OMBUDSMAN
OF FINANCIAL SERVICES
*Umlamuli wetindzaba tetimali*

Celebrating



5 Years

# Annual Report 2019-2020

OMBUDSMAN
OF FINANCIAL SERVICES
*Umlamuli wetindzaba tetimali*

# Annual Report
## 2019/2020

Ombudsman of Financial Services
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# OVERVIEW

## The Office of the Ombudsman of Financial Services

### OUR LEGISLATIVE MANDATE

The Office of the Ombudsman of Financial Services (Ombudsman) is a product of Section 74 (1) of the Financial Services Regulatory Authority Act, No. 2 of 2010 (the Act). As per the Act, the Ombudsman has a mandate to resolve disputes in the non-bank financial services industry quickly and with minimum formality.

### 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.

# FROM THE OMBUDSMAN'S DESK

## Building on Firm Foundation

In the last five years, the Ombudsman of Financial Services team has admirably executed its mandate of resolving disputes within the non-bank financial services industry. Our approach has been marked by establishing and refining processes, adding value through key partnerships and effectively engaging with the people we work with and serve. As is expected on any journey worth traveling, we encountered our share of challenges along the way. I celebrate and applaud the Ombudsman staff for their persistence in the challenging seasons. Their commitment has resulted in the outstanding accomplishments that we see, half a decade later.

It is with great pleasure that I reflect on five of many milestones from the past five years, presented in no particular order.

1. Strategic Plan 2018-2021: Our Strategic Plan has been managed and executed with the aim of being citizen centric and accessible to all our stakeholders. We also established a case management process and increased our public awareness initiatives. Our team has worked determinedly to achieve these goals through the programmes and targets set out in the Strategy.

2. Rebranding: Transforming the Ombudsman of Financial Services logo provided an opportunity to align the rich legacy of the Office with our current and future goals. The launch of our renewed corporate image was significant with regards to disseminating our messaging about accessibility. The Ombudsman provides alternative dispute resolution services FREE of charge and we handle complaints by considering what is FAIR and reasonable in each case, FOR ALL in the Kingdom of Eswatini.

3. Staff Complement Growth: The Ombudsman staff complement stands at a total of five consisting of the Ombudsman, Lead Adjudicator, Case Officer, Research and Communications Officer and the Administrative Assistant.

4. Case Allocation Spreadsheet: The Case Allocation Spreadsheet is our current electronic case management system. This database has proven valuable in ensuring Ombudsman staff keep record and stay abreast of our daily queries and complaints. It has also been invaluable in providing statistics for data required for research purposes.

5. Memorandum of Understanding Signings: In the spirit of fostering fruitful collaboration between our Office and stakeholders, we signed a Memorandum of Understanding with the Federation Organization of Disabled People in Swaziland, the Conciliation, Mediation and Arbitration Commission, the Central Bank of Eswatini and the Eswatini Competition Commission, respectively.

Looking ahead to the next five years, we are energised to build upon all that has been achieved. As the Office of the Ombudsman of Financial Services, we are driven by our intent to be a leading African forum in resolving financial services disputes in a fair and accessible way. This is attainable through continued excellence in our processes, maximising partnerships and never forgetting to focus our efforts on the people of Eswatini and the industry within which we operate. Here's to a very Happy 5th Anniversary to the Office of the Ombudsman of Financial Services, UMlamuli Wetindzaba Tetimali!

**Nondumiso Simelane**
**Ombudsman**

# COMPLAINT STATISTICS

## OUR COMPLAINTS

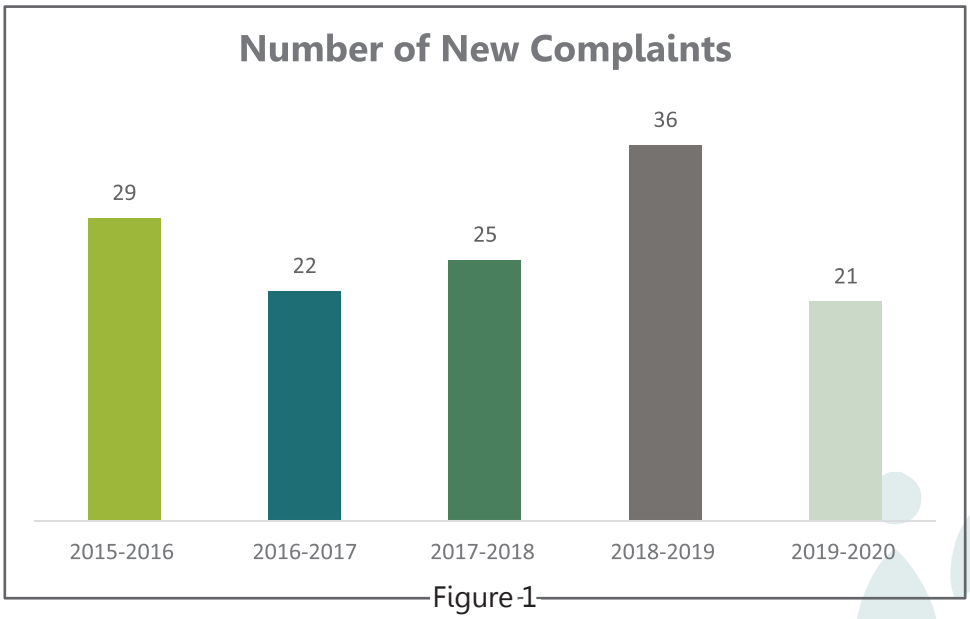



Figure 1

In the last 5 financial years, a total of 133 complaints have been registered. The number of complaints registered rose steadily from the 2016/2017 financial year to reach a peak in 2018/2019, where 36 new complaints were recorded as demonstrated by Figure 1 above. New complaints decreased to a total of 21 in 2019/2020 compared to 36 in the 2018-2019 financial year. This can be attributed to the Office of the Ombudsman's strategic target to increase resolutions through settlements at query stage and therefore decrease the percentage of determinations, where the latter would be registered complaints. In addition, the Office's stakeholder education engagements may have contributed to this decrease in complaints as the Ombudsman encourages financial services providers to establish and maintain internal dispute resolution mechanisms to handle consumer complaints, prior to complaints being brought to the Ombudsman for consideration

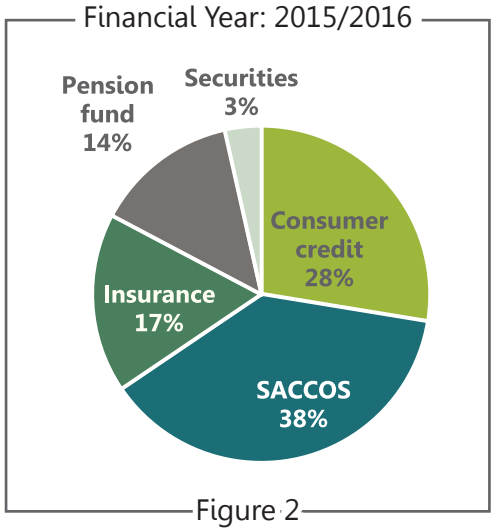



Figure 2

Figures 2-6 reflect the distribution of complaint types throughout the financial years under review. In 2015/2016, the terminology used to describe the types was Securities, Consumer Credit, SACCOs, Insurance and Pension Fund, and SACCOs was the complaint type with the highest percentage of complaints. From 2017/2018 onwards, the terminology was modified to Retirement Fund, Consumer Credit , Insurance, Investments or Securities and Medical Scheme. Over the years, Retirement Fund and Consumer Credit complaints have consistently been the two highest non-bank financial services complaint types.

