

## Decision of the ADVERTISING REGULATORY BOARD

Complainant	Cell C Limited
Advertiser	Vodacom (Pty) Ltd
Consumer/Competitor	Competitor
File reference	58 - Vodacom - Cell C - 11-01-19
Outcome	Dismissed
Date	8 February 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a complaint lodged by Cell C against the mobile advertising of Vodacom.

### Description of the advertising

On Vodacom's \*111# mobile portal, on the screen where one can buy data bundles, it shows the following:

- 1) 1GB at R100
- 2) 2GB at R149
- 3) 4GB at R249
- 4) Next

5) *Back*

When you select option 2, a new screen comes up that states:

*You have selected a 1GB (with 1GB FREE Night Owl) once-off bundle at R149 valid for 30 days. Visit [vodacom.co.za](http://vodacom.co.za) for T&Cs*

- 1) *Confirm*
- 2) *Back*
- 3) *Cancel*

## Complaint

The Complainant submitted that the first screen advertises various data bundles at different price points, but there are no further terms and conditions attached or referred to on this page. The second message on the portal adds material conditions to the offer on the first screen. This is because the customer is not getting 2GB for R149 but is actually paying R149 for 1GB and then gets 1GB free Night Owl data. The customer is being misled by the offer on two aspects:

- they are paying R149 for 1GB as the other 1GB is free; and
- the second 1GB is free Night Owl data which can only be used at night and not anytime, as is understood by the offer on the message on the first screen.

In Telkom – Lucille Govender – 03-12-18, the ARB Directorate specifically noted that:

- “Material conditions to an offer must be communicated upfront”; and
- “You cannot correct a misleading impression already created after the fact”.

The Complainant argued that Vodacom is guilty of exactly what the Directorate prohibits in Telkom – Lucille Govender. It communicates the offer of 2GB for R149 upfront on the first screen of the portal without any material conditions, and then seeks to correct the

misleading impression already created after the fact in the second pop-up message by including the specific terms and conditions of the offer.

In support of the argument that the advertisement is misleading, the Complainant attached examples of complaints from Vodacom customers on Facebook and Hellopeter.com to show the dissatisfaction that customers are experiencing due to Vodacom's misrepresentation of its data bundles. The Complainant argued that this illustrates that customers are in fact being misled when purchasing the data bundles.

## Response

Ogilvy & Mather Johannesburg submitted a response on behalf of Vodacom. It argued that the current complaint is identical, in principle, to the issues raised in the matters of Vodacom Data / D de Clercq / 2016-3611F (10 June 2016) and Vodacom Data Bundle / A Roos / 2017-7095F (8 March 2018) before the Advertising Standards Authority of South Africa ("the ASA"), in which matters it was found that the relevant SMS advertisements were not misleading.

In the current matter, and with reliance on the De Clercq and Roos matters before the ASA, the first message (which lists the various options available to a prospective consumer) cannot be divorced from the second message (which reflects the material information applicable to the option selected by a consumer). All this is communicated to a prospective consumer prior to deciding to purchase the specific offer. The second message should be considered as part of the overall advertisement and interchange, and one cannot reasonably divorce them when taking into account the nature of the medium, namely SMS advertising. These principles are equally applicable in the current matter. The interested customer is instantly and conveniently informed about the relevant limitations. Moreover, a customer has to actively select "*Confirm*" to accept the offer, meaning that no customer can claim ignorance about what is being purchased.

It is accepted that an advertiser cannot rely on a disclaimer or terms and conditions to clear up any confusion that may be created by the body copy of an advertisement. However, it is an established principle that advertising messaging must be viewed holistically and that the medium in question has to be taken into account, which in the current matter is that of an SMS advert. The complaint suggests that the first message of the advertisement must be divorced from the second message. This suggestion is, however, in conflict with the established principles in the Roos and De Clerq matters, namely that the various portions of an SMS advert should not be divorced from one another and should, together, form the advertisement as a whole. An SMS advert is clearly distinguishable from, for example, an online advert like the one considered in the Telkom – Govender matter.

## Application of the Code of Advertising Practice

The following clause was considered in this matter:

Misleading claims – Clause 4.2.1 of Section II

## Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

Clause 4.2.1 of Section II states that advertisements should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer.

