OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

ANNUAL REPORT
2021/2022

Reach New Heights

Annual Report
2021/2022

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

Ombudsman of Financial Services
PO Box 8490
3rd Floor, West Wing, Ingcamu (PSPF) Building
Mhlambanyatsi Road, Mbabane, Eswatini

Email: info@ombudsfs.org.sz
Website: www.ombudsfs.org.sz

Table of Contents

About

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 VISION

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

OUR MISSION

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

I am thrilled to report that following our commitment to move forward together, the Ombudsman of Financial Services (OFS) reached new heights in the 2021/2022 financial year.

The OFS uses the rule of law to carry out investigations and resolve complaints through party-led alternative dispute resolution processes such as conciliation, facilitation, mediation, or by issuing determinations. The OFS values its commitment to handling complaints without taking sides and doing so at no cost to the complainant. This commitment is encapsulated in the OFS' slogan, "Free, Fair and For All."

Despite the health and socio-political risks encountered by the Kingdom of Eswatini during the period under review, the OFS has continued to exercise its mandate effectively and efficiently. Some of the milestones that the OFS accomplished are highlighted below:

2021/22 Milestones	What Exactly Did We Accomplish?
Complaints Handling	**59 complaints** were registered. This marks the highest number of complaints that the OFS has received within a financial year.
	Introduction of **Mediation** to the OFS dispute resolution process.
	Enhanced **Accessibility**: • Mediators Training on Disability • Sign Language Training
Stakeholder Engagement	**Memorandum of Understanding** re-signing between the OFS and the: 1. Federation of Organizations of Disabled People in Eswatini (FODSWA) 2. Conciliation Mediation and Arbitration Commission (CMAC).
	Non-Bank Financial Services **Industry Series** 1. Swaziland Building Society 2. UNESWA Pension Fund 3. Eswatini Credit Providers Association 4. Public Service Pension Fund 5. Eswatini Nazarene Health Institutions Pension Fund 6. Royal Eswatini Sugar Corporation Provident Fund
	The Power of Service **Customer Service** Week Webinar
Process Efficiency	Updates were made to the OFS Case Allocation Spreadsheet (CAS) to improve **data entry and accuracy**.
	Staff Complement Growth: The **OFS staff** complement stands at a total of 7, consisting of the Ombudsman, Lead Adjudicator, Adjudicator, Case Officer, Research and Communications Officer, Administrative Assistant, and the Graduate Trainee.

Table 1

Strategic Plan

As of 31 March 2022, the process of procuring a strategy development consultant was still underway. However, the process had to be concluded through the rejection of the tenders following technicalities and an inadequate budget. In the interim, the OFS will operate with a stop-gap Operational Plan until the Office confirms consultancy services in the 2023/2024 financial year.

I am encouraged by the OFS team for being positioned and prepared to expand their strategic planning capabilities as we continue to reach for new heights. May I also express my heartfelt gratitude to our strategic partners for their continued support. We look forward to yet another fruitful year ahead.

From the Lead Adjudicator's Desk

The primary purpose of the Ombudsman of Financial Services (OFS) is to resolve non-bank financial services disputes in a fair and accessible way and to uphold good practice in the financial services industry. Over the course of the 2021/2022 financial year, more players entered the financial services industry following legislative developments. This review is compiled to review the following legal developments and their impact:

- Industrial Relations Act, 2000
- Consumer Credit Act, 2021
- Small Claims Court
- Commercial Court

Proposed Amendment of the Industrial Relations Act, 2000

Section of 64 the proposed amendment seeks to extend the Conciliation Mediation and Arbitration Commission's (the Commission's) mandate by the insertion of Subsection (3a):

> "The Commission may perform any other function related to alternative dispute resolution measures that it is competent to perform but which measures are not contemplated under the Act"[1].

The Commission was established under section 62 of the Industrial Relations Act of 2000 as an alternative dispute resolution body with the mandate to provide speedy, cost-effective, efficient, and accessible resolution of disputes in the labour market and overall industrial relations. However, the proposed amendment may extend the Commission's jurisdiction to resolve matters that do not ordinarily fall within the Commission's jurisdiction. This potentially means that the Commission's jurisdiction may extend to matters outside industrial relations, including non-banking financial services (provided the amendment is approved and accented into law).

Consumer Credit (Amendment) Act, 2021

Section 4 (a) of the Consumer Credit (Amendment) Act introduces the Central Bank of Eswatini into the administration of the Act for Financial Institutions.[2] This Act was previously administered by the FSRA. The implication of the amendment is to oust the jurisdiction of the OFS in consumer credit matters related to banking or financial institutions as defined by the Financial Institutions Act, 2005.

Introduction of the Small Claims Court

The Small Claims Court is a specialized tribunal created by the Small Claims Court Act 2011, [3]. This court was created for the adjudication of small claims which do not exceed the sum of E20,000.00. Section 16 (1) (d) and (e) stipulate the actions which the Small Claims Court has jurisdiction over, and these include, credit agreements, sales, purchases, and loans. The Small Claims Court Act was designed to provide a judicial determination of disputes involving small amounts of money. Its procedure is significant for inexpensiveness, speed, and simplicity. The jurisdiction of the Small Claims Court is similar to some actions which the Ombudsman may exercise jurisdiction in.

[1] Industrial Relations (Amendment) Bill, 2021
[2] Consumer Credit (Amendment) Act, 2021
[3] Small Claims Court Act, 2011

Commercial Court

The Commercial Court is a specialised division of the High Court of Eswatini. The Commercial Court is established according to section 139 (1) (b) of Constitution of the Kingdom of Swaziland Act, 2005. The Commercial Court handles business disputes including breach of contract, tort, property, trust and probate, IT disputes, judicial review, corporate mergers, global restructuring, insurance, portfolio transfers, etc. The types of matters which may be dealt with by the Court include a commercial dispute arising from a commercial transaction and includes claims relating to:

- The export or import of goods.
- The exploitation of oil and gas reserves or other natural resources that do not involve administrative law.
- Insurance and re-insurance.
- Banking and financial services.
- The operation of markets and exchange.
- The purchase and sale of commodities.
- Medical scheme services.

The Commercial Court ordinarily has jurisdiction over matters some of which fall within the jurisdiction of the OFS. In the words of The Honourable Chief Justice, "the mandate of the Commercial Court is to promote the expeditious and efficient resolution of commercial disputes".

Impact of Legal Developments

STAKEHOLDER	OPPORTUNITIES	THREATS
Consumers	Increased access to more dispute resolution functions will increase the variety of choices for stakeholders in dispute resolution.	- Possibility of forum shopping - Duplicity of legal actions and claims, making dispute resolution longer and tedious - Overlaps in jurisdictions may lead to inconsistent application of prevailing law
	Promotes and protects the core interests of businesses.	
Financial Services Industry	Promotes and protects the core interests of businesses.	Multiple forums with equal jurisdiction on the same subject matter may lead to complex, unending processes that do not serve the expediency principle of resolving disputes within financial services
Financial Services Industry	Promotes and protects the core interests of businesses.	Multiple forums with equal jurisdiction on the same subject matter may lead to complex, unending processes that do not serve the expediency principle of resolving disputes within financial services
Alternative Dispute Resolution	The recent legal developments promote a healthy competitive landscape in the dispute resolution industry.	The OFS may be impacted by the effect of concurrent jurisdiction. That is, the OFS cannot consider matters that are being heard by another forum.
	The OFS can leverage its statutory mandate of resolving disputes quickly and with minimum formality, at no cost to the complainant.	

Table 2

The Legislature and relevant bodies are commended for their contribution to the development of the recent legislation as outlined above. The Ombudsman would like to express her openness to the development of collaborative networks to collectively aid in the alternative dispute resolution spectrum for the furtherance of our respective mandates.

Overview of OFS Policies

Figure 1 below details the progress made on the development of OFS policies as of 31 March 2022. The Adjudicator is the policy development project leader and has been instrumental in managing every stage of the development process. The OFS further recognises its relationship with the INFO Network for the guidance provided in the development of relevant OFS policies and manuals.

Submitted

- Media Policy
- Complaints Handling Policy and Procedure Manual
- Mediation Policy

Pending With EXCO

- Risk Management Policy and Procedure
- Risk Management Procedure Manual
- Research and Development Policy
- Stakeholder Engagement and Management Policy

Outstanding

- Unreasonable Complainants Conduct Manual
- Complaints Handling Procedure Guidelines of the OFS
- Vulnerable Complainants' Policy And Procedure
- Vulnerable Complainants' Procedure Manual
- Research And Dev Procedure Manual
- Unreasonable Complainants Conduct Manual
- Complaint Handling Code of Conduct

Figure 1

Complaint Statistics

Financial Year: 2021/2022

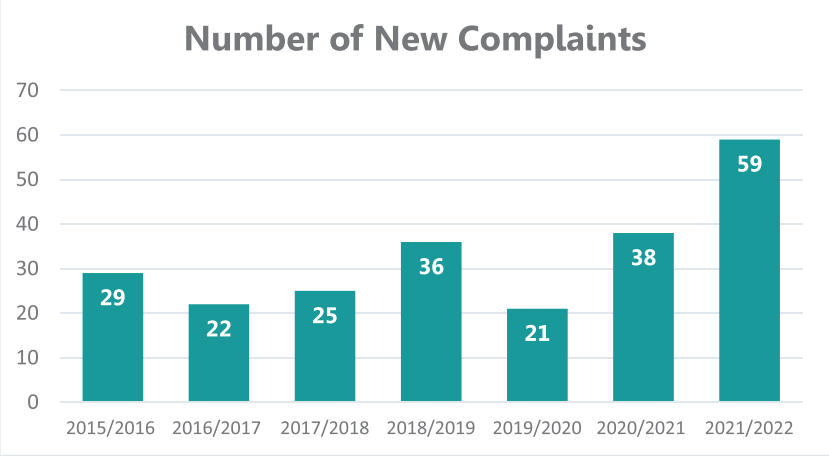


Figure 2

The Legislature and relevant bodies are commended for their contribution to the development of the recent legislation as outlined above. The Ombudsman would like to express her openness to the development of collaborative networks to collectively aid in the alternative dispute resolution spectrum for the furtherance of our respective mandates.

