



REPORT OF THE ADJUDICATOR

WASPA Member (Member):	Mobimex Group
Service Provider (SP):	SmartCall Technology Solutions
Service Type:	Subscription
Source of Complaints:	Consumer
Complaint Number:	7081
Code of Conduct version:	6.2
Advertising Rules version:	

Complaint

The complainant in this matter logged an unsubscribe request on the WASPA website on 15 July 2009 and also forwarded to WASPA copies of various correspondence he had entered into with Vodacom in which he had complained, inter alia, as follows:

“Dear Sirs, I noticed with dismay that that on my last invoice was a charge of R157.92 for Smartcall. This is my wives phone. I followed this up and much to my surprise learned that we were on some sort of a contract with a provider who sends various games pictures etc to cell-phone users, none of which we have received. I eventually managed to track down a number for the company and asked them to immediately take the number off their list and refund my money in full which has been deducted over the last few months. This was refused as and only a refund for the last month was offered. I need clarification on the following: Where in my contract with you, did I agree to have an outside party use you as a money collector? Did you contact me to check if I entered a contract with somebody, considering that you have access to my account? I will be seeking legal advice as to the legality of Smartcall deducting funds from my cell account without any authorization, the costs of which I will be seeking from either Smartcall or Vodacom as you are my service provider. I would appreciate a prompt reply as I am taking this matter further.”

The Member responded to the unsubscribe request on 17 July 2009 by stating that the consumer had been unsubscribed since 19 March 2009 and was currently blocked on their system. The Member also provided a table showing the make of phone allegedly used to subscribe to the services (a Nokia 5200) and the IP address of the consumer from which the subscription services of the Member had been activated. The Member did not offer a refund.

The consumer was not satisfied with the Member’s response and addressed further correspondence to WASPA stating as follows:

Thank you for your efforts, however perhaps you did not read all my correspondence to Vodacom. My complaint is not subscribe or unsubscribe. The situation is this. I have never asked or subscribed to Smartcall, but they have charged me for items via my Vodacom account. Whatever Smartcall supplies I did not want nor did I asked to get. We are Pensioners and do not require fancy things on our cellphone. All I want is MY MONEY RETURNED that Vodacom charged me on behalf of Smartcard. I do not know who Smartcard is and why they came into my life. Please tell me with a simple yes or no if you organisation has got the teeth to assist me with my claim.

WASPA therefore escalated the matter to a formal complaint and notified the Member accordingly on 21 July 2009.

Response to Complaint

On 27 July 2009 the Member furnished WASPA with the WAP Opt-In information for the consumer's MSISDN as well as the MO history showing the consumer had opted out of the Member's services on 19 March 2009.

On 28 July 2009 the Member's response was forwarded to the consumer who replied on the same date as follows:

"Dear Waspa

Thank you for your efforts, but as I can see they were fruitless. We are beeing referred to as having subscribed. I have never subscribed to anything via the cell phone and the party concerned just cold blodet hi-jacked my bank account. We are pensioners and have to watch our pennies. I do not worry about wallpaper, games, or ringtones on my cell. If you can not resolve this I will sue them in the Small Claims Court for money removed from my account.

I state again, that I have never subscribed to this, nor invited them or contacted them to come into my life. I have never used any of their products and will not give up until all my mony is returned. The only thing I did was cancell with them as I was getting charged every month."

The matter was then referred for formal adjudication.

After an initial review of the complaint, the adjudicator requested that further information be furnished by the SP or IP which request was forwarded to the Member by WASPA in the following terms:

"Dear WASPA members

The adjudicator reviewing complaint 7081 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 #7081 within 5 days of receipt of this request, including:

(a) proof of all required reminder messages having been sent to the customer;

(b) detailed transaction histories indicating all charges levied and the service or content item applicable for each charge; and

(c) any record of successful or unsuccessful unsubscribe requests.

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

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

On 26 October 2009 the Member produced logs showing receipt of the original subscription request and showing that the unsubscribe request had been processed.

On 4 November 2009 the Member responded further and stated that:

"The user has clicked on banner ad published in a third-party WAP site. The user has come on the Landing Page with the subscription terms and conditions and accepted them when accessed the WAP portal. A free welcome message was sent to the user."

The Member also produced a table showing the dates on which 57 different debits totaling R795.00 were made against the consumer's account in the period 22 October 2008 to 12 March 2009. The Member also produced a log of all reminder messages sent to the consumer as well as messages confirming that the consumer was to be unsubscribed on or before 20 March 2009.

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

"Please request the SP/IP in this complaint to provide me with copies of all advertisements for the service that were clicked on by any consumers who have complained in this matter, including the various banner ads published in third party WAP sites that the SP/IP alleges were clicked on and which resulted in the consumer arriving on the landing page for each service containing the subscription terms and conditions?"

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

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

100% Cool Vids - Download Here!

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

On 17 November 2009, the adjudicator then requested as follows:

"Can I now also please request the SP/IP in these complaints to provide me with copies of the "landing page" that consumers would have accessed after clicking on the banner ads and the terms and conditions for the service?"

I would request that these pages and terms and conditions be provided to me in the size and format that a consumer would have seen and accessed them.

If I could have this information in the requested format within 5 working days from the SP/IP please, alternatively the most suitable size or format in which they can provide them together with an explanation why they cannot furnish the information in the original size and format."

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

On 24 November 2009, the member replied as follows:

"Kindly find attached the requested "Landing Page" and "Terms and Conditions" page. Since we do not have in place the mobile phone used by the visitor, namely Nokia 5200, the pages are being displayed using WML browser.

