



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	TIMw.e. New Media Entertainment South Africa
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Robert Buckley
Complaint Number:	8452
Code Version:	7.4
Advertising Rules Version:	2.3

Complaint

The Complainant stated the following:

“Approximately six months ago I received an SMS from an unknown source informing me that I had subscribed to receive a daily horoscope at a cost of R4.99 a day. As I have no interest in horoscopes nor did I subscribe to anything remotely like that, I deleted the SMS thinking that it was hoax. Last week I discovered that R4.99 had been deducted from my cell phone account every day since 6 June 2009 by a company called Mira Networks on behalf of another company called, I believe, Vibra Movil. This totals up to approximately R1 030. I contacted Mira Networks, after finding out their identify from Vodacom, to find out what was going on and was informed that it was for a daily horoscope that was to be forwarded to my cell phone (072 292 5873) each day. They also told me that I had subscribed to the service in June 2009. When I pointed out that I had not, they said that someone must have got hold of my phone and done it on my behalf (a pathetic excuse). I would like to put on record that at no time did I ever subscribe to this ‘service’ and, in fact, have I never ever received a ‘horoscope’ from them. When I asked for my money to be returned I was told that this wasn’t possible, but I could ‘unsubscribe’ if I wanted to, which I did. Interestingly, the next evening I received an SMS from the same company saying “Well done! You have subscribed to Music Club and will be receiving five ring tones and a video each week at a cost of R4.99 per day.” Now, the literal translation of subscribe means to sign at bottom of a document, which of course I never did in this case. The modern meaning of the word means to arrange to receive something on a regular basis which, once again, I never did in this case. This is blatant scam where huge money is at stake and which is catching thousands of unsuspecting people every day. I am sure that your organization

is aware of what is going on, but how you can continue to let them get away with it beats me. Also, I cannot understand how Vodacom refuses to accept any responsibility, although they are obviously making money from this scam as well. On my legal advisors advice, I will be also taking this matter up with the SAP Commercial Crimes Unit, The National Consumer Council and Consumer Affairs. I will also be writing to the Saturday Star. I would be grateful if you would look into this matter at the earliest opportunity. I also expect to get my money back plus interest and expenses."

The Complainant provided the following reason for escalation:

"I have just spoken to Charles and made it clear that I want this business with Mira Networks further taken further. Firstly as they have, in effect stolen approximately R1030 from me, I want a full refund of my money. Secondly, as what they are doing amounts to fraud, I want Mira Networks taken to task. I have sought legal advice on the matter and, as advised, I have reported the case to the SAP Commercial Crime Unit and The National Consumer Forum. I have also contacted 707 Radio and written to the Star newspaper. I intend to pursue this matter until Mira Networks are properly dealt with."

The Complainant provided the following feedback:

"As I will not have an opportunity to speak to the adjudicator personally, I would like to stress that at no time did I ever receive a, so called, horoscope from these people, let alone subscribe to receive one. Therefore, I would appreciate it if you would pass my comments on. As a matter of fact, the Oxford England Dictionary (latest version) defines subscribe as: Arrange to receive something on a regular basis... or to express agreement with an idea or proposal. I think the key words here are "arrange" and "agreement." As neither of these actions took place I can't see how Mira Networks can suggest that I subscribed."

The Complainant also wrote:

"As this case has now gone for adjudication, it has occurred to me that the question may be asked as to why I was slow to see that deductions were being made from my account each day.

The reason is as follows:

"I have a Family Top Up account with Vodacom. This means that I pay a fixed amount each month, in advance. The bill I receive does not show details of calls that have been made previously. Therefore, there is no way of checking where the money was spent, apart from phoning Vodacom and asking them, which, of course, is what I did in the end.

This is obviously one of the reasons why Mira Networks and outfits like them are allowed to get away with the scam.

Incidentally, a similar case was reported by a reader in the Sunday Times last week (10/01/10). He stated that the outfit carrying out the scam on him (Venista) agreed to credit his MTN account with the money they had fraudulently obtained.

I want it made clear that I expect any refund to be credited to my bank account, not my cell phone account. Apart from the fact that I am unlikely to want use over R1 030 worth of airtime in addition to the amount that I pay for in advance each month, I don't see why Vodacom should profit from this as they must be fully aware as to what is going on and are, in fact, party to the scam."

