2016-2017 Annual Report

Contents

1. LEGISLATIVE MANDATE

The Office of the Ombudsman of Financial Services (Ombudsman) is an independent body with the legislative mandate to receive, investigate and make fair and reasonable determinations of certain disputes against authorized financial services providers in terms of Sections 74 & 75 of the Financial Services Regulatory Authority Act 2 of 2010 (the FSRA Act).

The FSRA Act

The FSRA Act was promulgated with the view to establish, in terms of Section 3, the Authority whose mandate is to foster, through regulation and prudential supervision of financial services providers, the stability of the Swaziland financial system; safety and soundness of financial services providers; highest standards of conduct of business by financial services providers; promotion of fair competition between different financial services providers for the benefit of stakeholders; fairness, efficiency and orderliness of the Swaziland non-bank financial sector; and the protection of stakeholders. It is within this landscape that the FSRA Act mandates the Ombudsman to enable certain disputes in the industry to be resolved quickly and with minimum formality.

2. OUR VISION, MISSION AND CORE VALUES

VISION

The Ombudsman is an independent office aspiring to be a world-class dispute resolution forum for easy access and redress to aggrieved persons in the non-bank financial services sector.

MISSION

The mission of the Ombudsman is to effectively resolve non-bank financial services disputes in an affordable, fair, reasonable and speedy manner, with minimum formality.

CORE VALUES

The Ombudsman will strive to act professionally at all times. To this end, in delivering our services we are guided by the following principles and values:

- Independence of thought
- Impartiality of judgment
- Integrity of conduct
- Transparency in our dealings
- Fairness in determinations
- Accountability in operations
- Flexibility in approach
- Courtesy in interactions
- Confidentiality
- Performance Excellence

3. OPERATIONS REPORT

3.1 Complaints Statistics

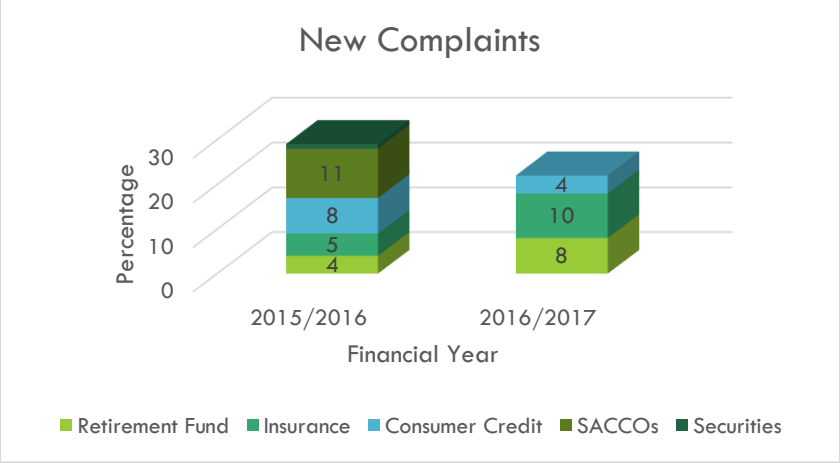
The doors of the Ombudsman were open to receive new complaints from the public with effect from the 1st February 2016. In order to prevent an instance of disservice to financial services consumers and to afford transition from the era of the Insurance and Retirement Funds Adjudicator (the IRFA) to that of the Ombudsman, all the complaints lodged at the IRFA and/or the FSRA now stand to be determined by the Ombudsman.

