

REPORT OF THE APPEALS PANEL

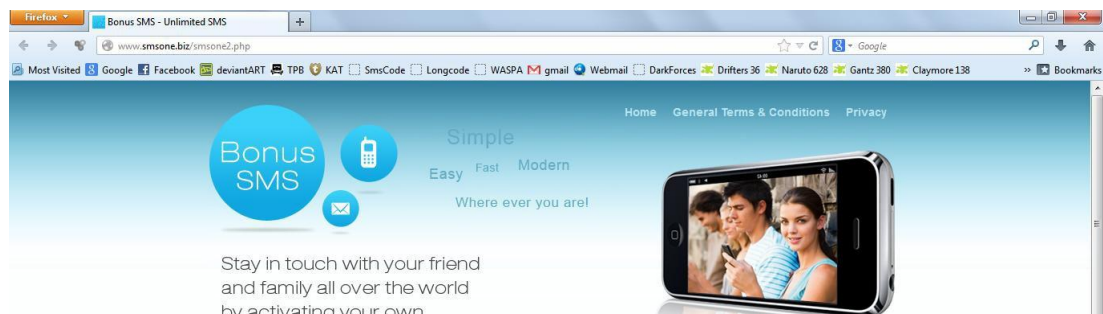
Date: 24 August 2014
Appellant: US Cellcom
Complaint Numbers: 20470
Code version: 11.6
Advertising Rules version 2.3