[1] Consumer Credit includes institutions such Savings and Credit Cooperatives, Money Lenders, Hire Purchase businesses and other non-bank institutions engaged in the credit and deposit taking business other than banks.

# COMPLAINT STATISTICS

5 Year Review

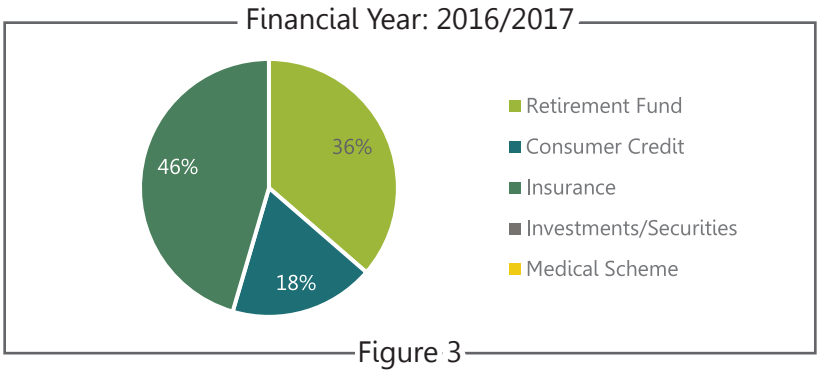



Figure 3

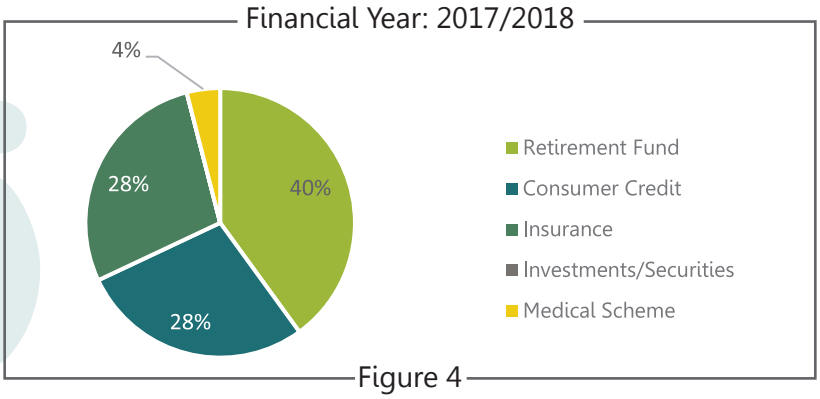



Figure 4

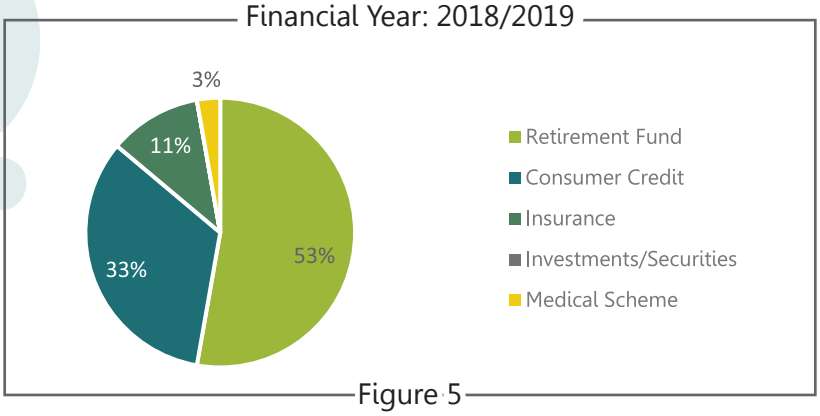



Figure 5

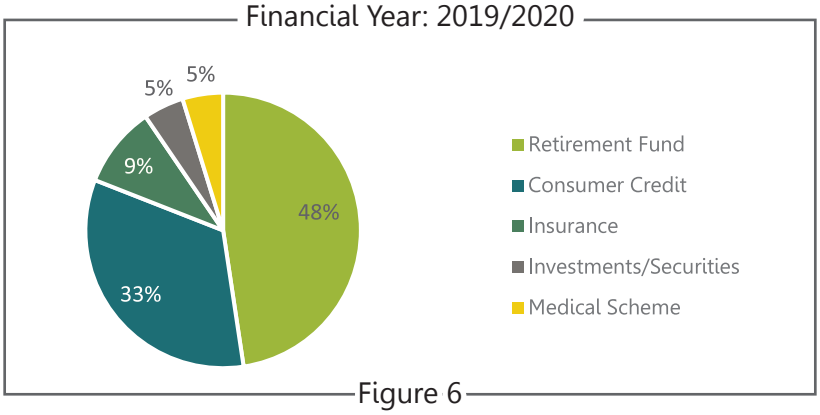



Figure 6

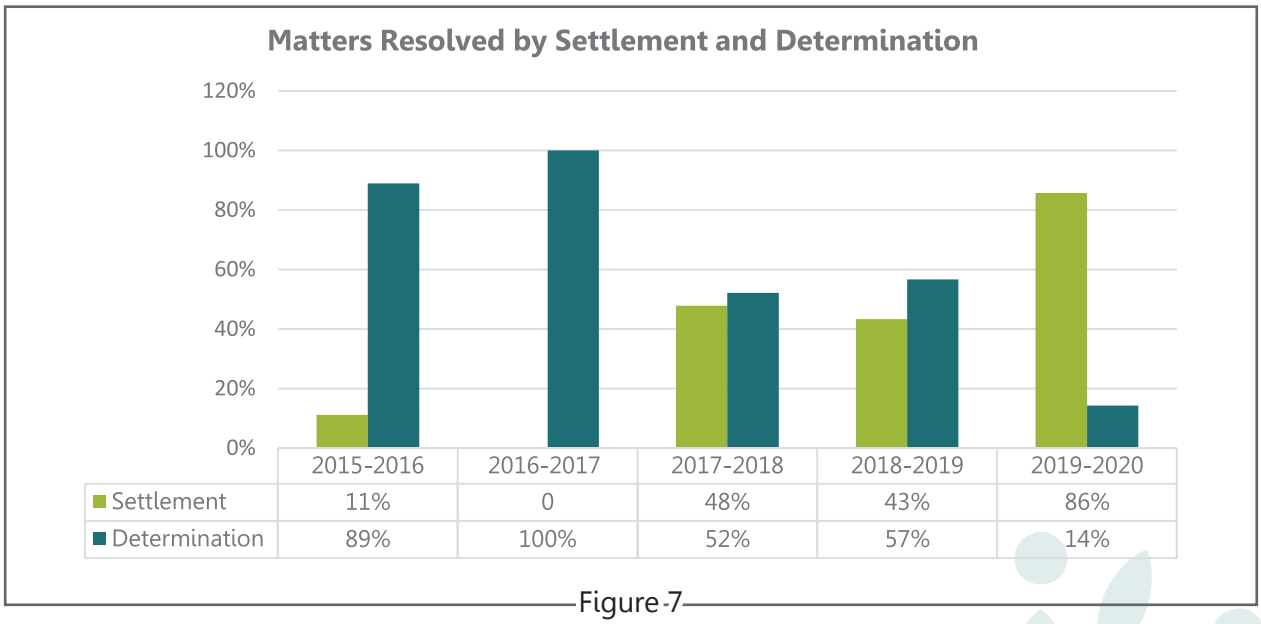



Figure 7

From 2015/2016 to 2018/2019, matters have predominantly been resolved by way of determination, with the highest percentage of determinations at 100% in the 2016/2017 financial year, as per Figure 7 above. The significant increase in settlements to 86% in the 2019/2020 financial year, again reflects the Office of the Ombudsman's strategic target to increase resolutions through settlements at query stage and therefore decrease the percentage of determinations.

