2018
2019

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

ANNUAL REPORT

OMBUDSMAN OF FINANCIAL SERVICES

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

CONTENTS

“Life is change. Growth is optional. Choose wisely”

Karen Kaiser Clark

FROM THE OMBUDSMAN’S DESK

GROWING STEADY

It brings me great delight to present the report of yet another year at the Ombudsman of Financial Services. As we reflect on the 4th year of being fully operational, I am in awe of how many positive changes have taken place within our Office as well as the industry which we are privileged to serve and engage with. The Office recognises the continued efforts made by the industry to comply with the standard upheld by the Financial Services Regulatory Authority (FSRA). Noted as one of our major developments is the acknowledgement that not every matter that comes into our Office qualifies as being a complaint or dispute that requires our determination. These matters are referred to as queries that often result from miscommunication and not a legal dispute per se. This has allowed us to preserve resources only to when it is absolutely necessary for us, a third party, to enter into the sacred relationship between a financial services provider (FSP) and its client.

In pursuit of our strategic goals, our Officers have made every effort to make use of the methods of conciliation, facilitation and mediation in order to aid the amicable end of disputes or continued relationship between the parties.

Our Office is glad to report significant milestones that point to the ongoing effort to ensure that while our Offices are operating, the impact of our work is felt beyond our walls and the existing complaints therein. Our Stakeholder Engagement and Consumer Education efforts have been covered in this report under the heading ‘Reaching Out to Eswatini’.

I heartily commend the Ombudsman staff who have worked tirelessly to bring this year’s success, and humbly thank all stakeholders for their continued support as we grow steadily in our standard of service. We are, of course, still in the process of achieving the outcomes we seek. Success will require more hard work and a redoubling of our commitment to service and collaboration in the spirit of our Office values, and the values of our larger Eswatini community.

Nondumiso Simelane
Ombudsman

The Office of the Ombudsman of Financial Services (OFS) is a proud member of the International Network of Financial Services Ombudsman Schemes (INFO Network), comprising 59 members across 38 jurisdictions. The Ombudsman, Ms Nondumiso Simelane attended the INFO Network 2018 Conference in Dublin, Ireland to exchange industry insights as we continue to work towards strengthening our relationships and collaboration with Ombudsman schemes across the globe. Our membership at INFO Network benefitted the OFS at its establishment and continues to benefit it during its growth.

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

OUR 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 authorised financial services providers in terms of Sections 74 & 75 of the Financial Services Regulatory Authority Act 2 of 2010 (the FSRA Act).

OUR INTENT

We aim to be a leading African forum in resolving financial services disputes in a fair and accessible way.

OUR PURPOSE

We resolve non-bank financial services disputes in a fair and accessible way, in order to uphold good practice in the financial services industry.

OUR VALUES

Independence
We handle complaints without taking sides and only consider what is fair and reasonable in each case.

Accessibility
We provide a service available to all and our processes are less formal and easy to grasp.

Confidentiality
We respect and protect all information that we receive, and we treat it with the privacy that it deserves.

> "If you focus on goals, you may hit goals - but that doesn't guarantee growth. If you focus on growth, you will grow and always hit goals."
>
> **John C. Maxwell**

WE CONSIDER AND INVESTIGATE THE FOLLOWING COMPLAINTS:

Retirement Fund · Insurance · Medical Aid · Savings/Credit · Investment

COMPLAINTS STATISTICS

Our Year in Numbers

> > > > > > >

COMPLAINTS STATISTICS

During our last financial year, we registered 36 (thirty-six) new complaints that were not resolved by conciliation during the period between 1 April 2018 and 31 March 2019, and Figure 1 shows that a majority of these complaints were registered in December 2018. The highest complaint type was Retirement Fund complaints at 19 (nineteen) complaints, followed by Consumer Credit at 12 (twelve) complaints (see Figure 3). Lubombo and Shiselweni remain the regions with the lowest data as demonstrated by Figure 2, which indicates the need for increased public awareness in these regions.

