

WASPA appeals panel

Complaint 20980

REPORT OF THE APPEALS PANEL

Date of Appeal Report: 9 April 2015

WASPA Member: USCellcom (membership number)

Complaint Number: 20980

Applicable versions: 12.4

Background

1. The Complainant alleged that it had received an unsolicited sms from US Cellcom ("the WASP") saying :

"Congrats XXXXXXXXXXXX U are the WINNER! Join 200 Prize draws and claim your R1,200 Reward Today. Send WIN to 44364

Ws8/subscription@R7/day.

Optout?TxtStop"

2. It is unclear when the SMS was sent and received. It was further alleged that when complainant followed up with the notification of having won a prize it realised that it was not a winner but would simply stand in line to win a prize if it subscribed to the WASP's service.
3. The complainant submitted that this is misleading.

4. It is apparent from the Logs provided by the WASP in this appeal, that the sms was indeed an unsolicited sms.
5. The WASP replied to the Complainant stating that it has unsubscribed the complainant.
6. The following sections of the WASPA Code were considered by the adjudicator:

9.1.7. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
- (b) exaggerate the chance of winning a prize;*
- (c) suggest that winning a prize is a certainty;*
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

11.2.2. 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 and may not be an entry into a competition or quiz.

Adjudicator's Findings and Sanction

7. The adjudicator held that there were two issues that required adjudication:

7.1 The Adjudicator held that complainant was told that “U r the WINNER!” and “claim your R1200” and “Reward today” when in fact, ex facie, she had not won anything and would merely be entered into a competition;

7.2 The Adjudicator went on to state that the request for subscription was ‘bundled’ with the entry into a competition and that the WASP did not put anything before the Adjudicator to contradict this version, or to explain its actions.

8. The Adjudicator held that the WASP is in breach of clauses 9.1.7 and clauses 11.2.2. of the WASPA Code.

9. Furthermore the Adjudicator considered the breaches to be fundamental principles of the Code of which any ethical WASP is expected to be aware. In addition the adjudicator added that it was unimpressed with the WASP’s failure to deal with the merits of the complaint and fined the WASP R100 000 in respect of both breaches; R 50000-00 being the respective fine for each breach.

Appeal

10. The WASP then appealed as per the appeal before us.

10.1 On appeal the WASP in its opening statement stated that:

‘This appeal is to address erroneous statements made by the adjudicator report regarding WASPA complaint #20980. Information provided will explain the nature of the subscription service in question and eliminate any uncertainties about its features. Further, it will clarify the user’s role (whether or not the user is winning a reward upon subscribing) and if the service is misleading.’

10.2 The WASP went further to state in the relevant parts of part 1 of its appeal against the initial adjudicators finding that ,

‘ This was an offer made to the owner of MSISDN xxxx, Mr xxxxxx. After responding to the received marketing message, Mr xxxx received another SMS inviting him to subscribe to our service. The message he received had all obligatory information any marketing message needs to obtain ... ‘

‘ The information included the info about the subscription service, prize, billing frequency, opt out information and customer care number. The contact number provided enabled Mr.[XXXXX] to get a reward (e.g. digital device, an accommodation or airfare up to the value of R1200). Also, as an alternative, our customers at any time can contact our customer service and specify a product they are interested in, user is invited to participate in the service as active customer ‘

‘it is obvious from the “Description of the service” above that the service is not a competition and that the user would not “stand in line to win”. With the subscription, the user already wins a reward that he will get within the 3 month period, as proven by the advanced algorithm formula specially developed for this purpose

‘ Finally attempts were made by our customer’s service staff to Contact Mr [XXXXX]. Our attempts proved unsuccessful as the MSISDN in question had all calls un-answered ‘

10.3 In part 2 of the appeal the relevant parts of the appellants appeals against the initial adjudicators states that,

‘ ...We take these matters very seriously and can summarise that there was a breakdown in communication here due to various language barriers...’

‘ ...We would never intentionally go against the WASPA Code of conduct as this would put our entire business model under threat. ... In addition, please notice from the service description above and from the T&C that the service type is not a competition. It is a prize winning subscription service with a 100% money refund guarantee in case the user does not get a reward ... “

‘Finally, our data base provider Plum Solutions (<http://www.plumdata.co.za/#!/menu>) confirmed that the user gave his consent to receive promotional and advertising

messages to his phone number, thus the message is an independent transaction to join a subscription service.'

10.4 The appellant however fails to produce the evidence that the Complainant had consent to receiving the marketing message.

10.5 In what the appellant calls WASPS response the appellant stated that the adjudicator may have misinterpreted "deactivated" with the word "unsubscribe". The following is important to note in the appellants submission:

'...The statement is erroneous and we assume it is a result of the language barrier issue. Mr xxxx was neither subscribed to nor billed for any of our service '

However the following admission is made shortly thereafter:

'....He has been deactivated from our data base as he did send the message "WIN" to the Short Code 44364.'

10.6 The abovementioned admission is repeated in the conclusion of the appellant's submission. No argument was produced to directly refute the findings of the adjudicator based on the merits of the particular cases in question and the appeal seemed to turn on the alleged erroneous interpretation of the WASPA Code and what the appellant calls a 'breakdown in communication and language barrier.'

Deliberations and finding

11. The appeal panel confirms the findings of the Adjudicator on all counts and dismisses the appeal with regards to the substance of the infringements of the WASPA Code.

12. No reasons have been advanced to the Appeals Panel why the finding of the initial adjudicator should be set-aside or was made erroneously as suggested in the Appeal. It is clear from the appeal document that the WASP does not have a clear understanding of what its obligations are under the relevant sections of the Code.

13. We agree with the adjudicator that the service is misleading in breach of Section 9.1.7 of the WASPA code in particular Section 9.1.7 (a), (c) and (d) thereof.
14. The word "WINNER" refers to the prohibited words "WIN" just the noun thereof and should not be allowed even though "WINNER" is not per se prohibited as it is very similar to the prohibited word "WIN".
15. There is certainly a suggestion that a definite prize has been already been won or will be won.
16. We agree with the Complainant that the service is misleading and agree with the Adjudicator that Section 11.2.2 of the WASPA code has been breached.
17. The request to join the subscription service was definitely coupled with the prospect of having won or going to win a prize.
18. We are also not convinced that the Complainant agreed to the service or direct marketing message as alleged due to lack of evidence by the appellant. This was however not an aspect that was considered or sanctioned by the Adjudicator and we need therefore not consider it either.
19. In the premises, the appeal on the merits must be dismissed.

Sanctions

20. The sanctions of initial adjudicator are set-aside as they are too harsh. No evidence was led or considered suggesting that this was a repeat offence or that there were other aggravating factors.
21. Also in terms of the punishment the WASP conducted itself with constraint in that it ceased the campaign after it got the Heads up from the WASPA Monitoring Team.
22. The fines are reduced to an aggregate fine of R30,000.00 which consists of R 15000.00 in respect of each of the infringements mentioned above.

23. 50 % of the appeal fee is to be refunded / set-off to the fines imposed as the appellant only partially succeeded with reducing the sanctions imposed.