## COMPLAINANT DEMOGRAPHICS

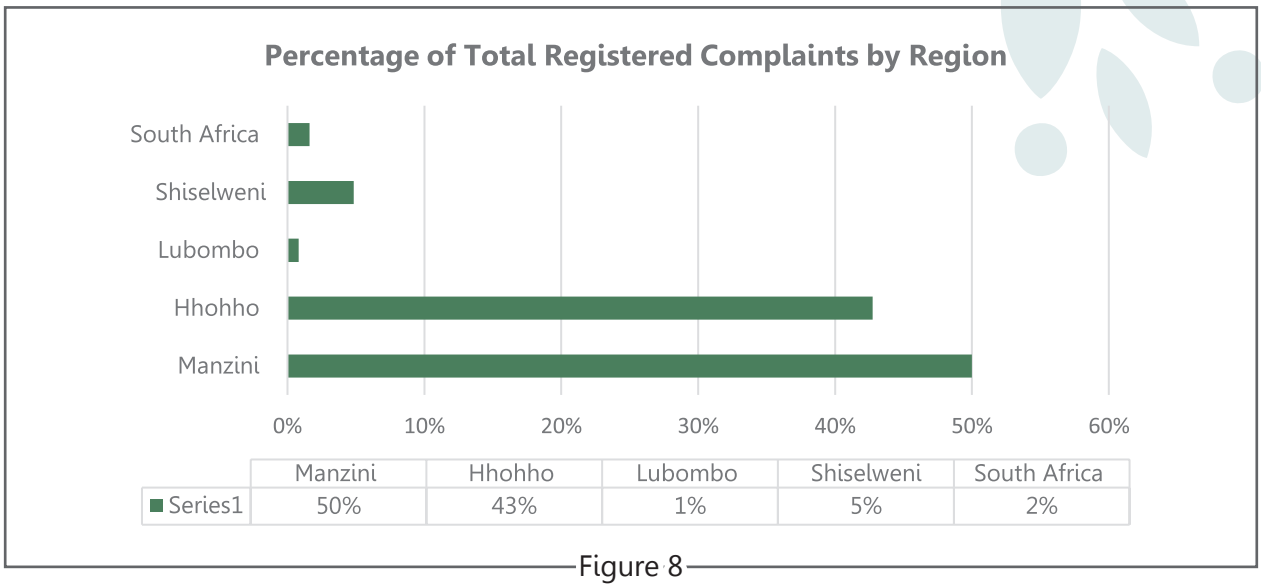



Figure 8

50% of the complaints that have been registered since 2015 are from the Manzini region. The lowest recorded traffic is from Lubombo and Shiselweni, which make up a total of only 6% of complaints when combined. It is a notable achievement to have engaged people from all four regions of Eswatini and beyond (see Figure 8). However, moving forward, the Office of the Ombudsman will work to improve its efforts at ensuring that the public awareness and consumer education campaigns reach those who are not in proximity to the Office.

# COMPLAINT STATISTICS

5 Year Review

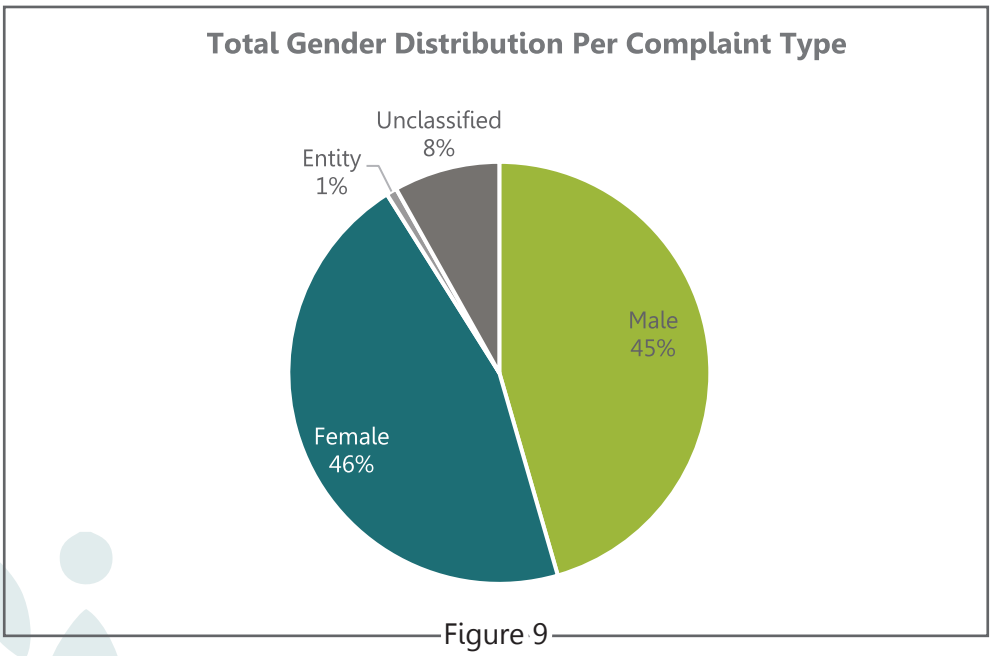



Figure 9

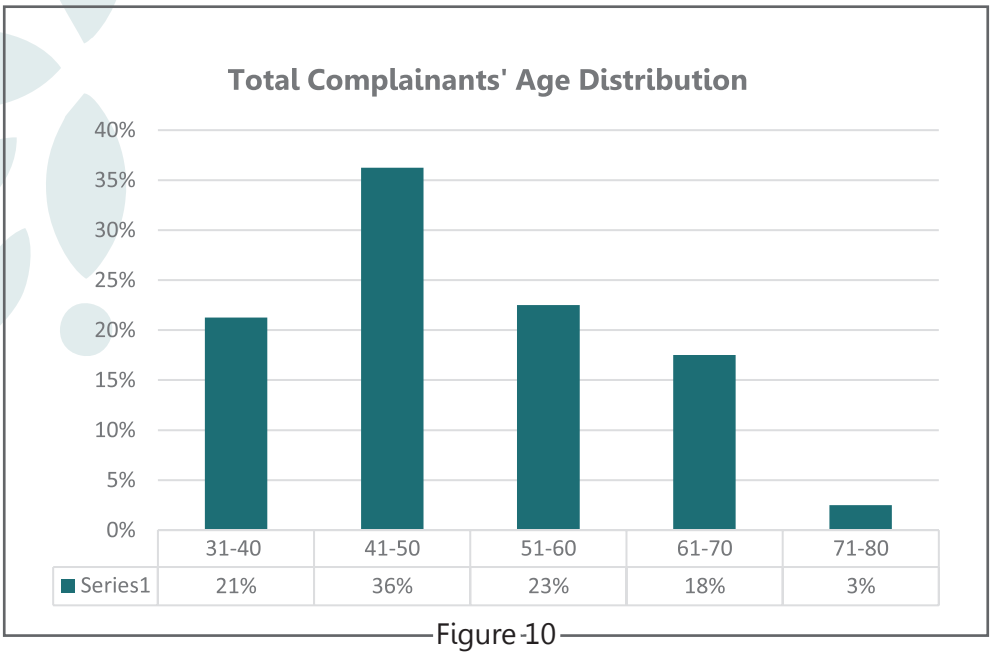



Figure 10

Figure 10 above indicates that almost 60% of all our complainants are between the ages of 41 – 60, with a majority of 46% being female (see Figure 9). Notably, one of these complaints was submitted by an entity, where the age and gender cannot be factored.