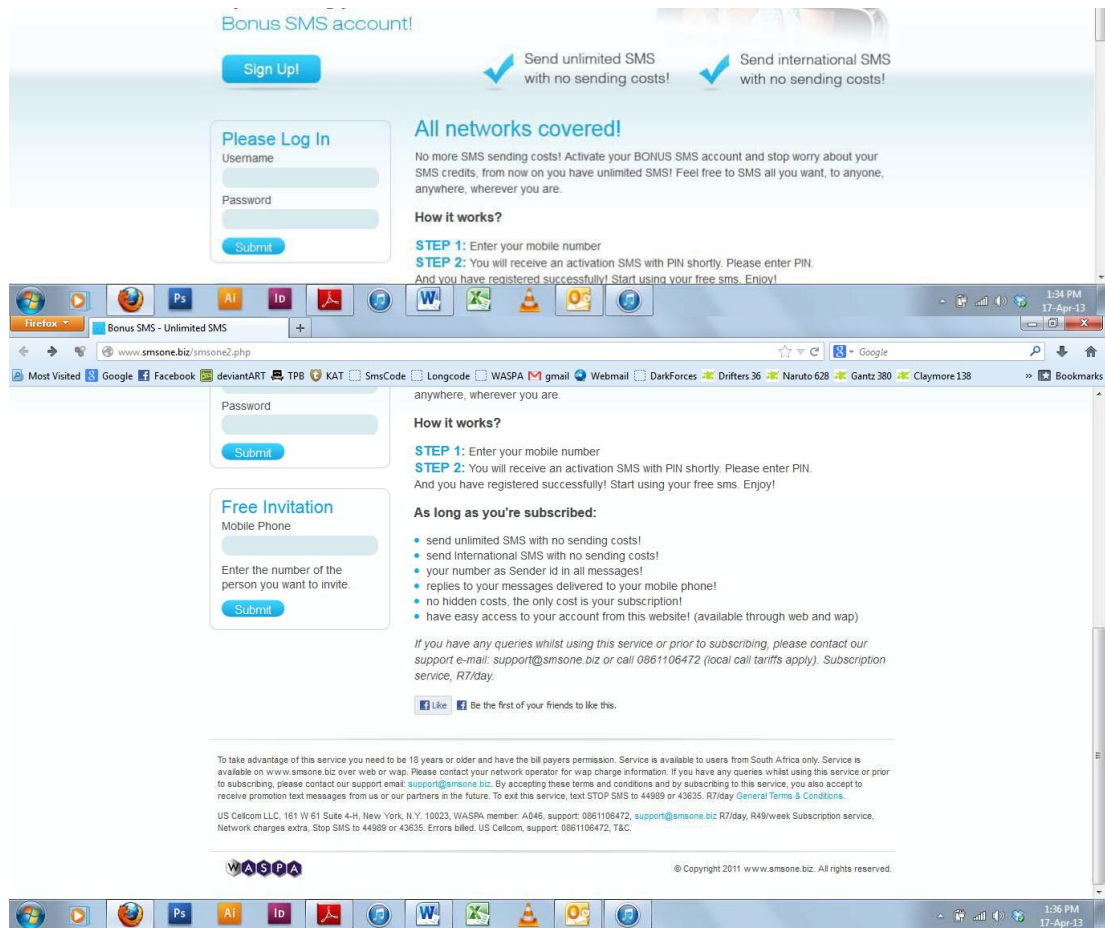
1. BACKGROUND TO THE APPEAL

- 1.1. The appeal document lodged by the Appellant is somewhat unclear and therefore this is regarded as an appeal against both the finding and sanction imposed on the Appellant by the adjudicator in complaint 20470.
- 1.2. The Appellant is a full member of WASPA.
- 1.3. The original adjudication does not set out the facts of this matter in any great detail; the panel finds it necessary to contextualise its reasoning, and so it will set out the facts which, in brief, are as follows.
- 1.4. The WASPA Media Monitor lodged a complaint based on a concrete case provided to her by a journalist. Neither the journalist nor the consumer is identified in the initial complaint of 9 May 2013. The subscriber's logs were attached to the complaint (Cell number xxx.xxx.xxx.xxx) and from this her identity is clear.
- 1.5. According to the logs the consumer was subscribed on 3 April 2012 after responding to commercial marketing material received from the Appellant. The original marketing message read:

"Your account 0733008392 shows unclaimed mobile points in April! To redeem send BONUS to 43635. [//TopSMS/Subscription@R7/day.Optout?TxtStop"](#)

- 1.6. The marketing campaign using that commercial message was apparently addressed in Complaint Report 17908 and the Appellant afterwards adhered to the conclusion that was reached in the process of dealing with that complaint, namely that the commercial message was not compliant even though that was not the finding of the adjudicator in that matter. The webpage appeared as follows, the first part showing the top page of the landing page and the second part showing the bottom half of the landing page after scrolling down :





- 1.7. The complaint was that there is no mention in the top part of the home page of the billing information, nor the fact that it is a subscription service. This information is only available if you scroll down to the bottom, which your average user has no need to do, as the sign up button is placed near the top of the page. This information is required to be placed in a manner that is explicit and prominent.

- 1.8. The Appellant responded that the 'Promotional material for all subscription services are prominently and explicitly displayed identifying its services as "subscription services". It attached a screenshot which seems to be a later version of the webpage that was provided by the complainants and which appeared as follows:

Home General Terms & Conditions Privacy

Bonus SMS

Simple
Easy Fast Modern
Where ever you are!

Stay in touch with your friend and family all over the world by activating your own **Bonus SMS account!**

[Sign Up!](#)

✓ Send unlimited SMS with no sending costs! ✓ Send international SMS with no sending costs!

Please Log In

Username
Password
[Submit](#)

Free Invitation

Mobile Phone
Enter the number of the person you want to invite.
[Submit](#)

All networks covered!

No more SMS sending costs! Activate your BONUS SMS account and stop worry about your SMS credits, from now on you have unlimited SMS! Feel free to SMS all you want, to anyone, anywhere, wherever you are. Subscription service R7/day.

How it works?

STEP 1: Enter your mobile number
STEP 2: You will receive an activation SMS with PIN shortly. Please enter PIN. And you have registered successfully! Start using your free sms. Enjoy!

As long as you're subscribed:

- send unlimited SMS with no sending costs!
- send international SMS with no sending costs!
- your number as Sender id in all messages!
- replies to your messages delivered to your mobile phone!
- no hidden costs, the only cost is your subscription!
- have easy access to your account from this website! (available through web and wap)

If you have any queries whilst using this service or prior to subscribing, please contact our support e-mail: support@smsone.biz or call 0861106472 (local call tariffs apply). Subscription service, R7/day.

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US Cellcom LLC, 161 W 81 Suite 4-H, New York, N.Y. 10023, WASPA member. A046, support: 0861106472, support@smsone.biz R7/day, R49/week Subscription service, Network charges extra, Stop SMS to 44989 or 43635. Errors billed. US Cellcom, support: 0861106472, T&C.