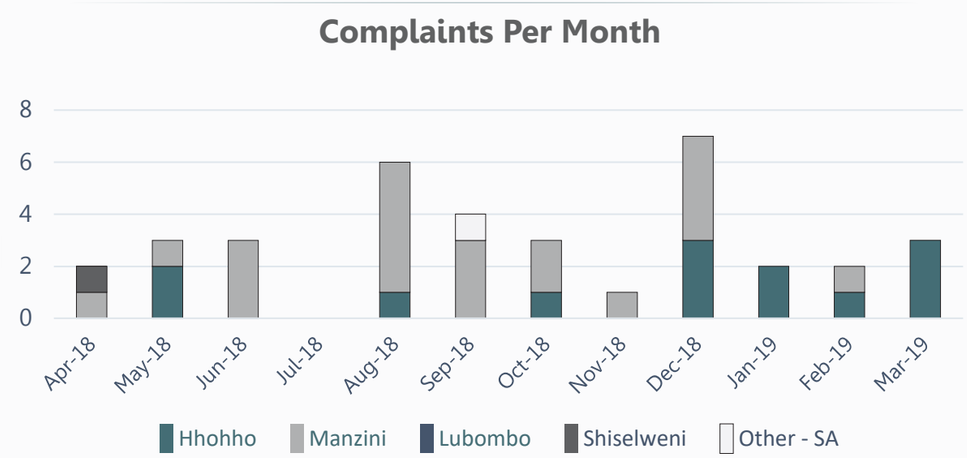


Figure 1

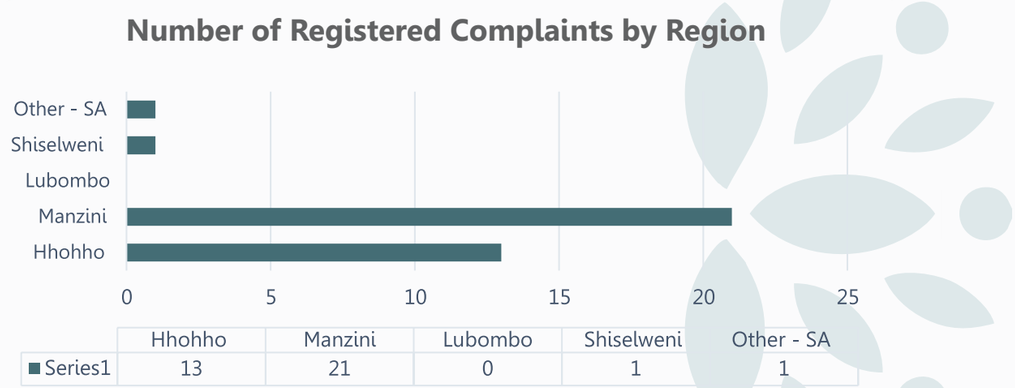


Figure 2

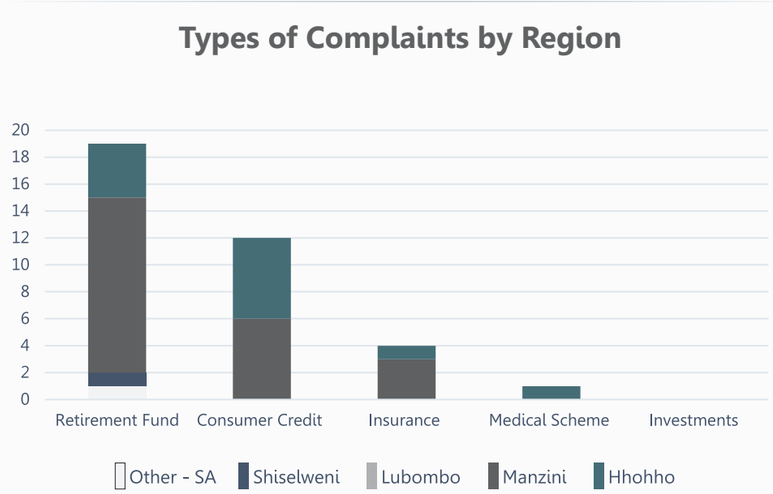


Figure 3

Our Complainants

Figure 4 demonstrates a relatively even distribution of Complainants between the ages of 31 – 60, with a majority of 58% being female. It is notable that there are no Complainants under the age of 31. This may very well be because many complaints are brought on behalf of/ impact younger members of the public who are not themselves direct participants in non-bank financial services.

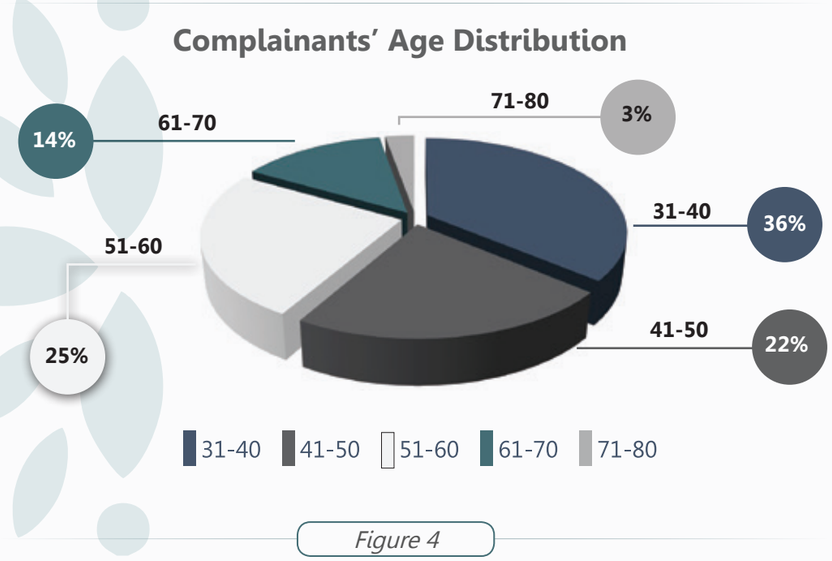


Figure 4

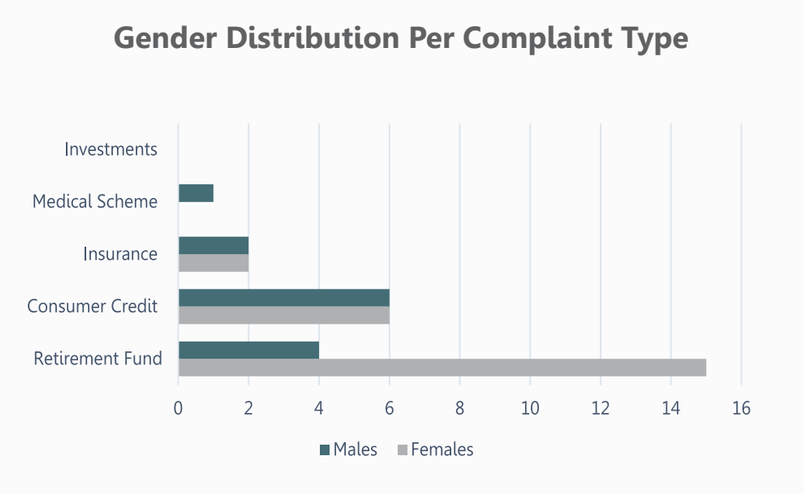


Figure 5

Complaint Type Issues

Figures 6 – 9 below demonstrate the distribution of issues raised per complaint type. Due to the fact that most of the complaints that the Ombudsman registered in the April 2018 – March 2019 period related to Retirement Funds and Consumer Credit, there is more variation in the distribution of issues for these said types