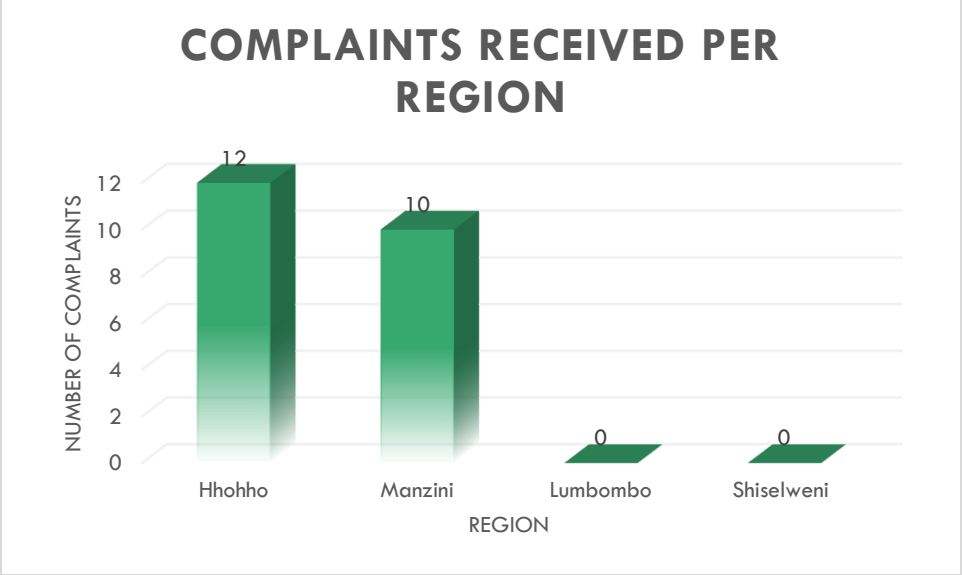
3.2 Complaints Received

A total of 22 (twenty two) new complaints were registered at the Ombudsman during the period under review.

Of the complaints received: 8 (eight) related to retirement funds, 10 (ten) related to insurance 4 (four) related to consumer credit. No complaints in respect to Securities and Medical Aid Schemes were received by the Ombudsman.

FINANCIAL YEAR	NEW COMPLAINTS
2015 / 2016	**16** [6 Consumer Credit; 6 SACCOs; 2 Insurance; 2 Retirement Fund]
2016/2017	**22** [8 Retirement Funds; 10 Insurance; 4 Consumer Credit]



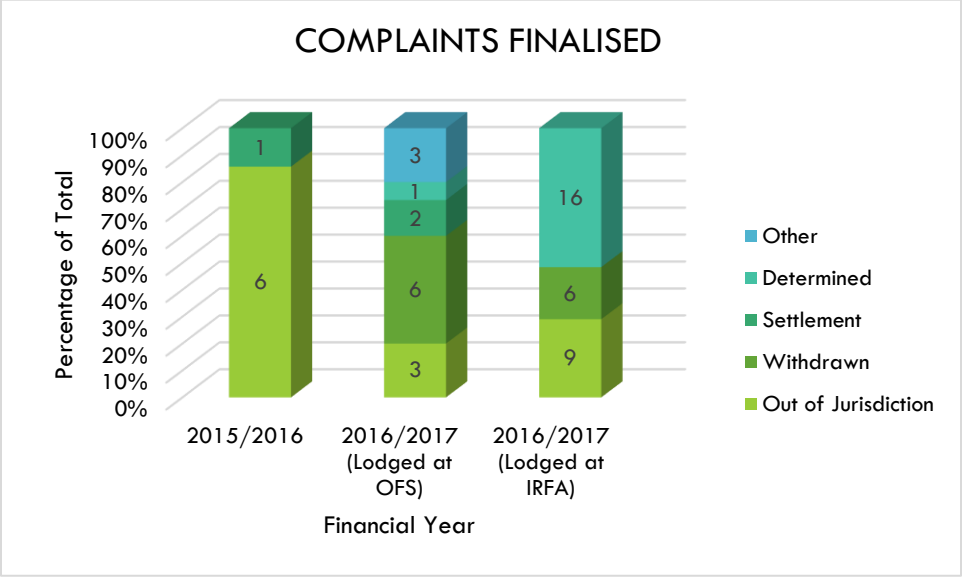


3.3 Complaints Finalized

The Ombudsman began the financial year with two operational staff as well as one administrative staff member until September 2016 at which time additional staff members required joined the Office. The need for increased capacity, necessary groundwork and for robust operations to begin resulted in the new complaints not resulting in any significant rise in number during this financial year.

Despite this, the Ombudsman was able to finalize the following matters during the period under review:

	2015/2016	2016/2017 (LODGED AT OMBUDSMAN)	2016/2017 (LODGED AT IRFA)
Out of Jurisdiction	6	3	9
Withdrawn	-	6	6
Settlement	1	2	-
Determined	-	1	16
Other	-	3	-
Total	**7**	**15**	**31**



3.4 Staff

"The Strength of the team is each member. The strength of each member is the team."
~Phil Jackson

At the start of the present financial year the Ombudsman staff comprised of Nondumiso Simelane (OMBUDSMAN), Elizabeth Mzungu (Legal Officer) as well as Zodwa Dube (Administrative Assistant) who has since taken up the position of Case Officer. In view of the mandate of the Ombudsman, in the course of the year we welcomed Sabelo Zwane as Senior Legal Officer (September 2016), Tilungile Ntshalintshali as Legal Officer (October 2016) and Pumza Matsebula as Administrative Assistant (November 2016).

