

REPORT OF THE APPEALS PANEL

Date: November 2010
Appellant: Mobimex (IP)
Complaint Numbers: 7424
Applicable versions: Code of Conduct v7.4

1 BACKGROUND TO THE APPEAL

- 1.1 The IP is appealing the decision and the sanction imposed by the adjudicator in complaint 7424 which arose pursuant to an unsubscribe request lodged with WASPA on 3 June 2009 against two subscription services (African Music Portal and Erotik Portal) offered by the IP.
 - 1.2 The adjudicator found that the SP had breached sections 11.1.11 and 11.6.2 of version 7.4 of the WASPA Code of Conduct (“the Code”). The adjudicator imposed a sanction which required Mobimex to suspend all of its subscription services pending it providing confirmation of the verification of the correctness of its subscriber database to the WASPA Secretariat. The IP was further fined an amount of R150 000. The adjudicator further stipulated that such sanctions were not be suspended in the event of the IP filing an appeal against the adjudication.
 - 1.3 The facts underlying the complaint are unusual and involve the subscription of a slave fax number to the IP’s subscription service. A slave fax number is linked to the normal mobile number and is generally not known to the user of the phone. There was a good deal of interaction between WASPA, the complainant, the IP and the relevant Mobile Network Operator (MNO) in trying to determine the facts of the matter, during which time the IP elected to provide the complainant with a full refund.
 - 1.4 The appeal in this matter is related to a similar appeal noted by the IP against the adjudication delivered in respect of complaint 7285.
 - 1.5 Note: although the adjudicator has referred to Mobimex as the SP the Panel prefers the more correct description of IP and this description has been used in this appeal document.
-

2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v7.4

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.

11.6.2 When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

3 COMPLAINT AND DECISION OF THE ADJUDICATOR

- 3.1 The complainant in this matter discovered a series of content charges identifying the IP on his itemised account for July 2009. He had previously been the recipient of a number of WAP SMSs over time but attempts to unsubscribe from the relevant services were unsuccessful as the IP informed him that there was no record of his MSISDN on its systems.
- 3.2 After discovering further debits on the accounts for previous months the complainant logged a further unsubscribe request with WASPA but neither WASPA nor the IP could provide any record of subscription. The complainant then obtained itemised accounts for prior months which indicated that the subscription had been affected in late October 2008.
- 3.3 Upon receipt of a further WAP SMS in the same vein the complainant forwarded this to the IP who advised that a different number had been subscribed to the service and that they were not responsible therefore. The IP unsubscribed this number from its services on 1 August 2009.
- 3.4 After initially asserting that no refund would be offered to the complainant the IP later provided a full refund together with interest thereon.
- 3.5 Subsequently it was discovered that the subscription had involved a "ghost" number which was related to the complainant's MSISDN and which constituted the data/fax number associated with his account. It appears that this number was not known to the complainant.
- 3.6 The IP provided the complainant with a statement indicating details of transactions that took place between October 2008 and July 2009. This statement did not include any proof of subscription nor did the IP explain how this number came to be on its systems.

**WASPA appeals panel
Complaint 7424**

- 3.7 There was also a discrepancy between the versions of the complainant and the IP in respect of the handset model used to subscribe to the service. The complainant averred that he was using an HTC TyTn during October 2008 whereas the IP's records indicated a different handset.
- 3.8 The complainant was not satisfied with the refund and raised the following pertinent queries for resolution:
- 3.8.1 How was it possible for the IP to debit an account in respect of multiple subscriptions without proof of subscription?
- 3.8.2 How was it possible for the IP to deduct subscriptions in multiples of R15 without complying with the WASPA regulations on subscriptions of R10 or more?
- 3.8.3 How did the IP manage to obtain a number which is unknown to most people and then use it for subscription purposes?
- 3.8.4 Given that it is impossible to unsubscribe from the primary cell number how many of these numbers are currently subscribed to the IP's services?
- 3.9 The IP indicated that:
- 3.9.1 It had requested clarification from the relevant network service provider as to how it was possible for numbers to be confused in this manner.
- 3.9.2 It had proof of subscription and download activity from the correct number but that the charges were being levied on a different number.
- 3.9.3 It appeared that the complainant was being billed for somebody else's use of the service.
- 3.9.4 It could not interfere with the complainant's settings on his mobile accounts or the slave accounts.
- 3.10 The IP provided proof of subscription on 15 October 2008 as well as two further opt-in request which took place on 24 December 2008 and 22 March 2009.
- 3.11 The adjudicator made the following findings:
- 3.11.1 That, subsequent to the correct number being identified, the IP was obliged to provide clear logs in terms of section 11.6.2 of the Code but had not done so.
- "Once the correct number was identified, the SP was then under an obligation, pursuant to the unsubscribe request, to provide clear logs in terms of section 11.6.2 of the WASPA Code. I am not satisfied that the SP has done so. In terms of section 11.6.2, such logs must include the following information: (a) proof that the customer has opted in to a service or services; (b) proof that all required reminder

**WASPA appeals panel
Complaint 7424**

messages have been sent to that customer; (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and (d) any record of successful or unsuccessful unsubscribe requests. The SP has not provided adequate proof that the complainant opted-in for the services in question. The SP faces the following problems in this regard:

1. The handset used by the complainant at the date of subscription differs from the handset details identified in the SP's print-out.
2. The number used to subscribe is a slave fax number connected to the complainant's sim. The complainant was not even aware that he had this number at the time when he allegedly subscribed to the SP's service.