**LEGISLATIVE FRAMEWORK OVERVIEW**

- Constitution of the Kingdom of Eswatini Act, 2005
- Financial Services Regulatory Authority (FSRA) Act, 2010
- Retirement Funds Act, 2005
- Insurance Act, 2005
- Securities Act, 2010
- Consumer Credit Act, 2016
- Building Societies Act, 1962
- Regulations under the above laws
- Rules, Directives, Codes, Guidelines, Policies, Practice Notes, Circulars, etc. made, given and/or issued by the Regulator, providing guidance under the FSRA Act, 2010 or any financial services law.
- Common Law, Judicial Precedent, & Industry Best Practices

The Ombudsman has the mandate to resolve disputes quickly and with minimum formality. Below is an overview of the Ombudsman's dispute resolution process:

| | |
|---|---|
| 1 | Is the dispute against an FSRA-authorised Financial Services Provider (FSP) in respect of a matter that took place less than two years ago? |
| 2 | Is the matter/dispute complained of not currently being heard by a court or another forum? |
| 3 | Has the complainant written a complaint letter to the FSP, giving them 30 days to resolve or respond? If so, are they still dissatisfied with the FSP's response? |
| 4 | Vetting of the complaint with our Jurisdiction checklist |
| 5 | Conciliate/Facilitate settlement |
| 6 | Register the complaint |
| 7 | Investigate the complaint |
| 8 | Mediate settlement |
| 9 | Issue a determination |

Figure 11

In the 2019/2020 financial year, the Office of the Ombudsman developed the Complaints Handling Procedure Manual and Complaints Handling Policy to consolidate and build upon the dispute resolution processes and to date, the Manual and Policy have received approval by the Board.

# OUR PARTNERSHIPS
## Stakeholder Engagement 2019/2020

One of the core functions of the Ombudsman is to educate all stakeholders including consumers, financial services providers, consumer bodies and associations about the role, procedures, and jurisdiction of the Office. The Ombudsman's stakeholder engagements are therefore invaluable with regards to ensuring that the public is aware and informed about the Ombudsman's mandate, as captured below.

| ENGAGEMENT | | | |
|---|---|---|---|
| **Engaging with Partners** | **Outreaches** | **Training** | **Student Engagements** |
| Umhluma Women and Youth Foundation – National Widows Status Report and Save a Widow Campaign Launch | Buhleni Buganu Festival | PSPF Board Training | Waterford Kamhlaba UWCSA 12th Annual Careers Fair |
| Umhluma Women and Youth Foundation – International Widows Day | Hlane Buganu Festival | Ombudsman, a Guest Speaker at the Eswatini Customer Service Conference | UNESWA New Students Orientation |
| One Billion Rising Campaign | Eswatini International Trade Fair | Financial Supervision Laws Awareness Training for Magistrates | |

Figure 12

| OUTREACH EVENT | | |
|---|---|---|
| **Activations** | **Tinkhundla Outreaches** | **Presentations** |
| FSRA's Financial Services Exhibition | Phondo | SNAT AGM Presentation |
| Financial Services Marathon | Mafutseni | |
| Siphofaneni Roadshow | Mntfongwaneni | |
| Matsapha Roadshow | Manzini North | |
| Mall Activation | Manzini South | |
| FSRA Manzini Roadshow | Mkhiweni | |

Figure 13

The Ombudsman is also a proud member of the International Network of Financial Services Ombudsman Schemes (INFO Network), comprising 59 members across 38 jurisdictions. Membership at INFO Network has benefitted the Ombudsman from its establishment and continues to benefit it during its growth.

# OUR PEOPLE

# OUR PEOPLE

## Consumer Education and Communication 2019/2020

Maximising the relevant and available means of communication is vital for reaching and educating the public about how we execute our mandate. By exploring new opportunities and developing innovative ways to reach the unreached, we are committed to educating the public on correct procedures for filing complaints; promoting the principles of good business practice in handling complaints by the industry; and educating the public on the Ombudsman's jurisdiction.

Figure 14 below demonstrates that a majority of 32.4% of the people we interacted with through queries, heard about our Office as a result of referrals. These among other friends and family, the FSRA and FSPs. This outcome further emphasises the importance of forging strong and healthy partnerships through stakeholder engagements. It is also significant to note that traditional and social media combined contributed to almost 25% of the leads that were generated in the 2019/2020 financial year. We are encouraged to develop and invest in more media content to attract and educate our target audience.

