



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Smartphone (Pty) Ltd trading as Smartcall

Service Type: Not authorised to deduct: content service

Complainant: Member of the public

Complaint Number: 7334

Code version: 7.4

Introduction

This is a complex matter as the service complained of does not fit neatly within the definitions within the Code. The added complication appears to be that no form of authorisation is specifically required. As with many services, pure use of the service incurs a charge. The matter also highlights the importance of monitoring the use of your mobile.

This matter is further complicated by the fact that the complainant appears to have complained in the same way about 2 different accounts, the accounts for each of cellphone number A and cellphone number B, although the facts of each are slightly different. The complaint concerns 5 mobile phone numbers, the users of which all (on the SP's version) bear the same surname and appear to be related. The complaint filed in relation to cellphone number A was filed at the same time and in the same form as the complaint in relation to cellphone number B (complaint 7333). The complaints state that the charges were levied in relation to both cellphone numbers for services used for the benefit of numbers C, D and E.

WASPA has accepted each complaint as separate and we have considered the complaints separately despite their similarity and the fact that the parties involved appear to be part of one group of users. We suggest you also read the adjudication of 7333.

Complaint

On 23 July 2009 the complainant lodged a complaint against Smartcall (alternatively Smartcall Technology Solutions, part of the same group) on noticing a charge on her mobile bill of R888.13 including VAT, for content services. She was advised by Vodacom, her provider, that she should contact Smartcall, their SP, directly on a particular number. This number advised her in turn and by recorded message, that her call could not be taken but if she wanted to stop her subscription she should SMS #stop+ to 36628. Despite calling on several occasions, a real person did not answer the phone.

The complainant seeks a refund in full.

SP Response

The SP advised WASPA that the complainant was charged for use of its Load a Buddy service, operating on Vodacom, on each of cellphone numbers A and B. The SP advised further that the service was not a subscription service but allows a Vodacom subscriber to recharge any other Vodacom subscriber at any time using the USSD menu option or by sending an SMS to a given number. The charges were R15 for R12 airtime, or R7 for R5 airtime, at that time.

Finally the SP noted that the numbers which were credited on each occasion that the complainant's mobile phone account was charged with the airtime belonged to the complainant's daughter and son (cellphone numbers C and D) and a third party (cellphone number E), and that the service had been accessed each time by USSD from either phone numbers A or B (see below).

The SP provided a log from 30 June 2009 to 3 August 2009 for cellphone number A and 21 June 2009 to 2 August 2009 in relation to cellphone number B recording the charges for each USSD transaction.

For clarity in this clouded matter, the following summarises the position under the 2 complaints:

Dates	Number used	Number benefited and number of times
21/6 . 2/8/09	B	D and E (D x 8, E x 1)
30/6 . 3/8/09	A	C, D and E (C x 5, D x 91 and E x 4)

Consideration of the WASPA Code

The Load a Buddy service does not fall within the definition of a subscription service, although it may constitute a **content subscription service**, which is defined as any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a "club" or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location-based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc. However, the requirement for subscription is not present. The Smartcall website which describes the Load a Buddy service, indicates that airtime can be purchased on an ad hoc basis, for the relevant fee.

A **premium-rated service** is any service charged at a higher rate than the standard rate set by the network operator for that particular service". It is therefore possible that this may be a premium-rated service, although we do not consider this to be the case either.

The service is not a children's service although it is obviously a useful service where children use prepaid cellphones.

Therefore we consider that the service is the most basic form of wireless application service. a simple request to purchase at a particular price in a particular way. The Code applies in all general respects. In particular and most importantly of course,

this means that members of the public should be able to use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services (from the Code's introduction, paragraph 1.2).

Section 4 of the Code (Customer Relations) requires the SP to act in a particular way towards its customers:

Section 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.

Section 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.

Section 4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, e-mail address and physical address.

Section 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

Section 4.1.5. Terms and conditions of members' services may not contain clauses that contradict the requirements of the WASPA Code of Conduct.

Section 4.1.6. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

Section 4.1.7. Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to (for example, support should not be limited to email if a significant number of customers do not have access to email).

Section 4.1.8. Any telephonic support must be provided via a South African telephone number and must function effectively. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers may not forward to full voice mailboxes.