The Ombudsman is committed to carry out its legislative mandate through the professional skills and capacity required and looks forward to increased productivity as steps are taken towards public awareness in order for the public to be able to bring their complaints.

3.5 Operational Activities

3.5.1 Stakeholder Engagement

The development of the Draft Rules of the Ombudsman is an important part of establishing the operations of the Office as mandated by Section 74 (3) of the FSRA Act. To that end, the Draft Rules were forwarded to stakeholders with an invitation for comments which were later presented to the stakeholders at breakfast meetings.

The two meetings, involving financial services providers (FSPs) and employer associations were held in Mbabane (Mountain Inn) and Matsapha (Esibayeni Lodge) on 15 and 17 November 2016 respectively, with the third and final meeting for consumers to be held in April 2017.

The Ombudsman undertook a number of stakeholder engagement initiatives in order to create public awareness and further financial inclusion amongst stakeholders. Pursuant to this the Ombudsman saw to the production of brochures and pamphlets; ran a series of 12 (twelve) Radio Programs between November 2016 and February 2017 at the Voice of the Church (VOC) Radio Station; attendance at Tinkhundla Council, Bandla-ncane, Bucopho and Zone Leaders meetings within the Hhohho region, as well as Buganu events during February and March 2017.

3.5.2 Conferences and Attachments

3.5.2.1 Bowmans Retirement Funds Act Training

Together with the FSRA Legal Services and the Licensing and Inspection Department (Insurance and Retirement Funds), the Ombudsman hosted trainers from Bowmans Law Firm in South Africa with a total of 26 staff members in attendance from the 12th -14th September 2016.

3.5.2.2 Financial Services Advisory and Intermediary Services Ombud, South Africa

Another systems familiarization visit was undertaken for four days by the Ombudsman and the Senior Legal Officer on 24 to 27 October 2016 to the Office of the FAIS Ombud. While the OPFA's mandate is

on the subject of pension, the FAIS Ombud covers a wide array of non-bank financial advisory and intermediary services.

In fostering a working relationship with Ombudsman schemes in the Region it is in plan to enter into memoranda of understanding (MoUs) with the OPFA and the FAIS Ombud in the immediate future.

The object of the intended MoUs is to establish co-operation between the Ombudsman and the said schemes in the area of referral of complaints considering the great numbers of our peoples working and/or doing business in and across our jurisdictions.

Mr Sabelo Zwane (Senior Legal Officer, Ombudsman); Ms Noluntu Bam (Ombudsman, FAIS); Ms Bridgette Sehlapelo(FAIS) and Ms Nondumiso Simelane (OMBUDSMAN, Ombudsman) at the FAIS Ombudsman (library), Sussex Office Park, Pretoria, South Africa

3.5.2.3 International Network of Financial Ombudsman Schemes 2016 Conference

In September 2016 the OMBUDSMAN attended the INFO 2016 Conference. The INFO Conference is an annual event that takes place in September hosted by member schemes on a rotational (voluntary) basis. The INFO 2016 Conference was on 19 – 21 September, 2016 held in Yerevan in the Republic of Armenia. The theme for the INFOS 2016 Conference was "DEFINING INDIVIDUALITY – GOING GLOBAL". The essence of this theme was the acknowledgement that while international principles are followed by Ombudsman Schemes and an attempt is made by these schemes to adopt best practices, there is need for the schemes to be alive to the reality of being unique, having national and cultural peculiarities that influence the day-to-day work of such schemes.

Ms Jennifer Preiss (Deputy Ombudsman, Ombudsman for Long Term Insurance, RSA (left); Ms Holly Nicholson, Executive Director, Ombudsman and General Counsel, Ombud Service for Life and Health Insurance, Canada (middle) and Ms Nondumiso Simelane (OMBUDSMAN, Ombudsman) (right) at the INFO Conference 2016, Yerevan.

4. DETERMINATIONS

While the doors of the Ombudsman were opened to the public with effect from the 1st February 2016, for the period under review the main focus of the Ombudsman has been to prioritise those complaints that remained pending from the Adjudicator with a view to clearing the backlog.