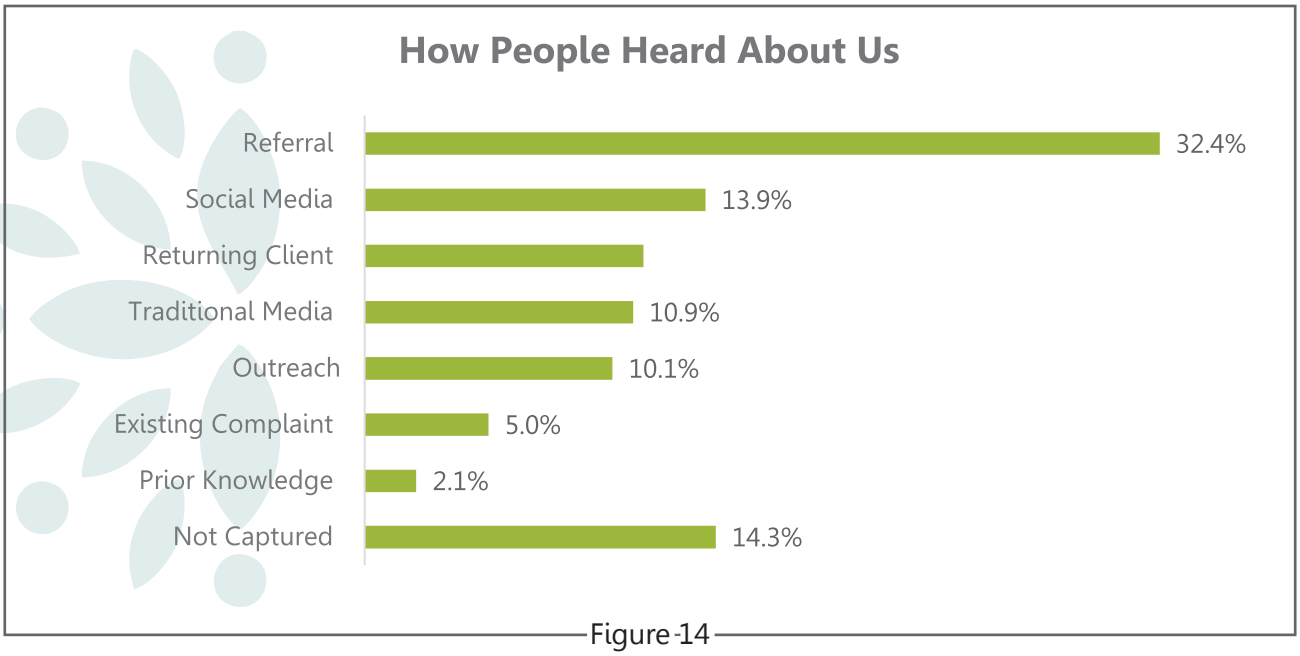
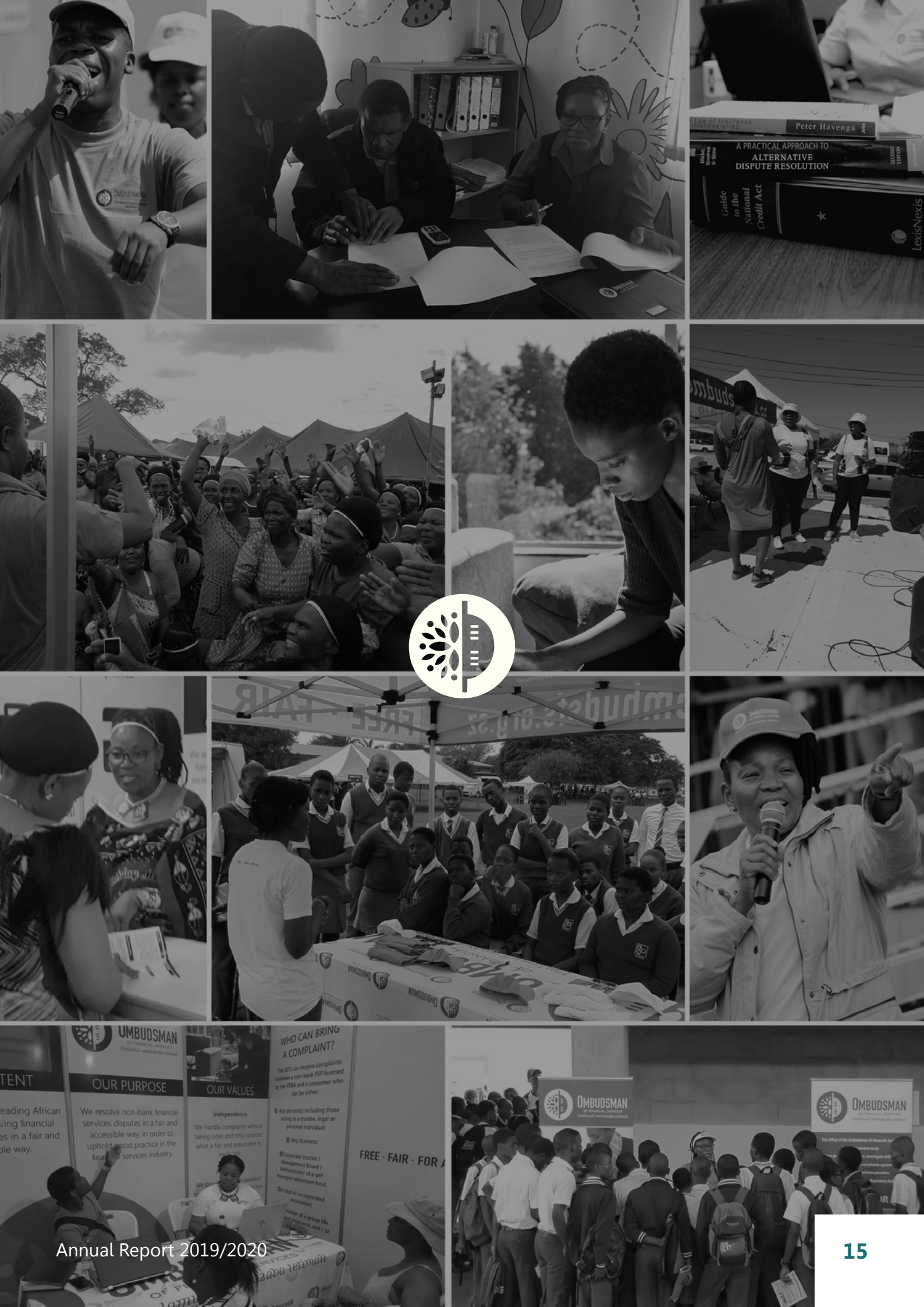



Figure 14

| PUBLIC AWARENESS INVESTMENT (SZL) | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Referral | Social Media | Returning Client | Traditional Media | Outreach | Existing Complaint | Prior Knowledge | TOTAL |
| Coverage Paid For | 0 | 1,702 | 0 | 73,475.74 | 5,000 | 0 | 0 | 75,177.74 |
| Coverage at no cost to the Ombudsman | 0 | 0 | 0 | 148,901.04 | 0 | 0 | 0 | 148,901.04 |

Figure 15

[2] Traditional Media includes Radio, Television and Print Media


Peter Havenga
A PRACTICAL APPROACH TO
ALTERNATIVE
DISPUTE RESOLUTION
Guide to the National Credit Act
LexisNexis
OMBUDSMAN
UMBUDSMAN
OUR PURPOSE
OUR VALUES
WHO CAN BRING A COMPLAINT?
FREE · FAIR · FOR

# OUR PEOPLE

## Staff Training & Development 2019/2020

**"You can have many great ideas in your head, but what makes the difference is the action. Without action upon an idea, there will be no manifestation, no results, and no reward."**

**- Don Miguel Ruiz**

The Office of the Ombudsman has been intentional about involving staff in training and development programmes to inspire productive action in day-to-day responsibilities, as reflected in Figure 16.

| TRAINING & CONFERENCE |
|---|
| 1. Ombudsman for Long Term Insurance systems and processes familiarisation attachment. |
| 2. Practical Training Workshop on Handling Discipline in the Workplace |
| 3. EBIS Radio Programme Recording and Production |
| 4. International Network of Financial Services Ombudsman Schemes 2019 Conference |
| 5. Pacific Institute Social Media Marketing Networking Breakfast |
| 6. Institute of Directors South Africa (IoDSA) Insights into Integrated Reporting |
| 7. Team Building Session with Kim Du Plessis from The Pacific Institute Eswatini |
| 8. Facilitation Training, Pretoria, South Africa |
| 9. Coaching and Mentorship Training |
| 10. Wellness Presentation: COVID-19; TB; Financial wellness |
| 11. Advanced National Credit Act – General (Online - South Africa) |

Figure 16

# CASE STUDIES

# CASE STUDIES

Review of Determinations and Settlements

## DETERMINATIONS

### Insurance – Long-term: Alleged mis-selling

The Complainant was a schoolteacher when the Broker visited the school that he taught at to inform staff about the Insurer's product offerings. 6 years after the sale took place, the Complainant lodged a complaint at the Ombudsman of Financial Services. The complaint against the Insurer was that the complainant believed that he was buying a long-term investment product, yet he had since been told that he bought a life insurance policy.

The Complainant attended at the Respondent to redeem the investment for his children's further education. It was at that stage that he found out it was actually a life insurance policy that could only be used as security for loans in very specific instances.

The Ombudsman, considering the nature of the complaint, asked not only the Insurer but also the Broker to answer to the complaint. This step is standard practice by the Ombudsman in complaints handling. As the Ombudsman, we appreciate that often consumers are not always clear on which party is responsible and/or involved in the transaction they concluded with a non-bank financial services provider. We, therefore, include all relevant parties to help resolve the dispute in the best way possible.

