



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mira Networks
Information Provider (IP):	TIMw.e. New Media Entertainment South Africa
Service Type:	Subscription
Source of Complaints:	Public
Complaint Number:	5692
Code Version (CoC):	Code of Conduct 6.2
Date of Request:	03 June 2009
Date of Adjudication:	16 July 2009

Complaint

1. On the 12 January 2009 a Vodacom network subscriber (the Complainant) logged a request to unsubscribe herself from a subscription service which is offered by the SP and IP in this matter (see above). She further requested a refund or proof of subscription to the service.
2. The original complaint reads:
 - 2.1. *"I received an SMS this evening 10-1-09 stating that i had subscribed to "Games Club" at a cost of R4.99/day and to stop this service i must dial *120*33535# and follow the menu at 0.01c/sec". A helpline no 0114470357 and www.za.natta.com was given. I called the tel No - no answer. I never subscribed to this service and they have have STOLEN funds from my cell account [Complainant cell number]."*
3. The Complainant was subsequently successfully unsubscribed, but indicated that she required a refund for the funds that had been paid by her. Her message reads as follows:
 - 3.1. *"No, I am not happy with the resolution of this matter. A sign up fee and R5 per day was deducted from my account for a service that I did NOT*

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subscribe. I request a full refund of all monies deducted from my telephone number for this unauthorised subscription.”

IP Response

4. In response the SP handed the matter to the IP who replied as follows:

4.1. *“We have provided the proof of subscription, the client subscribed to the IQ Test (Games Club) on December 11th, we sent the sms with the password to the number introduced on the web spot, and the password was introduced by the client or someone with access to the her mobile phone to activate the service. The client received several msg informing the service fees and how to cancel the service, which she did on January 10th. The subscription was cancelled on that date and the client wasn’t billed since.*

4.2. *As you know TIM we does everything to be compliant and when there is anything that is not according to any rules or that we believe a client can be unsatisfied we try to solve it immediately. We believe that the client doesn’t remember how she subscribed to this service, although the information was clear and received several massages with the information on the service and how to cancel it.”*

Second Complainant Response

5. The parties thus reached an impasse and the matter was referred to adjudication. On examination of the evidence it appeared appropriate to request for further particulars from both the Complainant and the IP. A request for further particulars was provided to the complainant whereby the complainant was asked the following questions by the WASPA Secretariat:

5.1. *The complainant has not alleged what the full cost of the service was according to her billing records from (it is assumed) Vodacom. In the event that it is found that she was illegally subscribed this information would be required (preferably in the original form of the Vodacom invoice).*

5.2. *The complainant has not provided the original text of the SMS’ that she has received and has not responded to the allegation that several reminder*

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messages were sent to her cell phone number of [complainants' cell phone number]. Further she has not provided the original SMS and date on which she requested that she be unsubscribed. She should be encouraged to provide as much evidence as possible in order to prove her claims failing which there is no option but to rely on the best evidence available.

6. The Complainant replied that she did not have the SMS that was sent to her as it was sent five months ago. She further indicated that her request to terminate the service was by means of email and not by means of SMS.

Second IP Response

7. The SP was also requested to provide further information by the WASPA Secretariat. To wit:

7.1. The following issues have arisen in relation to complaint 5692: (The Adjudicator has) been provided with an SMS list from 01 September 2009 for the cell phone number of [cell phone number #1]. However this is not the number of the complainant and it is common cause that the complainant's number is [complainants' cell phone number]. ...

7.1.1. Please provide the full SMS history relevant to the complainant's cell phone number of [complainant's cell phone number].

7.1.2. The SP is requested to indicate how the complainant would have known that the SP responsible for this content was TIMw.e. New Media Entertainment South Africa.

8. Notwithstanding this request the SP responded as follows:

8.1. We have provided the proof of subscription, the client subscribed to the IQ Test (Games Club) on December 11th, we sent the sms with the password to the number introduced on the web spot, and the password was introduced by the client or someone with access to the her mobile phone to activate the service. The client received several msg informing the service fees and how to cancel the service, which she did on January 10th. The subscription was cancelled on that date and the client wasn't billed since.

Further Investigation

9. This matter is complicated by the lack of specificity on the part of both the SP and the Complainant. While adjudicators in WASPA matters are able to have a somewhat inquisitorial approach to the evidence, the overly brief manner in which the complaint was formulated by the Complainant and the failure by the SP to provide the necessary information was of little assistance to the resolution of this matter.
10. In order to resolve the matter a telephone call by the adjudicator was placed on the 08 June 2009 to the telephone number of 011 447 0357. The telephone call was successful and resulted in the employee representing the IP indicating the following:
- 10.1. The Complainant's correct cell phone number was subscribed to the service and was unsubscribed from that service on the 13th January 2009.
- 10.2. The service in question was a subscription service for the sum of R4.99 per day.