Of the 38 files inherited from the Adjudicator, of which 31 cases were finalised during the period under review; 17 of these were determinations. Hereunder follows case studies drawn from some of the determinations made by the Ombudsman.

SUMMARY OF SELECTED DETERMINATIONS

RETIREMENT - Spouse's Pension - Requirements for the payment of Spousal pension payment of Spousal pension

Complainant A / Pension Fund B

The Complainant entered into a marriage ceremony in terms of Swazi law and custom with the deceased two days following the deceased's death. The deceased was a member of the Respondent Fund. Subsequent to his death, pension benefits became available for distribution in accordance with the Fund's governing Rules. The Complainant challenged the Fund's decision to deny her a spouse's pension which she claimed she was entitled to by virtue of her customary law posthumous marriage to the deceased. She argued that such a marriage has retrospective application and under the contemplation of the Respondent's rules.

Pronouncing on the spouse's pension the Ombudsman emphasised the supremacy of fund rules and that these must be strictly adhered to. With the Retirement Funds Act, 2005 (the RFA) only coming into effect in 2006, and the deceased having died in 30 October 2005, the Ombudsman's considered view was that in the circumstances, the only applicable legal instrument enforceable in this matter were the Fund Rules. The Respondent's Rules stated that a spouse is a person who was married to a member *at the time of the member's death*. Thus the Rules bestow pension entitlement to the surviving spouse. The Ombudsman held that the onus lies on the Complainant in this case to prove existence of a marriage between herself and the deceased at the time of his death. A Swazi customary marriage is generally proven by furnishing credible legally admissible evidence of occurrence of smearing of the bride with red ochre by the groom's family member. According to the Rules of the Respondent Fund, the person claiming a spouse's pension must have been married to the deceased before he died. The Ombudsman held that the Complainant was not married to the deceased at the time of his death, and therefore was excluded from the category of a beneficiary prescribed by the Fund Rules for award of spouse's pension benefit.

Even though cohabitation and therefore factual dependency was proven, the Complainant could not have a claim under the RFA as the latter had not come into effect. The complaint was accordingly dismissed.

Complainant C / Pension Fund D

The deceased, a pensioner, received monthly pension from the Respondent Fund. Following his death, a pension became available for disposal to his children and surviving spouse(s) in accordance with the Fund's governing rules.

The Complainant argued that she was deceased's wife by virtue of a Swazi customary law marriage concluded shortly before the deceased's death. The Respondent paid her a sum as a surviving spouse, but later on reversed its decision and recovered the funds paid to her from her children's pension. Following lodgment of the complaint with the then Adjudicator, the Respondent assented and reimbursed the deducted amounts to the children's benefit. The Complainant now challenged the Respondent's decision to refute her claim for spousal pension as the lawful wife of the deceased.

The issue for determination was whether or not the complainant was married to the deceased. The Respondent's Rules states that if a member dies before his separation from the Fund and was married at the time of his death, his surviving spouse shall be entitled to a pension equal to one-half the pension referred to in the Rules.

The Ombudsman held that the onus lies on the Complainant to prove existence of a marriage between herself and the deceased, at the time of his death. Unlike in the case of a civil marriage where parties simply produce a marriage certificate to prove existence of a marriage, an unregistered Swazi customary law marriage is more onerous to prove. The High Court of Swaziland has held that the essential requirement for a customary marriage is the ritual of smearing the bride with red ochre, which ritual is performed by a family member of the groom. Any other ceremonies or peripheral performances (including payment of *lobola* for instance) are not sufficient proof in the absence of the red ochre anointing ritual. The Complainant attached a copy of a certified copy of the affidavit deposing to such smearing with red ochre. However the respondent fund brought it to the attention of the Ombudsman that the deceased could not have consented to the alleged marriage as he was really sick at the time of the purported marriage. Thus the consent component was in question. The remaining question pertained to whether that act of smearing the Complainant with red ochre had the approval of the deceased. Guidance here was derived from Section 27 (2) of the Constitution of Swaziland Act, 2005 which states: "Marriage shall be entered into only with the free and full consent of the intending spouses." The present case demonstrated that the deceased was on his sick bed at the time of the marriage, oblivious to the purported marriage ritual. He therefore could not be said to have been a party to the marriage contract where neither his consent nor participation in it could be demonstrated. Therefore the complaint was dismissed.