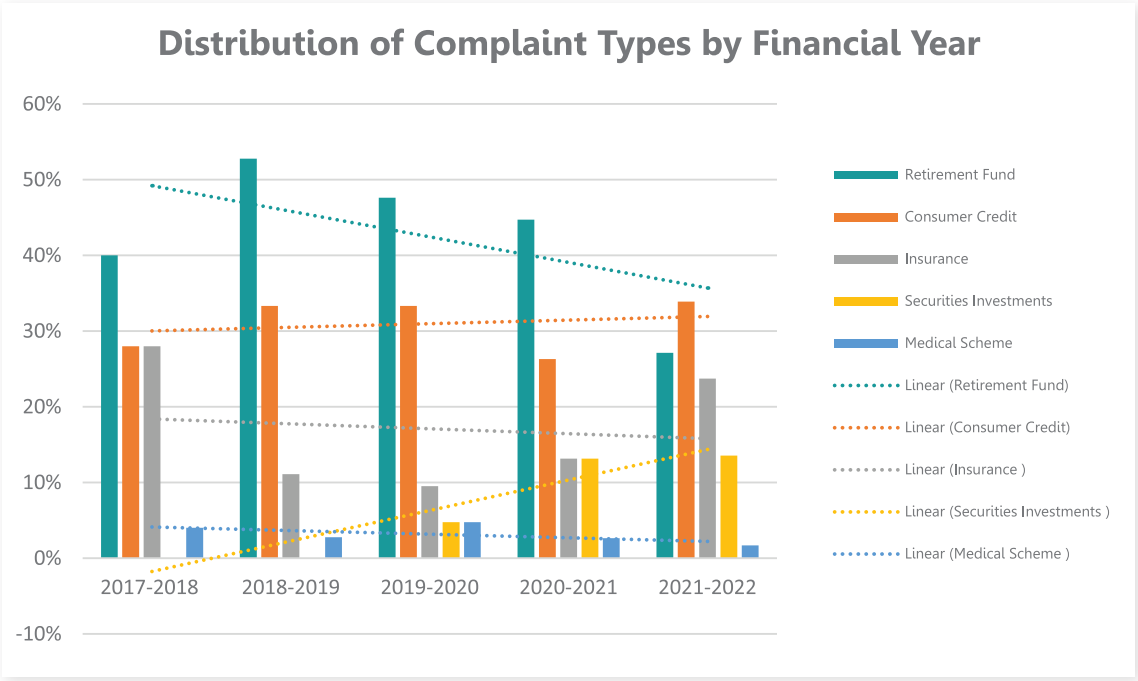


Figure 3

- Although the highest number of complaints has been against **retirement funds**, the volume of these complaints has been decreasing over the last 5 financial years.
- As the second-highest complaint type, **consumer credit** complaints continue to increase steadily.
- The number of **insurance** complaints has been increasing since the 2019-2020 financial year. However, trends demonstrate that overall, insurance complaints will decrease over time.
- In the period under review, the OFS has recorded a significant increase in **securities investment** complaints from 0 in the 2017-2018 financial year to account for over 10% of the complaints received in the 2021-2022 financial year.
- Over the years, **medical scheme** complaints have been relatively low.

Complaint Statistics

Systemic Complaints

For this report, systemic complaints are classified as 5 or more complaints received against a single FSP within a financial year. In the 2021/2022 financial year, systemic complaints are distributed as follows:

Systemic Complaints – FSP	Complaint Issues	% Distribution
FSP A = 34% (Securities Investments)	Dissatisfaction with policy performance and maturity values	64%
	Non-receipt of dividends by shareholders or unitholders	18%
	Non-receipt of redemption amount from a mutual fund or returns from a collective investment scheme	18%
FSP B = 31% (Consumer Credit)	Incorrect interest or fees being charged	60%
	Default on payment	20%
	Reckless lending and affordability	10%
	Supplied in error	10%
FSP C = 19% (Retirement Fund)	Miscalculation of Benefits	33.33%
	Distribution / improper exercise of discretion	33.33%
	Non-payment of benefits / fund value	33.33%
FSP D = 16% (Insurance)	Claim declined (policy terms not recognized or met)	60%
	Non-receipt of redemption amount from a mutual fund or returns from a collective investment scheme	20%
	Poor communications/documents or information not supplied	20%

Table 3

The OFS engaged one of the Regulators on matters lodged against an FSP under regulation given the influx in complaints against this FSP in the 2021/2022 financial year. While engagements are ongoing with this Regulator, the OFS is strategizing a stop-gap measure that will enable it to continue to discharge its statutory mandate while facilitating intervention on the apparent systemic issues.

Further, the OFS engaged 2 FSPs successively in September 2021 and February 2022, through its stakeholder (FSP) engagement program called the Non-Bank Financial Services Industry Series. The OFS, through presentations, emphasized the importance of due diligence and upholding best practices regarding the entities' internal dispute resolution mechanisms. Communication channels remain open between the OFS and stakeholders, and we look forward to continuing our efforts toward strengthening stakeholder engagement and dispute resolution in the 2022/2023 financial year.

COMPLAINANT DEMOGRAPHICS

Of the 38 registered complaints, 55% originated from the Hhohho region, 26% complaints were from the Manzini region, and 13% from the Lubombo region. Shiselweni was the only region below 10%. It is noteworthy that complaint leads were generated from all 4 regions in the 2020-2021 financial year, as per Figure 2 above.

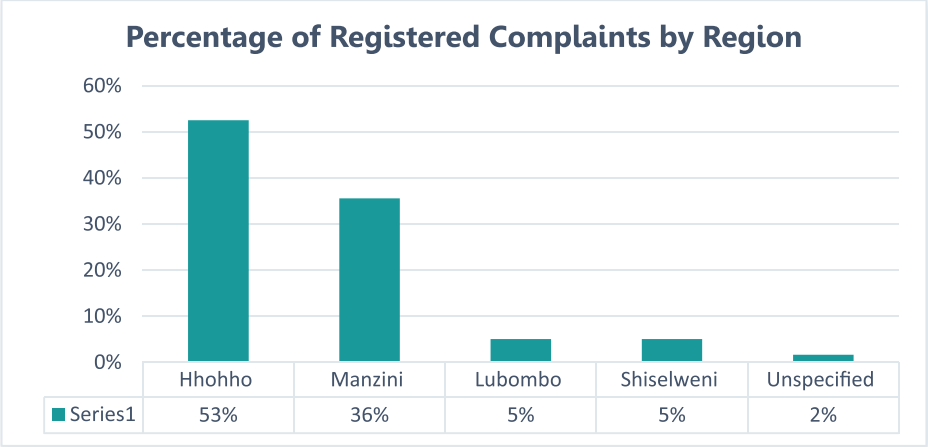


Figure 4

Of the 59 registered complaints, 53% originated from the Hhohho region, 26% complaints were from the Manzini region, and 5% from the Lubombo and Shiselweni regions respectively. It is noteworthy that complaint leads were generated from all 4 regions in the 2021/2022 financial year, as per Figure 4 above. In the 2022/2023 financial, the OFS will conduct market research to gather data on the regional distribution of complainants by differentiating economic and familial regional attachment to inform consumer education activities.

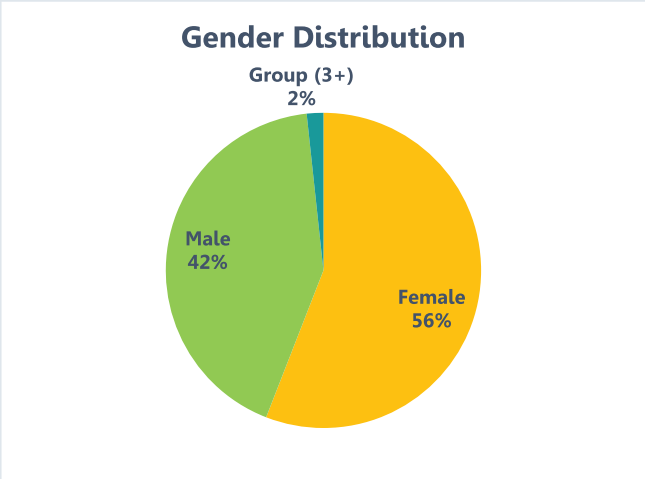
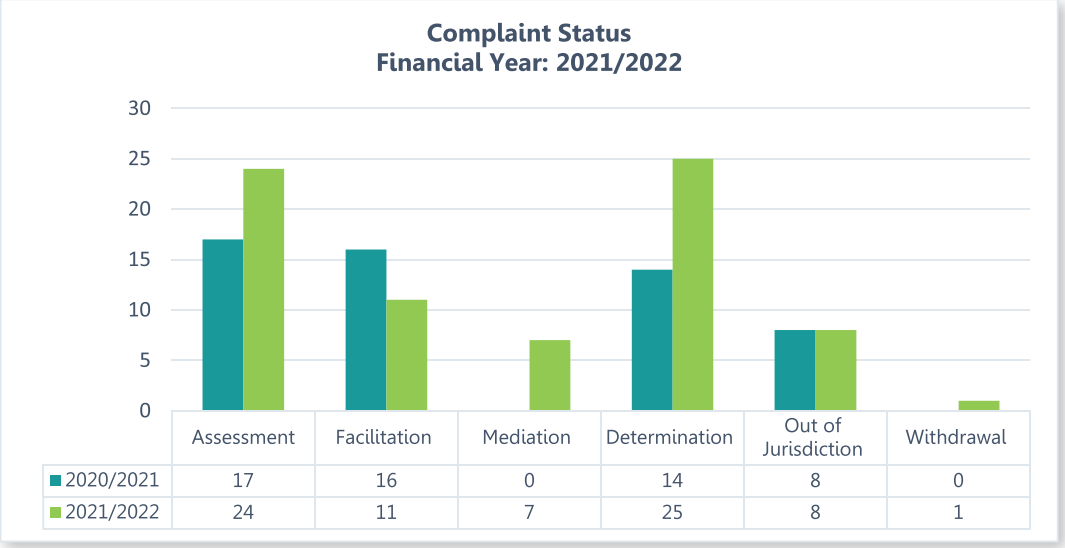


Figure 5

Figure 5 indicates that in the 2021/2022 financial year, over 50% of complainants were female and 42% were male. A single complaint was lodged by a group.