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

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

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 wap site (the services). The services are charged at value added services rates (free minutes do not apply). Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15. Subscription services at R15 every 3 days. All costs are VAT including. Additional bearer charges may apply. WAP enabled phones are required to play. Incorrect entries/requests will be billed in full. By utilising the services, you agree that Mobimex may contact you via SMS with promotional information/offers from time to time. Mobimex is not liable for any loss, damage or expense arising from the use by you of the services, and the services are used at your own risk. If you enter a competition then the judges decision is final, winners will be notified telephonically. All information and pricing of the services are correct at the date it is published on the web site but may be subject to changes. Participation in and/or use by you of the services constitutes acceptance by you of the Terms and Conditions; services brought to you by Mobimex. e-mail: help@gsm.vc. Call Centre: 079 144 4615 8am to 5pm Monday to Friday. SMS STOP to 39215 to unsubscribe.

Back

Decision

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

Section 11.1.2 of the Code of Conduct deals with requests by consumers to become subscribed to a subscription service. This section reads as follows:

11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.

The Code is clear: for a consumer to become subscribed to a service the consumer must have the specific intention of subscribing to a service and must not be intending

to do anything else other than subscribe to a service at the time he or she is so subscribed.

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

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

It is difficult to establish where in the above process the consumer would have expressly transacted to become a subscriber to the services.

The advertisement produced for the services by the Member does not have the appearance of a transaction page. The only button available to the consumer is a button headed "*Enter here*". Unless there are other indications of an intention to transact, an invitation to enter a site is considerably different from an invitation to transact on a site. Furthermore, it appears from the process description and the evidence put up by the Member that the subscription transaction mechanism must have been activated by clicking on a button that appears to be a navigation button rather than a transaction button. A reasonable consumer would not be intending to transact by clicking on that button and the method by which consumers were subscribed to the Member's service breaches section 11.1.2 of the Code of Conduct.

Section 3.1.1 of the Code requires members to "*at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA*".

Furthermore, sections 4.1.1. and 4.1.2 of the Code state as follows:

"4.1.1 Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission."

In light of my finding regarding the nature of the subscription activation process, I find the member to also have breached sections 3.1.1, 4.1.1 and 4.1.2 of the Code of Conduct.

The SP in this matter, being a member itself, is also obliged in terms of section 3.9.1 to bind information providers with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct. In terms of section 2.13 an "*information provider*" is "*any person on whose behalf a wireless application service provider may provide a service, and includes message originators.*"

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

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

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

Sanction

The breaches of the Code committed by the member in this matter are of a very serious nature. The primary purpose of the WASPA Code of Conduct is stated in section 1.2 thereof as follows:

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

The breaches by the member go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the member including in complaints 5696 and 5954 where similar breaches of the Code were upheld against the SP and complaints 6303, 6678, 6759 and 6928 where identical or near-identical breaches were upheld against the Member. I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the member has repeatedly breached the Code in a very serious manner.

For the purposes of paragraphs 1.3 and 2 below, a “related entity” shall be any entity in which any of the beneficial ownership of such entity is held directly or indirectly by any of the owners of the member or which has one or more directors, members or senior executives in common with the member.

1. The Member is directed to:
 - 1.1 immediately suspend all of its subscription services offered in South Africa and all billing for any such services;
 - 1.2 pay over to WASPA a fine of R350 000 within 5 days of the delivery of this report; and
 - 1.3 pay to the consumer compensation in the amount of R795 plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from 12 March 2009 until date of payment, such payment to be made into a bank account within 5 days of the consumer furnishing the Member with details of its nominated bank account;

failing which the Member's and any related entity's memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the Member's and any related entity's access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days or until such time as the fines imposed in paragraphs 1.2 and 1.3 above have been paid in full, whichever period is the longer.

2. The SP, Smartcall Technology Solutions, is directed that in the event that the Member does not pay the fines and compensation provided for in paragraphs 1.2 and 1.3 above within 5 days, or cause such fines and compensation to be paid, then the SP shall:
 - 2.1 immediately compensate the consumer as provided for in paragraph 1.3 above and make all necessary arrangements with the consumer to comply with the provisions of this sub-paragraph;
 - 2.2 within 10 days furnish WASPA with a historical statement of account detailing all revenue received by it in respect of all subscription services provided to Mobimex prior to 12 March 2009 and specifying the SP's service fees in respect of such services and the SP's share of any revenue generated by such services;
 - 2.3 permit WASPA to appoint an independent person to audit the accuracy of the statements to be furnished in terms of paragraph 2.2 above including by having reference to the SP's message records, transaction records and bank statements;
 - 2.4 provide WASPA and the auditor with all requested written consents that may be required to facilitate the conduct of the audit referred to in paragraph 2.3, including a consent to permit any network operator to furnish WASPA and the auditor with copies of all relevant records reasonably required for the purposes of such audit including relevant message and transaction records held by any such network operator;
 - 2.5 withhold any payments currently or at any time becoming due by it to Mobimex or any related entity as contemplated by the provisions of section 13.4.1(i) of the Code;
 - 2.6 pay over to WASPA the SP's service fees and the SP's revenue share paid to it by any cellular network operator in respect of all subscription services provided to Mobimex prior to 12 March 2009 until such time as WASPA has received payment in full of the penalty specified in paragraph 1.2.
3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1, 1.2 and 2.2 to 2.6 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.
4. In the event that any appeal is lodged is then interest on the compensation to be paid to the consumer in terms of paragraph 1.3 and 2.1 shall not be interrupted pending such appeal but shall continue to run.

5. In the event that any appeal is substantially successful, then any fine paid by the Member in terms of paragraph 1.2 or by the SP in terms of paragraph 2.6 shall be refunded to the relevant party concerned subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.