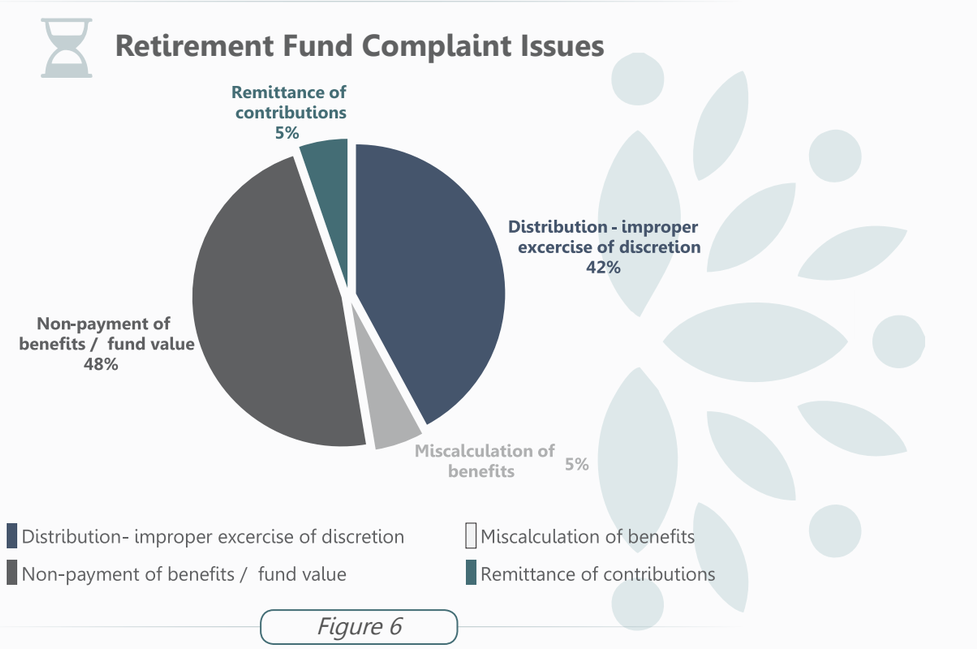


Figure 6

COMPLAINTS STATISTICS

Savings and/or Credit Complaint Issues

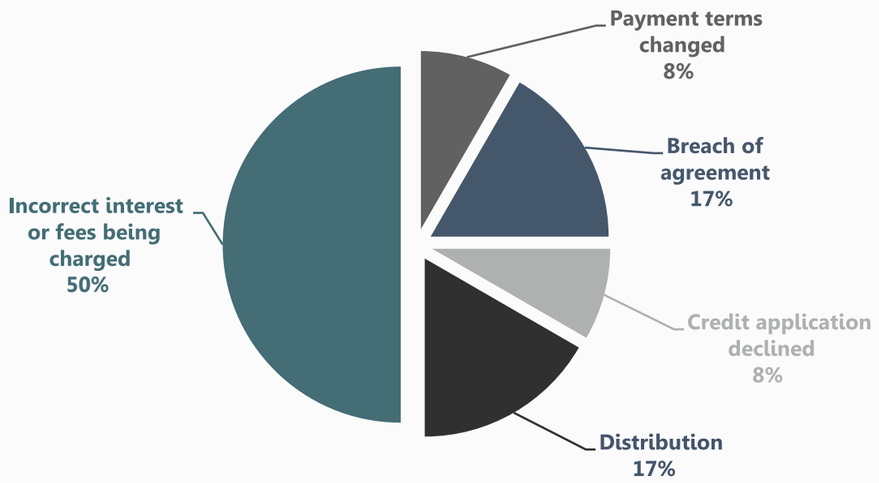


Figure 7

Insurance Complaint Issues

Figure 8

Medical Aid Complaint Issues

Figure 9

REACHING OUT TO ESWATINI

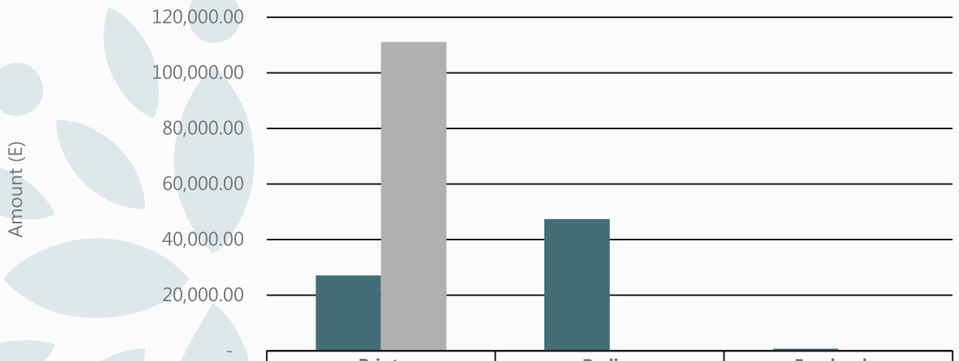
REACHING OUT TO ESWATINI

Our Office exists to serve members of the public. We recognise the importance of educating all stakeholders about our Office and how we work with consumers and FSPs to resolve disputes as amicably as possible. Our Office has taken strides towards implementing consumer education and stakeholder engagement efforts that add value to our process.

Adding value to our process has taken two forms. The first is by allocation of our budget into Public Awareness efforts. Secondly, through carrying out our mandate, the Office of the Ombudsman has obtained significant media coverage at no cost to the Office. This has been brought about by collaboration with stakeholders who include information about our Office in their publications or programming.

Figure 10 below displays the Ombudsman's Public Awareness Investment in the media, including print, radio and social media. Print media accounted for the greatest portion of media presence. From the graph below it is evident that the majority of Ombudsman print content was published for free, which is space that could have otherwise cost E111 160.20. The highest actual cost incurred for media was on radio, at a total amount of E47 394.30. This was spent on radio content such as specialty radio programs and advertisements to promote the Office or to market events. The Office recognises the extensive reach of radio in Eswatini, particularly in the rural areas where we are not physically located. Facebook accounted for the lowest cost incurred at E745.07, with a total of 33 688 people reached through paid advertising on the page.

Public Awareness Investment / Spend



	Print	Radio	Facebook
Coverage Paid For	27,156.00	47,394.30	745.07
Coverage at no cost to the Ombudsman	111,160.20	171.88	-

Figure 10

REACHING OUT TO ESWATINI

Source of Awareness/How People Heard About Us

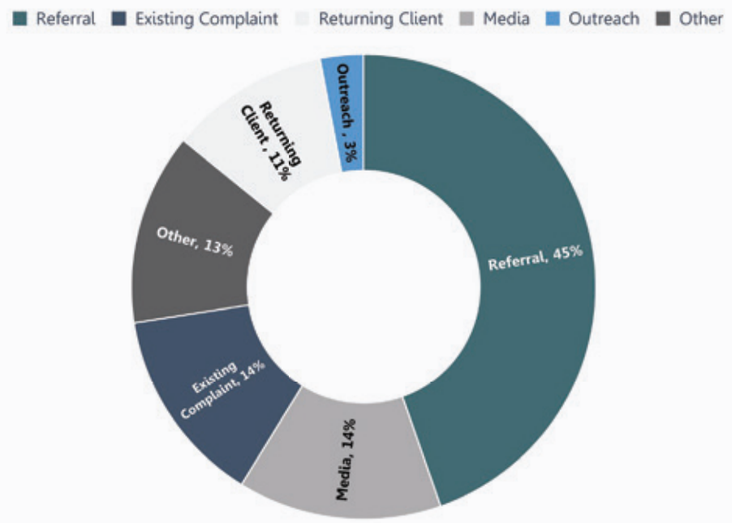


Figure 11

Most of the Eswatini populace who had queries and complaints at our Office became aware of us through referrals from other entities (45%) as shown by Figure 11 above. These entities include, but are not limited to, referrals by the Financial Services Regulatory Authority (FSRA), FSPs and relatives. This outcome is indicative of the importance of strong stakeholder and customer relations that the Office of the Ombudsman can continue to build upon.

