



Wireless Application Service Providers' Association

Report of the Adjudicator

| | |
|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Complaint number | #37421 |
| Cited WASPA members | Comit Technologies (1213) |
| Notifiable WASPA members | Intarget Mobile Advertising (Pty) Ltd (0030) |
| Source of the complaint | Public |
| Complaint short description | <ul style="list-style-type: none"> • False Information given for services rendered |
| Date complaint lodged | 04 January 2018 |
| Date of alleged breach | 25 November 2017 01 December 2017 23 December 2017 |
| Applicable version of the Code | 15. 2 |
| Clauses of the Code cited | 5.4, 5.5, 5.17, 6.6(c), 15.8, 15.9, 15.26, 15.27 |
| Related complaints considered | None. |
| Fines imposed | R 100 000,00 (One hundred thousand rand) fine broken up into the following: 1. R 10 000,00 for breach of clause 5.4 2. R 10 000,00 for breach of clause 5.5 3. R 5 000,00 for breach of clause 5.17 4. R 45 000,00 for breach of clause 6.6 (c) |

| | |
|-------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | 5. R 5 000,00 for breach of clause 15.8 6. R 10 000,00 for breach of clause 15.9 7. R 5 000,00 for breach of clause 15.26 8. R 10 000,00 for breach of clause 15.27 |
| Other sanctions | None. |
| Is this report notable? | Notable |
| Summary of notability | <i>WASPA must ensure that the issue of unauthorised debit orders for VAS services are monitored in that those unauthorised debit orders are prima facie unlawful and potentially fraudulent. A high level of disputed debit orders against one company could indicate fraud.</i> |

Initial complaint

The complainant received a call from the call centre agent for Elite Mobile /Comit Technologies and the purpose of the call was for the upgrade of his Vodacom contract. The agent advised that the upgrade had certain terms and conditions in relation to the Vodacom portion and further went on to incoherently and at a rapid pace dive through other unknown terms and conditions, the complainant noted that he requested the call centre agent to repeat himself which he did in an incoherent manner once again.

The upgrade was to be only to the value of R 219, 00 and that upgrade would be effective as of January 2018.

On conclusion of the sales call, the complainant received and sms with confirmation that there were four value added services that were activated , namely SosQuad , Techtrace, Magzone and Kintel, the total cost of which was R 222,00. No device had been received by the complainant at the time of the confirmation of value added services.

On the 24th of November, the complainant contacted the call centre to advise that there must be a cancellation of the added services and such was confirmed, however on the 01 December 2017 an amount for the added services was deducted. The complainant had the charges reversed and once again made a call to the call centre agent of the Respondent to cancel the services and the agent then confirmed that it would be canceled and that no further debit orders would occur. However, complainant notes that once again on the 23rd December his account was once again debited for those services.

Member's response

On the 23 January 2018, the member provided the following response;

Thanks for the mail-this was resolved a day after the complaint was received and not sure why you have not received response to this and sincerely apologize

You will receive a call today from [REDACTED] part of our executive team who was handling this to clarify

Thanks

Further on the 24 January 2018, the member sent a further email stating;

Good Morning

I received an email from the desk of [REDACTED] who we updated and was informed that the query had been closed.

Please see our communication below screening that we had resolved the query on the 8th Jan.

Kindly send me a contact number and I will call you to ascertain how we can further assist.

On the 25 January 2018, the member sent a further email stating;

Morning

Just doing a follow up to my e-mail that I sent yesterday.

Need to understand what is still outstanding for [REDACTED].

Complainant's response

On the 08 February 2018, the complainant advised of the following;

Good Day [REDACTED]

Thank you for the courtesy email. I do not have any further submissions.

I would only say that I find the reply from the waspa member unacceptable and dismissive, they provided no real feedback related to my complaint other than to say they cancelled the debited orders.

I am glad to hear that this has been forwarded further to a legal practitioner as I feel this WASPA member will continue with these bad practices recently visited Hello Peter and they continue to this day to take advantage of consumer's <https://www.hellopeter.com/elite-mobile> withdrawing money and selling false products.

Regards

Member's further response

On the 25 January 2018 the member provided a further response;

Hi

Thank you for responding.

Yes, we communicated directly with the complainant and he is satisfied.

We await your final response.

Sections of the Code considered

The following sections of the WASPA Code of Conduct, version 15.2, were considered:

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.17. Any refunds provided by members to customers must be provided either in South African rands, airtime or any other form acceptable to the customer. Refunds must not cause the customer to incur any bank charges, or alternatively must compensate the customer for any bank charges incurred. Refunds must not be unreasonably delayed.

6.6. A customer may enter into a contract with a WASPA member to opt-out of the required billing threshold reminders or amend the thresholds provided that: \

(c) The contract contains a description of the service provided, the duration for which the service will be provided, the frequency and amount of any billing, and information the mechanism the customer can use to terminate the service.

