

REPORT OF THE APPEALS PANEL

Date: 21 May 2013

Appellant: US Cellcom (IP)

Complaint Numbers: 17132 and 17149

Applicable versions: 11.6

1. BACKGROUND TO THE APPEAL

~~1.1.~~ This is an appeal against the decision of the adjudicators in Complaints 17132 and 17149.

~~1.2.~~ The original complaints were directed both against the Appellant and another member of WASPA – Mira Networks – which took the role of the “service provider” to the Appellant’s “information provider”. Only the Appellant responded to the complaints.

~~1.3.~~ The Appellant is a full member of WASPA.

~~1.4.~~ In Complaint 17132 the Complainant alleged that the subscription was an unauthorised subscription and demanded a full refund.

~~1.5.~~ In Complaint 17149 the Complainant laid a complaint that on or about 26 January 2012, she received an SMS text message to her cellular phone advertising the appellant's services. Subsequent to receiving the message she noticed her account was debited with a number of unsolicited charges. Upon inquiring with the service provider she was advised that she had responded to the text message, by way of return text message, "yes" and "go". She vehemently denied responding thereto. In any event she claimed that the SMS contained no mention of any charges and alleges same constituted deceptive marketing.

~~1.6.~~ In both instances the Appellant provided proof of the subscriptions and the welcome messages that were sent to the Complainants. The logs contained the following message:

Send YES to 39853 to receive your Mobile Points and complete your subscription. For help call 0861106472. R7/day. www.thelobop.com

~~1.7.~~ The logs indicate that the Complainant in Complaint 17132 responded on the same day by SMS'ing the word "TOP" and "TOP OK" to the given short code. Similarly the logs in Complaint 17149 showed that Complainant responded by texting the words "GO" and "GO OK" to the relevant short code.

~~1.8.~~ Despite both Complainants being subscribed according to the Appellant, the Appellant failed to send the required reminders to these Complainants during the times that they were subscribed.

~~1.9.~~ In both Complaints the Complainants were unsubscribed within a reasonable time and their subscriptions refunded.

2. THE APPLICATION OF THE CODE AND RULES

~~2.1.~~ The adjudicator correctly applied version 11.6 of the WASPA Code of Conduct to these complaints. The following sections of the WASPA Code of Conduct have relevance here and were considered by the Adjudicator:

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.

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

11.2.6. The confirmation message described in 11.2.5 must include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

11.6.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter. The customer may not be charged for these reminder messages.

[Our emphasis]

3. The Decision of the Adjudicator

~~3.1.~~ The Adjudicator in this matter took the view that the Appellant's subscription process is generally compliant with Section 11 of the WASPA Code as it contains the required text and makes provision for the double opt-in before a subscription is complete. However, in Complaint 17132 the Complainant did not respond with "yes" as indicated in the subscription message, but rather with the words "TOP OK". Similarly in Complaint 17149 the Complainant responded with "GO OK" instead of "yes".

~~3.2.~~ According to the adjudicator the Complainants in both instances should not have been subscribed to the Appellant's services as the response to the activation notice did not comply with the Appellant's own activation rules. This was an infringement of section 11.2.5 of the Code.

~~3.3.~~ The adjudicator also held that in both instances there was no indication that the Appellant sent any reminder messages to the Complainants in the months

following their subscriptions and before being unsubscribed. Had the relevant monthly reminder messages been sent, the Complainants would have been in a position to take steps to unsubscribe sooner.

~~3.4.~~ The Adjudicator made the following ruling as to sanction in Complaint 17132:

1. I have noted the previous complaints upheld against the IP in respect of its breach of the provisions of clause 11 relating to its subscription services (complaints # 15817 and 17131).

2. In light of the foregoing, the following sanctions are made:

2.1 The IP is ordered to refund all amounts charged to the complainant in respect of this subscription.

2.2 The IP is fined an amount of R 25 000.00. 2. The IP is formally warned to refrain from providing the complainant's contact details to other parties.

~~3.5.~~ The Adjudicator made the following ruling as to sanction in Complaint 17149:

1. I have noted the previous complaints upheld against the IP in respect of its breach of the provisions of clause 11 relating to its subscription services (complaints # 15817, 17131, 17132).

2. The IP has offered to refund the complainant. However there is no evidence that it has done so.

3. In light of the foregoing, the following sanctions are made:

3.1 The IP is ordered to refund all amounts charged to the complainant in respect of this subscription unless it has already done so.

3.2 The IP is fined an amount of R 25 000.00.

4. Grounds of appeal

~~4.1.~~ The grounds of appeal provided by the Appellant are almost identical in both Complaints. The grounds of appeal are rather sketchily set out, but seem to indicate an appeal against:

4.1.1. the finding that the Complainants should not have been subscribed taking into account the Appellant's own subscription procedures and the fine imposed;

4.1.2. the fine imposed only in respect of the finding that the Appellant failed to send the monthly reminder notices required in terms of Section 11.6 of the Code of Conduct as the Appellant acknowledged its failure in this regard.

