

ANNUAL REPORT

2022 – 2023



OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

ANNUAL REPORT

2022 – 2023

Annual Report for the year ended 31 March 2023

Any enquiries related to this publication should be sent to us at:

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

Tel: +268 24044464 / 24047653
WhatsApp Number: +268 76987570

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



The Office of the Ombudsman of Financial Services (OFS) is a proud member of the International Network of Financial Services Ombudsman Schemes (INFO Network), comprising 59 members across 38 jurisdictions. The Ombudsman, Ms. Nondumiso Simelane attended the Network 2023 Conference in Malaysia, Kuala Lumpur to exchange industry insights as we continue to work towards strengthening our relationships and collaborations with Ombudsman schemes across the globe.

Welcome to our 2022/23 Annual Report. This presents reviews of our year from our Ombudsman as well as key information about our performance and work.



OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali



Contents

- From the Ombudsman’s Desk: Shaping Our Tomorrow **3**
- About the Office of the Ombudsman of Financial Services **4**
- Complaint Statistics **7**
- Stakeholder Engagement and Consumer Education **11**
- Case Studies: Determinations and Settlements **20**



FROM THE OMBUDSMAN'S DESK

Shaping our tomorrow: From the Ombudsman's desk

It is my pleasure to present the report of yet another year to our stakeholders and our international partners at the Office of the Ombudsman of Financial Services (OFS). It gives me great joy to share that we are on our 8th anniversary of being fully operational, in resolving disputes within the non-bank financial services industry in the kingdom of Eswatini. As we continue to shape our tomorrow - using dispute resolution mechanisms, requires the adoption of an approach that is based on common values and principles. The office recognizes the effort made by the industry to comply with the standards set by the Financial Services Regulatory Authority (FSRA).

Non-bank Financial Services Industry Series

The Ombudsman has engaged in a series dubbed the "Non-bank Financial Services" (NBFS) series. Through this series, the OFS invites FSRA-licensed organizations to participate in the industry series meant to promote awareness on and understanding of the mandate and processes of the OFS. We foster healthy working relationships in the NBFS industry by positioning the Ombudsman as visible and accessible. The series wishes to encourage open channels of communication to uphold good business conduct by industry.

Stakeholder Engagement and Consumer Education

Stakeholder engagement forms a key part of our social and relationship capital. We are committed to optimizing the quality of our stakeholder relationships through regular engagements that seek to understand and respond to the needs and expectations of all our stakeholder groups, to foster stronger and more productive long-term partnerships. During the financial year of 2022/23, through various engagements, the OFS has had prolific collaborations through our Memorandum of Understanding (MOU) partners: the Conciliation, Mediation and Arbitration Commission; Central Bank of Eswatini; the Eswatini Competition Commission. We have also partnered with our MOU partners in hosting joint activations, and outreaches and engaged in career fairs which are meant to capacitate our youth in shaping their tomorrow, today. As the Office is in its stride to reach all populations of our economy, we have committed ourselves to publishing feature articles every first Monday of the month, these articles are dubbed "OmbudsDay". They are meant to educate, and raise awareness about the Office of the Ombudsman, as it is of public interest.

As I conclude, I would like to extend my sincere gratitude to our OFS Staff for working with dedication towards a successful year, and I would also like to extend my appreciation to all stakeholders for their support as we shape our tomorrow, today. As we continue to serve the nation, we will continue to work tirelessly to resolve complaints and reinforce internal dispute resolution mechanisms.



Nondumiso Simelane
Ombudsman



About the Office of the Ombudsman of Financial Services

LEGISLATIVE MANDATE

The Office of the Ombudsman of Financial Services is established by Section 74 (1) of the Financial Services Regulatory Authority Act No. 2 of 2010.

It was established to resolve disputes in the non-bank financial services industry quickly and with minimum formality.

INTENT

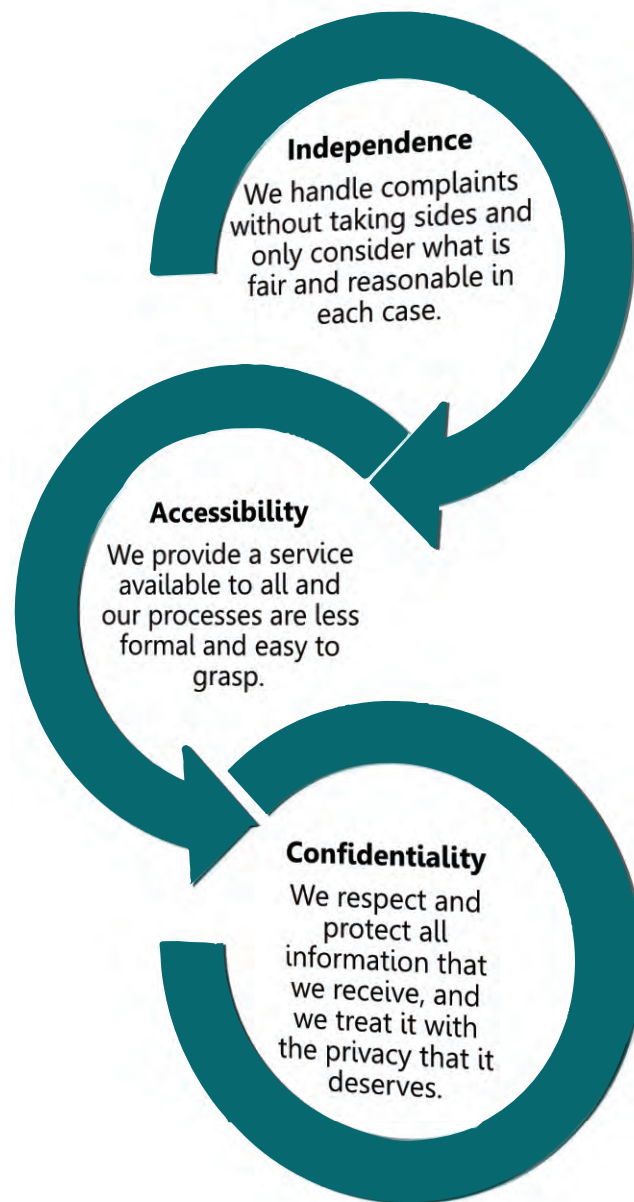
We aim to be a leading African forum in resolving financial services disputes in a fair and accessible way.

