

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Mr. Grey Holmes
Advertiser	Mobile Telephone Networks (Pty) Ltd
Consumer/Competitor	Consumer
File reference	2588 – MTN –Holmes
Outcome	Upheld
Date	18 May 2023

The Directorate of the Advertising Regulatory Board has been called upon to consider a consumer complaint against advertising by MTN.

Description of the advertising

The complaint referred to an advertisement that appeared in the MTN store in Greenstone shopping centre. A photo of the advertisement appears below:



Directors: GD Schimmel (CEO) S Fakir (Chair)

A Allision C Borain K Denalane A Gcoyi G Leck N Motsoeneng M Neethling

NPC 2018/528875/08 Block 4, 1 Magalieszicht Ave, Dunkeld West, 2196

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Complaint

The Complainant alleged the advertisement is misleading because the offer does not stipulate that it is an offer for 5GB Anytime Data and 5GB Night Express Data, and not for 10GB Anytime Data. The Complainant set out that data is normally split in 3 categories: Anytime data which is available 24 hours a day; daytime data which is available for the day; and night or nite data which is available from 23:00 or 24:00 to 06:00. Therefore, if the data was advertised as 10GBs, it was assumed that it is anytime data, otherwise it should be advertised as, say, 5GB day and 5GBs night or nite data.

Response

In response to the complaint, the Advertiser referred to the terms and conditions which it mentioned in the advertisement and which was fully set out on the website (“Terms and Conditions”).

The Advertiser explained that clause 4 of the Terms and Conditions set out the inclusive value of the various BozzaGigs bundles and provided a breakdown of the inclusive value of the each of the various BozzaGigs bundles. The following screenshot of the table breaking down the inclusive value of the BozaaGigs bundles was included in the response:

Price	Total inclusive value	Breakdown of inclusive value	Validity
R99	10GB	5GB Anytime Data + 5GB Night Express Data	30 days
R129	15GB	7.5GB Anytime Data + 7.5GB Night Express Data	30 days
R149	20GB	10GB Anytime Data + 10GB Night Express Data	30 days

The Advertiser stated that clause 5.6 of the Terms and Conditions expressly recorded that the BozzaGigs LTE bundles would comprise of both Anytime Data and Night Express Data. In addition to what was set out in the Terms and Conditions, it explained that the BozzaGigs Webpage set out the various BozzaGigs bundles as well as how the inclusive data in each bundle would be allotted between Anytime Data and Night Express Data.

The Advertiser submitted that that it was clear from the Terms and Conditions and the BozzaGigs Webpage that the value of the data offered in the advertisement would include both Anytime Data and Night Express Data, and it also set out how the value of the data offered in the advertisement would be allocated between Anytime Data and Night Express Data.

The Advertiser argued therefore that any customer who purchased 10GB of data as advertised in the Advertisement would receive all 10 GBs of data, however certain data (i.e. the Night Express Data) may only be used during certain times of the day.

The Advertiser explained that the BozzaGigs bundles could be purchased in-store or via USSD by following the prompts. When purchasing a BozzaGigs bundle in-store, customers would be advised that terms and conditions apply and would either be advised of the Terms and Conditions or will be provided with a copy of the Terms and Conditions. Therefore, the customer would be aware of the breakdown of the inclusive data prior to purchasing the preferred BozzaGigs bundle.

Finally, the Advertiser stated that the Complainant suggested that "*any person would assume that this advert is for anytime*", however in the Advertiser's view this was not a reasonable assumption as it is clear from the face of the Advertisement that terms and conditions would apply.

Application of the Code of Advertising Practice

The following clause of the Code of Advertising Practice was considered in this matter:

- Misleading advertising - 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 reads:

"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."

The Directorate notes that the Advertisement set out that 10GB of data is available to purchase for R99. The amount of data that the customer is able to use is not in dispute, but it is the way in which the Advertiser has allocated the data between anytime data and night data, which the Complainant alleges has been done without proper communication in the advertisement, that is in dispute.

The Directorate accepts that with all advertisements space may be limited, and it may not be possible to include each and every detail of the product in the actual advertisement. To this end, the Directorate agrees that terms and conditions have become a useful tool to provide further details of the product. However, as a general principle, advertisers cannot use the terms and conditions to fix a misleading impression which has already been created in an advertisement. Advertisers may only elaborate and give further information in the terms and conditions, or include information that does not materially change anything about the offer made in the advertisement. By way of example, the Advertisement could have had an asterisk next to the “10GB” with a corresponding asterisk at the bottom of the advertisement which states “Split between day and night data. T&Cs apply” and then detail the actual split of the day and night data in the T&Cs. This is acceptable.

The Directorate accepts that some consumers might view the advertisement and realise that it is possible that something in the terms might limit the availability of the 10GB data – especially if they are very experienced with this type of offer. However, there is nothing in the advertisement that actually alerts the consumer to this – and so it is also perfectly reasonable that a consumer might conclude that the large, emphasised offer of 10GB is as good as it sounds, and that the 10GB can be used at any time. The communication is, in this respect, ambiguous at best.

The Directorate notes that the advertisement includes the amount of data and the price payable for the data, together with the validity period during which the data may be used, and that terms and conditions apply. The Directorate is of the view that it would also have been simple for the Advertiser to include the allocation in the actual Advertisement; it is not cumbersome or complicated information.

The Directorate highlights that although the Advertiser has stated “T&Cs apply” in the advertisement, it is a general statement that has been made. There is no alert or asterisk next to “10GB” to draw a customer’s attention to the fact that this allocation is what is affected by the T&Cs.

Based on the above, the Directorate considers the Advertisement to be misleading and it is in contravention of Clause 4.2.1 of Section II of the Code.

Sanction

The Advertiser is required to:

- Withdraw all advertisements advertising 10GB for R99 without qualification. The process of withdrawing the claim must be actioned with immediate effect;
- The process of withdrawing advertisements must be completed within the deadlines stipulated in Clause 15.3 of the Procedural Guide.

The Advertiser is reminded that in terms of Clause 15.5 of the Procedural Guide, offending advertising is to be withdrawn from every medium in which it appears.