These issues were raised in the complaint but have not been answered by the SP. An adverse inference must therefore be drawn against the SP and the conclusion reached that the complainant did not validly opt-in for the service in October 2008."

3.11.2 That, while the records provided by the IP indicated that the complainant had opted-in through a WAP site, the IP had not complied with section 11.1.11 by obtaining a separate confirmation from the complainant prior to any billing taking place.

3.11.3 That the IP had accordingly breached sections 11.6.2 and 11.1.11 of the Code.

3.12 As noted above the adjudicator imposed a sanction of suspension as well as a fine of R150 000.

"This complaint is one of a number of complaints brought against the SP on the same or similar grounds. There appears to be a pattern developing whereby members of the public are being subscribed to the SP's services without their knowledge or consent. Such conduct must be viewed in a very serious light. The SP in this complaint has denied its obligations under the Code and has attempted to shift blame onto the shoulders of the complainant's network operator. However, despite denying any culpability on its part, the SP has made a full refund to the complainant, together with interest. Taking these factors into account, the following sanctions are given:

1. The SP is ordered to suspend all its subscription services accessible from its WAP sites until such time as it has verified all subscribers on its database and provided the WASPA Secretariat with confirmation that it has done so.
2. The SP is fined R150 000.00.

These sanctions may not be suspended pending any appeal being lodged against this decision by the SP."

4 GROUND OF APPEAL

- 4.1 The IP raised the following arguments in respect of the decision of the adjudicator that it had breached section 11.6.2 of the Code.
- 4.1.1 The IP had provided “detailed information” to WASPA with regard to: proof of subscription, the mobile telephone number and handset details of the complainant, the IP address, the date and time of transactions, the product and type of product purchased and the session IDs.
- 4.1.2 The IP had demonstrated through the logs provided that the complainant had opted in to the subscription services and provided the MSISDN and handset model with which this was achieved.
- 4.1.3 The Adjudicator had however found that the IP was obliged to provide “clear logs” and had not done so, nor had it provided adequate proof that the complainant had opted in to the services. The Adjudicator also held that there was a discrepancy between the handset model specified by the IP and that used by the complainant.
- 4.1.4 The IP now wished to submit “additional and comprehensive logs in respect of the Complainant’s subscription” and attached these as Annexure A to its response. The IP submits that these logs indicate proof of opt in as also proof that the IP sent all required reminder messages.
- 4.1.5 The IP asserted that its subscription activation process was at all relevant times compliant with the requirements of the Code.
- 4.1.6 The IP was accordingly of the view that it had “substantially complied” with the Code and that the sanction imposed was therefore unduly harsh.
- 4.1.7 The IP sought to address the issues raised by the adjudicator regarding the discrepancy in handsets and the number used to subscribe to the service.
- 4.1.8 The IP emphasised that it had played an active role in trying to sort out the initial confusion over the link between the complainant and the subscription services and that it had worked with the complainant and the relevant network service provider in this regard.
- “As such, there was proof of subscription from the slave fax number which was provided by Mobimex to both the Complainant and to the Adjudicator, despite there being a discrepancy between the information reflected on Mobimex’s records and the Complainant’s records regarding which handset was used for the subscription”
- 4.1.9 The IP also wished to make it clear that the extent to which it could remedy matters was limited:

**WASPA appeals panel
Complaint 7424**

“Mobimex cannot interfere with the settings of the mobile numbers in the complainant’s possession; Mobimex can only provide services to mobile numbers. As such, any queries relating to the settings of the mobile numbers should be directed to the Complainant’s network service provider rather than Mobimex as Mobimex does not have access to the necessary information to determine how the data was transferred from the slave fax number to the customer’s primary number. Mobimex submits that it is unfair and prejudicial for it to be penalised in this respect. Mobimex informed the Complainant that it could not provide any information in this regard but the network service provider did not respond to requests for this information. As such Mobimex provided all the assistance which it was in a position to provide and cannot be sanctioned for failing to provide information which can never be in its possession as a service provider and which is held by the network operator’s alone.”