PURPOSE

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

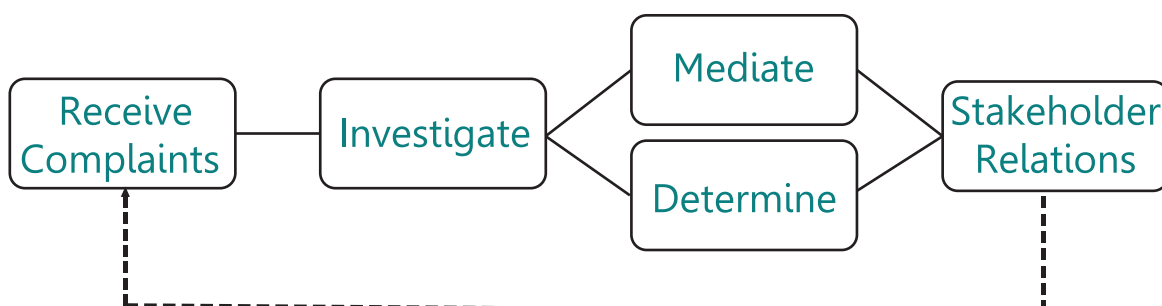


OUR VALUES



Mandate and Functions of the Ombudsman

The Ombudsman is an independent function of the Financial Services Regulatory Authority (FSRA) whose purpose is to receive, investigate and resolve complaints against authorised non-bank financial services providers (FSPs) licensed by the FSRA.



Functions of the Ombudsman

- To assess, facilitate, conciliate, and mediate the conclusion of binding settlement agreements in respect to financial services complaints.
- To investigate and make binding rulings and/or determinations with respect to financial services complaints and disputes.
- To educate all stakeholders including consumers, FSPs, consumer bodies, and associations about the role, procedures, and jurisdiction of the Ombudsman.
- To encourage industry to abide by the provisions of their relevant industry code of conduct.
- To report material and persistent non-compliance with Eswatini's financial services laws to the relevant regulators.
- To protect consumers by identifying fraudulent operators and publicising the information;
- To work with other Ombudsmen in the SADC Region.





COMPLAINTS STATISTICS



Complaints per Region

In the financial year under review, a total of 84 Complaints were registered as illustrated by figure 1 below. This is a substantial increase from the previous 2021-2022 financial year, which recorded 56 Complaints. There were 36 complainants recorded from the Manzini region, there were 33 from the Hhohho region, 8 were recorded from the Lubombo region and 7 from the Shiselweni region.

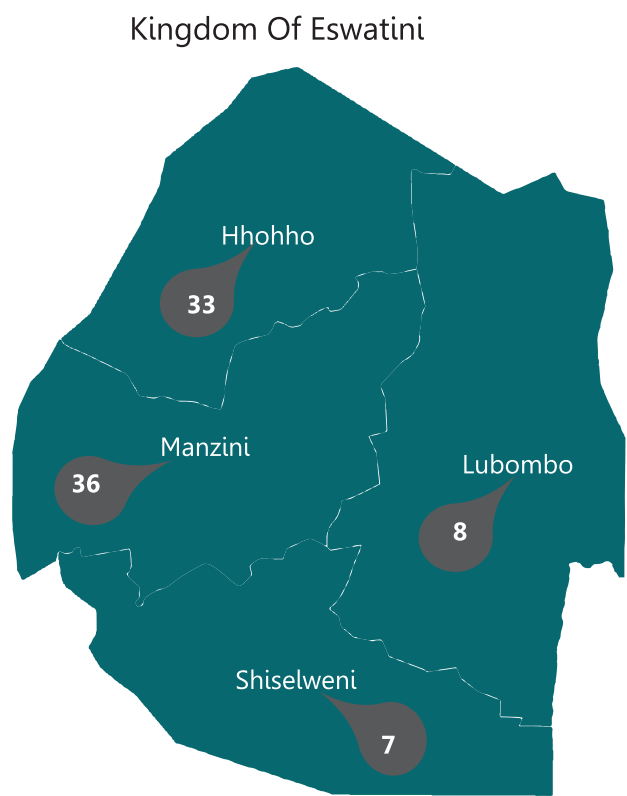


Figure 1

Complaints per quarter

Of the 84 complaints that were registered, the highest number recorded was in the second quarter with 32 complaints registered as shown in Figure 2 below. The year had begun with 21 complaints registered for the first quarter; the third quarter experienced a decrease with 14 complaints registered. The fourth quarter saw a slight upsurge with 17 complaints recorded.



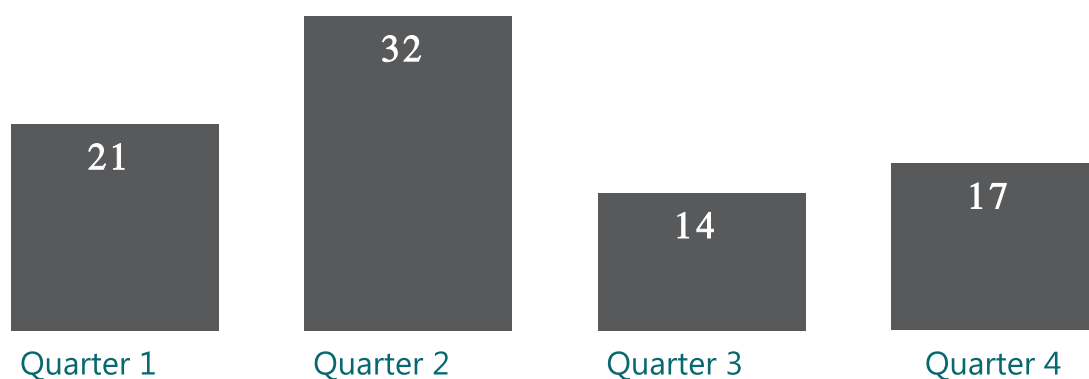


Figure 2

Complaints Status

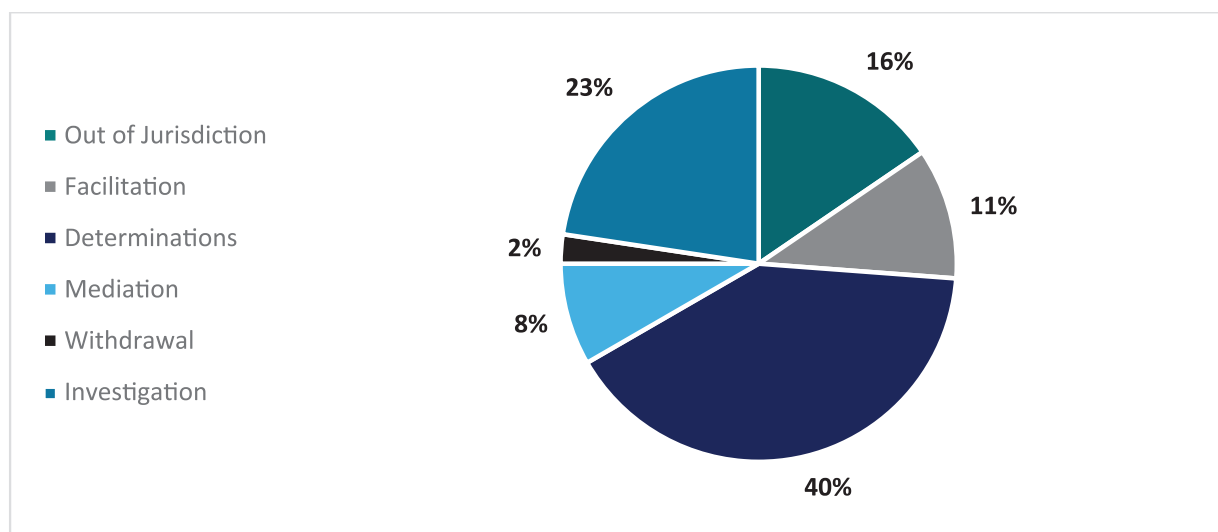


Figure 3

Figure 3 above highlights that the 2022-2023 year had 40% of the Complaints that were recorded concluded by way of determination, 16% were found to be out of jurisdiction, 11% were resolved through facilitation, 8% were mediated and 2% were withdrawn. 23% of the cases recorded for the year under review are still under investigation at the close of the financial year.