Complainant E / Pension Fund F

The deceased was a member of the Respondent Fund. On his death, a death benefit became available for distribution in accordance with the Fund's governing rules. The Complainant challenged the Fund's decision to deny her a spouse's pension, arguing that a customary law marriage existed between herself and the deceased. The Respondent acknowledged Complainant's dependency on the deceased during his lifetime and on that basis paid her 40% of the lump sum death benefit. The Fund, however, refused to pay her a spouse's pension citing lack of evidence that she was married to the deceased.

The Complainant asserted that she got married to the deceased by Swazi law and custom whereupon she was smeared with red ochre and later procured an affidavit by such person who smeared her to that effect. The Complainant stated that she did not obtain a marriage certificate. The Respondent submitted that its decision against payment of spouse's pension to Complainant was due to inconsistencies in the evidence tendered by the deceased's family.

The issue for determination was whether or not a marriage existed between the Complainant and the deceased at the time of his death. The Ombudsman held that the onus lies on the Complainant as the claimant in the case to prove existence of such marriage. Unlike in the case of a civil marriage where parties simply produce a marriage certificate for this purpose, an unregistered Swazi customary law marriage is more onerous to prove. The High Court of Swaziland has clearly declared the one essential requirement for such a marriage, namely, the ritual of smearing the bride with red ochre, which is performed by a family member of the groom. Any other ceremonies or peripheral rituals are not sufficient proof in the absence of the ochre anointing ritual.

The Complainant, with the assistance of her attorney, subsequently filed with the tribunal an affidavit deposed to by the lady who smeared the Complainant with red ochre. The tribunal felt that this affidavit provided key evidence on the salient question whether or not a marriage existed between the Complainant and the deceased, and supported or lent weight to the self-sworn affidavit the Complainant submitted to the Respondent. In the absence of counter evidence to that of the deponent, the Ombudsman held that there were no reasonable grounds for disregarding this affidavit. The Respondent was ordered to pay the Complainant a spouse's pension in terms of its rules.

RETIREMENT – Computation of Benefits – Responsibility of the Fund Management Board - Supremacy of Fund Rules

Complainant G / Fund H & Employer I

The Complainant was an employee of Second Respondent Employer who became ill and was found to be unable to continue in his employment. The Employer was of the view that the Complainant would not be awarded disability insurance benefits by the Fund's administrator. The Employer subsequently decided to

give notice to the Employer of early retirement from employment creating the impression that the Complainant had resigned as opposed to him being retired on medical grounds. As a result, the Complainant did not receive his full benefits as he would have had he been retired on medical grounds and he was subsequently heavily taxed.

The Ombudsman held that the Respondents were bound by the Rules of the Fund and that the Rule dealing with retirement on disability and not that of early retirement was applicable in the scenario. The Ombudsman further held that the deviation from the relevant Rules was not justified and ordered that the Complainant be placed in the position he would have been had the correct Rule been applied.

Complainant J / Pension Fund K

The Complainant resigned from employment after 9 years of service. He was a member of the Respondent (Defined Benefit) Fund to which he paid monthly contributions. Following his resignation, the Fund paid the Complainant his contributions, plus 8% compound interest. The Complainant challenged the Fund's decision to deprive him of his employer's contributions, including its decision to accord him interest calculated at an invariable rate of 8%, contending that it bore no correlation to the 15% return values declared by the Fund during his period of employment.

The Fund acknowledged payment to the Complainant of his own contributions only plus interest calculated at the rate of 8% devoid of the employer's contributions. The Respondent cited in its defence to the claim provisions of its governing rules.

The Ombudsman held that by its very nature a defined benefit scheme guarantees benefits to fund members based on a pay-out formula prescribed in its rules. In the present case the Complainant was entitled to compensation for the full period of his service within the meaning of the rules. The Respondent Fund Rules made it clear that a member is not entitled to retirement benefits where he resigns before he completes 10 years' service, but that his benefits are limited to his own contributions and interest. The Rules declare a member's contributions as 5% of pensionable salary. This indisputably is the amount that the Fund paid him.

On the employer's contribution, the Fund Rules provide that the employer contributes 15% of each member's pensionable salary to the fund. The Fund Rules state that the Employer's "contribution shall not be credited to any member's account" and directs that this amount be paid to an unallocated fund to meet costs where the member's own contributions do not cover them. Thus the employer's contribution is not credited to Complainant's benefit except in the manner guaranteed and defined in the rules.