Complaint Statistics



	Assessment	Facilitation	Mediation	Determination	Out of Jurisdiction	Withdrawal
2020/2021	17	16	0	14	8	0
2021/2022	24	11	7	25	8	1

Figure 6

At the end of the 2021/2022 financial year, 25 complaints were closed by way of determination. Settlements were achieved through facilitation and the introduction of mediation, taking the total number of settlements to 18. Furthermore, 8 complaints were assessed as out of the jurisdiction of the Ombudsman, and 1 was withdrawn. The period under review closed with 24 complaints that are under assessment, as per Figure 6 above.

QUERIES

The OFS recorded a total of 271 queries in the 2021/2022 financial year. Referrals generated 36% of the leads, including but not limited to referrals from the FSRA, strategic partners, and complainants' friends and family. The second highest leads were generated through social media at 20%.

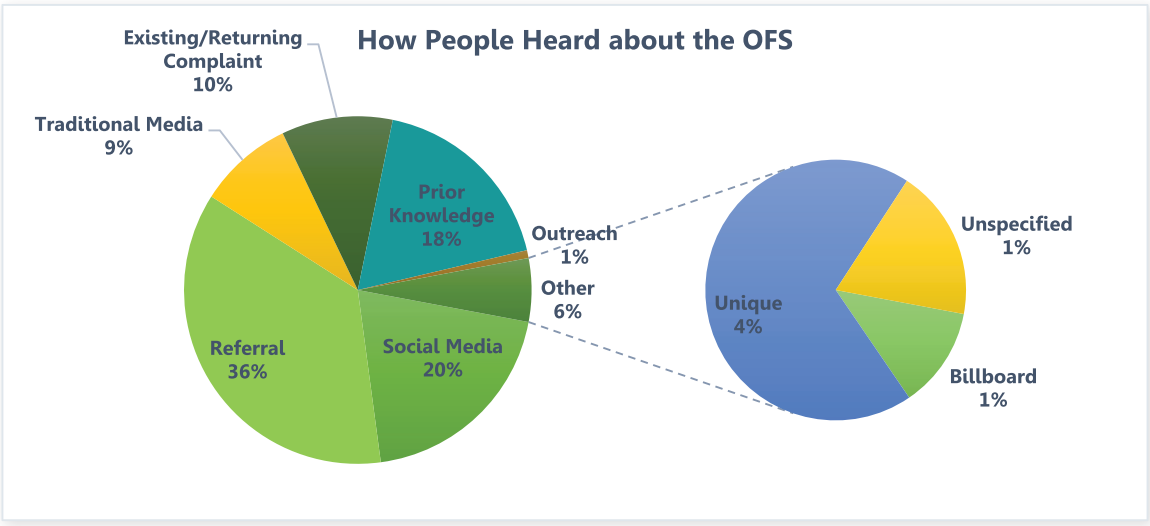


Figure 7

The COVID-19 restrictions continued into the 2021-2022 financial year. Therefore, for a significant portion of the year, in-person public education outreaches were suspended. Therefore, the OFS shifted to and maximised communication on social and traditional media, as well as increasing virtual stakeholder engagements. Figure 7 demonstrates that investing in social media, traditional media, and virtual stakeholder engagements has yielded just over 60% of the leads generated in the period under review.

PUBLIC AWARENESS INVESTMENT (SZL): 2021/2022							
	Social Media	**Referral; Existing/ Returning Complaint; Prior Knowledge**	**Traditional Media**	**In-Person Outreach**	**Virtual Outreach**	**Billboard**	**TOTAL**
Coverage Paid For	28,448.98	0	73,475.74	0	5,000	0	**90,367.44**
Coverage at no cost to the OFS	0	0	252,234.50	0	15 394		**267,628.50**

Table 4

PUBLIC AWARENESS INVESTMENT (SZL): 2020/2021					
	Social Media	**Referral; Existing/ Returning Complaint; Prior Knowledge**	**Traditional Media**[4]	**Outreach**	**TOTAL**
Coverage Paid For	16,901.49	0	231,897.40	0	**248,798.89**
Coverage at no cost to the OFS	0	0	205,051.30	0	**205,051.30**

Table 5

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

Stakeholder Engagement

STAKEHOLDER ENGAGEMENT: Consumer Education

Most of the OFS traditional media spend was allocated to print media, specifically towards Public Notices necessitated by lockdowns on account of the Covid-19 pandemic.

More so, the OFS would like to recognise and appreciate the traditional media houses for extending corporate social responsibility towards the OFS' consumer education efforts achieved at no cost. The OFS further encourages continued cooperation for the benefit of all consumers of non-bank financial services providers in Eswatini.

CONSUMER EDUCATION AND AWARENESS: TRADITIONAL MEDIA		
Print Media		
DATE	**PUBLICATION**	**TOPIC/TITLE**
April	Eswatini Observer	OmbudsDay: What Is a Facilitated Settlement?
April	INFO Network Newsletter	Yes, We CAS!
May	Eswatini Observer	OmbudsDay: Significance of Pre-Authorisation of Medical Benefits
June	Eswatini Observer	OmbudsDay: Understanding the Ombudsman's Powers
June	Money Matters	Know Your Rights and Responsibilities
June	INFO Network Newsletter	Leveraging Partnerships
July	INFO Network Newsletter	Understanding The Ombudsman's Powers
August	INFO Network Newsletter	Customer Service at The Ombudsman of Financial Services (OFS)
July	Eswatini Observer	OmbudsDay: Accessibility for Persons with Disabilities
August	Eswatini Observer	OmbudsDay: Long-Term Insurance or A Long-Term Investment?
September	Eswatini Observer	OmbudsDay: What is Double Insurance?
November	INFO Network Newsletter	The Power of Service Webinar
October	Eswatini Observer	OmbudsDay: The Power of Service Webinar
November	Eswatini Observer	OmbudsDay: What is Revolving Credit?
December	Eswatini Observer	OmbudsDay: From the Ombudsman's Desk: Moving Forward Together
February	INFO Network Newsletter	Moving Forward Together
March	INFO Network Newsletter	OFS Team Sign Language Training
January	Eswatini Observer	OmbudsDay: Know Your OFS
February	Eswatini Observer	OmbudsDay: Focus on Retirement Funds: Dependants and Distribution
March	Eswatini Observer	OmbudsDay: The Ombudsman and Accessibility
November	Financial Market-Place	Advert
December	Eswatini Observer	Public Notice
December	Times of Eswatini	Public Notice

Stakeholder Engagement

Radio		
DATE	**STATION**	**PURPOSE**
December	VOC	Advert production + airing
October	EBIS - Letishisako	Webinar Awareness
Television		
October	Eswatini TV	Power of Service Webinar Promotion
March	Eswatini TV	Sign Language Training PR

Table 6

Social media content was developed and themed around citizen centricity, stakeholder engagement, and public awareness. Statistics as of 31 March 2022 are as follows:

Consumer Education & Awareness Information content posted			**Page Followers**			**Number of Queries**		
FB	**LI**	**TW**	**FB**	**LI**	**TW**	**FB**	**LI**	**TW**
20	18	11	5639	113	0	16	0	0

Table 7

STAKEHOLDER ENGAGEMENT: External Partners

Figure 10 details some of the stakeholder engagements that the OFS participated in with external partners throughout the 2020-2021 financial year.

QUARTER	ENGAGEMENT
Q1	• MoU Meeting: Eswatini Competition Commission (ESCC) / Ombudsman of Financial Services (OFS) • MoU Signing Between the OFS and the Federation of Organizations of Disabled People in Eswatini (FODSWA) • MoU Signing Between the OFS and the Conciliation Mediation and Arbitration Commission (CMAC) • ESCC/OFS Task Team Meeting • First Quarter MoU Meeting: CBE-OFS First • CMAC/OFS Task Team Meeting • Swaziland Building Society/ Nondumiso Simelane High Court Judgement Meeting with FSRA

Q2	• Non-Bank Financial Services Industry Series
	  • Swaziland Building Society
	  • UNESWA Pension Fund
	  • Eswatini Credit Providers Association
	• OFS/ESCC Task Team Meeting
	• Eswatini Credit Providers Association Meet & Greet
	• OFS/ESCC Weekly Webinar Progress Meetings
	• Webinar Preparatory Meetings
	• Second Quarter MoU Meeting: OFS/CBE
	• Non-Bank Financial Services (NBFS) Industry Series Meeting with FSRA
	• CSI NBFS Industry Series Briefing
	• IRF NBFS Industry Series Briefing

Q3	• The Power of Service Webinar • Industrial Relations Act 2000 Stakeholder Validation • End of Year Message • OFS/CBE Standing Meeting • NBFS Industry Series Meeting with FSRA

Q4	• Non-Bank Financial Services Industry Series
	  • Public Service Pension Fund
	  • Eswatini Nazarene Health Institutions
	  • Royal Eswatini Sugar Corporation
	• OFS/ESCC Operational Meetings (Fortnightly)
	• Ministry of Labour / International Labour Organization Stakeholder Meeting
	• OFS/CBE Meeting
	• OFS/CMAC Meet & Greet
	• OFS/FODSWA Sign Language Training
	• INFO Newsletter Articles
	• Feb 2022 - Moving Forward Together
	• March 2022 - The Power of Service Webinar

Table 8

Special Report

The Customer Service Week Webinar

INTRODUCTION

The Memorandum of Understanding (MoU) between the ESCC and the OFS was signed on 23 March 2020. The MoU is established in consideration of the Parties' respective legislative mandates to manage and resolve consumer complaints in the Kingdom of Eswatini. To this end, the ESCC and OFS agreed to co-host a webinar panel under the following theme during Customer Service Week:

"The Power of Service: The Growth and Impact of Alternative Dispute Resolution in Eswatini"

The ESCC and OFS identified four key stakeholders who are at the forefront of customer service and dispute resolution:

- Conciliation Mediation and Arbitration Commission (CMAC)
- Institute of Research Management and Development (IRDM)
- Eswatini Standards Authority (SWASA)
- The Central Bank of Eswatini Ombudsman for Financial Institutions (CBE/OFI)

BUDGET REVIEW

The project budget was managed well with savings. However, should the Webinar be a recurring event, the Planning Committee would be more informed about which budget items to identify and prioritize in order to limit reallocations.