Types of complaints

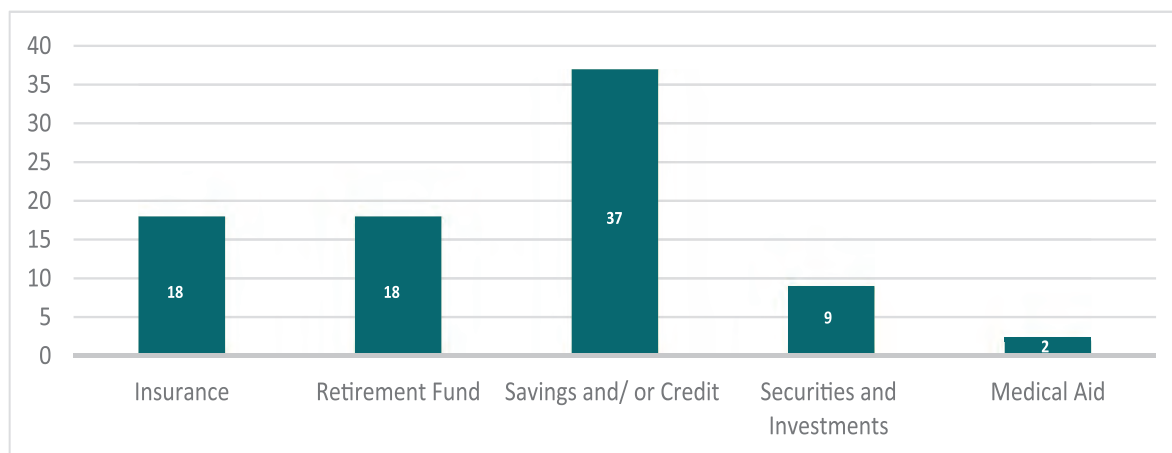


Figure 4

The year under review received a high number of Complaints relating to savings and/or credit with 37 Complaints as indicated in figure 4 above. The insurance and retirement fund Complaints each had 18 Complaints with less complaints received from securities and investments with 9 Complaints and even less received on medical aid with 2 Complaints recorded. Of the 84 Complaints, there were 38 females and 46 males as shown in figure 5 below.

Gender status

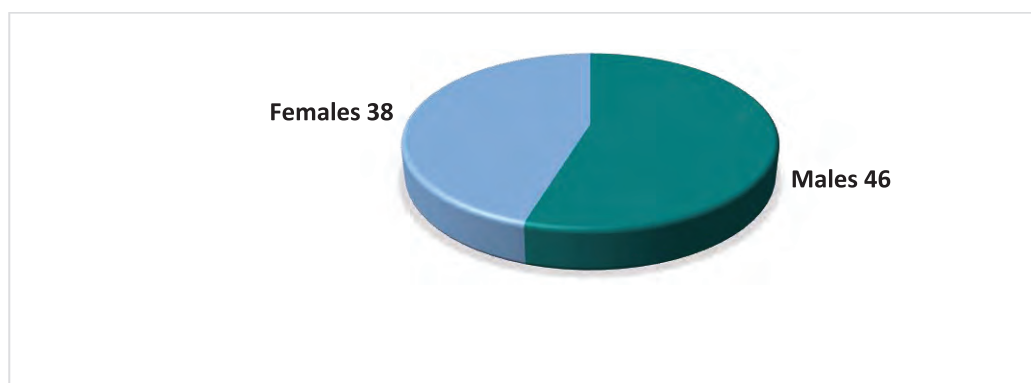


Figure 5





Stakeholder Engagement and Consumer Education



Memorandum of Understanding (MOU)

In the spirit of fostering fruitful collaborations between the Ombudsman and our stakeholders, the Ombudsman has signed and renewed Memoranda of Understanding with a few organisations including the Conciliation, Mediation and Arbitration Commission; the Central Bank of Eswatini; the Eswatini Competition Commission; and the Federation of the Disabled in Swaziland. These partnerships have been established and maintained to enhance and further the Office of the Ombudsman's strategic objectives.

In operationalising these key partnerships, the Ombudsman works toward:

- ❖ identifying opportunities through emerging trends and potential business opportunities. The resultant collaborations with strategic partners will enhance the capacity to innovate and find solutions to challenges.
- ❖ managing reputation by collaborating with different industry partners so as to increase visibility which will prompt a transparent and responsive corporate culture which is critical to the Ombudsman.
- ❖ reducing stakeholder engagement risks prior to selecting the level or method of engagement.
- ❖ defining engagement processes and communication guidelines.
- ❖ ensuring the monitoring and evaluation of engagements by identifying and implementing the appropriate tools to enhance stakeholder management, therefore enabling the measurement of the effectiveness of engagements.

Non-bank financial services industry series

The Ombudsman continues to engage stakeholders through educating them. One of these ways includes the NBFS Industry Series which promotes awareness about and understanding of the mandate and processes of the Ombudsman by licensed financial service providers.



Further, the aim is to foster healthy working relationships in the non-bank financial services industry by positioning the Ombudsman as visible and accessible, thus upholding the highest standards of conduct of business by industry. Lastly, through this series, the Ombudsman encourages open channels of communication between the Ombudsman and regulated service providers.

Enforcing internal dispute resolution mechanisms

A critical first step that is emphasised to complainants is that they must first try to resolve the matter directly with the FSP they have a grievance against. Similarly, the FSPs are strongly encouraged to maintain good internal dispute resolution mechanisms (IDRMs) and to apply complaint due diligence within these IDRMs. If a dispute cannot be resolved through the IDRMs, the aim is to maintain fair treatment of both the complainant and the FSP. One of the ways to achieve fairness is through planned and open communication. It is also important that such correspondence is clear and simple, to prevent further misunderstandings and frustrations.

The FSPs that have been capacitated through these meaningful engagements by the Ombudsman include, one (1) Insurance Provider, one (1) Building Society, and five (5) Savings and/or Credit Institutions

Print Media Engagement

- The Eswatini Observer Newspaper – the OFS publishes its educational articles dubbed “OmbudsDay” in the Eswatini Observer, every first Monday of the month. This is a quest by the OFS to reach every Liswati by informing, reaching, engaging, and teaching about the services of the OFS. These articles have yielded positivity in terms of being relatable to the brand, and this has been seen through our internal complaints program, where consumers mention that they learned about the Office through the OmbudsDay article published in Eswatini Observer.