In response to the SP's reply the Complainant wrote:

"Firstly: I am prepared to accept the refund as long as it is paid to me personally and not paid into my cell phone account for Vodacom's benefit. Secondly: I still want to see the, so called proof, that I subscribed. Because they are lying to cover their arses - I DID NOT SUBSCRIBE! In fact, I have no interest in so-called horoscopes what-so-ever. And I can assure you no-one would have subscribed on my behalf. These people are scam artists and must be stopped."

In his final response the Complainant stated:

"With regards to your figures: I have received the billing logs from Vodacom and I make it that there were 199 successful billings by Vibra Movil. I assume that you are working with the same information.

However, what the billing log doesn't tell me is how much each billing amounted to.

Why I mention this is because a recent magazine article that covered the subject of unscrupulous network providers, stated that where a "subscriber has insufficient funds in their account on a particular billing date, the accumulative amount is deducted by the network provider once the "subscriber" tops up their account.

This makes perfect sense because if the "subscriber" had actually subscribed to receive a daily service, such as a horoscope, the supplier would be entitled to make this deduction and, of course he would be silly not to. Therefore, if we are to assume that TIMwe have got their accounting right they would have deducted everything they claim I owed them. Or are they making so much money that they don't really care?

On the other hand, I am pretty sure that if I asked my bank to lend me R1 112.77 (4.99 x 223) at R4.99 a day for 223 days they would want to charge me compound interest. Therefore I don't see any reason why I shouldn't be entitled to ask for interest on the money that was illegally taken from my cell phone account.

Incidentally, you seem to think it necessary to repeatedly imply that I knowingly subscribed to receive "adult content", which I didn't. Maybe it's because you are planning to refund me for that as well - R60 I believe.

Other than that I cannot see the relevance here unless, of course, the idea is to try and embarrass me so that I'll drop the case. It's probably a tactic that

you people use quite often, as was highlighted in the article in last weeks Sunday Times called "Vodacom customers also need to keep their eyes peeled." Please assured, it won't work with me!

You'll be happy to know that Noseweek magazine is planning to run another article about cell phone scams - *guess who's going to be one of the first to contribute?*"

Service provider's response

After several reminders the SP provided the following response:

"Attached you'll find the proof of subscription. I have asked our technical team to provide the IP address from were the client made the subscription to proof that the pin code was introduced by the user of the phone or by someone with access to it. Tomorrow I should have this proof. Regardless of this, we'll refund the client as it seems he was not happy with the service. I detected now that in fact the client didn't receive the horoscope due to a failure in our system.

But we can prove he subscribed to the service. We did not send the correct content so obviously we will refund the client in full."

The SP provided an additional reply:

"The IP address is on a partners' server and they will send it tomorrow. As soon as I have it I'll send you."

The SP provided an input to the complaint:

"Mira would like to respond to this complaint as the customer is not going away. The refund amount offered is only for the portion that we billed on Timwe's behalf which comes to R983.03. The customer however insists on a refund of R1043.03.

Further to the above there were two downloads done from American Mobile Ventures. This is not a subscription service but a once off billing for dirty video downloads. The formal logs can be requested from AMV. This was charged at R30 per download. This R60 cannot be refunded by Timwe as it is not part of their service so we assume that the additional costs he is complaining about is the R60 for the once off downloads he requested.

In addition to explain the Timwe subscription process the user will go online and insert his cell number on a webpage. The user will then receive a password on his handset to activate the service. Once the user inserts this password on the website they will receive a welcome message on the handset. The subscription services cannot be initiated without the password activation. "

The SP provided an additional input:

"Our call centre will contact the client to make the refund to the bank account. Regarding the proof we have the IP address from where the subscription was made 196.35.158.179. We can't ask the client's internet service provider to confirm that this is the client's IP address at the moment of the subscription but the client can do it and confirm."

The SP wrote:

"I received feedback from Vodacom that this complaint was lodged at the Vodacom CEO office, please be advised this case was referred back to WASPA for the adjudicator to review as you declined Tim We's refund offer. Mira Networks is still prepared to offer the refund of R983.03, as per the adjudicators ruling for WASPA complaint 24056, as for the rest of the money's being claimed by you, the full amount deducted for Tim We was only R983.03 we are in no position to allocate a further refund for moneys we did not collect.