2018/2019 MILESTONES

Office of the Insurance and Retirement Funds Adjudicator (IRFA)

The Office of the Ombudsman of Financial Services finalised all outstanding matters from the era of the IRFA.

IRFA

Ombudsday Monthly Column

In August 2018, the first of a monthly newspaper column in the Eswatini Observer was published. Ombudsday is a monthly consumer education column compiled by the Office of the Ombudsman of Financial Services.

The Office of the Ombudsman of Financial Services received over 250 Queries by way of Office Walk-ins, Facebook as well as Telephone.

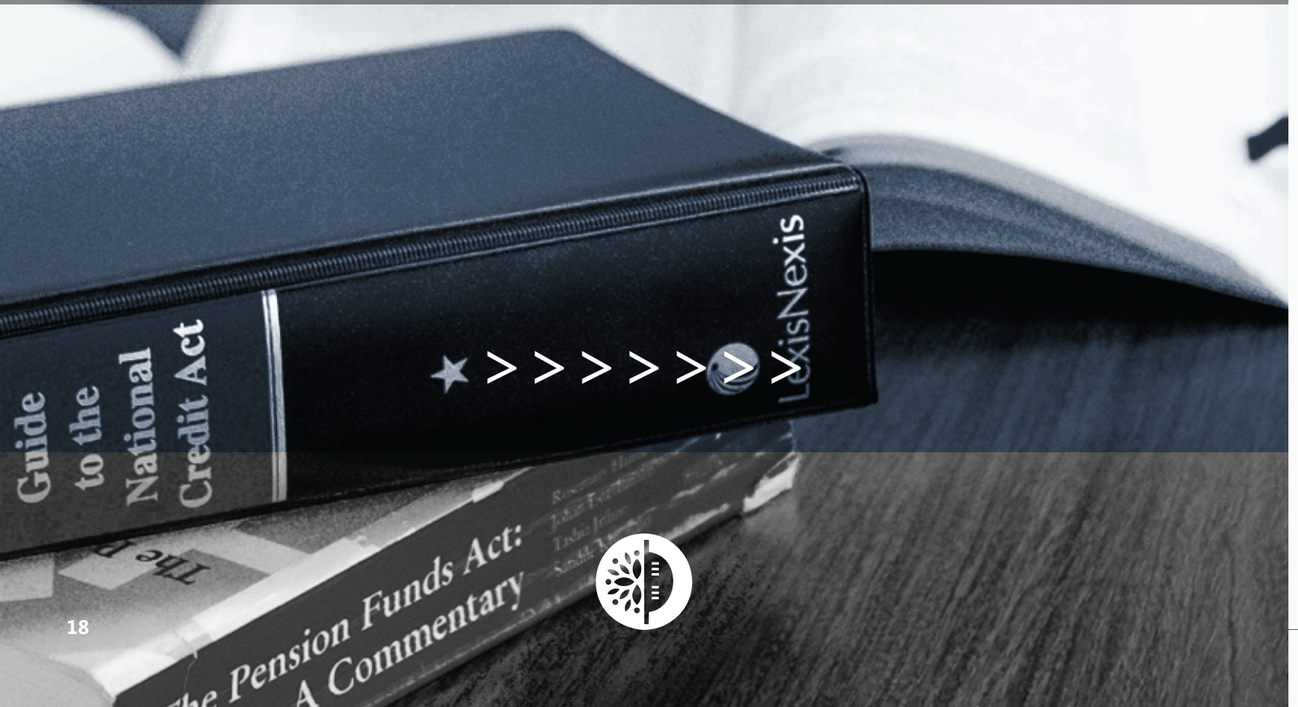
Over 250 Queries

Consumer education presentations were made regarding the functions of the Office at over 30 varied outreaches throughout the 4 regions of Eswatini.

Outreach Events

STAFF TRAINING & DEVELOPMENT

Our People



THE TEAM

At the start of the financial year, the Ombudsman team consisted of the Ombudsman, a Lead Adjudicator, two Adjudicators; a Case Officer and an Administrative Assistant. The Lead Adjudicator left for another assignment in July 2018 which left the staff complement reduced, save for one of the Adjudicators subsequently being promoted into the position of Lead Adjudicator in September 2018.

Training and Conferences

In view of equipping the staff for the work the following trainings were undertaken:

NQF in Financial Planning, Level 6

One Adjudicator successfully completed her final module in the NQF in Financial Planning, Level 6 for which she sat her final examination.

Events Management

One Officer, the Administrative Assistant underwent training for a week on 18 – 22 June 2018 in Events Management.

Attachment at the Ombudsman for Short Term Insurance, Credit Ombud and the Ombudsman for Banking Services - RSA

For the wide basket of non-bank financial services products falling within the jurisdiction of the Ombudsman, we continue training visits to Ombud schemes in the SADC region, in particular the Republic of South Africa, to seek knowledge and expertise in the approaches and systems they employ in external dispute resolution (EDR). The object hereof is to inform our drive at the development of appropriate policies, procedure manuals and systems for our EDR process. During the period under review, for 3.5 (three and half) days on 18 – 21 June 2018, the Ombudsman and one Adjudicator visited the Offices of the Ombudsman for Short Term Insurance (OSTI), Credit Ombud and Ombudsman for Banking Services (OBS).

STAFF TRAINING & DEVELOPMENT

Training and Conferences (continued)

South African Association of Mediators (SAAM)

One of our Adjudicators attended the SAAM Annual Conference in August 2018. As part of our strategic objectives we aim to raise resolutions achieved through settlements by either conciliation, facilitation and/or mediation over those achieved through determination. The conference findings assisted in better understanding the growing mediation industry.