SEMINARS AND WEBINARS

CMAC Labour Law Seminar

The Commission extended an invitation to the Ombudsman to participate in its Annual Labour Law Seminar, themed "The Changing World of Work – post Covid19." The Seminar reflected on the effects of the pandemic, highlighting considerations and recommendations for policymakers. The Office of the Ombudsman also participated in the exhibition on the day.

The Power of Service Webinar

The Ombudsman and the Eswatini Competition Commission (ESCC) co-hosted the Power of Service Webinar. The Webinar panel discussed the growth and impact of alternative dispute resolution (ADR) in Eswatini. The panel comprised as well of representatives from the Financial Services Regulatory Authority; Conciliation Mediation and Arbitration Commission (CMAC); Institute of Research Management and Development (IRDM); Eswatini Standards Authority (SWASA); and the Ombudsman from the Central Bank of Eswatini (CBE).

The Webinar was livestreamed on Facebook and YouTube. The project aim was to uphold the Ombudsman's and ESCC's commitment to promoting public awareness about ADR in the country. Another key objective of the discussion was to demonstrate how the industries represented by the panelists uphold excellence in customer service.

CAREER FAIR

Waterford Careers Fair

The Ombudsman's Office attended two career fairs where we met and engaged with young minds and expounded on the function of the Ombudsman; the different career paths that a student could explore in dispute resolution and related fields; and general strategies and advice for making career choices.



TRAINING

The Ombudsman is constantly seeking to improve internal procedures, with a view to ensuring that the Office deals with complaints in the most efficient manner and complainants have an optimal experience. This includes staff development through the honing of expertise, which has helped further improve the consistency and efficiency of Ombudsman processes in ensuring service delivery.

The Office of the Ombudsman and FSRA Complaints Handling Process Meeting

The purpose of the meeting was to continue the bilateral socialization of the Ombudsman and FSRA complaints handling frameworks to find areas of improvement efficiencies moving forward.

Advanced Excel Training, Regent Business School

The Ombudsman Team participated in a 3-day training in an effort to enhance process efficiencies in a bid to improve the management of the Ombudsman complaints management system.

INTERNATIONAL STAKEHOLDERS

International Network of Financial Services Ombudsman Schemes (INFO Network)

The Ombudsman is part of the INFO Network, which is a worldwide association for financial services ombudsmen, and other external, independent, out-of-court schemes and offices which resolve complaints brought by consumers (and, in some cases, small businesses) against banks, insurers and/or other financial services providers.

MS Dynamics Discussion

The INFO Network held a discussion with members on MS Dynamics. The discussion was led by Head of Applications at the UK Financial Ombudsman Service (FOS) and



the purpose of the meeting was to share insights on the technical development and delivery of the FOS MS Dynamics solution as a case or complaint management system.

INFO Town Hall // Social Media: A Friend or Foe?

The INFO Network discussed reviewing the use of social media. The discussion was led by INFO Network Chair, as the facilitator, and the purpose of the meeting was to share insights on the use of social media and exchange technical tips.

Annual General Meeting (AGM) & Consumer Behaviour Presentation

Following the INFO AGM, the Ombudsman team participated in a Consumer Behaviour presentation from Michael Tracey, who is the Director - Behavioural Science at Scotiabank (one of the largest banks in Canada).

ADR Survey Results

In November 2021, INFO Network Members were invited to respond to a survey being run by Geoffrey Bezzina (Malta) as part of his doctoral research with the University of Leicester on financial ADRs. Geoffrey had been exploring the extent to which financial redress bodies' exchange of complaints-related information with regulators contributes to enhanced regulatory development and understanding. On 28 November 2022, Geoffrey shared highlights of his survey analysis and discussed a few themes arising from his research.

Quality and Timelines Survey

The Ombudsman's Office participated in the INFO-wide survey to collect data on the universal challenge of delivering quality outcomes, while keeping timelines as low as possible to inform discussions in the 'Quality & timelines – A timeless tension' session at the 2023 Conference.



PUBLICATIONS

Local Print Media

The Ombudsman publishes articles in different print media to promote awareness and visibility, and to educate on the work done by the office and how assistance can be acquired. Such articles include ones published in the Eswatini Observer every first Monday of the month, aptly labelled OmbudsDay articles.

Publication: Eswatini Observer	
April 2022	OFS Team Sign Language Training
May 2022	2021/2022 Financial Year: Key Milestones
June 2022	The OFS Market Research Exercise
July 2022	The OFS Market Research Exercise
August 2022	Complaints-Handling Quarterly Update
September 2022	CBE/OFS Ombudsmen Joint Awareness Feature
September 2022	From the Lead Adjudicator's Desk
October 2022	The "Celebrate Service" Webinar
November 2022	Complaints-Handling Quarterly Update
December 2022	From the Ombudsman's Desk: Reach New Heights
January 2023	Understand the Ts & Cs of Your Agreements Before Signing
February 2023	Complaints-Handling Quarterly Update
March 2023	World Consumer Rights Day: Know Your Rights and Responsibilities



Publication: Times of Eswatini	
August 2022	CBE/OFS Ombudsmen Joint Awareness Feature
March 2023	World Consumer Rights Day: Know Your Rights and Responsibilities

Subscribed Institution – INFO Network

The INFO network publishes a monthly e-bulletin. Our Office participated as shown in the below table.

Publication: INFO Network Newsletter	
May 2022	FY 2021/2022 Key Milestones The purpose of this article was to highlight the Ombudsman's key milestones in FY 2021/2022.
July 2022	The Ombudsman Market Research Exercise The purpose of this article was to highlight the OFS' research exercise objectives.
August 2022	The Ombudsman Complaints-Handling Quarterly Update The purpose of this article was to highlight the Ombudsman's insights from the first quarter of the 2022/2023 financial year.
October 2022	From The Lead Adjudicator's Desk Purpose was to review the development of Eswatini Legislation to explore collaborative networks to collectively aid in the ADR spectrum.
January 2023	From the Ombudsman's Desk: Reach New Heights Purpose was to review some of the milestones that the Ombudsman accomplished in 2022.



CONSUMER (PUBLIC) EDUCATION AND AWARENESS

Social Media Statistics

The content was developed and themed around citizen centricity, stakeholder engagement and public awareness. Statistics for the financial year for each quarter are as follows:

Consumer Education & Awareness Information content posted			Page Followers			The highest Number of people reached through published content in one day			Number of Queries			Number of New Followers		
First quarter														
FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW
19	13	13	5,740	255	4	35423	24932	503	15	0	0	101	142	4
Second quarter														
FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW
23	23	21	5,966	302	7	62184	2493	350	17	0	0	226	47	3
Third quarter														
FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW
28	25	21	5978	319	6	35072	1445	58	48	0	0	12	17	0
Fourth quarter														
FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW	FB	LI	TW
5	5	5	6042	329	8	11035	445	83	0	0	0	64	10	2





Case studies



DETERMINATIONS

Securities Investments

The Complainant stated that, in or about the year 2021, he made an investment (long term) with the Respondent. When the policy reached maturity after 10 years, the amount promised to him in writing when he took the policy in or about 2011 was disputed by the Respondent. The complainant submitted that the amount in dispute was around E80 000.00, which was the policy maturity value after ten (10) years. The Complainant stated that, at maturity, he received E29 039.57, as final payment in or around March 2021. The complainant submitted that he then filed a formal complaint with the Respondent in March 2021, about the outstanding balance of E42 302.04. He stated that he also requested all the documents he signed when he took the policy in or around March 2011, to substantiate his claim, but the Respondent refused to produce such documents till the time he lodged his complaint before the Ombudsman.

