

**WASPA appeals panel
Complaint 8725**

REPORT OF THE APPEALS PANEL

Date: 22 April 2011
Appellant and Service Provider (SP): SMSNet-SA
Complaint Number: 8725
Applicable versions: 8.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 09 February 2010, by an individual against SMS-Net.

1.2 The SP is a South African company and full member of WASPA.

1.3 The complaint relate to subscription services.

1.4 The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The complaint relates to alleged breaches of sections 11.1.5, 11.1.8 and 11.6.2 of the Code, which reads:

2.1.1 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.

2.1.2 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:

- 2.1.2.1 (a) The name of the subscription service;
- 2.1.2.2 (b) The cost of the subscription service and the frequency of the charges;
- 2.1.2.3 (c) Clear and concise instructions for unsubscribing from the service;
- 2.1.2.4 (d) The service provider's telephone number.

2.1.3 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:

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

2.2 In this appeal, the panel will be guided also, by the general provisions and purpose of the Code:

2.2.1 1.2 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.

2.2.2 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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

The Adjudicator stated: “In the absence of any response from the SP, I must accept the complainant’s evidence in support of his denial that he ever downloaded the content referred to and/or that he subscribed to the SP’s services.

The SP has therefore breached section 11.1.5 of the WASPA Code.

In the absence of any response from the SP, I must accept the complainant’s evidence that he never received in notification or reminder messages for the subscription.

The SP has therefore breached section 11.1.8 of the Code.

The SP has also failed to upload clear logs after receiving a request from WASPA for it to do so. The SP has therefore breached section 11.6.2 of the Code.

The complaint is accordingly upheld.”

3.2 Sanctions

In giving sanctions, the Adjudicator stated the following:

“There have been previous complaints made and upheld against the SP in respect of its subscription services. I have also recently adjudicated another complaint against the SP were it was found that the SP has failed to pay a number of outstanding fines handed down from previous adjudications (see report for complaint 7923).

The SP's failure to respond to the initial request to upload proof of subscription and its failure to respond to this complaint has also been noted.

In light of the foregoing, the following sanctions are given:

1. The SP's membership of WASPA is suspended for 6 (six) months.
2. The SP is ordered to refund all amounts charged to the complainant's account and must provide written proof that it has done so to the WASPA Secretariat within 7 (seven) days of receipt of this report."

4. **GROUND OF APPEAL**

4.1 Grounds of appeal for complaint 8725:

4.1.1 The appeal is attached hereto.

5. **FINDINGS OF APPEAL PANEL**

5.1 Version of the Code

5.1.1 The complaint was made on 09 February 2010. Version 8.0 of the Code, in use from 13 October 2009 to 31 March 2010, applies.

5.2 Finding

5.2.1 With reference to its paragraph 1 the Appellant stated that the Adjudicator's findings are incorrect and cannot be justified.

5.2.2 It offered some reasons as to which this Panel will reply.

5.2.3 With reference to its paragraph 1.3:

5.2.3.1 This Panel cannot agree with this statement and in fact wants to draw the Appellant's attention to an email dated the 09th of February 2010, addressed to no fewer than four Appellant addressees by the WASPA Secretariat.

5.2.3.2 In this email, the Appellant was offered five working days to respond to allegations made by the Complainant, of which all allegations were contained in the said email.

5.2.3.3 No response was forthcoming and the WASPA Secretariat, **thirteen days** later, offered the Appellant another opportunity to respond, detailing reasons as to why it is beneficial to respond.

5.2.3.4 To highlight this, the Panel will refer to following statement in the email sent the 22nd of February 2010: "While you are not required to provide WASPA with a response, should no response be forthcoming from your office today, the WASPA Secretariat will be obliged to hand this complaint to an adjudicator **without the benefit of your input.**" (Panel's emphasis added).

5.2.4 With reference to its paragraph 1.5:

5.2.4.1 As stated in paragraph 5.2.3, this Panel cannot agree with the Appellant's contention that it was not afforded the opportunity to test the statements of the Complainant.

