



## REPORT OF THE ADJUDICATOR

**WASPA Member:** eXactmobile

**Service Type:** No facility to unsubscribe

**Complaint Number:** 4973

**Adjudicator:** Kerron Edmunson

**Code and Ad Rules:** v6.2 (14 August 2008) read with v1.6 of the Ad Rules

### Introduction

The complaint is somewhat complex given the number of logs and numbers to follow. In an attempt to simplify it I have summarised the gist of the results of the logs as I see them. The logs are available with the complaint and response of the SP. I have recorded the SP as eXactmobile, but the documentation submitted by the parties suggests that other parties, Mira Networks and AMV Holding Limited also played a role in recording messages received and logging requests. However, since eXactmobile disputed the need to refund the complainant, it is eXactmobile against whom the complaint was made.

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### Complaint

The complainant claimed to have been billed by eXactmobile without having subscribed to any services, and therefore to not have consented to the deductions made from her bank account. Her complaint was actioned by WASPA in October 2008 who requested that the SP:

- unsubscribe her
- send an SMS confirming this
- provide proof of subscription
- contact her regarding a refund.

The complainant indicated that she was not satisfied with the response received from the SP, which was to the effect that she had been unsubscribed. They did not, however, deal with the claim that she had never subscribed, nor did they refund her.

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### SP Response

The SP responded with a lengthy set of logs and an explanation of the matter. Specifically the SP stated that the complainant had joined the NOW club on the eXactmobile WAP portal on 3 January 2007, and purchased content regularly on that portal, with regular reminders from the SP, as required by the Code. Accordingly the SP denied that the complainant was entitled to a refund.

The logs begin on 3 January 2007 and reflect 16 entries for the year, and 18 entries in 2008 (a total of 34 entries). Of these entries, it would appear that 22 are the monthly deductions by the SP in the amount of R10. Of the remaining 12, 4 are communications from the SP. The final 8 constitute WAP or WEB activity, according to the log, reflecting charges of R105. These 8 transactions are noted differently from the WEB or WAP activity as "Exactmobile NOWCLub". The first message on 3 January 2007 is the same as every single message thereafter on the 3<sup>rd</sup> of every month until November 2008, it is therefore not possible to discern from the log that this was the moment of sign up. In addition, from the log it is not possible to discern a receipt of a request to subscribe. One of the other logs provided simply confirms the deduction of R10,00 per month from that number.

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### Consideration of the WASPA Code

It is relevant to consider **section 1** and the introduction to the Code which sets it in context:

- Section 1.2 states that "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. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made."
- Section 1.4 states that "unless otherwise specified, this Code of Conduct applies to all wireless application services accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator. Where the Code addresses services provided by members, it applies only to wireless application services provided by a WASP, and not to other types of services that the member may provide."

#### In **section 2**:

- a "content subscription service" is defined as "including 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 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"
- a "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction

Clearly we are dealing here with a subscription service, which is also a content subscription service. Content in this case would have had to have been downloaded but as a member of a "club" regardless of whether downloads were made, the charges were applied.

The key issue in this matter would therefore seem to be whether or not the customer subscribed in the first place, and if so, whether or not the charges ought to be

refunded. However this also begs the question as to whether or not the SP complied with section 5 in relation to commercial communications.

**Section 2** states that a commercial message “is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient”. The messages sent some 22 times as logged by the SP all say the same thing, namely “Dear eXactmobile user, you are a member of the NOW! Club. Cost R10/month. Help: 0822 302 222 (VAS rates). Go to [www.exactmobile.mobi](http://www.exactmobile.mobi) on yr phone to enjoy all!” As this message was on all occasions sent at the same time as the deduction of the R10 is recorded, it would appear that the subscriber could only unsubscribe after the deduction was made. Furthermore, the message does not itself indicate how a subscriber might unsubscribe, and to find out the pertinent terms and conditions applying to the Club, the subscriber will have to log onto the mobi website, for which it would appear that there is a further charge. The messages sent 22 times are clearly “commercial communications”.

This requires the SP to comply further with **section 5** of the Code. Section 5 provides at **section 5.1.2** that “any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator”. **Sections 5.1.3 and 5.1.4** deal in more detail with the requirements of the SMS and MMS communications with subscribers and mechanics of opting out. It would appear from the 22 communications by eXactmobile with the complainant, that no such opt out facility existed in relation to those commercial communications.

**Section 5.2** deals with spam, defined as “unsolicited commercial communications, including commercial messages as defined in section 5.2.1”. If the complainant did indeed subscribe then the messages are not spam.

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## Decision

In 2 matters I must make assumptions here. In the first, I must assume (although there is no evidence provided by the SP to support this) that the complainant did in fact subscribe to the Club. In the second, I must assume that messages are therefore not spam.

However, the fact that the 22 commercial communications did not offer an opt out facility is in contravention of the Code. Therefore the subscriber is entitled to a refund of R220. Insofar as there appears to have been positive activity on a WAP or WEB service, I am unable to determine what this was from the logs and the complainant has not provided sufficient information in this regard. Over the period of more than 1 year, as indicated above, there have been 8 such actions on the number recorded on the logs, which is that of the complainant. I cannot, on the information before me, make a finding for a refund in relation to these activities.

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## **Sanction**

The SP is directed to refund to the complainant the sum of R220, within 7 days of the publishing of this adjudication.

In relation to the breach of section 5, I direct the SP to pay a fine to WASPA of R10,000 for the basic contravention, plus an amount of R500 for every 1 of the 22 commercial communications sent without the appropriate unsubscribe information. The total of R21,000 must be paid to WASPA within 7 days of the date of publication of this adjudication. The SP is referred to the 2 assumptions made above in its favour. Had the facts supplied by the SP been more helpful, I would have been inclined to have made different findings on these matters and the fine might well have been greater.