The complainant stated that he was unhappy with the E29 039.57 paid to him as final payment on his policy, instead of E80 000.00, agreed upon in or around 2011. He also stated that the policy allowed the holder to take a partial withdrawal and that such an amount would then be deducted when the maturity value is paid out, having no effect on the interest paid in the policy.

The Complainant further submitted that in or around 2014 he took a partial withdrawal of E8 658.39 and assumed that he had an outstanding balance of E42 302.04 which was disputed by the Respondent. He, therefore, requested the Ombudsman to intervene because it seems there was a dispute of facts. He stated that he would like Respondent to be compelled to pay him the outstanding balance of E42 302.04 plus 20% interest monthly from March 2021 to the date of finality on the matter. He also requested that the Respondent be forced to produce the documents which the Respondent was withholding, the policy financial breakdown and mature values.



RESPONSE TO THE COMPLAINT

In response, the Respondent confirmed that in or around March 2021, the Complainant was called and informed that his policy had matured. The Complainant was advised to visit the nearest customer service centre to sign withdrawal documents, of which when he arrived at one of the Respondent's service centers, the Complainant discovered that the maturity value of the policy was E29 039.57. After this discovery, the Complainant then lodged a complaint, stating that in 2011, when he applied for an investment policy, he was assured he would receive E78 000.00 but did not receive that amount as the actual maturity value.

The Respondent also stated that upon investigation of the matter, they discovered that the Complainant had opened an investment policy on 25 March 2011. The Respondent further stated that the Complainant made a part withdrawal of E7 993.79 from the policy. Respondent also confirmed that their investigations revealed that, after laying the complaint, the Complainant requested a premium breakdown on his policy and the premiums breakdown statement was issued to him. The Respondent then submitted that they are not allowed to make projections as they cannot predict market performances. The Respondent further stated that if the projections were made, the broker must be held accountable and that they are not in possession of the projections document that the Complainant referred to in his complaint sheet. The Respondent stated that the maturity value in the breakdown statement is the only money the Complainant is entitled to, and the Respondent moreover undertook not to make further payment.

REASONS FOR ISSUING DETERMINATION

The role of the Ombudsman in this complaint was to determine whether the Respondent acted within the ambit of the Securities Act, 2010 in its dealing with the Complainant. The Ombudsman was to further determine whether the Respondent, in writing, promised the Complainant a maturity value of around E80,000.00. It was also to determine whether the Complainant could be paid the claimed value of E42 302.04; as well as whether the Complainant could be paid a monthly interest charge of 20%, from March 2021 until the finalization of the complaint, on the claimed value of E42 302.04.



THE APPLICABLE LAW

The relationship between the parties being one of securities investments, in determining the complaint, the Ombudsman referred to the Securities Act, 2010, general principles of contract, the Old Mutual Investment Plan Policy document and terms and conditions of the policy, as well as the application Form read together with correspondences exchanged between the parties.

Policy Agreement & Policy Terms and Conditions

The Ombudsman observed how it is settled law that investment is a contract-based relationship and that the contract of investment becomes the primary instrument regulating the affairs of the parties. On examination of the documents executed at the point of sale, and contrary to Complainant's assertion to have been promised a certain amount of money in writing, the Policy Document, under a section titled **How the policy works** provided that 'Your total savings value at any time is equal to the Fund Value or Paid-up Value (whichever is applicable),' language that the Ombudsman aligned with the Respondent's response, the Respondent "... is not allowed to make projections as we cannot predict market performance."

Other provisions of the Policy Document on the subject of the performance of the policy were provided for under The **General Terms and Conditions**, within a section on **Illustrations (Applicable to Investment Plans)** where, at the point of sale, the Respondent disclosed to the Complainant that, "Inflation has a major impact on investment returns, and in general higher inflation leads to higher investment returns and lower inflation leads to lower investment returns." Respondent further disclosed to the Complainant that -

"The actual benefit will depend on:

- the rates of bonus that are actually declared.
- the paying of monthly premiums when due.
- the actual investment returns earned.
- the benefits and/or calculations not being changed and the extent to which Part Withdrawals have been taken.
- the actual deductions that are made for expenses; and
- the annual level of the increase in premiums and the extent to which these increases are maintained during the lifetime of the policy."



The Ombudsman considered the above provisions and found that the factors that influenced the growth of the investment could not be ascertained on commencement of the plan, but bonuses were declared annually. The Ombudsman also found that, while the Complainant had not been able to provide evidence of the 'amount promised to me **in writing....**' There was more evidence in the Policy Document provisions alluded to above, to support Respondent's assertion that the Respondent "...is not allowed to make projections as we cannot predict market performance." In the totality of the above circumstances, the Ombudsman concluded that it cannot be fair and reasonable to find that the Respondent promised any amount in writing at the point of sale. The Ombudsman thus found that the Respondent did not promise any amount to the Complainant in writing.

Claim for 20 % Interest (on the amount of E42 302.04)

On the issue of the claim of 20% interest allegedly accruing from the alleged outstanding payment, the Ombudsman referred to Court decisions to inform the basis for payment of such kind of interest. For instance, in the matter of *Becker v. Stusser, 1910 CPD, 289, p294*, it was stated that -

It may be accepted that the award of interest to a creditor, where his debtor is in *mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on the due date.

In affirming the above position, the High Court in the matter of *Swaziland Development Finance Corporation v. Sibongile Clara Ndlangamandla t/a Bayandza Pre & Primary School, 228/2016*, stated that-

In our jurisdiction, the *mora* interest rate is set at 9%. There has been no challenge to this rate on the basis that it no longer meets the markets' demands, nor am I aware of any legislation regulating *mora* interest.

It was established from the submissions of the parties that upon maturity the withdrawal process supervened, and the Complainant was paid the sum of E29 039.57.



After receiving the fund value it was then that the Complainant lodged his complaint with the Respondent. From the totality of the submissions of the parties the Ombudsman established that there is nothing that the Respondent did that may warrant a claim for interest in this matter. Considering the above, it should be borne in mind that the jurisdiction of the Ombudsman is for resolving disputes in a fair and reasonable manner. In *Swaziland Building Society v Nondumiso Simelane NO. & Another (1228/20) [2021] SZHC 58*, Mlangeni J, emphasized the type of jurisdiction that the Ombudsman has, which is to resolve disputes by determining what is reasonable and fair in the circumstances presented before her. The Ombudsman found that in the circumstances, it cannot be reasonable and fair for the Respondent to pay any interest, as the Respondent acted within the confines of the investment documents.