PROJECT BUDGET	34 000
OFS Expenditure	17 250
ESCC Expenditure	15 394
Total	**32 644**
Project Savings	**1 356**

CONCLUSIONS AND RECOMMENDATIONS

- Consumers were very receptive of the Webinar content and platforms used. However, there is room to expand to other platforms as well to reach a wider audience.
- Consumers and panelists voiced the recommendation for the Webinar to be an annual event.

Special Report

STAKEHOLDER ENGAGEMENT: Staff Training & Development

In the first quarter of the 2021/2022 financial year, the OFS staff came to full complement, with the finalisation of the recruitment and resumption of duty of the Graduate-in-Training. As of 31 March 2022, the staff complement stands at a total of 7, consisting of the Ombudsman, Lead Adjudicator, Adjudicator, Case Officer, Research and Communications Officer, Administrative Assistant, and the Graduate-in-Training. With this, all recruitment processes were concluded.

QUARTER	ENGAGEMENT
Q1	• Webinar: Consumer anxiety, vulnerability, and challenging behaviours. • Court-Aligned Commercial Mediation Training • Effective Stakeholder Management • Mediators Training on Disability • Senior Management Development Program Training
Q2 & Q3	• McKinsey & Company Forward Foundation Level • Financial Sector Conduct Authority (FSCA) Familiarisation Programme: Investigation and Enforcement
Q4	• OFS Staff Recognition • Sign Language Training • McKinsey & Company Advanced Foundation Level

Table 9

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

Be Heard

Hear
Emphatise
Apologise
Resolve
Diagnose

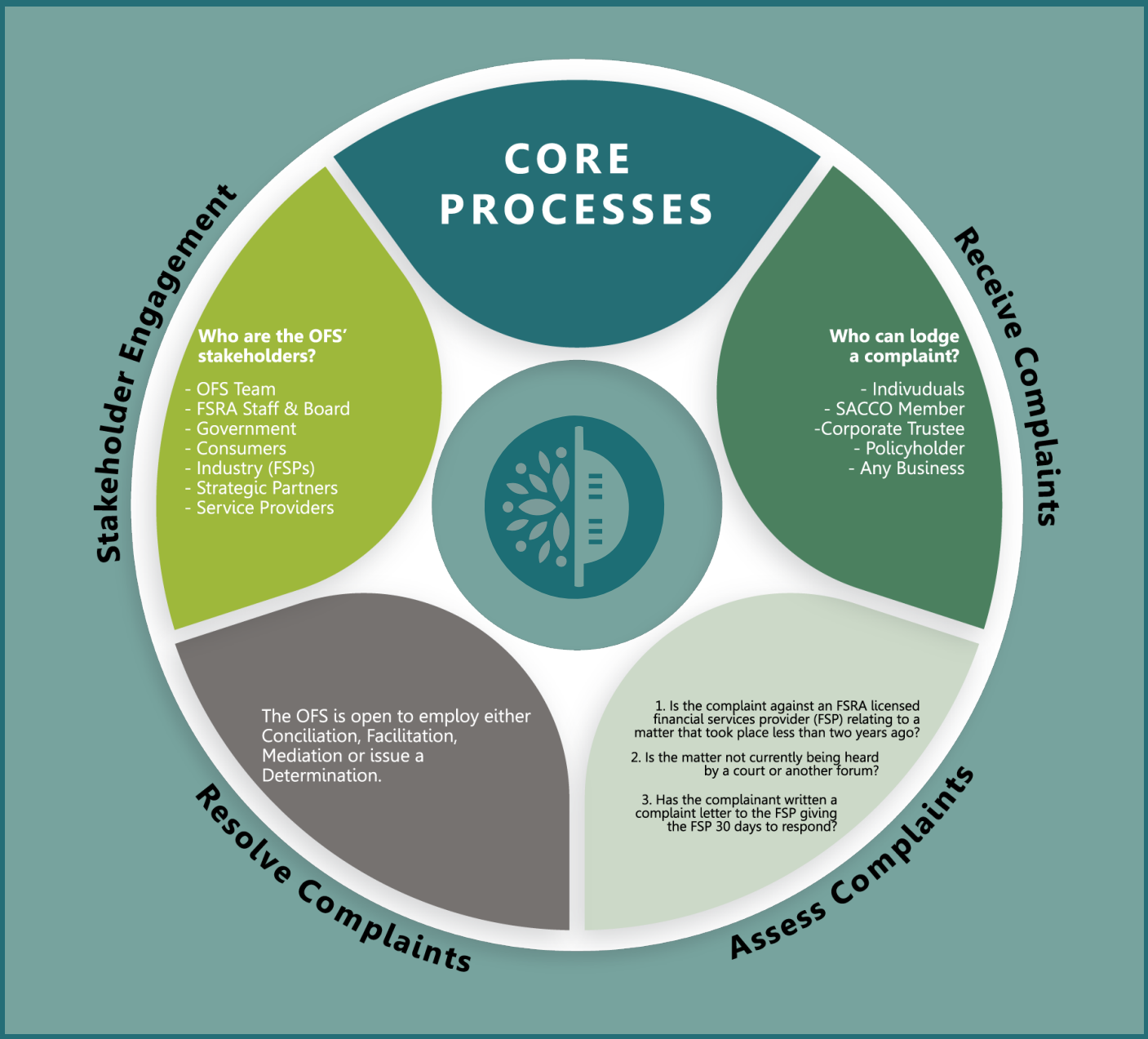
Our approach as an Office is to listen with understanding so we resolve non-bank financial services disputes in a fair and accessible way.

Case Studies

Review of Settlements & Determinations

The OFS receives, assesses, and investigates complaints against FSRA-licensed non-bank financial services providers. These complaints are then resolved through either conciliation, facilitation, mediation or by issuing a determination. Whilst the OFS executes this core function, stakeholder engagement requires constant management to foster stakeholder understanding of the OFS' functions and value addition to the financial services sector.

A summary of our core process is as follows:



The following case studies are presented in line with the OFS' commitment to educating stakeholders about how the Office resolves non-bank financial services disputes, as well as to identify key learnings on a case-by-case basis.

PROGRESSIONAL DISPUTE RESOLUTION: MEDIATION TO DETERMINATION

SECURITIES/ INVESTMENTS – NON-RECEIPT OF DIVIDENDS AND MATURITY VALUE

The Complainant

This complaint related to the investment of the sum of E20 000.00. The Complainant stated that she joined the Investment Company on or about 11 March 2020 where she paid a deposit of E20 000.00. The Complainant signed the contract a day after the deposit, which stated that the investment was for a period of 5 years. The Complainant was assisted by one Mr. N. in the transaction. The Complainant did not receive a copy of the contract, nor did she receive the membership number. The Complainant changed her mind and applied to withdraw (disinvest) her investment. She was advised that 6% would be charged on returns.

Respondent's Response

The Investment Company confirmed that the Complainant invested an amount of E20 000.00. It stated that there were significant developments in the Investment Company previously known as ABC Limited. Further, that these changes were communicated to all stakeholders to prevent the activation of a certain Clause 1.5.5, which was the conversion of a linked loan. That the changes necessitated the restructuring of the Investment Company and linked loan products to avoid losses. And that on 25 August 2021, the proposal was concluded and at least 75% of those present in the meeting voted in favour of the proposal.

Agreement of the Parties

The parties agreed that the matter cannot succeed in mediation. In the circumstances, mediation failed, and the matter was referred to determination.
greements with the 2nd Respondent, resulting from the non-payment of her withdrawal benefit.

The Ombudsman's Determination and Reasons

Principles of Contract

The Ombudsman underscored that the relationship between the parties was governed by the principles of the law of contract. In ascertaining whether there was an agreement between the parties, the Ombudsman investigated what constitutes a legally binding agreement. Reference was made to *JTR Gibson, South African Mercantile and Company Law, (2003)*, who defines a contract as, of section 32(2)(a), a retirement fund may deduct an amount from the members benefit in respect of:

> "...a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject matter..."

Emphasis was made that it is acceptable law that for a contract to be legally binding, it must comply with the above essentials of a contract. Gibson states that, "If one of the essentials is absent, the agreement is void." There was no dispute that the Complainant and the Investment Company signed a contract. For this reason, the Ombudsman found that there was a contract between the parties. debt."

Request for Mortgage Interest to be Waived

In deciding waiver of the mortgage interest, the Ombudsman informed her decision through the lens of section 76 (1) of the Financial Services Regulatory Authority (FSRA) Act, which provides as follows:

Prospectus

Section 2 of the Companies Act, 2009 defines that a prospectus "means any prospectus, notice, circular, advertisement or other invitation offering any shares or debentures of a company to the public." A prospectus is therefore an invitation to subscribers to a company's shares. Section 133 of the Act further provides,

> "Restrictions as to offers and issues. 133.
> (1) Other than in respect of the minimum number of shares required for incorporation, a public company shall not —
>
> a. allot or issue any shares in or debentures of that company;
> b. offer any shares in or debentures of that company; or
> c. invite any person to subscribe for any shares in or debentures of that company unless the said allotment, issue, offer or invitation is in writing and is accompanied by a prospectus issued by that company.
>
> (2) Subject to subsection (3), a public company shall not accept any offer for shares in or debentures of that company unless such offer results from an invitation made by the company in accordance with subsection (1).
>
> (3) An allotment or issue of such share in or debentures of that company resulting from any offer or invitation accompanied by a prospectus made in accordance with this section shall not be required to be accompanied by a further prospectus."

The prospectus is thus an invitation and offer to members of the public for subscription to shares. This, for purposes of legality, becomes the principal document to understand the relationship between the parties. As an offer to which the Complainant subscribed (or accepted), this becomes the foundation of the parties' interaction.

