



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	14369
<b>WASPA member(s):</b>	Mobile NOBO (IP) / Tanla Mobile (SP)
<b>Membership number(s):</b>	1091 (IP) / 0118 (SP)
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Subscription Service
<b>Date complaint was lodged:</b>	2011-08-12
<b>Date of the alleged offence:</b>	2011-05-01
<b>Relevant version of the Code:</b>	10.0
<b>Clauses considered:</b>	3.1.1, 4.1.2, 11.2.1, 14.3.13
<b>Relevant version of the Ad. Rules:</b>	Not Applicable
<b>Clauses considered:</b>	Not Applicable
<b>Related cases considered:</b>	7505; 8909; 9624; 9978; 10511

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### Complaint & Response

1. This complaint relates to an allegation of subscription without consent. The subscription service in question is operated by "Mobile NOBO" (the "IP"), which is an affiliate member of WASPA. Tanla Mobile (the "SP") acts as the aggregator for the IP's services, and is also a member of WASPA.
2. On 7 July 2011 the complainant lodged a complaint on WASPA's "unsubscribe" service, and specified that he wished to report the SP for "theft and fraud". According to the complainant, sites like "HelloPeter" frequently report such conduct on the part of the SP. When the complainant contacted the SP prior to lodging the complaint, he was told that they would cancel all of his subscriptions, but was given no explanation for how he came to be billed for the service complained of.
3. According to WASPA's unsubscribe system records, the SP contacted the complainant and offered a full refund. On 18 July, the Secretariat asked the SP for proof of subscription, and on the 27th the SP requested that the matter be handed over to the IP. Presumably the handover was requested because

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the SP was merely the aggregator in this case. The unsubscribe system shows that on 2 August the IP listed the unsubscribe response status as "unsubscribe" but that it had not offered a refund.

4. According to the record the IP provided proof of subscription in the form of a log, of which the following aspects are noteworthy:
  - 4.1. No MSISDN is set out in the logs.
  - 4.2. The document is dated 28/7/2011.
  - 4.3. "Start" and "Stop" dates are reflected as 1/5/2011 and 28/7/2011 respectively.
  - 4.4. There is one "MO" log entry dated 1/5/2011. This reads "User sent keyword 'win'", and lists a destination shortcode of "39826".
  - 4.5. The required welcome message was sent on the 1<sup>st</sup> of May, as is the first download link.
  - 4.6. The last download link was sent on the 27<sup>th</sup> of May.
5. The complainant was not satisfied with the IP's response, and on the 12<sup>th</sup> of August requested that the matter be escalated to formal adjudication. He also made the following comments:
  - 5.1. The complainant has a record of SMSes that he sent during the period. None of them were sent to the IP to his knowledge, and he certainly did not SMS the word "win" to the IP.
  - 5.2. There is no MSISDN listed on the logs provided by the IP.
  - 5.3. "I did get some arbitrary message a few days before saying I had won something. I did reply and the message I sent to 02784000134539826 was: who are you? How did I win a phone? this is not the same as sending a message saying Win."
6. The WASPA Secretariat escalated the matter to a formal complaint and provided the required notifications to the IP and the SP on the 12<sup>th</sup> of August.
7. The IP for its part merely provided another version of the log described above. The difference between the two versions is that this later version has a further irrelevant entry under "Support activity", and also lists an IP address.
8. The complainant was not satisfied with this response when the Secretariat forwarded it to him:

It is to be noted that there has been a great deal of effort to inform me that I am unsubscribed and my problem is not really there. The real issue is that they "subscribed" me in the first place, and it is that with which I have an issue. So, the adjudication needs to be in respect of the supposed subscription, not the un-subscription.
9. I requested the WASPA Secretariat to obtain further particulars from the IP. Many of the questions were addressed in the IP's response to a similar request in complaint number 14252, but the following remain:

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Why do the logs provided not mention an MSISDN?

No downloads are shown in the logs provided - are there any records of the complainant downloading material? If so please provide them.

Why is the MO entry manually entered? It is rare for an automated system to produce a record like " User sent keyword "win".

What does the IP address listed in the second log provided refer to?

Is the log a comprehensive record of all communications by SMS between the IP and the complainant?

10. The IP did not respond to this enquiry, despite two reminders being sent to it. I find it significant that I received responses to my questions in complaint number 14252, which were sent at the same time as the questions in this complaint.
11. The SP responded to the escalation by advising the secretariat that it would investigate and revert; the outcome of its investigation is set out in the related complaint 14252, the upshot being that it suspended all billing services in respect of the IP for all South African networks.