Conduct of the Broker (Alleged Mis-selling or Misinformation)

The Ombudsman ascertained from the submissions of the parties that the Complainant was advised by a broker at inception, that the policy would pay out after ten years, as an investment. The Respondent maintained her position that the policy product offered to the Complainant, was an investment plan and there was no way in which Respondent could have made future projections, as they are not allowed to make projections as they are unable to predict market performances. Respondent in proving her case further stated that the Broker acted as Complainant's representative, and he handled Complainant's investment with the FSP.

The Ombudsman referred to the words of Tlhapi AJ, in the matter of *D J Van Rheede Van Oudtshoorn v. VVM Centurion (Edms) Bpk h/a Brokers 2000*, to underscore the responsibilities of the parties in an agency relationship, thus -

...the relationship between the broker and the insured, is subject to the law of the agency. Depending on the circumstances of the case...an insurance broker is mandated by the insured to carry out certain instructions. In a brokerage agreement, it is required of the broker to exercise reasonable care and skill in executing the mandate of the insured.



Based on the above, the Ombudsman upheld the position of the Respondent that the broker, was independent, and presented the investment product to the Complainant, and as such, was executing the mandate of the Complainant in this relationship between the Complainant and Respondent.

Regarding mis-selling or misinformation, the Ombudsman could not find this substantiated by the Complainant, as a fact that can be levelled against the Respondent since the alleged misinformation or mis-selling was allegedly done by the broker. The Ombudsman found that the Respondent could not be held liable for mis-selling or misinformation that was presented by the broker.

Investment Disclosures

From the submissions, the following is what the Ombudsman established to have been disclosed to the Complainant by the Respondent.

In the welcome letter, Personal Details, in your policy document and in this section, you will find disclosures that we make to you. Please carefully read all these documents. As the policy only comes into effect on receipt of your first premium, you have a reasonable opportunity to consider the disclosures and to make an informed decision before your policy comes into effect.

The Respondent also disclosed that -

The Surrender Value or Paid-up Value of your existing policy may be as low as 65% of the policy value before the change and could be even less than premiums you have paid since unrecovered initial expenses must first be deducted. Check what charges you will be paying on termination of the old policy and see whether the advantages of the new policy will make up for any such charges.

Among the disclosures, the Respondent further included that-

The investment risk under the new policy may be higher. Remember that the past performance of a fund or asset manager of a fund is not necessarily an indication of future performance.

It was clear to the Ombudsman that the Complainant had been cautioned to carefully read the policy documents and then make an informed decision before the policy



came into effect. The Ombudsman considered that Complainant was afforded a reasonable opportunity to consider such disclosures before taking a decision, on the policy, as well as regarding the investment risk of the policy being higher and that past performances of a fund are not necessarily an indication of future performances.

It was also established that Complainant further made a part withdrawal in the course of the policy, which confirmed that he was aware of the performance of this portfolio. In the circumstances the Ombudsman found that enough information was provided to the Complainant at inception of the policy and that important disclosures were made to him.

FINDING

In the above circumstances, the Ombudsman found that there was no evidence submitted to justify that the Respondent, in writing, had promised the Complainant a maturity value of any amount. The Ombudsman also found that there could have been, and therefore there was, no outstanding balance of any amount. The Ombudsman further found that the 20% claim of interest had not been adequately supported by the submissions before the Ombudsman.

THE ORDER

The complaint was not upheld.

There was no order made to the Respondent.

Life Cover Policy

The Complainant was unemployed and was not able to continue with her monthly premiums. She informed the Respondent of her state of unemployment and further asked if they would refund what she had already paid. On the 16th of February 2022, the Respondent instead received a notice of termination from the Complainant and had expected the Respondent to communicate in writing but instead received a



termination of the monthly debit query. The Complainant made a follow-up a month later and she was told that they stopped the monthly debits and that because the policy was less than 24 months, she would not receive any refund.

The complainant additionally displayed dissatisfaction with the manner of termination, stating that she did not receive a refund just because of early termination. The Complainant complained of poor customer service and inadequate communication. The Complainant further stated that the Respondent did not have the client's interest at heart, as there are many uncertainties in life. The complainant requested a refund of the premiums she had paid when she terminated the policy. The complainant understood that an early withdrawal attracted charges, and which she would bear if the charges were reasonable.

THE RESPONSE

The Respondent submitted a response to the complaint. The Respondent in its response, explained as follows:

The Respondent is an insurance company, and the Complainant has been a life insured covered under policy number 0000, a life insurance policy. A policy acquires a surrender value when it has been in existence for 24 months or more from its commencement date or where at least two years of premiums have been received by the Respondent. When the life insured wishes to terminate the policy, the life insured notifies the Respondent of his or her intention to withdraw from the policy, and upon receipt, the Respondent immediately stops all debit orders attached to the policy and lapses the policy. Depending on the age of the policy the Respondent will lapse the policy and then calculate what is due to the policyholder and then process payment to the policy surrender value because the policy has acquired an encashment value. A policy will only attain an encashment value after twenty-four (24) months of effective existence.

If at the date of termination, the policy has been effective for a period less than 24 months, the policy has not acquired an encashment value, and any premiums paid in



that period are not refunded to the policyholder. Respondent confirmed receipt of Complainant's notice to terminate the policy through a letter dated 3 February 2022. Respondent stated that at the time of termination, the policy had been in existence for nine (9) months, having commenced on 1 May 2021. Upon receipt of Complainant's notice, Respondent terminated the policy, and Complainant was notified verbally that there was no refund due to her since the policy was below two (2) years and had not earned any value.

The policy document signed by the Complainant with Respondent provides that, "This policy will acquire an encashment value after two years' premium have been received. "The Respondent stated that based on all the submissions, the Complainant was not entitled to any refund or payment in terms of the policy, because at the date of termination, the policy had not earned an encashment value and there was no provision for repayment of the paid premiums whether in whole or in part. Respondent further stated that Complainant was aware of the provisions of the policy, and she endorsed it as representing her express wishes, as captured in Annexure "C" of Respondent's response. Respondent submitted that Complainant had failed to establish her entitlement to the refund of the payment and that her complaint ought to be dismissed.

DETERMINATION AND REASONS THEREOF

It was the role of the Ombudsman to determine whether the premiums paid by the Complainant were due to her in part or whole.

The Ombudsman was further required to determine whether the Respondent acted within the Policy terms and conditions.

THE APPLICABLE LAW

The relationship between the parties was one of investment and this is a regulated activity. In issuing this decision, the Ombudsman referred to the Policy and other correspondences exchanged between the parties.



APPLICATION OF THE LAW TO THE FACTS

Principles of Contract

The relationship between the parties was governed by the principles of the law of contract. The Ombudsman, in ascertaining whether there was an agreement between the parties, investigated what constitutes a legally binding agreement and then determined whether there was an agreement between the parties. *JTR Gibson, South African Mercantile and Company Law, (2003)*, defines a contract as "...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 agreeing with the subject matter..."