15.8. Billing for subscription services must not exceed the total amount specified in the pricing information.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.26. If a member is unable to immediately act on a service termination request received from a customer, the customer must be informed. (Example: "This may take up to 24 hours to be processed.")

15.27. The processing of any service termination request must not be unreasonably delayed and must be honored within two working days (48 hours).

Decision

I find it imperative to begin my submission on my decision with the noting of the failure on the part of the Respondent to adhere to simple instructions provided in the inception of the notification which reads as follows;

Dear WASPA member,

The attached complaint #37421 has been lodged with WASPA against COMIT Technologies.

WASPA has reviewed the complaint and determined that the formal complaints process set out in the WASPA Code of Conduct should be used to handle it.

Please note that:

- You have ten working days to respond to this complaint, and provide any information you deem to be relevant to the complaint.

- Your response should include any mitigating factors that you would like the independent adjudicator to take into account when reviewing the complaint.

- If the complaint involves an interaction with a customer, please provide clear copies of all relevant logs of that interaction.

- If you require longer than ten days to respond to this complaint, you are entitled to request an extension. Please include a motivation for the extension with any request.

- Once you have responded, your response will be provided to the complainant, and he or she will have an opportunity to provide a further submission in reply.

If the complainant chooses to do this, you will have a further opportunity to respond to that reply. The complaint and all associated correspondence will then be assigned to an independent adjudicator for review.

- If ten working days pass without any response from you, this complaint will be assigned to an independent adjudicator for review without the benefit of additional submissions from either parties.

- If you think that your company has been incorrectly identified as the target of this complaint, please do not ignore this message. Instead notify the WASPA Secretariat as soon as possible.

- Providing incorrect or fraudulent information in response to a complaint is itself a breach of the WASPA Code.

Please submit your response, and any other correspondence relating to this complaint to complaints@waspa.org.za.

The WASPA Secretariat will confirm receipt of your response.

Should you have any questions regarding the formal complaints procedure, or the WASPA Code of Conduct, please contact the complaints team using the same address.

Yours sincerely, WASPA Secretariat

The reasoning behind my reminder and / or provision of the first notification given to this (*and all Respondents*) is to highlight that there is an actual procedure which must be followed once a complaint has become formal and further to highlight the importance of ensuring familiarity with the Code of Conduct. I find it offensive that the Respondent failed to attempt to provide to the Adjudicator any records and or information at its disposal, neither did they attempt to ensure a cohesive response to the actual complaint.

The Respondent failed in that;

1. There was no information provided to the secretariat which would be relevant to the complainant at hand; and

2. This complaint involved an interaction with a customer and no provision of clear copies of all relevant logs of that interaction was provided.

With that said, I will therefore adjudicate on the facts before me.

Allow me to highlight that I was unable to consider any related complaints as there are none, therefore this concept of false information given for services rendered may become a new phenomenon as the Respondent has essentially ensured that their services would be subscribed to with the use of voice validation.

My submissions and finding, is based on the Electronic Communications and Transactions Act 25 of 2002 “ECT” and the Common Law in conjunction with the WASPA Code of Conduct “Code”.

The use of technology in our daily lives has been growing rapidly. Electronic contracts initially caused a great deal of legal uncertainty as to how, and whether electronic contracts could be recognized as valid and enforceable agreements. The passing of the ECT initiated the basic premise that digital communications are no less valid than paper based communications.

The complainant has placed on record that a call centre agent in the employ (*and therefore acting under his course and scope of employment*) of the Respondent, contacted him to conclude an upgrade for an already existing Vodacom contract. This then presumes that the complainant potentially authorised a debit order for subscription services over the phone, this must be analyzed with the above mentioned law to determine the validity and enforceability of such authorization.

I make use of the application of common law rules in conjunction with the ECT in this dispute to illustrate the suitability of common law principles for the determining the validity of an offer and acceptance that were made electronically.

In the situation before me, the complainant complains of unauthorized debit orders being conducted and / or authorized without his consent from his banking account. He further complains that the debit orders are for value added services “VAS”, which he did not agree to when upgrading his Vodacom contract.

“A debit order is an agreement between a customer and a service provider. In terms of that agreement, the customer authorizes the service provider to take money out of his/ her account for the service provided. The bank is not a party to the agreement” – Bank Ombudsman.

Therefore our analysis first lies at the authenticity of the mandate to the Respondent regarding the value added services offered to the client in the sum of R 222, 00 (two hundred and twenty two rand) over R 3, 00 (three rand) more than the amount payable for his upgrade which was to be R 219, 00 (two hundred and nineteen rand) and such upgrade amount being the only amount he expressly agreed to with the said call centre agent.

Was there a valid offer of the value added services by the call centre agent and was there acceptance from the complainant?