- 4.2 The IP expressed the view that the adjudicator had erred in accepting the complainant’s version without further assessment thereof and that the adjudicator should have borne in mind that consumers “in many instances and for various reasons” will “deny subscribing for content” where they are billed for accessing it. The IP had sent all required notification messages which should have made it evident to the complainant that he was subscribed to its services.
- 4.3 With regard to the discrepancy in handset models the IP emphasised that it had provided all information to which it had access and that such information was obtained from the network service provider. The IP was aggrieved that the adjudicator had drawn an adverse inference against it when choosing to believe the information provided by the Complainant.
- 4.4 The IP submitted that “even if a slave fax number (which was linked with a mobile SIM card) was used by the Complainant, it would still be possible for such SIM card to be used in a mobile phone to download content”. The IP therefore considered the information set out in the logs provided to be correct and that this view was substantiated by the correlation between such logs and the information held by the service provider / aggregator and by the mobile network operator.
- 4.5 The IP concluded that “all of the evidence thus appears to indicate that the Complainant did, in fact, validly opt-in for the Services in October 2008”.
- 4.6 As regards the finding by the adjudicator that the IP had breached section 11.1.11, the IP argued as follows:
 - 4.6.1 This finding was based on version 7.4 of the Code which came into force on 17 June 2009. The dispute around subscription, however, dates back to 15 October 2008 with further opt-in requests recorded on 24 December 2008 and 22 March 2009. During this period the

**WASPA appeals panel
Complaint 7424**

relevant version of the Code was version 6.2 and this version does not contain a provision on par with section 11.1.11 as it is set out in version 7.4.

- 4.6.2 It follows that – at the time the subscription took place – there was no requirement on the IP to obtain a separate confirmation from the complainant’s handset prior to billing taking place. The provisions of the Code cannot be applied retrospectively and the adjudicator had erred in this regard.
- 4.1 It is the intention of the Panel to substitute in its entirety the decision and sanction imposed by the Adjudicator. It is accordingly not necessary to consider the arguments raised by the IP relating to the legitimacy of the sanction (those relating to mitigation will be separately considered below).
-

5 FINDINGS OF THE APPEAL PANEL

- 5.1 The IP did not in its response to the complaint submit logs with the particularity required by section 11.6.2, a fact which it clearly acknowledges in its appeal document and which is implicit from the provision of “additional and comprehensive logs”.
- 5.2 The provision of logs which are compliant with section 11.6.2 as part of the appeal document does not excuse the original breach and the submissions of the SP are, in essence, raised in mitigation.
- 5.3 The finding of the adjudicator that the SP breached section 11.6.2 is accordingly confirmed.
- 5.4 The Panel noted that the obligation to provide the logs arose at the time that the IP was requested by WASPA to provide these, i.e. during July or August 2009 when the complaint was first lodged and that version 7.4 of the Code was in force during this time.
- 5.5 The Panel agrees with the submission of the IP as regards the breach of section 11.1.11 and the appeal succeeds in this regard.
- 5.6 The Panel does not attach any great import to the issues surrounding the correct handset or the “ghost” number within the context of this appeal, but notes the following:
- 5.6.1 It appears that the “ghost” number was being actively used to access services.
- 5.6.2 It further appears from the logs that the usage pattern indicates that it was probably not the complainant using the “ghost” number in this manner.
- 5.6.3 WASPA should take steps to clarify this matter with the network providers.

**WASPA appeals panel
Complaint 7424**

- 5.7 As regards the sanction imposed by the adjudicator the Panel:
- 5.7.1 Notes that it was applied in respect of both of the breaches found by the adjudicator and it is therefore not possible to effect an apportionment now that one of these findings of a breach has been overturned.
- 5.7.2 Agrees with the submissions made by the IP to the effect that the adjudicator's use of other complaints which had not been finalised at the time that complaint 7424 was lodged in aggravation of sanction is not correct.
- 5.7.3 Agrees with the submissions made by the IP that it was improper for the adjudicator to consider in aggravation of sanction the notion that complaint 7424 appeared to be part of a pattern of consumer complaints relating to non-consensual subscription to the IP's services.
- 5.7.4 Agrees with the submissions made by the IP that there was a degree of compliance with section 11.6.2 and notes that any prejudice resulting could be easily remedied.
- 5.7.5 Regards the sanction imposed as excessive.
- 5.8 In the circumstances the Panel hereby substitutes the following finding and sanction for that imposed by the adjudicator in complaint 7424:
- "The [SP] is found to have breached section 11.6.2 of the Code.
- The [SP] is ordered to refund the complainant in full.
- The [SP] is fined R1 000."
- 5.9 This sanction is a consolidated one lying in respect of complaints 7285, 7314 and 7424.
- 5.10 The Adjudicator had ordered the suspension of all subscription services offered by the IP in South Africa, thereby confirming the suspension which had been put in place on 3 December 2009 by a WASPA Emergency Panel. For the avoidance of doubt the Panel wishes to clarify that this suspension is no longer of any force and effect.
- 5.11 The appeal fee is refundable.
- 5.12 Note: While the underlying facts in this matter – particularly the fact that dates on which content was downloaded by the complainant coincide with the dates on which subscription occurred – strongly suggest that the subscription resulted from the dual subscription and pay-per-view model employed by the IP in its Erotik Portal and South African Music Portal services, this was not the finding made by the adjudicator nor is it the subject therefore of the appeal. The Panel is any event mindful that the breaches relating to these services have been sanctioned elsewhere.