Shares are units of equity ownership interest in a company that exists as a financial asset providing for a distribution in any residual profits, if any are declared, in the form of dividends. Shareholders may also enjoy capital gains if the value of the company rises. This definition encompasses the rightful definition of the word shares but does not seem to consolidate the different classes and forms certain shares may take. Companies issue shares, moreover, it is then necessary for the company to issue the form of shares, that is, preference shares or ordinary shares. This may involve any other shares which may be approved by the law. In 2017, Investment Company (As ABC Limited) issued a prospectus, the salient terms of which are the following:

This prospectus refers to a public offer of a) Five-Year Income Provider and Five-year Capital Growth Provider shares. The former were "A five year, variable rate, redeemable, convertible, cumulative, nonvoting par value preference shares at an issue price of E1.00 per preference share in the share capital of ECS. Limited and a variable rate redeemable, convertible claim of E999.00 per claim to be sold in linked loan units of 1 preference share and one claim, which share and claim are inseparably linked and offered at E1 000.00 per linked loan unit at a variable interest rate, presently at 15% per annum with interest being payable and cumulate monthly, and with a minimum amount of E10 000.00 per investment."

The latter were "Class E five year, zero rate, redeemable, convertible, non-voting par value preference shares at an issue price of E1.00 per preference share in the share capital of ECS. Limited and a zero-rate redeemable, convertible claim of E999.00 per claim to be sold in linked loan units of 1 preference share and one claim, which share and claim are inseparably linked and offered at E1 000.00 per linked loan unit at a zero rate, at a redemption value of E2 000.00 per linked unit, and with a minimum amount of E10 000.00 per investment."

Clause 1.5.4 "Redemption of linked loan units" deals with how the units will be redeemed. Pertinent provision is "Linked loan unit holders may not redeem early or migrate within the first three years of investment. After this three-year period, linked loan unit holders may redeem early or migrate their investments by giving three months' written notice to the Company in accordance with the terms and conditions which are set out in this prospectus."

Clause 1.5.5 "Conversion of linked loan units" deals with the conversation of the linked loans to other classes of shares. A pertinent provision is that "If there is a change in any circumstances affecting the Company, which change, in the opinion of the directors, necessitates the consideration by any or all classes of linked loan unit holders of a restructuring of the shareholding of the Company, the Company shall be entitled to convene a meeting of any or all classes of shareholders at which meeting proposals will be considered, including but not limited to the early or partly redemption of linked loan units into ordinary shares or cash or a combination of ordinary shares and cash."

Decision/ Order

The Ombudsman found that the parties were in a lawful agreement to invest, and that the Complainant knew all the risks associated with the investment agreement.

The Ombudsman also found that the prospectus to which Complainant subscribed provided for the process of converting redeemable linked loan shares. This process has now been completed and a new prospectus has been issued. The Complainant has until May 2022 to subscribe to the new prospectus should she so wish. In the circumstances, the Ombudsman finds that the investment amount of E20 000.00 should be dealt with in terms of the new prospectus

The complaint was not upheld.

There was no order made to the Investment Company.

KEY TAKEAWAYS:

1. It is important for consumers to understand the nature of the products sold to them. When the Ombudsman considers matters before her, the agreements signed by the parties become an important indicator of the nature and scope of the relationship between the parties. When a party executes a document, he signals appreciation of the rights and obligations flowing from that transaction and the Ombudsman (and by and large the courts) are reluctant to interfere unless fraud, mistake, duress, and undue influence are proven.
2. Financial services providers are encouraged to explain the true nature and extent of the relationships that parties are invited to enter into.
3. The importance of continuous engagement between financial services providers and their customers.

SETTLEMENTS

MEDIATIONS

1. RETIREMENT FUND – PENSION FUND: DISTRIBUTION OF RETIREMENT BENEFITS

1.1 The Complaint

The complaint related to the distribution of retirement contributions. The Complainant was a child of a deceased member of the Fund. The Complainant was aggrieved by the fact that the Fund paid the deceased member's second wife, yet the beneficiaries of the first wife (the Complainant's mother) who died in 2021, did not receive any portion of the deceased's death benefits.

The Complainant stated that when they attempted to claim the benefit, the Fund advised that the file was closed. The Complainant requested the Ombudsman to resolve the complaint as the Fund paid a sum of E500 000.00 to the deceased member's second wife, yet nothing was paid to the beneficiaries of the member's other wife. The Complainant also wanted to know where the funds paid to the beneficiaries of the second wife were sourced from, as the Fund had advised that the file was closed. The Complainant requested the Ombudsman to assist in the fair and equal payment of all beneficiaries of the deceased member.

1.2 Respondent's Response

1.2.1 The Fund was converted from a defined benefit fund and members, including spouses, were converted to annuitants, following amendment of the Fund's founding legislation. The conversion of the Fund meant that the rules of the defined benefit fund were no longer applicable. Members were eligible to nominate beneficiaries in the event they passed away. The deceased member's second wife submitted her nominees.
1.2.2 The complaint falls outside the scope of the law as the member's first wife benefited from the previous legislation.
1.2.3 The first wife died in 2012 and there was no funeral benefit when she died. More so, the Fund's funeral benefit only covered the deceased member.
1.2.4 The benefits for the deceased member were distributed in 2011 and all beneficiaries received their benefits, including the member's first wife.
1.2.5 Following the conversion of the Fund, the deceased member's second wife had funeral cover which she was paying monthly. After the conversion of the fund, the funeral cover became a lump sum that was payable to the second wife's beneficiaries upon death.

1.3 Agreement of the Parties

The parties agreed that the matter cannot succeed in mediation. In the circumstances, mediation failed, and the matter was referred to determination.

KEY TAKEAWAYS:

2. There is a distinction between benefits for purposes of retirement funds law and assets for purposes of succession law.
3. It is important for Retirement Funds (Trustees) to explain the process and expectations to beneficiaries. These are generally not familiar with the Fund's business.
4. Retirement Funds should conduct their due diligence and also conduct their investigations proper and in terms of the law, before paying benefits.

2. CONSUMER CREDIT: CREDIT ADVANCED AND COST OF CREDIT

2.1 Consumer Credit Complaint

The Complainant alleged that she applied for a loan through The Credit Provider. She was credited in December 2019, and the last and final instalment was projected for 2025. The Complainant further alleged that in July 2020, she applied for and was granted a payment holiday in August 2020. On two different occasions in 2020, and in February 2021, the Complainant requested a settlement quotation and found that the loan was not decreasing, as per her repayment. The Complainant's complaint was that although she was allegedly diligently repaying her loan, the debt was not decreasing, and the interest charged was too high. Therefore, the Complainant requested for her loan repayments and related costs to be recalculated.

2.2 Respondent's Response

The Credit Provider confirmed the following about the Complainant:

2.2.1 She has been their client since 2016 and had applied for and was granted 8 loans from 2016 to 2021.

2.2.2 The last top-up loan received by the Complainant was administered in December 2019.

2.2.3 The Complainant's existing loan at the time she applied for a top-up was E140 000.32. She was granted a top-up of E40 000.00, taking her principal loan amount to E180 000.32.

2.2.4 In July 2020, the Complainant applied for and was granted a repayment holiday, in terms of which she was entitled to skip the instalment payment for August 2020.

The Credit Provider stated that the effect of the repayment holiday was the extension of the loan tenure. The Credit Provider further stated that the extension was explained to the Complainant at the time of application. The Credit Provider confirmed that in March 2021, the Complainant settled her loan in full and no amount was owed to the Credit Provider.

2.3 Agreement of the Parties

The Complainant was satisfied with the explanation tabled by the Credit Provider regarding the loan and the costs of credit. Following this development, the Complainant withdrew the complaint. Therefore, the matter was successfully mediated, and an agreement was signed by the parties in full and final settlement of the matter.

KEY TAKEAWAYS:

1. Service providers should ensure that they fully explain their service offerings to consumers (cost of credit).
2. Credit agreements should be aligned with the relevant credit legislation and the necessary requirements for the provision of credit.
3. Financial service providers should ensure that they adequately conduct consumer assessment to align with legislation and avoid over burdening consumers.

DETERMINATIONS

1. RETIREMENT FUND – PENSION FUND: INTERFERENCE WITH DISCRETION OF THE MANAGEMENT BOARD

1.1 The Complaint

The Complainant was the wife of a deceased member of the Respondent (the Fund). After retirement, the member received an annuity from the Fund and as such, his dependants were eligible to benefit following his death.

As the spouse to the deceased, the Complainant attended the next of kin meeting, submitted the required documents, and the Fund made its decision and paid the benefit. However, the Complainant was excluded as a beneficiary on the basis that her marriage to the deceased was bigamous. Therefore, the Fund decided to exclude the Complainant because she was not regarded as a spouse in terms of the law. The Fund regarded the first wife as the deceased's spouse and paid her accordingly.

In her Complaint Form, the Complainant requested:
1.1.1 To be paid at least half the pension pay-out as a dependent.
1.1.2 That the transgressions of the deceased in committing her to a bigamous marriage, should not be a justification for her exclusion from the pension pay-out.

1.2 Respondent's Response

The Fund submitted the following response, that:
1.2.1 The Complainant did not qualify for the surviving spouse pension benefit because she is not a surviving spouse in terms of Regulation 17(1) of the Fund's Regulations, read together with section 7(1) of the Marriage Act.
1.2.2 The Complainant's Customary marriage with the deceased was bigamous and unlawful, hence null and void. The Fund stated that Complainant is not a spouse as envisaged under the definition of dependant by section 2(b)(ii) of the Retirement Funds Act.
1.2.3 Its decision regarding the civil rights marriage was based on:
1.2.3.1 The verbal submissions by the family in the Complainant's presence during the next of kin meeting, which the complainant never contested. That the Complainant granted the acknowledgement of spouses and confirmation of agreed facts which she signed after the meeting.
1.2.3.2 The birth certificates of the first wife's children and the deceased's employment documents reflected her as the deceased's legal wife.
1.2.3.3 The deceased's marriage to his first wife was never terminated.
1.2.4 The Complainant's complaint should not be considered by the Ombudsman since she would indirectly be asking the Ombudsman to declare that her bigamous marriage is lawful and valid, which is beyond the Ombudsman's jurisdiction. A declaratory order of this nature would require the Complainant to approach the High Court.
1.2.5 The Fund fully discharged its mandate in line with the rules of the Pensions Order. The Fund prayed that Complainant's claim be dismissed in its entirety.