Consequently a benefit accrues to the Complainant only when he resigns as determined by the rules as worded at the time the benefit accrues. At the time of resignation any contributions made by the employer had not yet been credited to the Complainant's account, but in another account. Complainant had not served enough years to be entitled to the 15% contributed by the employer. Hence, at the time of resignation, the employer's contribution had not vested on Complainant and he was therefore not entitled to it.

On the interest question the Ombudsman held that, the board has discretion as accorded by the Fund Rules to fix the rate as it sees fit. The Fund stated that the trustees considered the investment returns when determining interest paid to its members and was loathe to deplete the Fund's resources. This led to the Fund paying interest at a flat rate both where the investment returns were negative and the fund experienced loss; and where the Fund experienced a rebound and increased returns. The Ombudsman found that the trustees acted reasonably, fairly and with due regard for the interests of the fund's members, and stakeholders as a whole.

The Ombudsman did not interfere with what she considered as a fair and reasonable exercise of discretionary powers by the trustees of the Fund in respect to the interest on Complainant's contributions. The complaint was therefore dismissed.

Complainant L / Employer M & Pension Fund N

During his time of employment within one department of the Employer, the Complainant successfully applied for a bursary that was advertised in a local newspaper for the completion of a 3 year qualification. Some years after his studies, and at a time when the Complainant had transferred to another department of the Employer the latter department was abolished and the Complainant's terminal benefits had to be calculated. The Fund deducted the 5 year period of his studies from his pensionable years of service for such calculation. The Complainant thereafter submitted a compliant on the basis of prejudice suffered from the reduction of the 5 years of study from his years of pensionable service in calculating his benefits. The complainant requested payment for the outstanding 5 years on which he had been on study leave as well as notice pay and gratuity.

The Respondents position was that they had deducted the years of study due to the reason that he was not permanently employed and was only hired to do vacation work during that period. The Ombudsman had to consider the applicability of the relevant Rules to the Complainant's circumstances, in terms whereof an employee was required to be "nominated" by the Employer to be able to benefit from the sponsorship/bursary. The Ombudsman, in considering the meaning of the wording of the Rules, held that the Complainant's successful application for the bursary did not amount to a nomination by the Employer.

The Ombudsman declined the recalculation of the Complainant's pensionable years as the Fund had correctly deducted the years he was not on a pensionable salary. In considering the remainder of the complaint, the Ombudsman found that a particular amount of money was payable together with interest only in respect to the financial loss incurred during the period of time in which the Fund delayed payment of his pension benefits.

RETIREMENT – Group Life Assurance Policy – Termination of Member Cover at the Instance of the Employer – Jurisdiction of the Ombudsman

Complainant O / Umbrella Fund P & 2 Others

The Complainant was the surviving widow of a former long-standing employee of the Employer, which was a participating employer in Umbrella Fund P. Upon the death of her husband, the Complainant requested payment of the deceased's pension and death benefits from the Second and Third Respondents, through the Employer. The Complainant was then informed that 4 months prior to the deceased's passing, the Employer had advised the Second and Third Respondents that the deceased would no longer be covered by the insurer nor have contributions made to the Fund on his behalf.

In assessing its jurisdiction the Ombudsman considered the provisions of Section 77 (6) of the FSRA Act to the following effect:-

> *"In this Part-*
> *(a) "complainant" means the person bringing a complaint against an authorised financial services provider; and,*
>
> *(b) "respondent" means an authorised financial services provider against whom a complainant is brought under this Part."*

The Ombudsman found that the conduct complained about was in fact that of the Employer who bore the responsibility of carrying out any and all other legal obligations (arising either from contract, delict or other) placed on the Employer by applicable laws of Swaziland.

Subsequently, it was held that the Ombudsman had no jurisdiction to determine legal disputes over the legal obligations of the Employer to its employees as these were determinable by a forum other than the Ombudsman of Financial Services.

RETIREMENT – Computation of Pension Benefits Pursuant to Order of Court – Jurisdiction of the Ombudsman

Complainant Q // Pension Fund R

Prior to lodging the complaint at the Ombudsman, the Complainant's employment had been terminated as a result of a disciplinary hearing. Following the notice of termination by his Employer to the Fund, the Complainant's terminal benefits were calculated in accordance to the Fund Rules dealing with employees dismissed by the Employer.

