Any request from a customer to join a			

Code version 7.4

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 and may not be an entry into a competition or quiz.

Code version 8.0

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 and may not be an entry into a competition or quiz.

- **11.1.4**. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.
- **11.1.4**. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.
- **11.1.5**. 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. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.
- **11.1.8**. 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:
- 11.1.8. 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;
- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (c) Clear and concise instructions for unsubscribing from the service;

Code version 7.4	Code version 8.0			
(d) The service provider's telephone number.	(d) The service provider's telephon number.			
11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:	11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:			
[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].	[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].			
11.1.11. If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.	11.1.11. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.			
11.2.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/ month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.	e "RX/week" or "RX/ month" (or RX.XX if the			
11.5.1. Instructions on terminating a	11.5.1. Instructions on terminating a			

Code version 7.4	Code version 8.0				
subscription service must be clear, easy to understand, and readily available.	subscription service must be clear, easy to understand, and readily available.				
11.5.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.	11.5.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.				
12.3.2. Prohibited services:	12.4.2. Prohibited services:				
(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.	(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.				

Sections of the Advertising Rules considered [if applicable]

Not considered.

Decision

There are a number of difficulties with the member's service. The service itself is, to a degree, misleading from the outset. It has the appearance of a sms chat service whereas it is, in fact, a subscription service alongside a premium sms service. The

member has contended that the complainant was notified of the service's pricing on its website, presumably located at southafrican-singles-online.com (no website loaded when I pointed my browser at this domain so I was unable to verify the member's assertions in this regard).

I did attempt to load a website on the maybemeet.me domain name which was mentioned in one of the messages the member sent to the complainant and that resolved to a placeholder website advertising pharmaceutical drugs. A variation of this domain, maybemeet.me.co.za, directed me to a similar placeholder website containing a variety of keyword links including a "mobile dating" link that directs to a dating website at http://dating.thunderboltcity.co.za. I wasn't able to determine whether this dating website is, in any way, affiliated with the member.

Further research regarding domains associated with this complaint and similar complaints regarding the member indicate the existence of a network of domains and websites with similar themes. These domains don't appear to be linked to functioning websites in their own right and this makes verifying claims about pricing information on the respective websites difficult to impossible. I therefore have little choice but to focus on the evidence which has been presented to me.

Pricing information

The Code specifies the format of any pricing information for mobile services. I am unable to comment on whether pricing information for the reasons I stated above. On the other hand the member has disclosed the pricing format in its messages, which I quoted above.

In the first message the member alleges was sent to the complainant, the price is in the format Rx although it is unclear what the billing frequency is. In other words, the quoted price, "R10 msg + R60sub" doesn't reveal whether the prices quoted are charged per message, once off, daily, weekly, monthly or otherwise. Furthermore, the pricing information in the subsequent meeting is even more opaque. "r60subscriptionpw" doesn't clearly state that a subscription charge of R60 per week applies. This pricing format also doesn't comply with the Code formatting requirement is rule 6.2.8 or in Rule 11.2.5.

Billing reminders

The Code requires members to notify users when charges incurred reach certain thresholds (R400 total charge or increments of R200). There is no evidence that any such notifications were sent to the complainant. This is particularly concerning because the complainant has informed WASPA that his total bill amounted to roughly R2 000, a substantial amount of money, especially considering the complainant appeared to have been a subscriber for roughly 8 days in total.

The member's failure to notify the complainant of his increasing charges is negligent at best, calculated to profit unduly from the complainant's ignorance, at worst. Either way it is a gross violation of the Code's provisions in the circumstances. Compliant notifications could have helped the complainant avoid the high costs he faced in the short time he made use of the service.

The member also appears to have failed to maintain proper records of the complainant's confirmation of the charges applicable to the service, or his election to opt-out of such requirement, as required by Rule 6.2.12 (a) or 6.2.13 (respectively). The member certainly didn't furnish WASPA with such records when it responded to the complaint.

Rule 10.1.1 contains a further notification requirement where a contact and dating service includes an "ongoing incremental cost". It is unclear whether the services charges qualify as "ongoing incremental" costs but this provision is worth noting.

In addition, the member failed to ensure that a message including the prescribed format specified in Rule 11.1.10 was sent to the complainant when the complainant apparently became a subscriber to the service. Such a notification would have clarified the nature of the service to the complainant and given him an opportunity to limit his costs.