International Network of Financial Services Ombudsman Schemes (INFO Network)

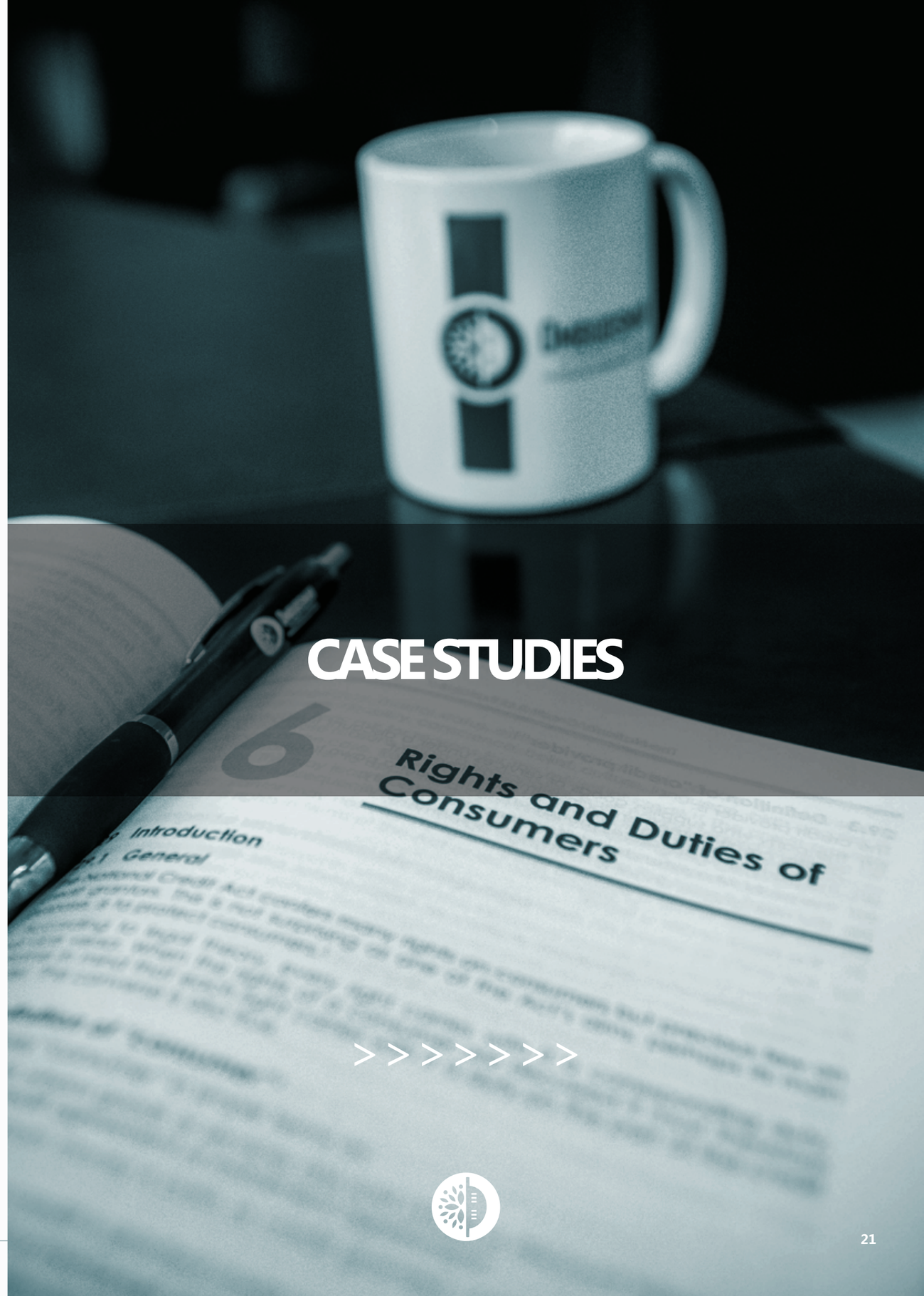
Under the 2018 theme of "Disputes- Causes and Cures", the Annual INFO conference was hosted in Dublin from 24 – 26 September. The Ombudsman was in attendance and gained knowledge from the international community. The conference covered various topics including good governance, maintaining independence, motivating and retaining staff as well as balancing confidentiality and transparency during dispute resolution as ombudsman schemes.

New Managers Program

The newly appointed Lead Adjudicator underwent a four-month program at Wits Business School. The New Managers Program (NMP) is an entry-level program for new managers or managers growing from a technical specialist to a general management role. The Lead Adjudicator was introduced to business principles and skills in a variety of management areas. The Lead Adjudicator completed the program successfully and was awarded a prize for being third place amongst the participants.

Investment in Excellence Staff Team Building

Our staff participated in a two-day training with The Pacific Institute (TPI). The Ombudsman partnered with TPI given our shared sentiment that people are the cornerstone of organisational success and are subsequently worth developing. The team went through the 'Investment in Excellence' course which is a development experience that enables individuals and organisations to achieve their potential by changing their perception of what is possible. This course provides the skills, knowledge and application needed to positively influence what a team can accomplish



CASE STUDIES

MATTERS RESOLVED BY DETERMINATION

CONSUMER CREDIT – Employer SACCO - Credit application declined

The Member had applied for a loan of E12 000.00. This loan was rejected on the basis that her monthly instalment would lower her take home salary to less than the allowed 33% of her earnings. The Member did not agree with the Respondent's rejection of her application as the Bursar had already approved the additional deduction.

The Member was also not happy with the way in which the Board of the Respondent handled the application and appeal process as well as their communication therein. She was of the view that her loan application appeal should have been addressed by the SACCO's Executive Committee and not by the Supervisory Committee.

The SACCO's response can be summarised as follows:

- Loans are calculated from a rate of pay and not basic pay of the members.
- For a loan to be granted, the Member has to retain no less than 1/3 of their salary.
- The Member's contributions and savings level only qualified her to receive a loan of E1000.00.
- The Bursar did not have the authority to grant a loan to a member.
- The loan policy does not provide for an appeal from the Supervisory Committee to the Executive Committee.
- The Member had not been honest or properly applied the rules of the SACCO in her calculations of her eligibility.
- The SACCO denies the allegation of misuse of power and bias on the part of the Management Board.

Applicable Laws

The Ombudsman considered the binding nature of the rules and procedures of a SACCO as set out in its by-laws considering that Section 15 of the Co-operative Societies Act, 2003 provides that the by-laws are binding upon all the members.

> *"By-laws to bind members*
> 15.(1) The by-laws of a co-operative shall, when registered, bind the co-operative and members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member for himself/herself or for his/her successor to observe all the provisions of the by-laws."

Section 6 of the Co-operative Societies Regulations, 2005 further states:

> *"Compulsory by-laws.*
> 6. (1) Subject to the Act and these Regulations, a society shall [emphasis added] make by-laws for the regulation of its affairs and the promotion of its stated objects..."

Another provision considered by the Ombudsman was the statutory limit found in Section 56 of the Employment Act of 1980. This provision states that: "(3) An employee may assign a part of the wages due to him under his contract of employment. (4) The total amount... shall not in any pay period, exceed one third of the wages due to the employee in respect of that pay period."