Unfortunately, the specific Broker in this matter had since passed away, which meant that the Ombudsman had to decide from the records of the Insurer, the Broker and the Complainant.

## THE INSURER'S DEFENCE

The Insurer submitted copies of the documents that the Complainant had signed. In one such document, there was a Clause that said "I ***understand*** *that this insurance is subject to terms and conditions. Those terms and conditions* ***have been fully explained*** *to me...*" [Emphasis added].

Referring to this Clause, the Insurer argued that the duty to fully explain the nature of the policy had been mandated to the Broker. Their defence was that they were not present at the sale and relied on the Broker discharging his mandate.

The Insurer relied on this as well as the specific wording of the policy referring to "Life Cover" (not investment) and that the policy also afforded the Complainant an opportunity to cancel during a specific period after receiving the document.

## THE BROKER'S DEFENCE

The Broker company also referred to the fact that the Complainant had signed the agreement. Furthermore, in the absence of the Broker being able to defend himself, the Ombudsman should consider the Complainant's level of education. They believed his education enabled him to read the document for himself and appreciate that the non-claim bonus on the life policy did not amount to a return on investment as would be the case with typical investment products.

## DETERMINATION AND REASONS

### The Nature of the Product Sold to the Complainant

As with all complaints, the role of the Ombudsman is to look at all sides of the story. It was necessary to look at the differing duties the Broker had towards the Complainant and the Insurer as well as all individual responsibilities that each party had.

The Ombudsman considered that under the Insurance Directives (Amendment) Notice 2010[3] "*A broker's duty to the client is to provide competent guidance on sufficient knowledge of the client's needs, specific risks entailed and adequate consideration of the relevant insurance principles in a skilful and expert manner.*"

This duty, however, does not mean that consumers must only rely on what is presented to them by a Broker. In this specific case, on the face of all the documentation that was made available to the Complainant, it would have been unreasonable to accept that- even if he was misled by the deceased Mr Broker, the Complainant would not have been able to realise that the product was one of life insurance.

Fairness and reasonableness are important elements of how the Office of the Ombudsman carries out its duty in decision-making. It is also vital that the Ombudsman considers the unique facts of each case and gives each fact the correct weight. For the industry to grow, each participant ought to take responsibility for their purchasing decisions and, at all times, do their due diligence when presented with a product by any third party, including Brokers.
In the Determination, the Ombudsman not only considered the defences raised by the Insurer and the Broker but also analysed the documentation and timing of events. In these specific circumstances, the Ombudsman did not find any attempt by the Broker or Insurer to disguise the nature of the product from the Complainant.
In addition to the Complainant's complaint, the Ombudsman also considered if the Insurer and Broker had fulfilled all their other duties under the law.

### Cashback Bonus

The Certificate of Benefits states that 3 months' worth of premiums were payable every 5 years on condition that the preceding 60 premiums have been received and that no claim has been made against the policy. The cashback was also based on the premium at the start of the year in which the cashback is due. The policy brochure further states that: "A Cashback bonus equivalent to 3 months premiums are up to date and the policy is still in force".
The Complainant had, however, paid just over 80% of premiums due in the 60-month period to have qualified for a Cashback bonus. In light of the terms and conditions of the policy requiring that the payments be up to date at the time of consideration, it could not be said that the Complainant had met these conditions. The Complainant, therefore, did not qualify for the Cashback bonus.

[3] Issued by the Financial Services Regulatory Authority (FSRA) under Section 118 of the Insurance Act, 2005

# CASE STUDIES
## Review of Determinations and Settlements

The Ombudsman requested a detailed statement of account from the Insurer showing the full history of payments, credits extended to him as well as the reasons given by the bank for non-collection. However, at the time of Determination, a comprehensive statement of account had not been produced by the Insurer. The Insurer representative did advise that they worked on a 3-month grace period before cancelation of a policy. The Insurer's representative further made verbal submissions that they would call and forward the Complainant letters to advise him of his non-payment. The Insurer did not submit any proof of the correspondences or delivery thereof nor documents nearing an endorsement that the Complainant had been contacted.

Under the Policyholder Protection Guideline issued by the FSRA, the Insurer has a Record Keeping duty set out as follows:

"**Record Keeping**
24. (1) The insurer and/or intermediary shall have appropriate procedures and systems in place to store and retrieve transactional and other documentation relating to the policyholder and to keep such documentation secure and safe from destruction.
(2) Records shall be kept in an appropriate recorded or electronic format, which shall be readily accessible and reducible to printed format.
(3) Disclosure records and documentation pertaining thereto shall be kept for a minimum period of at least five years after the termination of the relevant policy.
(4) The records shall be available for inspection upon request by the Authority and copies shall be furnished to a policyholder upon request by the policyholder."

Apart from the client's bank statement, the Insurer's records in respect to the Complaint were not submitted in a uniform manner that one would expect to have been comprehended by the average consumer. This is something that the Insurer was encouraged to consider going forward.

The Complainant's bank statement reflected 3 deductions from his account after the deemed lapsing of his policy. These amounts in fact should not have been paid to or accepted by the Insurer.

The Finding: The Ombudsman found inconsistency in the record-keeping and premium collection methods.

Order: The Insurer was ordered to refund the Complainant part of his premiums paid after the lapsing of the contract.

**Retirement Fund – Pension Fund: Deferred Pension - Miscalculation of Benefits - Error by previous Administrator**
The complaint related to the calculation of pension benefits of the Complainant.

The Complainant was a member of the Pension Fund (1st Respondent/the Fund) as a result of her employment at a Bank. At the time she lodged the Complaint, Administrator B was the administrator of the Fund.

The Complainant had been an employee of the Bank for 26 years. On reaching her retirement age, she chose to take a deferred pension. When the Complainant returned to withdraw the funds, she asked for her benefit calculation from the Fund. Administrator B then gave her a statement reflecting a pensionable salary, maximum cash as well as a residual pension amounts that were 27-29% lower than what had been stated in the last statement she had received earlier. She also submitted that she had not received any statements since choosing to have her pension deferred. She requested the Ombudsman to order the Fund to pay the amounts she had last been advised she would receive.

**THE ADMINISTRATORS' RESPONSE**
Administrator B submitted its response through the Fund and advised that it had been the administrator of the Fund since 01 March 2010. Prior to this date, Administrator A had been responsible for producing benefits statement for the members of the Fund.

Administrator B explained that the discrepancy is due to the fact that Administration A used the Complainant's final pensionable salary and not the **average** as required by the definition in the Fund Rules. Put simply, the calculation produced by Administrator A was not in compliance with the provisions of the Fund Rules.

Administrator B went on to refer to the disclaimer on the statement by Administrator A. The disclaimer was to the effect that the statements issued were for information purposes only and neither the Fund or Administrator could be held liable for any loss arising as a result of this statement, as all rights of Members were contained in the official Rules and Policies.

**DETERMINATION AND REASONS**

**Doctrine of Legitimate Expectation**
The Complainant argued that an expectation arose from the period of 9 years that she would get a certain amount of benefits and therefore the Fund is bound to compensate her. The Fund, on the other hand, submitted that the payment should be in terms of the Fund Rules and not in terms of the incorrect figures appearing on the benefit statement in issue, as doing so would render it in contravention of the Fund Rules.