In relation to sections 4.1.1 to 4.1.5, we cannot, in the context of this complaint, find any wrongdoing. We note, however, that the complainant was not able to report her complaint using an acceptable procedure, and that without the intervention of WASPA the SP may not have replied at all. The frustration caused to the complainant in attempting to report her complaint first to Vodacom and then to the SP directly on their line is unacceptable. The SP is therefore in contravention of sections 4.1.6 to 4.1.8 of the Code.

In relation to pricing, various sections of section 6.2 set out the requirements:

Section 6.2.7. For menu-driven services such as USSD, the price for the service must be clearly stated at the top of the first page. Any additional costs associated with specific menu selections must be clearly indicated.

Section 6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.

(b) If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.

There does not appear to be a specific contravention of section 6.2.7 if the website is considered, and the complainant has not made her complaint on the basis of incorrect pricing or failure to comply with the Code in relation to the pricing of a service specifically. Although some transactions were billed at more than R10 and others at less than R10, they were not on these facts, initiated by the SP, and therefore there is no specific contravention of section 6.2.12 either.

There is an undisputed commercial relationship between Vodacom and the complainant, which seems to have extended to Vodacom's service providers including Smartcall. This is often the case when a subscriber signs up to a contract with a mobile network operator. This is perhaps the crux of the matter. Although the complainant may not specifically have authorised the charges for the Load a Buddy service, her contract with Vodacom entitled her (or her cellphone number or numbers registered to her) to access Vodacom-approved services, including top-ups, for which her account would be charged. Her specific approval was not required for the service complained of, given that the service was accessed simply by USSD from her phone or phones registered to her. The implications are clear. Her account was charged for a service she was apparently unaware of.

To the extent that cellphone numbers A and B are both registered to the complainant as she has complained in relation to each of them, then she must be regarded as the registered subscriber in relation to both the numbers and the person responsible for payment in relation to both accounts. If none of C, D or E is a subscriber to the Vodacom network under a contract, we must assume they are prepaid subscribers, and we are advised that the SP has confirmed this verbally with the users of the numbers.

In addition, as the service required a positive action which in turn could be expected to attract a charge since the transaction consisted in the purchase of airtime, there is no particular requirement for the SP to have advertised the charges or short code in a way other than it did on its own website.

What is concerning is that the complainant is so adamant that the other members of her family would not have used the service. If this is true, this raises a serious concern about the billing operations of the SP, its access to subscriber information, and its ability to charge subscribers' accounts for benefits received by third parties. In this case of course, the third parties appear to be related family members of the complainant, which is highly coincidental. We are advised however, in response to enquiries by the adjudicator, that the SP telephoned all the numbers to find out who they belonged to and the identity of the users was confirmed as described above in relation to each of A, B, C, D and E.

Decision

There are several points that should be noted at this juncture:

1. I have taken into account the complainant's frustration at the amount of charge and lack of assistance in response to her queries about it to each of Vodacom and the SP. On the face of it, there has been a transgression of

sections 4.1.6 to 4.1.8 of the Code, since the complainant was not able to report her complaint to her satisfaction or as required under the Code.

2. Given the relationship between the complainant and the users of the numbers to which the airtime was allocated and for which she was billed, and in the absence of any indication to the contrary, we must assume that value was received by those users, albeit at someone else's expense.
3. I note that when the SP called the numbers involved, the users confirmed that they were the children of the complainant and that they were using the Load a Buddy service, and the SP also spoke to their father on the other number (formerly a contract number) who confirmed that he knew that this was the case. At the time, on the SP's version, the complainant denied that the users were related to her.
4. I note too that although the WASPA Secretariat itself contacted the complainant and attempted to explain how the service works and that the service for which she had been charged had been used by her children's prepaid numbers and that this had been confirmed by them, she insisted that there had been no authorisation for the charges and that the matter should proceed to adjudication.
5. There is therefore considerable confusion as to whether or not the complainant did actually know that the service was being used by her children and that her number had nominated them as beneficiary numbers, and the complainant has perhaps not been too helpful in solving the problem.

If the complainant is able to show that her son and daughter did not action the request for airtime through her number (the mother's number) or that of her husband (the father's number), nor did they receive it and that she was therefore billed in error by coincidence in relation to two numbers belonging to family members (the children's numbers), there may be reason to reconsider the finding.

Sanction

1. In relation to the request for a refund the complaint is not upheld given the absence of proof that no benefit was derived.
2. The SP is directed to pay a fine in relation to the failure to comply with the provisions of sections 4.1.6 to 4.1.8 in the amount of R20,000 within 10 days of the date of notice of the finding of this adjudication.