In its response, the Respondent submitted the calculations reflecting that the required deduction for the Member's loan would in fact be in breach of the above statutory limits. Although the Member put forward motivations for the granting of the loan, the Ombudsman is of the view that the Supervisory Committee correctly remained in compliance with the applicable by-laws and governing legislation.

The Appeal Process

The Ombudsman critically analysed the time that passed between each event after the Member's application was submitted and found that the appeal outcome was communicated to the Member after a period of 5 (five) days. This turnaround time could not have been unreasonable. Furthermore, the contents of the communication sent by the Supervisory Committee to the Member provided sufficient detail as to why the loan was not granted.

The Ombudsman held that the SACCO had considered the Member's application as well as her appeal in accordance with the prevailing laws and within a reasonable time.

INSURANCE – Commercial Vehicle - Claim denied due to non-payment of Premiums

The Insured had taken out a motor vehicle insurance policy to cover her newly purchased motor vehicle. The Insurer issued a motor policy, through the Insurance Broker.

The motor vehicle purchase was facilitated through a motor vehicle finance agreement the Insured had with a Financier Bank. The Insured had purchased two motor vehicles from the Bank. The other, however, was not subject to the present complaint.

On 10 September 2016, the Insured's motor vehicle was damaged as a result of an accident. After submitting her claim, a representative of the Broker phoned her to advise that her policy had been cancelled due to unpaid premiums.

The Insured was not happy that the Insurer did not pay her claim citing premium default as a reason. She submitted that since 2013 the Bank would make payment of the annual premium due to the Insurer through the Broker. She further stated, in a complaint letter to the Broker that she "never got a single invoice as all transactions were done between the Bank and Broker". The Insured's expectation was that if her policy had not been renewed, the Broker would have told her.

[1] As defined in the Interpretation, Section 2 of the Insurance Act 7 of 2005.

1st Respondent Broker

In its response, the Broker explained that the policy fell due for renewal in May 2016. The Broker further stated that they sent a renewal letter to the Insured who in turn confirmed receipt of same. The Broker advised that they regularly sent renewal notices to the Insured and that the Bank would make the premium payments.

In addition to this, the Broker followed up with the Bank about the payment and was told that the Insured's account "had problems and was currently with their credit department as the bank was in the process of re possessing the assets.as the account was in arrears (sic)". The Broker had no further communication on the Insured's account until the date the accident was reported to them.

The Broker held the view that no fault lay with their Office and that the matter was between the Insured and the Bank.

2nd Respondent Insurer

The Insurer confirmed that the Insured's policy was cancelled with effect from 13 May 2018. The reason given for the cancellation was non-payment of premiums to the Insurer. The cancellation was confirmed by way of a policy cancellation schedule which was signed on 31 August 2018. The Insurer argued that they were well within their rights to cancel the policy as they had not received premium payment due in terms of the policy.

The Insurer was of the view that the complaint should be dismissed.

3rd Respondent Bank

The Bank confirmed that at the time of the accident the Insured's VAF loan accounts were not up to date and the Bank subsequently did not effect payment of the premiums.

The Bank further stated that it held a meeting with the Broker after hearing about the accident and advised the Broker that "the Bank is the Financier and not the insurance Broker. The Bank's role was to communicate with the Insured regarding the loan arrears status and the Broker had the role to communicate with the Compliant (sic) the insurance policy's status."

The Bank denied liability for the loss suffered by the Insured.

Insurer's Liability Under the Policy

A motor vehicle insurance policy entails an undertaking by the Insurer to indemnify the Insured against loss or damage to a vehicle as described in the policy, in exchange for a monthly premium. This is an indemnity insurance contract. The Insured is entitled to recover the actual commercial value of what s/he has lost through the occurrence of the insured event.

CASE STUDIES: MATTERS RESOLVED BY DETERMINATION

The terms and conditions of a contract of insurance are embodied in a policy. The privileges and obligations of the parties should be set out in the policy in a clear way. This is an important document as it provides all the terms and conditions, rights and duties of the parties to the contract.

The wording of the policy evidenced the timely payment of the premiums as being vital or essential to the contract. It was also clear that the duty to pay premiums was indicated as being that of the Insured.

In addition to the above, the policy schedule further indicates that the policy was to be renewed on a yearly basis.

The Insurer cites non-payment of premiums as the basis for cancellation and further submits a copy of its agreement with the Broker in respect to premium payments. The agreement provided for a 60 (sixty) day credit period for the Insured.

The Insurer brought into evidence a copy of its cancellation notice which was dated 110 days after the renewal date of the policy. In light of the provisions of the policy and agreement with the Broker, the Insurer was found to not have been at fault in cancelling the policy.

Bank's Liability Under the Vehicle Asset Financing (VAF) Agreement

From a reading of the VAF agreement it was apparent that the Bank had a discretion and not a duty to pay for the insurance premiums for the vehicle. The Bank states that it "declined to increase its exposure due to the behavioural traits of the VAF loan account."

From the statement of account submitted by the Bank, it appears that at the date on which the policy was due for renewal, the Insured's account was 3 months in arrears.

In light of the state of the Insured's account, the Bank could not be said to have exercised their discretion unreasonably. This is also considering the nature of the business of the Bank primarily being that of a financing agent with the legal right to manage its risk exposure considering each client's account.

From inception of the VAF agreement, the Insured assumed all Risk relating to the vehicle purchased through financing by the Bank, for as long as she had the goods. The Bank, as owner and lessor of the vehicle, had a stake in the vehicle. However, the managing and insuring of the Risk was evidently the duty of the Insured.

For purposes of assigning liability to the Bank under the VAF agreement, the Office of the Ombudsman did not make a finding against the Bank in the approach taken in light of the Insured's VAF loan account.

[2] *Nafte v Atlas Assurance Co Ltd* 1924 WLD 239.

Duties of the Broker

At the most basic level, a Broker's duty is to mediate insurance contracts between an insurer and an insured . Both the Broker and Bank confirm that the renewal notice had been forwarded to the Bank in light of the fact that the Bank had effected payments of the premium in 2014 as well as 2015. The fact that the Insured had in previous years not objected to this process indicates that it was an accepted practice between the parties. The Broker submitted that a copy of the notice was forwarded to the Insured to the last known address and that the Insured had failed to prove that she would not have received the notice.

In addition to the above, the Insured would have been aware of the state of her loan account and annual premium payment obligations. The Insured may have sought to redress the matter during the 3-month period between the renewal date of her policy and the date of the accident.