Bundling

As I mentioned above, the service is somewhat misleading. It has the appearance of an sms based chat service but it is also a subscription service. Even assuming that the complainant was fully aware of and consented to being charged for sms's he exchanged with the service's operators/servers, there is no indication that the complainant entered into an independent transaction with a view to subscribing to the service as a subscription service. For this reason I believe that the service falls foul of the Code's "anti-bundling" provisions, specifically Rules 11.1.2 and 11.1.5.

The member's conduct

I have a number of concerns about the member's conduct towards the complainant and WASPA.

While there is no clear evidence before me, the service appears to be somewhat misleading and calculated to disguise the various charges associated with the service, along with their billing frequency. One reasonable conclusion to draw from this is that the service is designed to induce subscribers to use it frequently without being kept apprised of the associated costs, much to their dismay when they, like the complainant, find themselves having to pay excessive costs they perhaps did not anticipate initially. This conclusion is reinforced by the availability of clear guidelines in the Code that specify the format and frequency of various notifications and how such services may be conducted. The service is potentially fraudulent and the member in breach of its obligation to act lawfully in its dealings with the complainant and WASPA.

Going further, the member's dealings with the complainant do not appear to have been fair and honest, based on the apparently deceptive nature of the service. Pricing information is not clearly communicated to subscribers at all.

The short history of this matter further indicates that the member has not responded to WASPA's communications with a reasonable diligence and with information it is required to collate and have available on request. The member failed to furnish WASPA with adequate logs (or any real logs for that matter).

Historical context

This is not the first time a complaint about the member's service has been lodged and adjudicated. One of my colleagues adjudicated two complaints (6186 and 6371) regarding what appears to be substantially the same service. Complaint 6186 is particularly relevant to this present complaint and concerns very similar facts,

including the initial message the complainant in that matter received from the member. In that matter the complaint was as follows:

The complainant states that he received an SMS from an online dating site:

http://www.maybemeet.me.co.za which read as follows:

"Hi Marcel, Claire from MATCHMAKE wants to chat and maybe meet.me! TXT YES to CONNECT NOW! for help 0800981229 Msg10rand60sub2endtxtstop"

The complainant replied to the message with the intention of meeting Claire, whose profile he states he viewed on the website.

Upon receiving his cellphone bill some 3 weeks later, the complainant realized that he had been charged an amount of R8.77 for every SMS he had sent. The complainant then investigated the matter further and confirmed the details of the website from which he had received the original SMS.

The complainant acknowledges that the charge per SMS sent using the service is displayed on the website as being R8.77.

The complainant notes that the initial message sent to him was unsolicited.

The complainant states that he was led to believe that standard charge rates would apply as the number which appeared on the original SMS was began with the prefix "083". No short code number was displayed on the original message.

The complainant further argues that he has never signed any agreement or otherwise agreed to the pricing which he has been charged.

Many of the issues raised in these previous complaints apply to this present complaint and I can't help but conclude that the member has practically disregarded my colleagues' findings in those previous matters.

I conducted superficial research into the member and discovered a number of news reports from Australia and/or New Zealand about a recent case in which the member was found to have violated that country's/those countries' anti-spam laws and fined

substantial fines. The facts of the reported case/s I read about are similar to these facts and this concerns me greatly.

Sanctions

The member has clearly failed to take notice of previous findings against it. It is appropriate for me to quote my colleague in complaint 6186 who said the following in that report:

I have previously adjudicated on a complaint involving this IP and in particular the manner in which it advertises and/or promotes its virtual chat service through the medium of online dating sites (see adjudication report for complaint 6371 dated 26 June 2009). This complaint, although lodged later than the current complaint, was dealt with through the emergency panel procedure and was referred to me on an urgent basis.

In my report for that complaint, I made the point that visitors to an online dating site do so with the intention of genuinely meeting someone, which is clearly distinguishable from engaging in a virtual chat service where users communicate with an automated operator. Even though, in that complaint, users were also requested to expressly opt-in to use the IP's virtual chat service, this did not excuse the misleading and/or deceptive manner in which the service was promoted.

Pursuant to complaint 6371, the IP was formally warned not, in future, to promote, advertise or market its virtual chat services in any manner or form which contravenes the WASPA Code of Conduct....

Based on my factual findings and my review of the provisions of the Code the service violates, it is clear than firm action must be taken.