5.2.4.2 In fact, more than enough time was afforded.

5.2.4.3 This Panel has examined the Appellant's so-called factual proof of the subscription.

5.2.4.4 The so-called factual proof of subscription does not illustrate to this Panel:

5.2.4.4.1 whether the subscription was due to an opt-in or not; or

5.2.4.4.2 whether or not it was an automatic subscription due to a request for any non-subscription content or service.

5.2.4.5 If the Appellant provided more proof of the process followed, or offered a reply to the allegations made, the contrary might have sufficed.

5.2.4.6 In the absence thereof, the Panel has to give the benefit of the doubt to the Complainant.

5.2.5 With reference to its paragraph 1.1, 1.2 and 1.4:

5.2.5.1 This panel is of the opinion that these allegations are mere attempts on behalf of the Appellant to discredit the Complainant, which, without proper proof on behalf of the Appellant, remains only that, "mere attempts".

5.2.6 This Panel therefore has no alternative but to concur with the Adjudicator, and find the Appellant in breach of section 11.1.5 of the Code.

5.2.7 With reference to its paragraph 2 this Panel is of the opinion that the Appellant has not familiarise itself with the content of the Code and its allegations under its paragraphs 2.1, 2.3 and 2.4 are irrelevant to section 11.1.8 of the Code.

5.2.8 With reference to its paragraph 2.2, this Panel has to disagree with the Appellant, and disagrees on the basis that the Appellant has not provided any evidence or proof of reminder messages, not even in its Appeal – in various other cases before this Panel, SPs / Appellants have done so.

5.2.9 This Panel therefore has no alternative but to concur with the Adjudicator, and find the Appellant in breach of section 11.1.8 of the Code.

5.2.10 This Panel wants to refer the Appellant once again to section 11.6.2 of the Code; the Code states: "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.”

5.2.11 It is this Panel’s view that none of these conditions were met.

5.2.12 If the Appellant alleges that its Annexure A provides proof thereof, then this Panel has to assume that the Appellant is completely mistaken.

5.2.13 The Panel concurs with the Adjudicator and finds the Appellant in breach of section 11.6.2.

5.2.14 With reference to its paragraph 4:

5.2.15 According to section 13.3.11 of the WASPA Code of Conduct an adjudicator, when determining any appropriate sanctions, must take into consideration:

- 5.2.15.1 any previous successful complaints made against the member;
- 5.2.15.2 any previous successful complaints of a similar nature.

5.2.16 As per WASPA records in its complaints search directory, there are 19 complaints against the Appellant on date of Appeal.

5.2.17 Nine of these relate, in the opinion of the Panel, to some degree with erroneous billing for unsolicited subscription services.

5.2.18 Without referring to adjudications 6730 or 7923, five of these complaints were upheld and the following sanctions were imposed:

- 5.2.18.1 Adjudication 3548: Refund of subscription charges ordered.
- 5.2.18.2 Adjudication 5558: Fine of R20 000.00 imposed.
- 5.2.18.3 Adjudication 5214: Refund of subscription charges ordered and a fine of R35 000.00 imposed.
- 5.2.18.4 Adjudication 5352: Refund of subscription charges ordered.
- 5.2.18.5 Adjudication 6403: Refund of subscription charges ordered.

5.2.19 It was also found that Adjudication 8060 still remains unpaid.

5.2.20 The Panel has taken note of the allegation that the Appellant did refund the Complainant.

5.2.21 In determining whether the six month suspension as ordered by the Adjudicator is justifiable, all of the above were taken into consideration.

- 5.2.22 The Panel is of the opinion that in this instance, a six month suspension is not appropriate and therefore overturns the Adjudicator's sanction of a six months suspension.
- 5.2.23 The Panel is however also of the opinion that the Appellant's actions are casting the industry in ill-repute.
- 5.2.24 The Panel therefore fines the Appellant R100 000-00 which must be paid to the WASPA Secretariat within 5 (five) working days of receiving notice hereof.
- 5.2.25 The Panel further suspends the Appellant's services for 3 (three) months, this sanction being suspended for a period of 3(three) months from date hereof.
- 5.2.26 The suspended sanction will be triggered if the Appellant commits any subscription related breach within the 3 month period, or refrain from paying any outstanding fines as stipulated, apart from those adjudications which are pending appeal.
- 5.2.27 The cost of appeal is non-refundable.