1.3 The Ombudsman's Determination and Reasons

The Ombudsman was tasked with determining whether the management board of the Fund acted within the law in the distribution of the death benefits of the deceased. The Ombudsman was further required

to determine whether the management board exercised its discretion judiciously in the allocation of the deceased's death benefit. Finally, the Ombudsman was called upon to determine whether the discretion of the Fund to exclude the Complainant as a beneficiary could be interfered with.

1.3.1 Section 33 of the Act

The complaint was dealt with under the *Retirement Funds Act (RFA), Section 33 (s33)* since it was a death benefit. The RFA grants the management board the mandate to deal with such matters. *S33 (2)* states that "...the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board." Therefore, the management board of the Respondent was the relevant body to have dealt with the distribution of the death benefit for the deceased.

1.3.2 Discharge of Mandate – S33 of the RFA & Pensions Fund Order

The Ombudsman found that the management board discharged its mandate as stated in *s33(4)* of the RFA, where it states that the management board is required to pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable. This element of the law brings in the aspect of discretion. The Ombudsman noted that it is the duty of the board to determine the proportion to be allocated to each beneficiary. To this end, the board is expected to act within the law in exercising its discretion. Furthermore, the board must ensure that the evidence available at the time they made the decision was sufficient to enable them to reach an informed decision. The Ombudsman referred to the matter of Ngalwane V. in *Sakildien v. Cape Municipal Pension Fund*, in dealing with the issue of discretion which stated that,

> "As long as the board has properly considered all the relevant factors, ignored irrelevant ones from consideration, and not unduly fettered its discretion, no court or reviewing tribunal will lightly interfere with their decision."

The board should also ensure that it exercises its discretion fairly, correctly, and that all relevant issues are considered. In instances where the board is required to review or reconsider its decision, there should exist sufficient evidence to warrant the review. In this case, the Ombudsman found that there was enough evidence before the board to enable it to decide on an equitable distribution, which the Ombudsman found that the management board had failed to consider in the exercise of its discretion.

1.3.3 Dependency

The Complainant submitted that "...as we lived as husband and wife for 37 years, built a home at Mahlanya and I bore three kids for him [the deceased member]. He was also dependent on me for physical, emotional, and other needs for 37 years." The above was found by the Ombudsman to be proof that the Complainant and the deceased lived together, and that Complainant was factually dependant on the deceased. The Fund in its submissions had stated that "...there is no basis for the relief sought against the Respondent as the Complainant does not qualify as a surviving spouse because her purported Swazi law and custom marriage with the deceased was bigamous and unlawful." The Fund based its decision on the validity of the marriage and never brought its mind to bear on the question of dependency between the Complainant and the deceased.

Based on the submissions of the parties, the Ombudsman found that there was factual dependency between the Complainant and the deceased. The Ombudsman further stated that the Regulations and Rules of the Fund should be read together with the RFA, which provides guidance on dependency and the level of dependency. Therefore, the Ombudsman found that there was sufficient evidence to warrant interference with the management board's exercise of discretion and the decision of the Fund.

1.3.4 Equity

The Ombudsman also considered that her jurisdiction is premised in the resolution of disputes in a just and equitable manner. *In Swaziland Building Society v Nondumiso Simelane NO. & Another (1228/20) [2021] SZHC 58*, His Lordship Mlangeni J, emphasized the type of jurisdiction that the Ombudsman has, "to resolve disputes by determining what is reasonable and fair in the circumstances presented before her." The Ombudsman mentioned that at the time of death, Complainant was living with the deceased and was dependent upon the deceased. However, the management board exercised its discretion and had issued a decision that the Complainant was not a legal spouse in terms of the law. The Ombudsman found that the management board should not have overlooked the fact that Complainant was living with the deceased and was factually dependent upon the deceased during his lifetime.

For this reason, the Ombudsman considered the fact that the decision of the Fund was based on the evidence presented by the parties during the next of kin meeting and the documentary evidence submitted in support of the submissions. The Ombudsman found that the Complainant should be categorized under factual dependants of the deceased. The Ombudsman also found that it would be fair in this circumstance, for the declaration of the legality of Complainant's marriage to be left to the Courts to decide.

1.3.5 Decision/Order

The Ombudsman found that the management board of the Fund acted outside the discretion accorded to it by the law in excluding the Complainant as a beneficiary only on the basis that her marriage with the deceased was bigamous and unlawful and disregarded the other relevant consideration of factual dependency.

The Ombudsman further found that the allocation of the benefit was not fair and reasonable to the Complainant.

The Ombudsman then made the following order: that,

The complaint was upheld, and the Fund was ordered to reconsider its decision, and consider the Complainant in the distribution based on the factual dependency that existed between Complainant and the deceased.

KEY TAKEAWAYS:

2. The Law has given the management board (Trustees) the discretion to distribute the benefits of a deceased member. In exercising discretion, the Trustees are guided by certain factors, among which are dependency and the degree of dependency.
3. There are two (2) types of dependencies, factual and legal.
4. Due diligence on the part of all parties should be conducted, to inform proper decisions.

2. INSURANCE – SHORT TERM: REPUDIATION OF CLAIM

2.1 The Complaint

The Complainant stated that the Respondent (the Insurer) unfairly took a decision to decline his motor vehicle theft claim. The Complainant also submitted that he provided all the information within his knowledge relating to the theft of his motor vehicle. However, in July 2021, the Insurer wrote a letter denying liability for the second time. The Complainant referenced emails dated July 2019, June 2019, and February 2020. These emails demonstrated that the Insurer was furnished with all the information it required as early as April 2019.

However, the Insurer took a decision to repudiate the claim without sharing the contents of the investigation

report. The Complainant stated that the investigator interviewed the driver and should have ascertained when the driver left the country and via which port. Furthermore, the Complainant submitted that he was not driving the vehicle when the event took place. The Complainant stated that the Insurer sought information that was evidently not within his knowledge. The Complainant stated that in his claim, he had indicated that he gave the vehicle to Mr. A M and attached the letter authorizing Mr. A M to use the vehicle.

In February 2020, the Insurer denied the claim. The Complainant considered malpractice. The Complainant considered the file containing his claim closed, as opposed to a rejection of the claim. The Complainant thereafter demanded the investigation report which he considered was the basis of the denial of the claim. This demand was denied through an email dated August 2021. The Insurer considered the investigation report to be its property.

In his Complaint Form, the Complainant requested:
2.1.1 The Ombudsman to order the Insurer to furnish him with the investigation report.
2.1.2 The Insurer to consider his claim and indemnify the loss fairly and objectively.

2.2 The Respondent's Response

The Insurer submitted the following response:
2.2.1 The Complainant had a non-life policy.
2.2.2 Through an email marked Annexure 1, the Complainant advised that a motor vehicle was stolen. The email indicates that the theft occurred on October 2018.

2.2.3 In November 2018, the Complainant submitted a claim form through his broker, a copy of his driver's license, and a police report. According to the police report, the date of the claim was in October 2018. It appeared on the form that the Complainant last saw the vehicle in October 2018. The claim was then registered, and a claims notification was issued on 31 October 2018.

2.2.4 At the time of the loss, the vehicle was not in the possession of the Complainant who is the insured. It was in possession of one Mr. E M. The Complainant advised through his Broker that he had given full authority to Mr. M A, a family friend. The Insurer submitted that while the vehicle was with Mr. M A, the latter handed it over to a third party without Complainant's knowledge.

2.2.5 In its claims process, the insured must notify the Insurer in writing or person as soon as the insured discovers or becomes aware of damage or loss. Upon completion of the necessary claim form, submission, and attachment of necessary supporting documents, the claim is investigated, assessed, and considered by the Insurer.

2.2.6 Per its process, the Insurer appointed investigators on 25 January 2019. According to the investigators' report, further information and clarity was required from the Complainant. This information was requested from the Complainant's Broker. The Broker requested the Complainant to furnish the required information regarding the date on which the vehicle was taken to South Africa and the border post that was used for departure.

2.2.7 In his response on the same day, the Complainant advised that he had handed over the vehicle to Mr. M A on 14 September 2018. The Complainant stated that he did not know if Mr. M A left on the same or the following day. He further requested for the question about which border post was used for departure to be

directed to Mr. M A. Consequently, the Complainant shared Mr. M A's contact details with his Broker on the same email.

2.2.8 The Insurer submitted that the Complainant's conduct was dismissive. The Insurer referred to the Policy agreement which imposes a duty on the Complainant to provide all necessary information to the Insurer regarding any claim. This is a contractual duty that rests on the insured and the Insurer, not third parties.

2.2.9 The Complainant's Broker followed up with the Complainant via email requesting him to produce the required information. In the same email, the Broker advised him that it was the Complainant's duty to furnish any information required by the Insurer. However, as of 29 January 2020, the Complainant had not furnished the information as initially requested. In an email, the Insurer reminded the Complainant through his Broker, to furnish the information within 7 days. The Complainant was further advised that failure to produce the information would leave Insurer with no option but to close the file. The Insurer submitted that the notice on the closure of the file was on account of its inability to process the claim based on its validity and merits without the requested information.

2.2.10 On 11 February 2020, another email was sent to the Broker pertaining the requested information, and neither broker nor the Complainant responded. This necessitated the closing of the file some fifteen (15) months after the date of the claim. This decision was communicated to the Complainant.

2.2.11 On the same day and after the closure communication, the Broker informed the Insurer that the Complainant had eventually been located after several attempts. The Broker further communicated (through a tele-conversation) that the Complainant had been unable to receive correspondence as his last known address was no longer operational. A new address had been provided. Through his Broker, the Complainant requested that the deadline for submission of the initially requested information be extended.

2.2.12 On 20 February 2020, the Insurer raised concerns over the Complainant's conduct because he had not taken action on the Insurer's request from 16 April 2019 to 11 February 2020. The Insurer continued to inform the Broker of the closure of the file. The Broker subsequently closed its file on 20 February 2020.