I, too, take notice of the member's further and blatant disregard for the Code's provisions and the member's continued failure to heed WASPA's rulings regarding the service and its variations. I therefore impose the following sanctions which will similarly not be suspended pending any appeal process:

1. The member is fined an amount of R250 000, payable to WASPA within 10 business days of receiving notice of this report;

- The member is ordered to refund all amounts charged to the complainant for his use of the service from 3 February 2009 to date of termination of his subscription. Such refund must be paid within 10 business days of receiving notice of this report;
- 3. The member is ordered to cease all instances of the service for so long as the service (and its variations) continue to be in violation of the Code;
- 4. The member is ordered to send all the service's (and its variations) current subscribers a notification in the format prescribed by Rule 11.2.2 of version 8.0 of the Code, being the current version of the Code.

Annexure "A" – Member's email dated 25 June 2009

From: eric parke <ericparke@hotmail.com>
Subject: Re: [WASPA.complaints] [formal] Complaint Ref:#6875 Escalation of unsubscribe #16451
Date: 25 June 2009 4:28:27 AM SAST

To: <complaints@waspa.org.za>
Reply-To: "complaints@waspa.org.za" <complaints@waspa.org.za>

Please be advised that the customer was stopped from our service on the 11.02.09

FREE MESSAGE - You have been removed from southafrican-singles-online.com For help or further information call 0-800-981- 229	2009-02-11 07:22:51		outgoing	38696
> System has automatically stopped Session	2009-02-11 07:22:51	system	stop	
> Stop	2009-02-11 07:22:51		incoming	38696

When he signed up to our website he would have seen the cost of our service. Also the customer received the cost in our initial opt in messages and in the spend notification sent to the customer shown below

Your chat partner will reply to you shorty. Welcome to maybemeet.me 4 help 0800981229 r60subscriptionpw 2end txt stop	2009-02-03 18:34:28	outgoing	38696
> Yes	2009-02-03 18:34:27	incoming	38696
> Hi Riaan, CLAIRE from MM wants to chat and maybe meet. me! TXT YES TO CONNECT NOW! for help 0800981229 R10 msg +			

R60sub 2 end txt stop

Remember, if you have any problem with your chat partner you can contact customer support on 0800982186 No action is required zasmsclub!

Please email us if you have any further questions you need us to answer.

Kind regards

Mobile Gate

Date: Wed, 24 Jun 2009 16:00:10 +0200
> From: complaints@waspa.org.za
> To: ericpark@hotmail.com; support@southafrican-singles-online.com
> CC: complaints@waspa.org.za
> Subject: [Tomai] Complaint Ref:#6875 Escalation of unsubscribe #16451 Dear WASPA member,

> The appended unsubscribe request was logged on the WASPA unsubscribe > system on 2009/04/24, but Mobilegate has unfortunately not responded to > this request.

> Therefore, the WASPA Secretariat has no choice but to escalate this > query to a formal complaint against Mobilegate.

Accordingly:

You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you deem to be relevant to this complaint.

After five working days have passed, this complaint, together with your response (if any) will be assigned to an adjudicator for review, and if upheld, determination of appropriate sanctions.

You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.

Your response, and any other correspondence relating to this complaint, must be sent to <complaints@waspa.org.za>.

Correspondence sent to any other address may not be deemed to constitute a formal response.

The WASPA Secretariat will confirm receipt of your response.

> > If you have any questions regarding the Code of Conduct or the > complaints procedure, please address your queries to > <complaints@waspa.org.za>

Please confirm your receipt of this message

> Warm regards, > WASPA Secretariat

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

> The user who escalated this request has provided the following reason > for escalation: Request for additional information regarding the spend > notifications have not been supplied and the logs have not been supplied > which proves that the user was aware of the charges of the smses

WASP members

> Mobilegate

Details of the complaint

> Mobile number
> Customer namer: Riban
> 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: Mobilegate

> 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: Requested

> > Comments

Jacqui on 2009-04-24 15:09:23 said:

Has run up R2000 of sms charges - was completely unaware that he was not talking a real live person and was completely unaware of the charges - be says he suddenly received a message from a woman that started a chat with him and he thought it was just a regular chat - feels that they are pretending to be someone they are not and ripping off the unsuspecting consumer. Where was the spend notification for this service

> Mobilegate on 2009-04-27 09:13:12 said:
> Dear Waspa, The Customer opted into our Website which is a Fantasy chat
> site on the 3/2/09. He received our subscribed message and our spend
> notification.

pjacqui on 2009-06-15 10:41:12 said Please supply the logs as requested