It is an accepted law that for a contract to be legally binding, it must comply with the above essentials of a contract. Gibson states "If one of the essentials is absent, the agreement is void. Although the term 'void contract' is used, there is no contract at all. There was no dispute that the parties signed a contract, for this reason, the Ombudsman found that there was a contract between the parties.

Terms of the Contract

Having established the existence of a contract between the parties, the Ombudsman had then to consider what the parties agreed on. The Policy provided that, "This policy will acquire an encashment value after two years' premiums have been received." The agreement between the parties was that the investment would mature after fifteen (15) years and that the policy would acquire an encashment value after two years' premiums had been received. The complainant terminated the policy in February 2022, and she had only paid premiums for about nine months. In the circumstances, the Ombudsman found that the policy had not acquired an encashment value, since the premiums received were less than the stipulated two years.



In concluding the applicable law, it was appropriate for the Ombudsman to deal with the nature of investment contracts or policies. It remained an undisputed fact that the signature that appeared in the document belonged to the life insured, hence the principle of *caveat subscriptor (let the signor be aware)*, then applied. The life insured signed the contractual document and the law accepts that she read the contents of the investment application and the policy and then consented to be bound by the terms of the policy. Further, the Complainant had not in her submissions denied knowledge of the policy documents.

Equity

It was underscored to be borne in mind that the jurisdiction of the Ombudsman is premised on 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." It was worth mentioning that the parties agreed with clear terms and conditions. The complainant terminated the agreement through her notice and the policy had not acquired the encashment value, as per the policy document. In the circumstances, the Ombudsman found that it was reasonable and fair for the parties to align themselves with the terms of the agreement they entered.

FINDING

The Ombudsman found that the Respondent acted in line with the life policy. The Ombudsman further found that the Complainant was not owed any premiums paid for the nine months, as the policy had not acquired an encashment value.

THE ORDER

The complaint was not upheld.

There was no order made to the Respondent.



On the 27th of July 2022, the complainant submitted that on the 23rd of May 2022, the working committee of pensioners raised a concern with the First Respondent. The crux of the working committee's concern was that the pensioners were not represented in the management board (board of trustees) of the Second Respondent. The reason for the concern was that the interests of the pensioners were not represented through the management board of the Second Respondent. The complainant submitted that notwithstanding the concerns being raised, the Respondents resolved to proceed with elections scheduled for 29 July 2022. The Complainant prayed that the Ombudsman suspend the elections pending a resolution of the anomaly.

INTERIM AND URGENT RELIEF

Upon receiving the complaint and its annexures, the Ombudsman assessed the matter to be one of urgency and warranting interim relief. The order was issued on the 28th of July 2022, interdicting the Respondents from conducting the elections until the complaint was fully resolved. In granting the interim relief, the Ombudsman considered the principle in *Customs Motors (Pty) Ltd vs Engen Petroleum Limited & Another* (319/16) [2016] SZHC 47(10 March 2016). The Court stated the following:

[47] Buckle and Jones: Civil Practice of the Magistrates Courts in South Africa (Vol 1) also states the requisites for the granting of an interlocutory interdict: -

"The requirement which an applicant for an interim or interlocutory interdict has to satisfy are the following:

- (i) Prima facie right.*
- (ii) A well-grounded apprehension of irreparable harm if the interim relief is not granted.*
- (iii) A balance of convenience in favour of the granting of the interim relief; and*
- (iv) The absence of any satisfactory remedy."*



The learned Author further observed that –

"These factors should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought."

The Ombudsman observed that the above principle crystallized the nature of interim relief. It is a discretionary remedy granted in circumstances where the complainant may suffer irreparable harm and there is no satisfactory remedy but the interim order. The Ombudsman therefore found that the complainant was a pensioner of the Respondent. The actions (decisions) of the Respondent had an impact on his rights, status, or otherwise. This, therefore, established a *prima facie* right to the affairs of the Second Respondent, and, by necessary and logical extension, the governance of the Second Respondent. The elections are conducted to install the management board of the Second Respondent. The Respondents' decision to declare pensioners such as the Complainant ineligible to stand for elections may result in harm. Therefore, the apprehension that the Complainant may suffer irreversible harm was found to be grounded and objectively supported. The correspondence between the parties (the working group for pensioners and the Respondents) demonstrated that there is no immediate and adequate remedy save for the interim relief sought.

The Ombudsman, considering the above factors, made the following order.

1. The matter was one of urgency and the usual processes and time limit applicable to the Ombudsman of Financial Services are hereby waived.
2. The Second Respondent's elections scheduled for Friday; 29 July 2022 were interdicted pending finalization of the complaint.
3. The First Respondent was interdicted from conducting and/or proceeding with the electoral process scheduled for Friday, 29 July 2022 pending the finalization of this complaint.
4. The Respondents were directed to submit responses to the complaint no later than Wednesday 3 August 2022.
5. The parties were invited to a mediation process, which is a party-led dispute resolution process on or before 5 August 2022.



Through an internal memorandum dated 28 July 2022, the First Respondent informed all permanent and pensionable staff that the elections were suspended pending further communication. The correspondence originated from the First Respondent to all permanent and pensionable staff. The First Respondent further submitted, per correspondence dated 2 August 2022, that the elections were suspended as per the interim order above-mentioned.

RESPONSE TO THE COMPLAINT

Per the Order dated 28 July 2022, the Ombudsman called upon the Respondents to respond to the complaint. The Ombudsman received responses from the Respondents.

First Respondent

By correspondence dated 2 August 2022, the First Respondent submitted his response. The First Respondent was the Electoral Officer who was appointed to oversee the electoral process. After cancellation and/or suspension of the process, he duly communicated to the Employer's management.

The First Respondent stated that he did not have the authority to resolve the complaint. He communicated to the Complainant that the issue raised in the complaint would best be addressed by the new Board of Trustees. The First Respondent further stated that he did not have the mandate to operate outside the mandate given to him or set new rules on the composition of the Board of Trustees. Further stating that his electoral committee was required to elect "new employee representatives" of the Second Respondent.

Second Respondent

The Second Respondent, through the Acting Principal Officer, responded to the complaint by stating that it received the concerns from the Complainant, and these were given priority. The general practice was for the Second Respondent to conduct elections per the stipulated Rules and that the Complainant (and by and large the working Committee) were advised of the conflicts within the Rules which call for amendment. This process, unfortunately, required the engagement of all relevant stakeholders including the FSRA as the regulator, actuary, and others).



A resolution was taken to defer the request to a subsequent Board with the expectation that the matter would be dealt with expeditiously and with no pressure of time. The term of office for the last Board of Trustees was until 30 June 2022.

APPLICABLE LAW

The relationship between the parties arose from pension law as this was a regulated activity. In issuing this decision, the Ombudsman referred to the submitted documents. The principles of pension and retirement funds law was under consideration in the analysis of the law and facts in this matter. The Ombudsman considered the principles of natural law and *audi alteram partem* in weighing her considerations in the matter. At all material times, the Ombudsman was guided by section 75 of the FSRA Act, 2010 which enjoins her to make decisions based on what is, in her opinion, fair, and reasonable in each case. The Retirement Funds Act, 2005 was also instructive in the determination of this complaint.