[Highlighting provided by the Appellant]

- 1.9. The logs of the specific consumer mentioned in this complaint was attached and shows that although the consumer was subscribed on 3 April 2012, the first reminder message to the consumer was only sent some 4 months later on 3 August 2012.
- 1.10. The consumer's account also reached the limit of R200 on several occasions during this period without any notice being sent to the consumer as required. The logs indicate that on several occasions no funds were available, but that of course did not suspend or stop the indebtedness of the consumer at such time.
- 1.11. When the Appellant did eventually start sending reminder messages, the messages were in the following format:

You are subscribed to SmsOne. HELP: 0861106472.Cost R7/day. To unsub, sms STOP SMS to 43635.
- 1.12. The Appellant responded to the complaint by indicating that it had sent the requisite number of reminder messages when regard is had to the number of billings that took place during the subscription period. It did concede however that the first reminder was only sent after 53 billings occasions (response dated 29 May 2012).
- 1.13. The Appellant acknowledged that the reminder message was not in the exact format required by the Code of Conduct as it did not contain the word 'Reminder' and did

not follow the prescribed sequence. It changed its reminder messages as result of this complaint to comply with the requirement.

- 1.14. There was no intelligible response to the allegation that no reminders were sent when the R200 threshold was reached during this period as required.

2. THE APPLICATION OF THE CODE AND RULES

The Code, v 11.6

- 2.1. The adjudicator correctly applied version 11.6 of the WASPA Code of Conduct to this complaint. The following sections of the WASPA Code of Conduct have relevance here:

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

6.2.10. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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.

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description].

3. The Decision of the Adjudicator

- 3.1. The Adjudicator found in regard to the complaint that the required reminder messages in terms of section 11.6.1 were not sent and that the Appellant seems to operate under a misapprehension about the fact that a monthly reminder message

needs to be sent. This requirement is not linked to the number of billings taking place.

- 3.2. The Appellant failed to comply with this requirement and was therefore in breach of section 11.6.1.
- 3.3. Section 11.6.2 prescribes a very specific format for reminder messages which the Appellant failed to adhere by omitting the word 'Reminder' and by failing to place the cost before the word 'HELP'.
- 3.4. There was therefore technically a breach of section 11.6.2.
- 3.5. Section 6.2.10 requires a message to be sent to the consumer when the R200 threshold is reached, which did not take place in this case.
- 3.6. There was therefore a breach of section 6.2.10.
- 3.7. The Adjudicator was of the opinion that the webpage presented to the consumer was in breach of section 11.1.1 prior to the amendments made to it as a result of Complaint 17908 as the reference to a subscription service was not prominently or expressly displayed. The requisite text was displayed only in small print in amongst other text far below the 'Sign up' button. This does not meet the requirement of prominent or explicit.
- 3.8. The web page was amended at some stage as evidenced by the version presented by the Appellant. This post amendment webpage still suffered from the same deficiencies as the original webpage in that the reference to the subscription service was not prominently or explicitly displayed on the webpage. The adjudicator therefore found a further contravention of section 11.1.1.
- 3.9. The adjudicator applied the following sanctions:
 - 3.9.1. Breach of 11.6.2: The Appellant was ordered to send reminder messages in the correct format;
 - 3.9.2. Breach of 11.6.1: The Appellant was fined R5,000 for the failure to send reminder messages;
 - 3.9.3. Breach of 6.2.10: The Appellant was fined R5,000 for the failure to send the R200 threshold messages;
 - 3.9.4. Breach of 11.1.1: The Appellant was fined R50,000 for the initial breach and a further R50,000 for the post-amendment breach. The latter fine was suspended provided that the Appellant rectified this further breach within seven days of the ruling.

4. Grounds of appeal

- 4.1. The Appellant states that a free monthly reminder was sent every month, but since WASPA haven't provided it with the MSISDN from which the test was made, it is not their fault that no additional proof is sent. In order to clarify this, it required from WASP to provide them with the MSISDN in order to send full logs report.