2.2.13 On 10 June 2021, the Insurer received a letter from the Complainant through his attorneys. The letter disclosed that the Complainant sought to be covered for the loss of his vehicle as the process had taken unduly long. In response to the attorneys, the Insurer communicated that the process took long due to the conduct of the Complainant and the Insurer referenced the history of the claim. This included its registration, appointment of an investigator and further engagements with the Complainant to submit further information. In response to this letter, Complainant's Attorneys issued a letter of demand. The demands were being furnished with the investigation report. The letter of demand further required the Insurer to furnish the Complainant with certain information. The Insurer submitted that this was contrary to the Private Motor Policy which requires the Complainant to provide information and not the other way around.

2.2.14 The Insurer communicated its refusal to share the investigation report because it is a confidential report and is owned exclusively by the Insurer.

2.2.15 The Insurer stated that it was unable to consider the claim due to the unavailability of the required information. The Insurer maintained file closure due to the Complainant's alleged non-cooperation.

2.2.16 Furthermore, the Insurer submitted that the claim was not repudiated. However, it could not conduct

an assessment due to insufficient information. The Insurer prayed that Complainant's complaint be dismissed.

2.3 Complainant's Reply

The Complainant submitted his reply. However, the reply did not disclose new facts or issues, and accordingly, the allegations by the parties were covered in the above. The reply just emphasized the following aspects of the material facts:

- The Insurer's act of concealing the report falls short of the duty of good faith that each party to an insurance contract owes the other.
- Based on the emails cited by the Insurer, there is no indication that further information was required apart from the one already furnished.
- The Complainant gave all the necessary information (within personal knowledge) required by the Insurer and duly referred the Insurer to those persons who had further knowledge.
- On 20 July 2020, the Insurer disclaimed liability and thus the Policy provision 2 (c) does not apply.

2.4 The Ombudsman's Determination and Reasons

The Ombudsman had to determine whether the Insurer's repudiation was good in law, especially considering the Insurance Act, 2005, read in tandem with the contractual arrangement between the parties. Secondly, the Ombudsman was tasked with determining whether the Policy imposed a duty on the Complainant to provide information that was not in his personal knowledge and experience. Lastly, the Ombudsman was tasked with determining whether the investigation report can be disclosed and shared with the Complainant.

2.4.1 Request for Further Information

The sequence and chronology of the facts were in the main not in dispute. The trigger event was the request for further information. The key information required at the time was the date on which the motor vehicle was taken to South Africa and the border post which was used. In response to this enquiry, the Complainant stated:

> "Thank you for your email below, and would like to respond as follows:
>
> The date which the vehicle was taken to South Africa
> - If my memory is that good, I handed over my car to [Mr. M A] on the 14 September 2018, whether he left the same day or the following day, I have no idea.
>
> The border gate used to cross over
> - May I kindly request you to direct the question to [Mr. M A], I personally do not have a clue which border he used on the day of departure; I normally reach him on one of the following numbers:
> +258.....
> +276.....
> +278....."

The Ombudsman paused and restated the nature of the insurance relationship. The relationship of the parties was purely contractual, and as such the Policy was the document that informed the parties, and any other person of the rights and obligations flowing in the relationship. According to Clause 2, the Complainant must, at his own expense do or take certain steps in the event an insured event occurs. The pertinent provision states:

> "2. (a) On the happening of any event which may result in a claim under this Policy the Insured must at his own expense
> ...
> (iv) Give to the Corporation any proof information and sworn declaration it requires and forward to the Corporation immediately any notice of claim or any communication whatever writ summons or other legal process issued or commenced against the Insured in connection with the event giving rise to the claim."

The Ombudsman considered the interchange between the Broker, the Complainant, and the Insurer. The central issue became the duty to provide further and satisfactory explanations or information. It was important to state that at all material times, the Parties were bound by their contractual imperatives. The common law principle of privity of the contract states that only the parties in the contractual relationship are bound by the rights and obligations unless of course the contract itself specifically extends them to third parties. In the present case, the only parties to the insurance relationship were the Complainant as the Insured and the Respondent as the Insurer. Mr. M A and Mr. E M were all third parties to the relationship and the rights and duties did not extend to them.

The Ombudsman referred to Mbonderi, (2018:2)[5] according to whom the principle of contractual privity has certain objectives. He states:

> "Its essence is that only parties who actually negotiated a contract are privy to it and can enforce its terms. While the concept will be explained in detail later in chapters two and three, for now it suffices to state that privity of a contract entails that no one may be entitled to or bound by the terms of a contract to which he is not an original party. This was a decision reached upon by the common law judges in the ground-breaking case of Tweddle v Atkinson." [Emphasis added]

The Ombudsman considered the communications and email interchange between the parties and found that the Complainant failed to act in accordance with the contractual relationship. As a party to the relationship, especially one who had the duty to provide all information as required, "at his own expense", he ought to have taken all necessary and reasonable steps to provide the information. The Ombudsman noted that there was no prescription on the format or structure of the information required; that is, for example, sworn statement. This, therefore, left the Complainant with ample options and opportunities to secure the required information and provide or "forward" it to the Insurer. For this reason, the Ombudsman found that the Complainant failed to discharge an obligation under the contract which, in the chronology of events, delayed the adjudication of the claim by the Insurer.

In the reply, the investigator put the question to the Complainant on the exit point of the motor vehicle. The Complainant's response also appeared. This settled the issue of whether the contested particulars were ever sought from the Complainant. The submissions demonstrated that from the investigator to the Insurer (sometimes the Broker), the persistent enquiry of the exit port for the motor vehicle remained. To this, Complainant directed them to one Mr. M A who was, in the finding of the Ombudsman, not privy to this relationship.

[5] 10. Mbonderi, B., (2018). Exploring the possibilities of relaxing the privity principle of contract to accommodate the interests of third parties in South Africa.

2.4.2 Closing of File

As earlier provided, the file was closed. This was a common cause fact which, however, attracted varying interpretations in terms of its implications to the claim. The Ombudsman did not find any fact to support a conclusion that the claim was assessed to finality and thus repudiated. For this reason, the Ombudsman did not consider repudiation as a factor in this complaint. Instead, the provisions of the policy were instructive, especially the "Conditions" clause which guided the parties on the conditions underpinning their relationship.

According to Clause 2 (b),

> "(b) No claim under this Policy will be payable after the expiry of twelve months (or such further period as the Corporation may in writing allow) from the happening of the event giving rise to the claim unless the claim is the subject of pending legal action or is a claim for indemnity in respect of sums which the Insured may become legally liable to pay as compensation in respect of death bodily injury illness loss or damage." [Emphasis added]

The above clause is self-explanatory. The claims process was time sensitive. The proviso that follows relates to circumstances that were not operative in this complaint. It was not in dispute that the events leading to the claim arose sometime in October 2018. It was also not in dispute that the closure notice was sent through, and the date of closure was 29 January 2020. This marked a significant period after the "loss date." Furthermore, the circumstances leading to this delay could not be considered reasonable. The various communications disclosed that all the pertinent persons in this matter requested the Complainant to provide the information. There was no question that the Complainant was made aware of the information required and its importance in concluding the claims process. The Ombudsman found therefore that it was the Complainant's conduct that delayed the claims process, and accordingly, the provisions of Clause 2 (b) could not be avoided. The claim could not lie open in perpetuity while Complainant failed to discharge his contractual duties.

2.4.3 Peripheral Issues - Investigation Report

The Ombudsman also observed that the submissions by the parties were full of issues that, though not material to the decision of the Ombudsman, were a source of great conflict. Prominent among these issues was the investigation report. Upon reading the submissions, the Ombudsman found that the report was not material to the decision of the Insurer to close the file. The Ombudsman noted that this report would have been produced during an internal claims' validation exercise aimed at establishing the merit and validity of claims. In this complaint, the report did not affect the decision as the exercise was not completed. To direct the Insurer to disclose an incomplete report, that did not inform its decision is not in keeping with the fairness and equity principles that the Ombudsman must further in its determinations. Considering the above, it should be borne in mind that the jurisdiction of the Ombudsman is of resolving disputes in a just and equitable manner. In *Swaziland Building Society v Nondumiso Simelane NO. & Another (1228/20) [2021] SZHC 58*, His Lordship Mlangeni J, emphasized the type of jurisdiction that the Ombudsman has, i.e., to resolve disputes by determining what is reasonable and fair in the circumstances presented before her. The Ombudsman found that given that the investigation report was not material to the closure of the claim file, it was not material in this matter and at that point.

2.4.4 Decision/Order

The Ombudsman found that the closure of the claim file by the Insurer was fair and proper in the circumstances. The Complainant failed to discharge its obligations under the Private Motor Vehicle Policy that would have prevented this occurrence. The Ombudsman further found that the Complainant acted in bad faith and contrary to the spirit and purpose of insurance arrangements. The Ombudsman found that the investigation

report was not material to the decision being complained of, that is, the closure of the claim file. Therefore, the necessity to disclose the report was immaterial.

The Ombudsman then made the following order:

The complaint was not upheld and there was no order made to the Insurer.

KEY TAKEAWAYS:

5. The Ombudsman interprets contracts of insurance to be relationships of utmost good faith. Both parties have responsibilities that they must attend to with the considerations of bona fides.
6. Parties should be acquainted with their duties and responsibilities in insurance contracts, to reduce repudiation.
7. Due diligence on all parties to avoid misinformation and misspelling being alleged at claims stage.

3. CONSUMER CREDIT: EXHAUSTING OF INTERNAL REMEDIES, EXERCISE OF RIGHTS IN TERMS OF BYLAWS & FSP UNDER REGULATORY SUPERVISION

3.1 The Complaint

On 26 October 2021, the Complainant forwarded his resignation letter to Savings and Credit Co-operative Society (Co-op). After delivering the letter, Complainant stated that he was told that he will have to give the Co-op a month's notice. During this notice period, the Co-op would continue to deduct money from the Complainant's salary even after the loan had been settled.

The Complainant acknowledged that he had a running loan which was below the amount of the savings that the Complainant had with the Co-op. Therefore, in his resignation letter, the Complainant requested the Co-op to deduct the outstanding loan balance from his savings and then pay him the remaining balance. The Complainant stated that he requested that they respond in writing, and the Co-op failed to respond in writing. On 1 November 2021, Complainant made a follow-up with the Co-op, and he was told that the letter was supposed to be written by the Credit Committee of the Co-op. On 17 November 2021, the Complainant was invited to a meeting with the Credit Committee, and the Co-op stated that the Complainant was going to receive a response within seven working days. The Complainant stated that he was not given the response as promised.