Portions of the Code of Conduct and Advertising Rules Considered

11. Clauses 3.1.1 and 3.1.2 of WASPA Code of Conduct version 6.2
12. Clauses 11.2.4 of WASPA Code of Conduct version 6.2

Decision

13. While the IP admits that it did subscribe the Complainant to its subscription service on the 11th December 2008 it has refused and/or failed to provide the message log as requested by the WASPA secretariat and as further requested by the Adjudicator. Bearing in mind that the IP bears the onus of proof to indicate that the Complainant requested the subscription service, the IP is hereby found to have contravened clause 3.1.2 of the CoC in that the subscription of the Complainant to a subscription service without her consent which is prima facie unlawful in South Africa and may amount to the criminal charge of fraud/theft. It

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should be noted that this contravention of the CoC is extremely serious as it goes one step further than clause 11.1.4 which requires that a Complainant must not be automatically subscribed to a service “as a result of a request for any non-subscription content or service”. In this matter no proof has been provided to show that the Complainant “requested” anything at all of the IP or SP and the Complainant alleges that she did not. Moreover the refusal by the IP to provide a refund while being unable to provide proof of the request smacks of the intention to unlawfully and permanently deprive the Complainant of her property.

14. Reference is further made to Complaints 5717, 4672, 4400, 5558, 3646 which all dealt with, in some form, the allegation that the SP/IP had engaged in unlawful conduct and fairly frequently also dealt with the difficulty that adjudicators face when dealing with competing testimony from the various parties. However unlike many of these matters, the IP has not provided the correct SMS logs pertinent to the Complainants cell-phone number in this matter.
15. While the IP indicated in its correspondence that the Complainant had been unsubscribed on the 10th January 2009, the telephone call to the SP’s help line (the same one as indicated in the Complainant’s SMS) indicated that the Complainant was unsubscribed on the 13th January 2009. Thus for the purposes of this Complaint it is found that the Complainant was unsubscribed on the 13th January 2009, three days after the request for the termination of the subscription service was communicated to the IP by the Complainant and one day after WASPA communicated the request.
16. It is further found that the SP did not contravene clause 11.2.4 of the CoC - which provides that members must ensure that the termination mechanism for the service must be functional and accessible at all times - in that there is insufficient proof to indicate that the termination mechanism of the SP was non-functional.
17. While there is no apparent breach of clause 11.2.4 in this particular matter, it is noted with great concern that two previous matters, Complaints 5853 and 5928 deal with the exact same subscription service and that Complaint 5853 found that the Termination Service was not functional in that the unsubscribe request was not honoured timeously. While the delay in case 5853 is greater than in this instance, the IP is once again cautioned to be aware of this requirement of the CoC.

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18. While Complaints 5853 and 5928 also consider various advertising rules as well as the web site of the IP, it is beyond the scope of this Adjudication to consider these aspects as they were not alleged by the Complainant and the web sites in question have been removed pursuant to the sanctions contained in the said Adjudications.
19. Bearing in mind the above findings the Complainant is advised that this matter may amount to the criminal charge of fraud and/or theft on the part of the IP and as a result the Complainant is advised that she should contact the South African Police Services should she wish to pursue a criminal charge against the IP.
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Mitigation/Aggravation

20. The following factors are considered to be aggravating factors:
- 20.1. The fact that there are two existing complaints regarding this matter is an aggravating factor in this regard.
- 20.2. The fact that the IP failed to provide the necessary subscriber logs even after being specifically requested to do so by the WASPA secretariat.
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Sanction Imposed

21. The complaint is upheld and the following order is made:
- 21.1. The IP and SP are ordered to put systems in place to ensure that the adequate record of SMS logs is correctly recorded and stored and easily able to be retrieved when requested.
- 21.2. The Complainant must be refunded the full amount deducted by the IP in this matter within five working days of the publication of this adjudication. Bearing in mind the lack of information provided by the IP and Complainant regarding the amount invoiced by the IP, the amount to be refunded is R169.66 which is calculated as follows:
- 21.2.1. Number of days subscribed x daily subscription = total
- 21.2.2. 11 December 2008 to 13 January 2009 x 4.99 = total

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21.2.3. 34 x 4.99 = total

21.2.4. **R169.66 = total**

21.3. The IP is fined the amount of R40 000.00 for subscribing the Complainant without her consent in breach of clause 3.1.2 of the CoC, R30 000.00 of which is suspended on condition that the IP is not found guilty of contravening clause 3.1.2 of the CoC in 6 months following this adjudication. This amount will be paid within five working days of the publication of this adjudication.

21.4. The SP will be liable for the amounts mentioned above in the event that any amount is not paid in full by the IP on the due date as indicated above.

Appeal

Please note that should the SP or complainant wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.6 of the Code of Conduct version 6.2 (and as amended thereafter).