In the matter of Vodacom Data / D de Clercq / 2016-3611F (10 June 2016), the Directorate of the Advertising Standards Authority (ASA) dealt with a similar situation as in the present matter. An SMS advertisement stated that a customer could buy 50MB of data for R3, but did not state that the data would only be valid for one hour. This information was

disclosed through another SMS once a customer dialled \*111\*96#, and the customer then had to confirm the purchase. The Directorate held, *inter alia*:

“Technically speaking, the customer is correct in arguing that the initial advertisement does not contain any information about the limited validity, and that the respondent could reword its message to include this information. The Directorate is also inclined to agree that the limited validity could arguably be viewed as material to the decision to purchase.

“However, this is not automatically the end of the matter. Unlike traditional print or broadcast advertising where an offer is communicated, and the customer then has to take the time to interact with the advertiser at store level, this particular campaign creates instant, personal interaction.

“As soon as a customer dials the number \*111\*96# he/she receives a message alerting him/her to the fact that the bundle is valid for the next hour. This interaction is instantaneous and ‘costs’ the customer nothing more than the effort of dialling the eight-digit number.

“At this point in time the customer is adequately informed and can elect to continue with, or cancel the offer with no added inconvenience or cost. It must be added, however, that a customer who opts to proceed with the purchase without bothering to read the message does so at his/her own peril. The Directorate is not convinced that a hypothetical reasonable person would commit to purchase without checking to make sure that the purchase accords with his/her expectations.

“Had the respondent not included any information about the validity, or perhaps only included this information after the purchase had been completed, the Directorate could be swayed to find the communication misleading. This is not, however, the case.”

While the present matter is not about SMS advertisements but about Vodacom's \*111# mobile portal, the principle reasoning is similarly applicable.

The Memorandum of Incorporation of the ARB states:

[The Members] regard themselves as bound by, and hereby adopt as precedent, the principles of the decision-making organs of the Advertising Standards Authority of South Africa (1995/000784/08), as at the date that the aforementioned ceased to trade

ASA decisions are therefore of persuasive value to the Directorate of the ARB.

The Directorate has a level of discomfort with the fact that the first screen showing "2GB at R149" could be clearer in terms of what exactly is being offered. Like the ASA in the De Clercq decision, the Directorate of the ARB felt that the wording of the initial screen could have been better. This does not, however, automatically render it misleading.

The offer is for 2GB of data at R149. A customer who chooses this option will indeed get 2GB of data and pay R149 for it. While most customers would probably prefer to have the full 2GB of data available at all times, this does not make the essential claim of "2GB at R149" a misleading claim.

Furthermore, and similar to the situation in the De Clercq-matter, a customer is informed that the 2GB of data that you get for R149 consists of 1GB of data and 1GB of free "Night Owl" data *before* the purchasing decision is made, not after. In addition, it is clarified immediately after the initial offer. Accordingly, the customer has the option not to buy the data bundle if they are unhappy with the advertiser's offer.

This is not, however, meant to condone the practice of engaging customers in drawn out negotiations, only to change the advertised offer at the last moment. The nature of the advertising in the present matter allows for immediate interaction with the customer, and the customer is instantly informed of the nature of the offer. It also does not condone a material change to an offer during the interaction: the substance of the original offer in this matter (2GB for R149) is delivered in the ultimate deal.

There were a number of other factors relevant to the Directorate:

- The advertising being considered is not meant to rope in new customers, but is aimed at existing customers who would most likely be familiar with the process of buying data bundles and Vodacom's pricing structure.
- If one looks at Vodacom's website, the cost of a 1GB once-off data bundle is listed as R149. The hypothetical reasonable consumer would therefore immediately realise that an offer of 2GB for R149 amounts to one free GB of data, that may therefore have limitations to it.
- The nature of the advertising means that a limited amount of information can be included at each level of communication. It would be impractical to include all the details of each offer on the first page, and the consumer would realise this.

**In light of the above, the Directorate finds that the Respondent's advertising is not misleading, and does not contravene Clause 4.2.1 of Section II.**