The Ombudsman referred to the case of ***Meyer v Iscor Pension Fund (391/01) [2002] ZASCA 148*** in which the applicant claimed compensation on the basis that his legitimate expectations were engendered by the Fund's promise to the effect of improved retrenchment benefits with retrospective effect. The Supreme Court in that case held that "in administrative law, the doctrine of legitimate

expectation has traditionally been utilised as a vehicle to introduce the requirements of procedural fairness and not as a basis to compel a substantive result." [at para 25].

In that consideration, in the present case, it could not be said that the issuance of the benefit statement reflecting an incorrect figure amounted to a legal promise of undertaking by the Fund. The disclaimer raised by the Fund and Administrator B was a standard qualifier for most benefit statements. It, however, could not be used to absolve the Fund or the Fund Management Board of its duties and/or fiduciary responsibilities under the Retirement Funds Act, 2005 (the RFA).

**Duties of the Fund**

The Ombudsman considered that a Fund, its legal status, and the rights and obligations of its members, are governed by the rules of the Fund, relevant legislation and the common law (***Tek Corporation 10 Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at 894 B-C ("Tek")***). Whether or not a benefit paid by the Fund is correct must be determined with reference to the provisions of the Fund Rules. In the circumstances, the Ombudsman agreed with the Fund's assertion that the Complainant cannot be paid in terms of incorrect figures reflecting on her benefit statement as doing so would be unlawful. The Ombudsman was of the view that paying benefits which are inflated and incorrect would amount to unjustified enrichment, which was not legally permissible.

In addition to the above, the Ombudsman also considered that the Retirement Funds Disclosure Guideline 2017 (effective 1 November 2017) provide for the following:

> *"**Periodic disclosures to deferred pensioners***
> *14. (1) A deferred pensioner **shall** be provided with a statement **at least once every year.***
> *(2) The statement will include the following-*
> *... (l) **accrued pension** and explanation of any increase in its amount (DB);*

**Claim for Compensation**

The Ombudsman noted, with concern, the Fund's failure to ensure that proper records were kept, and that adequate and appropriate information was communicated to members and beneficiaries of the fund in terms of Section 9 of the RFA. Furthermore, the disclosures of annual benefit statements required by the 2017 Disclosure Guidelines were not complied with, at least for the time that the Disclosure Guideline was effective in 2017 to the time that the Complainant now requested the benefit calculation in 2019.

The Ombudsman observed that it is an accepted principle that it is often not practically possible for a Fund to perform every action that is required to be taken for the Fund to be properly managed. (***Kaplan & another NNO v Professional and Executive Retirement Fund & others 1998 (4) SA 1234 (W)***). *"For this reason, most, if not all, boards elect to delegate their powers and duties to third parties, including fund administrators, consultants and asset managers. There is nothing unlawful in this provided that*

- *the rule of the fund expressly or impliedly permits such delegation;*
- *the transfer of responsibilities to the delegate does not amount to the board's abdication of those responsibilities;*

- *the powers which is sought to be delegated is not a power to exercise a general discretion which the law vests in the board or which it can reasonably be expected to exercise itself; and*
- *the board monitors and supervises the conduct by the delagee(sic) of its functions and the fulfilment of its duties in terms of its delegated authority. "*

The Ombudsman found that by giving the Complainant an erroneous quotation, the Fund failed to execute one of its fiduciary duties by not keeping its books and records in order, which is an act of negligence on its part. Furthermore, upon becoming aware of the error of the previous Administrator, no steps were taken by the subsequent administrator to advise deferred or active members of the Fund appropriately.

The Ombudsman found that it was the duty of the Board to ensure that they advised members of the Fund of the error and the effect it would have on the Fund and its operations, particularly its ability to make future payments. In this matter, the Fund did not issue benefit statements and quotations to the Complainant for 9 years, or at least for the period after the Disclosure Guideline came into effect. Although the Complainant did not provide proof that she suffered financial loss to any benefit recognised by the Fund Rules, the Ombudsman found that the Fund should be ordered to compensate her for its failure to keep proper records.

The submissions indicated that the Complainant had deferred her pension with the expectation that same would grow over time. Thus, she was found to have been inconvenienced not only by the change in the amount after 9 years but also by the period in which it took for the Complainant to get her payment from the Fund.

In the final analysis, the Ombudsman found that:

The Complainant was not entitled to the erroneous amount that was quoted; the Fund contravened Sections 9 and 10 of the RFA as well as Section 14 of the Retirement Funds Disclosure Guideline, 2017.

The Fund was ordered to pay a percentage of the difference in the benefit statements.

# CASE STUDIES
## Review of Determinations and Settlements

**Consumer Credit – Credit Agreement: Incorrect fees or interest charged**
The complaint related to the provision of credit services.

The Complainant requested the Ombudsman to investigate whether the interest, initiation as well as the service fees were charged in accordance with the laws governing money-lending in Eswatini. The Complainant further alleged that an amount was not paid to him in respect to a refund owed to him. Finally, the Complainant was not happy that the Respondent/Credit Provider deducted funds from his salary as well as his bank account.

The Complainant requested the refund on the basis of the upfront instalment that was taken as security and should have later returned to him.

**RESPONDENT'S RESPONSE**
The Credit Provider submitted copies of the Complainant's statement of account highlighting three payments that amounted to the refund owed, save for an amount that had not been paid by the Complainant due to a rejected stop order.

The Credit Provider further submitted that the initiation fee and service fee charged were lawful under Section 39(1) of the Consumer Credit Act 2016 (the CCA) which deals with the cost of credit.

Finally, the Respondent submitted a copy of the debit order signed by the Complainant authorising deductions from his bank account.

The question before the Ombudsman was whether the Respondent correctly computed the amounts owing by the Complainant in terms of governing legislation. Furthermore, the lawfulness of the deductions by the Respondent had to be considered.

**Interest Under the Money Lending Act**
In terms of the otherwise repealed Money Lending and Credit Financing Act, 1991 (the Money Lending Act), a credit lender was entitled to charge interest on a loan extended to a borrower. Section 3.1 (b) of the Money-Lending Act provided for limitation to the interest to be charged thus:

> *"Where in respect of any money-lending or credit transaction the principal debt —exceeds E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 8 percentage points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank...."* [Emphasis added]

The discount rate at the time of the credit agreement between the complainant and the credit provider, added to the 8% provided for in the section meant that a money-lender would not charge a borrower more than 14.5% interest that year. In the present complaint, the Respondent charged 13.75%, which was less than the then prevailing interest rate. It is noteworthy that the legislation required that the charges be specifically stated. This serves to ensure transparency between the parties. Therefore, once a certain rate is put forward, then the values, once calculated, should reflect

that given rate.

**Interest Under the Consumer Credit Act**
Section 45 of the Consumer Credit Act, 2016 (the CCA) provides for maximum rates of interest, fees and charges to be set by the Minister, after consulting the FSRA. At the time of issuing the Determination these limits had not been issued by the Legislature. Subsequently, the Interest rate of 13.75% could not be said to have been unlawful, as at the time of the credit agreement the Money Lending Act was applicable.

**Service Fees**
The Complainant challenged the Respondent's billing of service fees on the agreement he signed. The reason advanced by the Complainant in challenging the charges is that his payments were made through his employer's payroll office. The question was whether the Respondent was justified in charging such amount over and above the interest.