In protest of the dismissal, the Complaint took the matter to the Conciliation Mediation and Arbitration Commission as well as the Industrial Court for review of the Employer's decision. The Industrial Court found that the dismissal had been both procedurally and substantially unfair and ordered that the Employer compute and pay the Complainant 12months' salary as well as 'his terminal benefits being severance allowance, additional notice and notice pay'.

The Complainant held the view that the declaration made by the Industrial Court in respect to the unfair dismissal entitled him to have his pension benefits recalculated as though he had not been dismissed. The Fund held the contrary view that the Industrial Court did not reverse the dismissal but intended the Complainant only to be awarded 12months' salary as compensation.

The Ombudsman, in considering its jurisdiction, found that the main complaint issue rested on the interpretation of the Industrial Court Order and its implications for the calculation of terminal benefits by the Fund. The Ombudsman held that it does not have jurisdiction to review and/or interpret the decision or Order issued by the Industrial Court. For want of jurisdiction the complaint was subsequently dismissed.

RETIREMENT – Withdrawal Benefit – Supremacy of Fund Rules - Social Security Considerations

Complainant S / Pension Fund T & 2 Others

The Complainant resigned from her employment. By virtue of such employment, she was a member of the Respondent Fund. She argued that at the time of her resignation, she requested the fund to transfer her benefits from the fund to her new employer fund. The fund however processed her benefits as a withdrawal as opposed to a transfer. Her position was that the transfer values ought to have been calculated in terms of a rule providing for such transfer. The fund insisted it paid her correctly as hers was a withdrawal, not a transfer – as transfers could only be possible where there the new employer was a subsidiary or ally of the former employer.

Later the Fund offered to pay the employer's contributions, in addition to the Complainant's contributions. The Complainant however argued that the offered employer's contribution was equivalent to her own contributions, and did not reflect the ratio of employer to employee contributions in terms of the rules, which is apportioned at a 9:6 ratio respectively. The Complainant requested the Ombudsman's intervention in awarding her the employer contribution in line with the rule making provision for a transfer; interest for the delayed payment of employee contributions and employer contributions; and, to confirm if the tax due to the Swaziland Revenue Authority had been calculated correctly. The fund explained that it had experienced financial difficulties; that in fact its funding level was 31.5%. Further that were the benefits calculated in terms of the rule Complainant contested applied, the benefit on transfer would be less than what she ultimately received as it would be reduced by the percentage of any deficit in the Fund.

The Ombudsman found that the Complainant had not proved a subsidiary or alliance relationship between her former and current employers as per the fund rules. A transfer could not be justified, and consequently the benefit had been calculated correctly, since such calculation of the benefit in terms of the rules had to take cognizance of any shortfall in the fund. The fund's subsequent offer of the employer's contribution amounted to a gratuitous amount, and far above the amount representing the employer's contribution given the fund's financial circumstances. The Ombudsman further held that the fund's failure to pay more than

it had already paid was necessitated by its financial incapacity, not by a willful refusal to make the said payments. The Ombudsman also noted how the interests of the fund and members as a whole, and its continued existence take precedence over the interests of one individual member. The complaint was dismissed.

INSURANCE - Repudiation - Terms of the Insurance Contract

Complainant U // Insurer V

The Complainant had funeral cover with the Respondent for himself as well as his dependents. In and during March 2013 the Complainant lodged a claim on behalf of his brother which was declined by the Respondent which stated that they were not liable due to outstanding premiums. The Complainant's premium for May 2012 was unsuccessful and as a result a double deduction was made in the following month of June. In September the debit order was again dishonored and thereafter a single premium was deducted in October and November before the debit order failed again in December 2012. In January 2013 a single premium was successfully deducted; however, in February 2013 the payment failed to go through once again. When the Complainant submitted his claim in March 2013 he was of the view that his premiums were up to date and made a further premium payment on 03 April 2013 in respect to the month of April.

The Respondent held the position that they had not cancelled the policy as they were entitled to but, instead, they had continued receiving premiums as the contract still existed albeit they were not liable in terms of the policy during the periods in which the policy premiums were unpaid.

The Ombudsman had to consider whether the Insurer was correct in repudiating the claim and whether its decision was in compliance with the terms and conditions of the funeral policy. In accordance with insurance law, the insured Complainant had an obligation to effect payment of the premiums, and, in this case had failed to carry out his obligations entitling the Insurer to cancel the contract after the 30 day grace period, under the policy, had lapsed.