~~4.2.~~ The Appellant offers the following grounds in mitigation of the infringement of Section 11.6

This was due to it was set to be recurring and the time range wasn't fixed. Nevertheless it was the first and last time this problem occurred in February 2012, yet in order to minimize any additional technical problems in the future,

we have integrated additional back-ups in our system and sending is working properly for each MSISDN and each Short Code

5. Findings of Appeals Panel

~~5.1.~~—The panel notes that the adjudicator did not make a ruling in respect of a particular clause within section 11 of the Code of Conduct, although three specific sections are quoted. Section 11 is a long section which deals with a wide range of aspects relating to subscription services. Not indicating which subsection a member has infringed is too vague and potentially prejudicial of the member's rights. How is a member to appeal if it does not know on which clause the finding is based?

~~5.2.~~—In this case the panel is satisfied that the context indicates with suitable clarity which clause of the code of conduct was meant by the adjudicator, and as a result the member's ability to make a meaningful appeal has not been prejudiced.

~~5.3.~~—**In regard to the first infringement:** Section 11.2.5 of the Code of Conduct applies whenever a 'subscription service is initiated by a customer sending an SMS to the service provider'. The Appellant states that the user subscribed to the service after replying to a promotional and free message from the Appellant. The appellant did not provide any screenshot or log of this initial message. The message logged seems to be the confirmation message. The fact that the customer responded to the promotional offer does not alter the fact that the SMS sent by a customer in this situation will be to initiate a subscription service. 'Initiate' here does not necessarily mean that the communications between the parties must have been initiated by the customer, merely the subscription service. A contrary interpretation would largely defeat the purpose of this section.

~~5.4.~~—Section 11.2.5 of the Code of Conduct furthermore stipulates that the customer may only be subscribed if the activation instructions in the confirmation message are followed. The initial messages sent did indicate that the customer should respond with "yes", but the logged responses of "TOP OK" and "GO OK" on the part of the Complainants did not comply with this instruction. Section 11.2.5 specifically stipulates that the customer may only be subscribed if the customer has followed the activation instructions. If a response of 'yes' is required no other response should activate the subscription. This is necessary to prevent customers who indicate 'no' or any other response from being subscribed automatically. It is also regarded as significant that the appellant did not seriously contest the correctness of this finding by the adjudicator in its appeal document.

~~5.5.~~—**In regard to the second infringement:** The adjudicators in both instances correctly found that there was no indication in the logs provided that the IP had sent the monthly reminder notices as required by section 11.6.1 in the Code. In our view this is a serious charge as there may well have been prejudice to the Complainants who were not alerted again to the fact that they were subscribed to relatively expensive subscription services. This is particularly so given the findings made above relating to the failure of the Appellant to provide a subscription sign-up procedure compliant with the Code. The Appellant has conceded that no reminders were sent but has

indicated that there was a system problem at the time which has been resolved and that both Complainants were offered a full refund despite being validly subscribed. We accordingly find that the Appellant did infringe Section 11.6.1 in both cases and uphold the findings of the adjudicator. In so far as the Complainants have not been refunded we uphold the Adjudicators orders in this regard as well.

~~5.6.~~ In arriving at a sanction the adjudicator in Complaint 17132 took into account Complaint 15817 (infringement of Section 5.1.11 – failure to identify the source of personal information – fine R 50,000) and 17131 (infringement of Section 11 and 11.1.6) in similar circumstances and at the same time as these Complaints (January to February 2012 – refund only ordered). The adjudicator ordered a refund and a fine of R 25,000.

~~5.7.~~ In Complaint 17149 the adjudicator additionally referred to case no 17132 (which is also now being considered in this appeal - infringement of s 11 and 11.1.6 in similar circumstances and at the same time – R 25,000 fine and refund) and Complaint 15871 (see above). The adjudicator ordered a refund and a fine of R 25,000.

~~5.8.~~ In our opinion, having regard to the previous complaints taken into account by the adjudicators, the Appellant does not seem to be a serial offender of the same provisions. These similar complaints all stem from the same period early in 2012 and the Appellant has indicated that the system problem has been resolved. However, non-compliance with the subscription requirements of section 11.2.5 and the reminder notice of section 11.6.1 are serious breaches which need to be sanctioned. Accordingly the cumulative fine of R 25,000 in respect of both infringements imposed by the adjudicator is upheld.

~~5.9.~~ The Appeal has been unsuccessful, and accordingly the appeal fee should not be refunded.