The Money-Lending Act, which was obtaining at the time of concluding the credit agreement, only catered for interest as well as finance charges. The CCA, on the other hand, which was now obtaining at the time of the complaint, made no reference to a finance charge. The Respondent, however, cited Section 39 of the CCA as the basis for charging a service fee. This charge under the CCA is a lawful charge that is provided for as follows:

" (c) a service fee, which-
i. in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
ii. in any other case, may be payable monthly or annually; and
iii. shall not exceed the prescribed amount relative to the principal debt;"

At the time of Determination, the prescribed amount relative to the principal debt had not been set by the Minister. Subsequently, the Ombudsman considered the charging of the service fee under the Money Lending Act. The Ombudsman found that the service fees were within the confines of the law at the time and therefore allowable.

**Initiation Fee**
Under the CCA an initiation fee is defined as "*a fee in respect of costs of initiating a credit agreement, and- charged to the consumer by the credit provider; or paid to the credit provider by the consumer upon entering into the credit agreement,*"

Furthermore, Section 39 (1) of the CCA quoted by the Respondent provides as follows:

"***Cost of credit***
*39. (1) A credit provider shall not, in a credit agreement, require payment by the consumer of any money or other consideration, except-*

*.. (b) an initiation fee, which-*

*(i) may not exceed the prescribed amount relative to the principal debt; and*
*(ii) shall not be applied unless the application results in the establishment of a credit agreement with that consumer;*

*.. (3) A credit provider who is a party to a credit agreement with a consumer and enters into a new credit agreement with the same consumer that replaces the earlier agreement in whole or in part may not charge that consumer an initiation fee contemplated in subsection (1)(b) in respect of that second credit agreement."* [Emphasis added]

In this particular complaint, the Complainant had an existing credit agreement with the Respondent. The loan under dispute was a "rollover" which merely replaced his existing obligation to the Respondent and therefore was not a new credit agreement. Because the agreement was not new, the Ombudsman found that it was not an instance in which an initiation fee could be charged under Section 39.

The Ombudsman also considered the transition period afforded to the Respondent by section 113 to comply with the provisions of the CCA before March 2018. After this date, the agreement should have been brought in line with the CCA.

**Payment of the Amount of Refund**
The retention of this amount put the Complainant in an overall better position as money retained by the Respondent had the effect of reducing his loan balance. The Ombudsman was, therefore, reluctant to order a reversal of a credit on the Complainant's loan as it would increase his overall obligation to the Respondent and lengthen his repayment terms. It was necessary to acknowledge that the Complainant himself did not stick to his obligations under the agreement and that the funds served their purpose of meeting part of the shortfall on the loan account.

**Deductions from the Complainant's Bank Account**
While the loan agreement was a contract between the Complainant and the Respondent, which regulates the mutual promises made by each party, the salary deduction agreement signed by the complainant, served as an addendum or addition to the contract. It was therefore enforceable. Throughout the duration of the complaint with the Respondent, there was no detection that the Complainant did not appreciate or denied the extent of his obligations towards the Respondent, namely that he undertook to make a monthly instalment of E4 280.99. The fact of his indebtedness to the Respondent as a result of the service given to him was not in dispute. The Ombudsman was of the view that the Respondent was entitled to enforce the agreement signed by the Complainant, and to find otherwise, would have been to allow the Complainant to disregard his obligations under the binding contract. The complainant's objection was therefore not upheld, and the deductions were held to be lawfully enforceable as the agreement specifically allowed for same and the Complainant had authorised the debit order therein.

## SETTLEMENTS

### Retirement Fund

The Complainant advised that he is expecting the Board of Trustees from his deceased wife's employer to give him half of her pension payout as the husband. He stated that the deceased had one child from outside their marriage and had been allocated 90% of the payout and 10% had been allocated to him. He further advised that he fears that he will be made responsible for the deceased's child's wellbeing as she was fully dependant on the mother.

The Office of the Ombudsman (OFS) facilitated settlement of the matter, and the outcome was in favour of Respondent Fund due to the fact that Respondent stated that during their investigation they found that the child was being fully supported by the mother and that the spouse (Complainant) is in full employment and earns a decent salary.

It was explained to Complainant that Respondent was guided by Section 33 of the Retirement Funds Act (RFA). It was further explained to him that the RFA describes a dependant as a person in respect of whom the member is legally liable for maintenance and/or was, in the opinion of the Management Board, dependant on the member for maintenance, and the deceased member would have become legally liable for maintenance had the member not died.

The Complainant stated that the Board of Trustees from deceased's former employer did not guide him on the issue of dependency and what would become of deceased's child as he thought since the child is young, maintaining self would not be as simple and once funds have been depleted, he (Complainant) would have the responsibility to maintain the child.

### Medical Aid

Complainant joined parents under the aged parents option with the medical scheme as an active member. The Complainant later stopped making contributions for her membership which resulted in termination. The parents' monthly subscriptions were being paid and they (parents) therefore remained active members. Complainant re-applied for membership after the termination and was issued with a new membership number. A down payment of six months for the parents was made on the same month of re-joining.

The Complainant requested for pre-authorisation for surgery for a parent a month after the down payment and it was approved subject to benefits available. Unfortunately, the parent had a prolonged length of stay at the hospital post the operation, resulting in the depletion of the overall annual limit. Respondent explained that it was communicated to Complainant that liability rests with Complainant. The Complainant was also advised to utilise the ex gratia facility which she did not. Respondent further stated that the overall annual limit was paid in full for the patient.

At facilitation, the parties considered the above facts and the Scheme's Rules which were known to Complainant as well as the series of correspondences between both parties. The Complainant agreed to settle outstanding arrears on the contributions.

**Provident Fund**

Complainant advised that his father passed on and had been contributing with the Provident Fund. He stated that after his death he went to claim at the Fund but was turned back and advised to come with deceased's wife who is his biological mother, but she was also turned back as she did not have a marriage certificate. The Complainant and his mother explained to the Fund that there is no way they can get the marriage certificate as at the time of their marriage and during the deceased's lifetime, the mother left and remarried.

The OFS intervened and facilitated settlement in the matter. The OFS enquired from the Fund about the procedure in an instance like this one. The Fund advised that in the absence of the marriage certificate and the spouse having remarried, they request the Complainant to bring along birth certificates for the children and an affidavit from the mother. The Fund apologised for the misunderstanding and promised to grant payment if all requested is satisfactory. Complainant submitted requested documents as per the requirements of the Fund and payment was granted.

**Insurance**

Complainant advised that she was involved in an accident with an insured motorbike (the Insured). The Insurer then informed Complainant that they do not accept liability for the claim against the Insured. The Complainant stated that she wished for the Insurer to honour her claim as a third party and to have her vehicle repaired and not an apportionment of 50/50 as Complainant claimed that the Insured was in the wrong as he was driving on a solid line, hence the request for full payment.

Third party claim was not admitted by Respondent due to inconclusive liability on the Insured, based on the submitted report by the Police and the fact that contents of the Police report were being contested by both parties. The Complainant was also insured by Respondent but maintained that a claim will not be lodged under her own policy despite being told that claim cannot be lodged under the Insured's policy. Respondent, therefore, claimed that the claim was denied due to the fact that the Police findings pointed to contributory negligence, therefore an apportionment of the damages would have to be applied.

In finalisation, the Respondent offered to proceed on the basis of apportionment in consideration that neither party was to blame. The Complainant accepted and signed for an agreement to payment offered by Respondent.

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5 Years


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**Annual Report**
**2019/2020**