The Ombudsman held that the Respondent, through its conduct waived its right to cancel the policy and therefore the agreement between the two parties remained of full force and effect. The Ombudsman emphasised that the provisions of the policy required cancellation by the Respondent and since same had not been done, the Insurer remained liable in terms of the policy agreement. The Respondent was therefore ordered to pay the claim under the policy. The Ombudsman further highlighted the need for the Respondent, and insurers and financial service providers alike, to strengthen the terms of their policies in order to avoid instances of uncertainty in respect to the payment of premiums and the consequences of failing to make such payments.

INSURANCE – Funeral Cover – Utmost Good Faith

Complainant W / Insurer X

In 2010 the Complainant took out a funeral insurance policy for himself and his dependents. On occurrence of the insured event, the Complainant and his dependents would receive E10, 000.00 within 48 hours of receipt of the full claims documentation by the Insurer. His child dependents were covered until they reached the age of 22. Cover was retained after age 22 if such dependent proved registration with an educational institution. Coverage for all child dependents, however, compulsorily terminated at age 26.

During the underwriting of the policy, the Complainant informed the insurer that one of his dependents, a son identified as X1 was born in 1991. When X1 died in 2015, the insured produced documentation inconsistent with the information advanced earlier. The new information stated that X1 was born in 1993, not in 1991. The insured further furnished the insurer with a letter from X1's school aimed at supporting his story. The principal's letter confirmed that they had registered at the school one X2, a female born in 1990. In addition, the said X2 was registered at the school between the years 2012 and 2016. X1 had died in 2015 and so were the documents submitted to the insurer by the insured attesting to. The insurer repudiated (cancelled) the claim on the basis of the inconsistencies in the information the insured had supplied initially (that is, during the proposal stage when he supplied the insurance provider with an application containing necessary information on which to base the decision to accept or reject the risk and, if to accept, at what terms), and the later information submitted for the claim. The Ombudsman's task was to determine as to whether or not the misrepresentations by the insured were sufficient grounds for repudiation of the insured's claim.

The duty of good faith includes the requirement that both the proposer and the insurer honestly disclose all material facts relating to the insurance contract to be entered into. The proposer knows more about the specific risk/s than the insurer. Accurate and extensive information about all facts necessary to assess the risk in question are imperative. Wrong information may be a material mis-disclosure/misrepresentation, and may give rise to the repudiation of a claim.

At the extreme end of the spectrum, when underwriting is required and a material fact, relevant to the risk undertaken by the underwriter, is either misstated or not disclosed, the insurer may rescind the agreement. Unless fraud is proven, the insurer would return the premium paid.

After looking at the totality of all the facts of the case, the Ombudsman found that the misrepresentations were material, in that in a funeral policy, falsehood of the age or identity of the insured goes to the core of the contract. Therefore the insured's decision to repudiate the claim was found justifiable. The insurer's repudiation was upheld and the complainant's complaint dismissed.

5. CHALLENGES

The determinations of the Ombudsman, once accepted by the complainant are binding on both the respondent and the complainant and are final, in terms of Section 75 (3) of the Financial Services Regulatory Authority Act, 2010 (the FSRA Act). The challenge with the current legislative framework is that, although providing for the binding nature of the determinations of the Ombudsman the legislation does not provide for a corresponding enforcement mechanism for these binding determinations. As such some respondents or financial services providers against whom determinations are made by the Ombudsman do not execute these determinations, or do not do so timeously, but instead engage in delaying tactics and in the process frustrate complainants in their rights and in consequence hamper the effective timely or quick resolution of such disputes or complaints.

A proposal in this connection is that the FSRA Act be amended to make provision for the manner of enforcement of determinations of the Ombudsman, at least in the same way that the repealed provisions of the Insurance and Retirement Acts, both of 2005, provided in respect to the Adjudicator.

6. ACKNOWLEDGEMENTS

The Ombudsman would like to acknowledge the continued support of the FSRA Board, CEO and staff.

The Ombudsman is committed to the establishment and improvement of the Office, enhancement of the ADR processes and complaint turn-around time; building and boosting the confidence of industry players and consumers of non-bank financial services in ADR, by upholding high standards of reasonableness and fairness in terms of the law.