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### Sections of the Code considered

12. The conduct complained of took place during May 2011. As a result, version 10.0 of the WASPA Code of Conduct is applicable. The following clauses of the Code have relevance:
  - 3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
  - 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.
  - 11.2.1. 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.
  - 14.3.13. Providing incorrect or fraudulent information in response to a complaint, or in response to any other request to provide information is itself a breach of this Code.

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### Decision

13. Complaints relating to subscription services often fail due to a lack of evidence. The complainant is adamant that he did not subscribe to the service complained of, and the IP produces logs that show that the complainant *did* subscribe. It is very difficult to find against the IP in such a case without also finding that the IP falsified its logs. Such a finding inevitably leads to a severe penalty being imposed.

14. In this matter the complainant has kept records of SMSes sent during the period. While he admits sending an SMS to the member, he alleges that he sent it in response to a spam SMS sent to him, and that it certainly did not contain any wording that would indicate an intention to subscribe to a subscription service.
15. The IP in its turn produced logs to prove that the complainant subscribed to its service. The logs purport to indicate that the complainant subscribed to the IP's service by sending a keyword to the IP's shortcode. The log entry is peculiar however in that it reads simply "User sent keyword 'win'", and lists a shortcode of "39826". An automated log entry would normally contain more substantial information, including the subscriber's MSISDN. The impression created is that the entry was created "by hand".
16. Further, if the complainant subscribed to the service by sending an SMS to the IP 's shortcode (i.e. not by use of WAP or website), why did the IP see fit to list an IP address in the log?
17. Finally, why did the IP not respond to my request for further information when it responded to such a request in respect of complaint 14252 sent at the same time? The WASPA secretariat sent the IP two reminders to respond, and there was little scope for confusion in the matter. In the circumstances, I draw a negative inference from the IP's failure to respond. It is reasonable to conclude that it did not respond because it could not explain away the implication that it had falsified its logs.
18. The Complainant holds a dogmatic position that he did not subscribe to the service in question. He quotes the SMS that he sent to a party who may have been the IP. If I were to suggest that he may have subscribed by mistake, I have little doubt that he would reject the suggestion.
19. The IP is equally dogmatic that the complainant *did* subscribe, and has produced logs to "prove" it.
20. Unfortunately is clear that one of the parties is lying, and on the evidence described above, I am of the opinion that the IP is that party.
21. Consequently, I find that the IP has infringed clause 11.2.1 of the Code of Conduct in that it subscribed the complainant to its subscription service without his consent.
22. It follows from my conclusion above that the IP must have falsified its logs, and accordingly I find that it has infringed clause 14.3.13. Such conduct also necessarily infringes clauses 3.1.1 and 4.1.2.

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## Sanctions

23. The IP's record of previous infringements of the Code of Conduct is not a happy one.
  - 23.1. Under complaint 7505 the IP was found to have infringed, inter alia, clause 4.1.2 and sundry clauses relating to subscription services. The

IP was fined the amount of R100 000, of which R 80 000 was suspended.

- 23.2. Under complaint 9978 the IP was found to have infringed clauses 4.1.1 and 4.1.2 of the Code. The IP was fined the amount of R150 000, which remains unpaid.
24. Clause 14.3.13 refers to “incorrect or fraudulent information”, and thus contemplates incorrect information furnished to WASPA either negligently or intentionally. Where a member attempts to intentionally mislead WASPA this would serve as a significant aggravating factor. The self-regulation of the WASP industry depends in large part upon the honesty of its members, especially where logs are concerned, and any dishonesty on their part endangers the viability of this self-regulation.
25. The adjudicator in complaint number 10511, the only adjudication to date to deal with clause 14.3.13, imposed a suspension of 30 days on the member.
26. An infringement of clause 14.3.13 necessarily involves an infringement of clause 4.1.2 as well, and an overview of sanctions imposed by other adjudicators for breaches of clause 4.1.2 shows that relatively lower sanctions are imposed where intention to mislead has not been shown (8909 – R50 000 fine, 9624 – R50 000 fine, R 40 000 suspended), while a more onerous sanction is imposed where intention is found, such as the R150 000 fine imposed in complaint 9978 (against the IP as it happens).
27. In the light of the above, the following sanction is imposed on the IP for its infringement of clause 14.3.13 of the Code of Conduct:
- 27.1. R 150 000 fine; and
- 27.2. Suspension of membership in WASPA for a period of three months.
28. A breach of clause 11.2.1 is considered a serious offence, and its nature serves as an aggravating factor in deciding a sanction. The IP has been found to have infringed provisions of chapter 11 before, but not this particular clause. Consequently I draw no inference from its record in this regard. The IP is accordingly fined an amount of R50 000 for its infringement of clause 11.2.1.
29. There is *prima facie* evidence of fraud on the part of the IP, and it is suggested that the WASPA Secretariat refer the matter to the South Africa Police Service for investigation as contemplated in clause 14.4.1.