In the case of **Gardener Grapevine CC v Flowcrete Precast CC & Another 2002 (SA) 324 (WPD)** the court held that, knowledge of the acceptance of the offer is necessary before it can be said that the contract was concluded, plaintiff would need to be made aware of the acceptance so that it could commence to perform its part of the bargain. Therefore the complainant here would have to have had knowledge of those value added services and accept them each individually for him to begin to make payment for them. The evidence placed before me by the complainant was that there were other terms and conditions that were incoherently and rapidly presented to him and when he requested a repeat of same, there was a return performance of incoherence and rapidity by the call centre agent. I am of the view that the complainant had no knowledge of the value added services let alone the cost that was to be attached to each of them.

An offer presented must draw an acceptance from another that is clear, unequivocal and unambiguous.

The common law requirements of offer and acceptance are pleasantly highlighted in the case of **Jafta v Ezemvelo KZN Wildlife 2008 (10) BLLR 954 LC**, wherein the court was called upon to determine whether the communication by the Plaintiff was to be constituted as a valid acceptance of the offer via sms. The court held that if there was uncertainty and misunderstanding then there could not have been a clear offer made. The essential elements of offer and acceptance were;

- (a) The acceptance must have been clear, unequivocal and unambiguous;
- (b) The acceptance must correspond with the offer;
- (c) The acceptance must be made in the mode prescribed by the offeror;
- (d) The offeree has to communicate acceptance of the offer to the offeror. The general rule is that the contract is not concluded until the offeree has communicated his / her acceptance to the offeror.

According to section 11(1) of the ECT Act, information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message. It is now possible to contract by means of data messages and parties may sign agreements using digital signatures if they wish.

Section 22 (2) of the ECT determines that in terms of an electronic contract, the contracting parties make use of the reception theory. In that, the contract is formed at the time and place where the offeree received acceptance of the offer.

Under section 23 of the ECT the acceptance of an offer must come to the knowledge of the offeree for a contract to come into existence.

In using foreign authorities to make a determination I find that it is worth noting that the Canadian dispensation regarding contracts conducted electronically indicates that the agreement itself is binding even though it is not technically a contract, if one party has fully placed total reliance on the others promise and the reliance was reasonable then, out of equity (fairness) the agreement may be found “binding” in the sense that it is enforceable. There are evidence codes throughout Canada which include audio recordings as “writings” and have specific exceptions for certain types of transactions that are documented by audio recordings.

While I may align myself with the Canadian dispensation – I am of the view that the South Africa common law must be applied in that, those essential elements must be present to ensure a proper determination that the agreement concluded between the call centre agent as the offeror and the complainant as the offeree was in fact a validly enforceable contract. Electronic contracts must meet the common law requirements of contracts for it to be valid and enforceable. The minimum requirements for a valid contract under South African law include a valid offer and acceptance; or consensus between the contracting parties. All contracting parties must furthermore have contractual capacity. In a technologically advancing era, businesses are relying on electronic communication to a greater extent. It is now possible to enter into agreements (including their amendments or notices thereunder) not only through e-mail, but through other data messages such as SMSs. In light of the above, businesses should consider whether there are steps that can be taken to protect themselves and avoid dispute.

I find therefore, that there was no valid acceptance of the offer for value added services made by the call centre agent and further that the complainant was entitled to have those services canceled as from the 23 November 2018. The debit order was therefore unauthorized and potentially fraudulent particularly since there was a continuing of the harm without the Respondent attempting to rectify it until it was brought to the formal complaints panel. A reading into the Respondents profile on hellopeter.com, surely indicates that the Respondent has done this numerous times and even though I am not called upon to make a determination for those other persons affected, I caution the Respondent to ensure that their business practices should be amended so as not to bring this organization (WASPA) and the industry into disrepute. For the poor, the bank charges for the reversal of these debit orders are seemingly insurmountable and the complaints by consumers are lurid.

The contravention of the clauses in their entirety are upheld as the reading into the cited clauses will provide an indication and the extent of the breach.

Sanctions

I therefore determine that there was in fact a breach of the code, therefore all cited clause contraventions are upheld and I call for the following fine to be imposed on the Respondent, such fine is therefore payable within 7(seven) days of receipt of the adjudication report.

All fines are directly imposed on Comit Technologies (1213).

Given the serious nature of these clauses and the failure to comply with them, I believe that the fine of R100 000 is an appropriate sanction.

R 100 000, 00 (one hundred thousand rand) fine broken up into the following:

1. R 10 000,00 for breach of clause 5.4
2. R 10 000,00 for breach of clause 5.5
3. R 5 000,00 for breach of clause 5.17
4. R 45 000,00 for breach of clause 6.6 (c)
5. R 5 000,00 for breach of clause 15.8
6. R 10 000,00 for breach of clause 15.9
7. R 5 000,00 for breach of clause 15.26
8. R 10 000,00 for breach of clause 15.27

Matters referred back to WASPA

NONE.