A period close to four months passed after the cancellation of the policy, in which the Insured could have remedied the situation with the Insurer and the Bank. The Insured failed to meet her financial obligations in respect to the VAF agreement and therefore could not reasonably expect that her policy would have been up to date.

The Broker took the steps that could reasonably be expected of a Broker in the circumstances. The Broker was found to have acted in good faith and did not breach its legal obligations.

The Ombudsman subsequently dismissed the complaint

RETIREMENT – Claim for Death Benefits – Spousal Pension

This matter was referred to the Ombudsman by the Regulator after Complainant approached the latter following a failed attempt by her to stay the distribution of death benefits in respect of her deceased husband through an application to the High Court.

The Complainant had been married to the deceased member of a retirement fund by SiSwati customary law. Upon his death, pension and death benefits then became available for disposal to deceased's spouse(s) and dependants in accordance with the Fund's governing rules and the principal Act, the Retirement Funds Act, 2005 (RFA).

In its distribution of the retirement and death benefits, the Fund paid the deceased's death benefits to a list of beneficiaries but did not include the Complainant, and she then complained against her exclusion.

[3] Havenga, P (2012). *The Law of Insurance Intermediaries.* Claremont: *JUTA law. 44-46.*

The Complaint

Complainant stated that she was wrongfully excluded from the list of beneficiaries alleging that she was a dependant of the deceased during his lifetime. She argued that despite the fact of her being deceased's legal wife and therefore his dependant, she was unfairly excluded from deceased's list of beneficiaries of his pension benefits.
Advancing the argument of her dependency, Complainant stated that the deceased supported her in paying for her monthly rental at her residence, and that he would provide food parcels for herself and deceased's child with her.
She prayed that the Fund's decision to exclude her be overturned and that she be considered as a beneficiary in deceased's death benefits.

Respondent's Response

In response, the Respondent cited provisions of the principal Act dealing with the definition of a dependant, and the distribution of death benefits as well as the exercise of discretion by the fund management board in benefits distribution as the basis for its distribution.

Respondent stated how, after the deceased passed on, the Fund's trustees called a next-of-kin meeting, during which the Fund established that the deceased had married the Complainant, but the two had then separated; that at the time of his passing, the deceased lived with a SiSwati Law and Custom second wife; had 6 (six) children, 2 (two) of whom were minors and 1 (one) of the major children was still attending school; that the Complainant, though married to the deceased, was not receiving any financial support from him.

Considering the above, the Respondent concluded that Complainant was not a dependant of the deceased since they had been living apart until his time of death. Its conclusion was that Complainant was not receiving any financial support from the deceased.

The Respondent submitted that it had considered that the Complainant was the deceased's wife since their union had not been lawfully dissolved, but that it also considered the fact of the deceased's 6 (six) children whilst the benefit was not substantial. That some of the minor children had not begun school, a major child was still at school and another major child engaged in a lowly paid job. Then there was the second wife who, though gainfully employed, was dependant on the deceased since they lived together.

Determination and Reasons

In determining the matter, the Ombudsman considered that following the death of a member of the Respondent Fund who was still in employment, two sets of benefits provided for in the Fund Rules came into issue. These benefits were the death benefit and the surviving spouse's pension.

Death benefit

In terms of section 33(2) of the Retirement Funds Act,
"If, within twelve months from the death of the member, the fund becomes aware of a dependant or dependants of the member, the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board." [Emphasis added]

Dependant

Subsections 33 (2) and (3) provide that the benefit must be distributed between the deceased's dependants and nominees in a manner the board deems equitable. The term "dependant" is defined in the RFA as-

> *""dependant" means in relation to a member —*
> *(a) a person in respect of whom the member is legally liable for maintenance;*
> *b) a person in respect of whom the member is not legally liable for maintenance if such person —*
> *(i) was in the opinion of the management board dependent on the member for maintenance*
> *(ii) is the spouse of the member and shall include a spouse as a result of any customary or religious union;..."* [Emphasis Added]

Equitable Distribution

Considering that it was not in dispute that the Complainant was deceased's wife at the time of his death the Ombudsman had to now consider whether the distribution made by the Respondent was equitable.

The Ombudsman considered that, once possible beneficiaries were identified, the question then remained as to the extent of the allocation and portion of the benefit. In this relation the Ombudsman considered the case of ***Sithole v ICS Provident fund And Another [2000] 4 BPLR 430 (PFA)*** at 25 where the question of equity of distribution was discussed. The Adjudicator in the Sithole case stated that the duty of the trustees is to:

1. Consider all relevant factors, and not ignore relevant factors.
2. Ignore irrelevant ones/ do not give irrelevant factors unnecessary weighting.
3. Do not rigidly adhere to a policy or fetter their discretion in any other way.

Such factors include the following:

1. The age of the dependants;
2. Their relationship with deceased;
3. The extent of their dependency on deceased;
4. The amount available for distribution;
5. The financial affairs of the dependants;
6. The wishes of the deceased (as a guide only); and,
7. The future earning potential and prospects of the dependants.

While the Fund had established some facts of indiscretions by both spouses, culminating in the Complainant giving birth to a child with another man than the deceased, of which the Complainant had asked the Ombudsman to hold that the Fund was not entitled to consider these facts, as well as the deceased's second marriage, the Ombudsman found that these facts were material to the relationship between Complainant and the deceased, and that the Respondent had a right and responsibility to enquire into them in order to be able to effect an equitable distribution to the identified dependants

Surviving Spouse's Pension

The Fund's Regulation 17 (1) of the Pensions Order further provides for a surviving spouse's pension as it states that-

> *"If the 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 regulation 8 (4)."*

Since Complainant's marriage to the deceased was not challenged, and she was considered as his first wife, the Ombudsman found that she was entitled to the spouse's pension which would be paid in terms of subsection 17 (4) which states that-

> *"In the event that the deceased member leaves more than one surviving spouse, the surviving spouse's pension shall be divided among them in such proportion as the Master of the High Court may determine."*

In the totality of the facts of the matter, the Ombudsman did not find any reason to interfere with the exercise of discretion by the Respondent to exclude the Complainant in the death benefit distribution. For that reason, the Complainant's claim on deceased's death benefit was not upheld. The reason was not because there was lack of a dependency relationship between herself and the deceased, but rather, it was on account of her level of dependency to the deceased in relation to the other possible and identified dependents. The Ombudsman ordered that the Complainant was entitled to her portion of the surviving spouse's pension.