- 4.2. As far as the format of the reminder message is concerned, the Appellant maintains that as a result of the failure of WASPA to provide it with a concrete MSISDN, it is not possible to respond to the specific complaint, however the appellant did concede that the reminder format it generally uses was defective in that the price should be stated before the word "HELP".
- 4.3. The Appellant maintains that the website complained about prominently and explicitly identify its services as subscription services as highlighted in red (see above) and complies with the Code of Conduct in all respects, including fonts, billing information and billing frequency. The Appellant states that a website needs to be viewed from the point of view of the customer. According to the Appellant the top part of the message is not the most important part, but the middle part is, which contains all of the information about the subscription. It is alleged that this is confirmed by marketing experts. It is also maintained that the font sizes of the reference to the subscription service is in the requisite size, namely at least 15 point or 80% of the largest access number on the page.

5. Findings of Appeals Panel

Failure to send reminder messages 11.6.1

- 5.1. The allegation in the grounds of appeal that the Appellant was unable to respond to the specific complaint as it did not have the necessary MSISDN reference, rings hollow. The logs and MSISDN was supplied to it by WASPA on 29 May 2012 (see document 20407.010.wasp.reply.2013-05-29). The Appellant in response to that email provided the explanation on which the adjudicator based the decision on this part of the complaint. The Appellant also offered a refund to the specific consumer, but fails to provide its own logs to contradict the logs provided by WASPA.
- 5.2. It is clear from the logs provided that the Appellant failed to send the required messages. The finding of the Adjudicator on the breach of section 11.6.1 is upheld.
- 5.3. The Adjudicator imposed a fine of R5,000 for this infringement.

Failure to send threshold message 6.2.10

- 5.4. The Appellant fails to address the complaint about the threshold messages specifically and seems to rely on the same reasons referred to in 5.1 above. The decision of the Adjudicator that the Appellant breached section 6.2.10 is upheld for the same reasons.
- 5.5. The Adjudicator imposed a fine of R5,000 for this infringement.

Failure to send use correct reminder message 11.6.2

- 5.6. The Appellant acknowledged that its reminder message was non-conforming and the Adjudicator's decision on this breach is upheld. The Adjudicator viewed this infringement as a mere technical infringement which is reflected in the sanction.

- 5.7. The Adjudicator imposed no fine but ordered the Appellant to rectify its messages. This sanction is upheld.

Failure to prominently and explicitly refer to subscription service 11.1.1

- 5.8. The original screenshots provided to the Appellant in the complaint differs from the two versions of the website provided by the Appellant. In the first version provided by the Appellant the reference to a subscription service first appears at the end of the first paragraph amongst the fine print under the heading "All Networks Covered". The service that is provided to the customer, namely unlimited 'free' sms's is certainly prominently displayed in the top part of the website, ie all of the benefits. The obligations of the consumer, namely a R7 per day subscription is not prominently displayed at all, but contained in amongst the fine print. In the initial screenshot the reference to this being a subscription service is found even lower down in amongst the fine print. It is not even contained in the section 'How it works' or in step two that refers to the activation process. It simply states "and you are registered successfully. Start using your free sms. Enjoy!" Here the word 'free' is used without any reference to the financial obligation undertaken by the consumer.
- 5.9. The Adjudicator has found that the Appellant has contravened section 11.1.1 on two occasions, namely by using the website in the format prior to the complaint and the use of an amended website afterwards. Two different sanctions were applied to these contraventions. In our view the use of the very similar websites during the period preceding this complaint and complaint 17908, constitutes one continuing transgression rather than two different transgressions of section 11.1.1. The finding on the second infringement of section 11.1.1 is overturned and the finding on the first infringement amended to include a reference to the amended webpage, ie that the Appellant infringed section 11.1.1 by using these non-complying web pages.
- 5.10. These web pages are misleading and clearly made up to avoid a prominent reference to the subscription service and the obligations undertaken by the consumer. The infringement is viewed as a serious breach to be reflected in the sanction.
- 5.11. The sanctions imposed by the adjudicator for the infringement of sections 11.6.1 is amended to read as follows:
- The Service provider is ordered to pay a fine of R50,000.*
- 5.12. The Appeal has been successful in only one respect, namely against the finding of the second infringement of section 11.1.1. The majority of the findings and sanctions of the adjudicator has been upheld and accordingly only 20% of the appeal fee should be refunded.