On 26 November 2021, the Complainant submitted a follow-up letter. The Complainant stated that he was told that he will not be allowed to resign until he had fully settled his loan. The Complainant stated that he was not happy about the Co-op's decision to deny him his right to resign, even with savings that are more than the amount of money he was owing.

In his Complaint Form, the Complainant requested:
3.1.1 To be allowed to resign from the Co-op.
3.1.2 His loan to be settled using his savings and he be paid the balance.
3.1.3 That no money should be deducted from his salary after settling the loan.

3.2 Respondent's Response

The Co-op submitted the following response:
3.2.1 The Complainant willingly joined on 11 December 2012 and resigned on 26 October 2021.

3.2.2 However, the Complainant forwarded his complaint to the Ombudsman prematurely. The Complainant did not exhaust all internal complaints handling processes, to the extent that the Board of Directors (the Board) was not aware of the matter until it was reported to the Ombudsman. The Co-op communicated that it is a requirement that the final decision-making body is the Board, in terms of the Savings and Credit Cooperatives (SACCO) bylaws.

3.2.3 Had the Complainant submitted his complaint to the Board, the resolution taken in the Annual General Meeting (AGM) of 3 March 2018 about the terms of registration of members, would have been explained to him. The Complainant would have also been reminded that the resolution taken on 3 March 2018 is binding to every member and cannot be overridden unless it is overruled by another AGM scheduled for such purposes.

3.2.4 Further, it was common knowledge that the Co-op was declared insolvent in 2018 and that reserves stood at negative E8 000 000.00, as evidenced in the audited financial statements and an inspection conducted by the Financial Services Regulatory Authority (FSRA). 3.2.5

3.2.5 The Interim Board then came up with turnaround strategies and a capital adequacy plan that yielded the desired results, as the last audited financial statements showed negative reserves of E792 043.00. Considering the sharp decline in the reserves, as stipulated in the recent audit report, it was a necessary step to halt resignations or otherwise. Therefore, any resignation required payment or otherwise would be greatly prejudicial to the Co-op as it would distort and/or destroy the efforts to resurrect Co-op. Thus, the Co-op argued that the Complainant was fully aware of the resolutions because he attends AGMs and as such, cannot be allowed to resign.

3.3 Complainant's Reply

The Complainant acknowledged receipt of the Co-op's response and informed the Ombudsman that he still stood by his complaint. He requested the Ombudsman to continue with further investigations and issuance of a determination.

3.4 The Ombudsman's Determination and Reasons

The Ombudsman was vested with the role to determine whether:

i. The Co-op acted within the ambit of the Consumer Credit Act, 2016 (CCA) in dealing with the Complainant.
ii. The Ombudsman had jurisdiction to hear the matter, on the basis that Co-op alleged that the Complainant had not exhausted internal remedies.
iii. The Complainant's resignation could be granted in terms of Co-op's bylaws.
iv. The Complainant's loan could be settled using his savings and that he be paid back the balance.
v. The Co-op could deduct any monies from the Complainant after the loan had been settled.

3.4.1 The Financial Services Regulatory Authority Act (FSRA Act)

A SACCO, defined in terms of section 2 of the FSRA Act, as "a savings and credit co-operative society, [is] licensed under this Act to provide financial services to its members", and listed in the Second Schedule to the FSRA Act as a non-bank financial services provider, the Ombudsman found that she has jurisdiction to hear the matter.

3.4.2 Exhausting of Internal Remedies

The Complainant made submissions that he exhausted the internal remedies as outlined in Co-op's bylaws. The Complainant proved that he gave the Co-op enough time to deal with the matter, through resignation letters and following up on his matter. The Complainant further notified the Co-op that he would approach

the Ombudsman should the Co-op fail to address his matter.

The Complainant further submitted that he was invited to a meeting on 17 November 2021, where he appeared before the Credit Committee. At this meeting, the Complainant was told that he would be allowed to resign after he had fully settled his loan. In his submissions, the Complainant demonstrated that he appeared before the Credit Committee, which is a body established in terms of Co-op's bylaws to deal with issues of withdrawal and resignations of members. The Complainant was advised that the Credit Committee decided that the Complainant would be permitted to resign after his loan had been settled. The Ombudsman found that Complainant exhausted the internal remedies before lodging his complaint with the Ombudsman.

3.4.3 The Savings & Credit Co-operative Society By-Laws

3.4.3.1 Rights and Obligations of Members

By-law 8, provides for the rights of members of the Respondent as follows:

> "All members shall have rights and obligations mentioned below:
>
> (g) "To withdraw from the Co-operative as prescribed in bylaw 10."

As per above, it is provided that members like the Complainant possess the right to withdraw from the Co-op as prescribed in bylaw 10, which happens to be bylaw 8. Having considered that it is within the rights of members to withdraw, the Ombudsman then considered the process of withdrawal as provided for in the bylaws.

3.4.3.2 Withdrawal of Membership

In terms of bylaw 8, the withdrawal procedure and process are outlined as follows:

> "Due notice of withdrawal shall be 3 months. Withdrawal from membership shall be effective only from the end of the financial year in which due notice to withdraw has been given. Withdrawal procedures shall be as follows:
>
> a. The intending member shall write a letter requesting to withdraw from the Society,
> b. The Committee shall call the member to verify its reasons for withdrawing. The Committee, through the Credit Committee shall verify the member's debts.
> c. In case of debts, the member's savings shall be used to make up for his or her debts. If the savings are not enough, the member shall be requested to sell his or her shares back to the Society to cover up for the outstanding debt.
> d. A member shall not receive his/her dues until the end of the financial year, irrespective of the date and month she withdrew from the Co-operative Society and as prescribed in Regulation 21 of the Corporative Societies Regulations of 2005."

The Ombudsman found that the Co-op's bylaws provide a clear process on how a member can exercise his or her right of withdrawal from the Co-op. It is provided for in terms of bylaw 8, that due notice of withdrawal shall be three months and that such withdrawal shall be effective from the end of the financial year in which due notice to withdraw has been given. The Complainant submitted that he resigned or withdrew from the Co-op on 26 October 2021.

3.4.3.3 Termination of Membership

Bylaw 12 provides for how members can terminate their membership and it provides in part as follows:

"Membership shall be terminated by:
a. ...
b. ...
c. Resignation after giving the society (3) months' notice in writing to the Secretary for consideration purposes."

The Ombudsman considered the fact that in exercising their right to resign from the Co-op, it is upon members to give the necessary notice of three months and such notice should be in writing. The Ombudsman found that Complainant submitted his resignation on 26 October 2021 and that such was in writing as prescribed in terms of bylaw 12.

3.4.3.4 Supreme Authority
Bylaw 21, provides for the Co-op's General Meetings and states as follows:

"The supreme authority shall be vested in the general meetings of the members..."

Through its governing document, the Co-op placed the supreme authority upon its members during a general meeting. The Ombudsman found that resolutions taken during general meetings are binding upon members and that members sitting during annual general meetings possess the supreme authority to guide and lead the Co-op. Such authority was exercised during the meeting held on 3 March 2018.

3.4.3.5 Member's Meeting of 3 March 2018
It is provided in terms of the Co-op's bylaws that members will convene an annual general meeting. On 3 March 2018, the Co-op held a general meeting. One of the resolutions of this meeting was to suspend members' withdrawal from the Co-op. The resolution is captured as follows:

"It was resolved that no member is allowed to withdraw or resign from the [Respondent] from today (3 March 2018), until the association is stable."

In terms of bylaw 21, members exercised their supreme authority when they resolved that resignation and/or withdrawal of members was suspended as of 3 March 2018, until the Co-op could be declared financially stable. In its response, the Co-op stated that it was still not financially stable, although measures were in place to resuscitate the SACCO. Having considered the submissions of the parties, the Ombudsman found that the resignation or withdrawal of members remained suspended as per the resolution taken by members during the annual general meeting of 3 March 2018.

3.4.3.6 Regulatory Supervision
In terms of section 34(1) of the FSRA Act, the FSRA (the Authority) is empowered to issue directives or desirable remedies to financial services providers. The Act provides as follows:

"If the Authority considers that a financial services provider is conducting its affairs, or is proposing to conduct its affairs, in an imprudent, improper, financially unsound or unlawful way, it may give the financial services provider any directive it is satisfied is necessary or desirable to remedy the matter or protect the interests of the financial services sector or of stakeholders."

In exercise of its powers in terms of section 34(1), the Authority endorsed the decision of the members to suspend resignations and withdrawals, and the Co-op was subsequently placed under regulatory supervision.

Based on the above, the bylaws of the Co-op should be read together with such endorsement and the resolution taken in the general meeting of 3 March 2018. The Ombudsman found that in view of the above, resignations and withdrawals of members were suspended.

3.4.4 Decision/Order

The Ombudsman found that:

3.4.4.1 The Complainant exhausted the Co-op 's internal remedies.

3.4.4.2 In the circumstances, the Complainant was exercising his rights in withdrawing or resigning from the Co-op, as provided in bylaw 6(g), read together with bylaws 8 and 12 of the Co-op 's bylaws.

3.4.4.3 The Complainant's resignation, however, could not be effected following the resolution taken on 3 March 2018, that all resignations and withdrawals are suspended until the Co-op is declared financially stable. The Ombudsman then made the following order:

The complaint was not upheld and there was no order made to the Co-op.

KEY TAKEAWAYS:

4. Members of Coops should participate in the governance issues of the cooperatives. This will allow members to participate in decision making that will impact their interests and rights.
5. Bylaws should be availed to Members, so that they be appraised on the processes and procedures of the entity.
6. Internal dispute resolution mechanisms should be in place so that Members should exhaust internal remedies before approaching the Ombudsman.

ANNUAL REPORT
2021/2022

OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

Tel: (+268) 2404 7653/4464

Fax: (+268) 2404 0636

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

info@ombudsfs.org.sz

www.ombudsfs.org.sz

Ombudsman Of Financial Services