We did refer your case back to the adjudicator to decide whether you are entitled to collect interest on the money's. I am not sure what the time lines are concerning the review but WASPA can give you more insight. I did forward the full logs on your number to WASPA for the review. "

The SP provided another feedback:

"To give you further feedback. There were 223 billing attempts.

Only 197 were successful.

And there were 26 failed attempts due to insufficient airtime.

$197 \times R4.99 = R983.03$

Below please see the content that was downloaded on the 2008/11/08 2 adult content video's from AVM blingmob 2 x R30 video's, this is once off downloads and get only be ordered directly from the handset.

BILLING 2008-11-08 10:08:24 AMV 31931Mobile 365 AMV 31931 (Mobile 365) 2782004842231931 3000 SUCCESS SAVids: *Billing confirmation for Content ordered 2008-11-08. R30.00. Terms: <http://wap.blingmob.com/tdirtyvidsterms.wml> Help: 0114610317*

BILLING 2008-11-08 10:08:24 AMV 31931Mobile 365 AMV 31931 (Mobile 365) 2782004842231931 3000 SUCCESS SAVids: *Billing confirmation for Content ordered 2008-11-08. R30.00. Terms: <http://wap.blingmob.com/tdirtyvidsterms.wml> Help: 0114610317*

I also once again attached the logs on the number in question.

As per my previous email, our offer stands for the refund of R983.03 but I am prepared to wait for the adjudicators review to see if they will grand a further refund and the interest Mr. Buckley wants to claim."

In its final response the SP wrote:

“Mira Networks billed you 197 x R4.99 = R983.03 for the Tim We subscription, there was 223 billing attempts but only 197 were successful and as I said before, Mira Networks can only refund you for the exact amount that you were billed for the Tim We subscription.

As for the additional content that was downloaded, it is not a subscription a service but once off downloads that was ordered from your phone. Mira Networks has an obligation to report all traffic on your number and we picked that up on your number, when we send logs to WASPA and the networks we send the full logs to them and that will include all traffic found. Your original complaint did not include the additional downloads and when I send my report in to WASPA for the adjudicators review on the case I reported all traffic found on the number. There were no motives behind it I simply reported what we found on the number.

We have offered you a refund which you declined, the case is now in for review by the adjudicator we will now wait for the outcome of the review.”

Sections of the Code considered

3.3.1. Members will not offer or promise services that they are unable to provide.

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.

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 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.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.5.1. Instructions on terminating a 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.

11.5.5. Members must ensure that the termination mechanism is functional and accessible at all times.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant was subscribed.

These facts read together with the logs provided reflect contradictory evidence and boils down to the typical scenario of I said this you said that.

The Adjudicator has long deliberated on this case and finds it difficult to come to a conclusion.

Taken all the evidence provided into consideration and pondering on all the allegations made by both parties the Adjudicator can only rule on the failure of the SP to provide the services "promised". This suggests a breach of section 3.3.1.

Although the Adjudicator can understand all the frustrations of the Complainant in this matter, it has to be emphasized that the SP in this matter has provided its full co-operation in trying to alleviate any alleged irregularities.

At the same time, the Adjudicator cannot dismiss the allegations leveled by the Complainant, and it is obvious that somewhere something went wrong. Sufficient proof on behalf of the Complainant is however absent and for obvious reasons difficult or impossible to obtain. The Adjudicator only has hearsay evidence, which in itself is a difficult source for making an effective ruling.

Due to the fact that the SP was unaware of its system's malfunction in providing the horoscopes, it cannot be ruled out that there might have been other failures on behalf of the SP, whether technical or otherwise which might have triggered unintended or wrongful subscription. These are mere speculations and ruling on such speculations or allegations without sufficient proof would be erroneous.

The Adjudicator therefore finds the SP only in breach of section 3.3.1.

The Complaint is partially upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

The SP is formally reprimanded for its breach of section 3.3.1.

The SP is instructed to refund the Complainant in full (R 983-03) plus interest accumulated until receipt of this notice within 5 working days notice hereof.

In addition, the SP is instructed to provide a full report to the WASPA Secretariat explaining its failure to notify the users subscribed over the same period over the malfunction of its system. In the report the SP must also indicate whether these users have been refunded.

The report should also describe its subscription methods and processes. Should any irregularities come to the attention of the Secretariat, it must be referred back to Adjudication.