



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Mobilegate

Service Type: Subscription service

Complainant: Member of the public

Complaint Number: 7571

Code/Ad Rules version: 6.2 and 2.3

Introduction

Having investigated the SP (an affiliate member of WASPA) it would appear that although details given on the WASPA website are for a company based in Australia, that company no longer exists, and other details available on the internet direct calls to an unrelated company in Germany. This presents a significant problem in that even were a finding to be made against the SP, it will be difficult to enforce the sanction.

Complaint

The complainant submitted a very lengthy complaint the essence of which is that he understood himself to be charged on the basis of the usual text rate for various messages sent to his "friend". However it would appear that as his friend had initially contacted him over a dating or chat service offered on the MTN network, subsequent texts were charged at the premium rate applicable to that service.

The complainant submitted various monthly bills prior to the ones in issue together with copies of the bills in issue, indicating that his monthly charges for SMS messages were usually under R100, escalating to more than R6,000 and more than R4,000 in 2 consecutive months (January and February 2009).

The complainant denied having signed up to a subscription service and denied further that he was made aware of the charges applicable to a dating or chat service such as the one he had been billed for the use of.

The complainant contacted MTN directly (in a variety of ways and at several different times) to no avail. On the complainant's version, having referred the matter to their fraud department, "I received a call from MTN saying that the number that has been charging me these fees was in fact some kind of dating service, I explained to the lady that I did not engage or enter into any agreement with any dating site. She said that this amount of money has already been deducted from my account and there is nothing MTN can do to help me, she also asked me if I wanted the contact number to this dating site that was responsible for these charges so that I could contact them and discuss this issue with them, I later received a call from a gentleman who apparently works for this dating service company that has been charging my cellphone account and he said to me that I am liable for these charges

because I have been texting a person by the name of Samantha and therefore I am liable for these charges, he explained to me that I engaged their services to chat to me via text and that they had sent me an sms with all the charges. I said to the man firstly I don't believe this because I was texting Samantha on her cellphone number and I was not aware of any dating service and there was no such price listing of the cost per sms, he got aggressive and I put down the phone....I went back to MTN and said to them that I will not be paying this so called dating company any money and was there any way that I could pay only what I owe MTN and the person on the other side of the counter said yes it is not a problem and they have put it on the system that I will only have to pay what I owe MTN. ... I left there and did not hear from MTN or this dating company so I thought everything was more or less sorted out, but to my surprise when I went into MTN Vangate Mall in Cape Town two weeks ago and wanted to check for a new phone...she had said to me that I will not be able to get the upgrade because my account is in arrears in excesses of R14000 and that was that."

SP Response

The SP was contacted by WASPA regarding the complaint in the usual way. The SP's sole response was to send the following message – "Please see above the customer's opt in was compliant and valid [sic]. Cost of service was on the website he put his number into and in the initial msg". The message was repeated: "yes 2008-12-23 08:05:34 incoming 38696 > Hi donavin, SAMANTHA wants to chat at maybe meet. me! SA singles TXT YES TO CONNECT NOW! for help 0800981229 2endtxtstop. R10 msg + R60 sub".

No further logs were provided by the SP to confirm that the complainant himself had actually replied to the initial text, nor that further messages were directly as a result of subscribing to the service. There was no indication that the complainant had actually sent or received messages to a particular short code or directly to the friend as alleged by the complainant.

The website cited by the SP for contact purposes (www.southafrican-singles-online.com) does not exist.

When the complainant contacted MTN, MTN acknowledged that the charges were unusually high and referred the matter to the fraud department, but no further correspondence was entered into with the complainant regarding the outcome of any investigation.

The adjudicator contacted MTN through WASPA to obtain logs, but MTN was reluctant to provide WASPA with the logs, requiring the complainant to apply using the PAIA procedure. As an aside, this seems somewhat extreme, given the circumstances and MTN's membership of WASPA, and has frustrated the quick resolution of the matter to the prejudice of the complainant.

Consideration of the WASPA Code

Because in any other adjudication it would be relevant to consider the various sections binding on SPs, I have done so here too, although the application of the various sections and therefore the application of any remedy for failure to uphold the obligations in those sections, may be impossible against the SP.

Section 4.1. (Provision of information to customers) must always be considered to be an overriding consideration, and in particular:

Section 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.

Section 4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, e-mail address and physical address.

Section 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.

Section 4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

Section 4.1.6. Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to (for example, support should not be limited to email if a significant number of customers do not have access to email).

Section 4.1.7. Any telephonic support must be provided via a South African telephone number and must function effectively. Should the member be unable to provide immediate support, a customer should be provided with the ability to leave a message. Support numbers may not forward to full voice mailboxes.

Section 4.1.8. Customer support may not be provided via premium rated numbers, and may only be provided via standard-rate or VAS-rate numbers.

Section 4.1.9. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

Section 4.1.10. Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

Based on our investigations, the SP failed to comply with these provisions, or to the extent that they may have done so, it is no longer possible to determine this with certainty.

The complaint is about subscription services, defined as "any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction." The complaint is also possibly about contact or dating services, defined in the Code as "any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person". The following sections of the Code are relevant to subscription services:

Section 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.

Section 11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

Section 11.1.7: 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:

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

Section 11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

Section 11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

Section 11.1.10: Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

Section 11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

There is little point examining the provisions of the Ad Rules or the pricing provisions applicable under section 6.2 of the Code since we have no other information about the service and no further contact with the SP is possible.

The provisions of the Code relating to contact and dating services provide at 10.1 (Provision of Information) that:

Section 10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

Section 10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.

Section 10.1.3. Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.

Section 10.1.4. Providers of contact and dating services must obtain explicit consent from a customer prior to making his or her contact information available to third parties.

Section 10.1.5. Promotional material for contact and dating services must make clear any restrictions on the location, gender and age range of callers to the service.

On the face of it and on the information available, the SP failed to comply with these provisions at all.

The Code provides at section 1.2 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." This suggests that it is all parties involved in the provision of mobile services are bound or ought to be bound by the Code, which includes the underlying network operator.

Decision

In the absence of an explanation from the SP as to how the complainant was subscribed to the service, and because neither the SP nor MTN has provided information to this effect despite request, it is arguable that the complainant never actually subscribed to the service, but as he suggests, merely texted his friend on her normal mobile number, which should have been charged then at normal text rates.

The message sent to the complainant initially which was provided in the SP's initial response to WASPA, does not itself conform to the requirements of the Code, but there seems little point in applying a penalty in this regard against the SP. The SP clearly failed to comply with section 4.1 at all.

There is no evidence at this point that the complainant's version is not correct, and therefore no reason not to uphold the complaint.

Sanction

Despite the difficulties I anticipate in enforcing this sanction:

1. the SP is directed to refund all charges in relation to short messages billed to the complainant in January and February 2009, less the amount of R200 which is estimated to be the subscriber's usual monthly charge for short messages; and
2. the SP is also fined the amount of R100,000 for breach of the Code as set out in the report; and
3. the payments must be made within 10 days of the date of this adjudication and confirmation of payment provided to WASPA in writing.

I believe that this SP has contravened the Code on several other occasions and in consequence recommend immediate termination of the SP's membership of WASPA and prohibition on any future services being accepted from this SP.