CASE STUDIES

MATTERS RESOLVED BY FACILITATED SETTLEMENTS

CONSUMER CREDIT – SACCO- Non-payment after resignation by Member

The Complainant was a former Member of a savings and credit co-operative society (SACCO). In 2016 he resigned from his employment and subsequently advised the Employer SACCO that he wished to terminate his membership with them. At the time he brought his complaint a period of two years had passed, and he had not been paid the monies owing to him.

The Complainant attended at our Offices and submitted a complaint form. Our Office contacted the SACCO to enquire as to why the Member had not been paid. Communication was made to the SACCO and it became apparent that the present complainant was one of many former members whom the SACCO had not been able to pay.

In scenarios such as this, the Office of the Ombudsman enquires with the Financial Services Regulatory Authority (the Regulator) where the complaint appears to be symptomatic of a larger issue. While the Ombudsman can deal with individual complaints where market conduct must be addressed, a certain trend of complaints may point to other prudential problems.

In this set of facts, the SACCO was in financial trouble and had in fact been working with the Regulator. The Office of the Ombudsman subsequently brought the complaint to their attention and followed up with the SACCO until a payment plan was successfully proposed by the SACCO. The Office of the Ombudsman did not make a determination against the SACCO even though the money was owing to the former member. The complainant accepted the payment plan of the SACCO and the Ombudsman held his file in abeyance until such time all payments were made to the Complainant. The SACCO undertook to make total payment of an amount of E19 087.99.

CONSUMER CREDIT – SACCO- Non-payment after resignation by Member

The complainant in the matter approached our Office after he had resigned from his employer and had not received payment of his withdrawal benefits. The employer had been provided with all the necessary claim forms but had still not effected payment after a period of two months. The Complainant submitted his complaint against the employer, the Fund as well as the Provident Fund Administrator.

When the complaint came to our Office, we contacted the Provident Fund and requested reasons for the non-payment. The Fund advised that payment had not been effected due to alleged misconduct by the Employer. At the time the response was received, no legal action had been taken against the complaint.

When the Ombudsman is faced with such complaint from a former employee/a member

of a fund, her task is to determine whether:

i. there is legal justification for the failure of the fund to pay a former employee's pension benefit upon exiting the fund; and
ii. at the time the complaint is lodged, facts exist in support of withholding of former employee's pension benefits in terms of the fund rules, the **Retirement Funds Act, 2005 (the RFA)** or any other law.

The general rule is provided for in section 31(1) of the RFA which prohibits the reduction of pension benefits. Only deductions permitted by section 32, such as tax deductions or maintenance orders are allowed. The RFA does, however, protect an employer's right to recover losses caused by the misconduct of an employee. Section 32(2)(a) states:

> *"(2) A retirement fund may deduct an amount from the member's benefit in respect of:*
> a. *an amount representing the loss suffered by the employer due to any unlawful activity of the member and of which judgment has been obtained against the member in a Court or a written acknowledgment of culpability has been signed by the member and provided that the aforementioned written acknowledgment..."* [Emphasis added]

Where neither of the two has obtained, any unilateral withholding of a pension benefit is unlawful. Section 32(3) provides the following:

> *"If for any reason ... a member, is unable or unwilling to acknowledge any debt contemplated in subsection (2)(a), then the employer shall apply to the Court for an order authorising him to make a deduction from the member's benefit up to an amount equal to the debt."* [Emphasis added]

Consequent to subsection (3), it is clear that the Ombudsman will tolerate withholding of a pension benefit whilst the employer seeks a court order. Accordingly, funds have the discretion to withhold payment of a former employee's pension benefit in these circumstances. The South African Supreme Court case of ***Highveld Steel and Vanadium Corporation Ltd v Oosthuizen 2009 (4) SA 1 (SCA)*** serves as persuasive authority in our jurisdiction for the position that in exercising its discretion a fund must:

i. act with care and reasonableness;
i. balance the competing interests between the parties having regard to the strength of the employer's claim.

To achieve reasonableness and before withholding or deducting from a member's benefit, a fund must be satisfied that:

i. the employer has made out a demonstrative case against the member;
ii. there are reasonable chances of success in the proceedings; and
iii. he employer is not at any stage responsible for any undue delay in the prosecution of the proceedings.

In this case, a facilitated settlement was reached whereby the employer agreed to direct the fund administrator to pay the former employee his full pension benefit. The

employer had withheld the pension benefits without instituting court proceedings. Such self-help remedy is frowned upon by the law and the Ombudsman will not hesitate to decide accordingly.

The Complainant had entered into a hire purchase sale agreement from a local franchise of a South African furniture store. In her loan agreement was included the cost for Customer Protection Insurance from a local Insurance Company.

Before the end of her payment term, the Complainant unfortunately fell ill and was retired on ground of disability. The Complainant submitted a claim on her Customer Protection Policy and was advised by the Insurer that she was not covered for loss of employment and her claim was declined.

The Complainant attended at our Offices and the complaint was brought to the attention of the Insurer by one of our Officers. The Complainant had shown evidence of her permanent disability and the Insurer had not fully explained or substantiated their reasons as to why her particular circumstances did not fall within the terms of cover.

The Insurer then advised our Office that they would reconsider the matter and seek all the relevant information from the South Africa Office, as well as the documentation submitted by the Complainant.

Two months after the date the matter was brought to our Office, the Insurer paid out the claim explaining that the matter had been treated as a dismissal from employment

---

MEDICAL AID – Medical Insurance – Pre-Authorisation – Grant of Pre-Auth – Non-payment

The Complainant was a member of a medical aid fund. He then required for a surgery to be conducted on his hand. When approaching the Office of the Ombudsman (the Office) he stated that he had obtained a pre-authorisation to cover all aspects of the surgery from his fund, that is, all costs of the surgeon, hospitalisation, anaesthetist and medication. He stated, however, that his medical aid fund had only paid the anaesthesiologists, hospital expenses and medication for the surgery. He said that he was then informed that the fee for the surgeon was not covered. According to him, he had to then pay the surgeon's fee from his pocket. He then later lodged a complaint with the Office for re-imbursement of the paid fees.

With the intervention of the Office through a facilitation session, the parties finally agreed to settle their differences on terms agreed between and best suited to themselves.

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

OMBUDSMAN

OF FINANCIAL SERVICES

Umlamuli wetindzaba tetimali

3rd Floor, West Wing, Ingcamu (PSPF) Building,
Mhlambanyatsi Road, Mbabane, Eswatini

(+268) 2404 7653/2404 4464

(+268) 2404 0636

info@ombudsfs.org.sz

www.ombudsfs.org.sz