The right to be heard / *audi alteram partem*

The foundations of the *audi alteram partem* principle consist of proper and/or adequate notice to the other party coupled with an unambiguous statement of the complaint the said party is called upon to answer. Case law, as espoused in *Simelane and Another v Registrar of Insurance and Retirement Fund* (1627 of 2012) [2014] SZHC 68 (09 April 2014) addresses the question of the right to be heard as follows.

The poser here is: what then is fair hearing? To my mind, a fair hearing is synonymous with a fair trial and implies that every reasonable and fair-minded observer who watches the proceedings should be able to conclude that the court or other tribunal has been fair to all the parties concerned. The rule of fair hearing is not a technical doctrine, it is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party entitled to be heard before deciding had been given the opportunity of a hearing. Once an appellate or reviewing Court concludes that the party was entitled to be heard before a decision was reached, but was not given the opportunity of a hearing, the order or judgment thus entered is bound to be set aside. This is because such an order is against the rule of fair hearing, one of the twin pillars of natural justice which is expressed by the maxim *audi alteram partem*.



This right or principle emanates from the rules of natural justice which call upon decision-makers, such as the Ombudsman, to extend an opportunity to a party who might be adversely impacted by a decision to make his representations. These representations must then be factored into the decisions by the decision-maker, specifically, they must be given due weight and influence the decision. This principle finds expression in section 33 of the Constitution of Swaziland Act, 2005 as the right to administrative justice. The provision states:

(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly by the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.

The Ombudsman, in adherence to the above principle, extended the opportunity to the Respondents to be heard. Their submissions were received and considered. There were a few peculiarities that the Ombudsman noted in the responses. However, none of them vitiated the right to be heard as captured above. The peculiarities were that the Second Respondent was without a management board (Board of Trustees). Consequently, the response was issued under the hands of the Acting Principal Officer.

Duties of the management board

The duties of the management board are pronounced in section 9 of the Retirement Funds Act, 2005 which states that the management board shall ensure that: (f) the rules and operations of the fund are not in violation of this Act, and (g) the fund is managed per its registered rules. Section 10 provides for the board's fiduciary responsibilities as far as it states that the management board shall ensure that the interest of members is protected at all times by (a) acting with care, diligence, and good faith; (b) avoiding conflict of interest, and (c) acting impartially.



Protecting the fund & continued profitability of the fund

The courts have interpreted the duty to ensure that the interest of members is protected at all times to mean that the management board is required to act in the best interest of the fund. This duty applies even in circumstances where the interests of the Fund and those of a member or members conflict. The management board is enjoined to pursue that which is in the best interests of the fund. Put differently, the interests of the fund as a whole become supreme. In Armeli v Southern Field Staff Defined Contribution Fund & another [2001] 3 BPLR 1693 (PFA) the Adjudicator held that it was not unreasonable for the board of the fund to amend its rules to provide that the amount of a withdrawal benefit at any time would be determined regarding the market value of the assets backing the guaranteed fund policy issued by its underwriter. This was so, he said, particularly in the context of a large number of withdrawals consequent upon the retrenchment exercise that followed the merger of Southern Life and Momentum and the 1998 market adjustment which reduced the market value of its investments.

This essentially meant that the board should ensure that the fund is and will, for the foreseeable future, remain financially sound, and able to pay benefits to members and beneficiaries when they become due or accrue [Hunter et al The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives, and circulars, 2010 Cape Town, 162]. The relationship between a fund, its board, and its members is similar to the relationship between a company, its board, and shareholders [Hunter, 165]. Just as members of a board of a company owe fiduciary duties to a company, not its shareholders or individual members, the members of a board of a fund or trustees owe a fiduciary duty, meaning, loyalty, to the fund, not its members. Admittedly members and even former members of a fund benefit from proper management and administration of the fund, but that does not mean that duty is owed to them [Hunter, 166].

Rules of the Second Respondent

The rules of the Second Respondent per the law above were of paramount importance in dealing with affairs of the fund. These rules are sanctioned by the Retirement Funds



Act, of 2005 (section 13). The rules are also endorsed by the Registrar (in this case, the Financial Services Regulatory Authority). The Act provides the following:

Rules of a retirement fund

13. (1) The business of a retirement fund shall be governed by a set of rules which shall comply with the prescribed requirements in terms of the Regulations.

(2) No rules shall be of any force unless those rules have been approved and endorsed by the Registrar after consultation with the Minister.

(3) Subject to the provisions of this Act, the rules of a retirement fund shall be binding on the fund and its members, employer and officers, and any person who has a claim on the fund.

(4) Every member of a retirement fund shall be entitled on request to inspect a copy of the rules of the fund.

(5) Notwithstanding the provisions of subsections (2) and (3), if the rules of the retirement fund are found to conflict with the provisions of this Act on any aspect, then the provisions of this Act shall apply.

Interest of society

The Legislator's interest in enacting the Retirement Funds Act, 2005, and subsequent promulgation of the FSRA Act was to ensure compulsory and continuous participation by workers in occupational retirement schemes. The Fund plays a social security function in the sense that they prevent sectors of the population from being destitute once they exit employment. This would make certain that large sections of society have recourse to funds in the event of exiting employment – whether it be because of resignation, death, disability, or retirement. Hence it is in the interest of the state that funds continue to be economically viable. This safeguards against large sections of our population being destitute when they leave employment since they would have access to the funds deferred and saved on their behalf during their working life.

APPLICATION OF THE LAW TO THE FACTS

This complaint required the Ombudsman to interpret the rules of the Second Respondent. The interpretation was premised on membership to the Respondent and who can enjoy the privilege of being elected as a member of the Board of Trustees. In



MEPF v SAMWU PF (1412/2018) [2019] ZASCA 42 (29 March 2019), the court stated per Swain JA (Lewis ADP, Tshiqi and Van der Merwe JJA and Dlodlo AJA concurring)

Before interpreting these rules of the Fund, it is necessary to consider what was said by this Court, in *Sasol Limited & others v Chemical Industries National Provident Fund* [2015] JOL 33910 (SCA) para 13, concerning the legal status of the rules of a pension fund and the correct approach to their interpretation:

The legal principles that apply to pension and provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation, and the common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents.

The principle enunciated above is unambiguous. The rules of a fund must be interpreted as any other document. The Ombudsman's interpretation was grounded on section 74 of the Financial Services Regulatory Authority, Act 2010; towards, considering what is fair and reasonable in each circumstance.

The rules state that "ACTIVE MEMBER" shall mean MEMBER who, having been admitted to membership of the Fund, remains in SERVICE, or is deemed to remain in SERVICE. The Ombudsman found that there is no ambiguity in the definition. The Second Respondent intended to distinguish ACTIVE MEMBERS and other types of members. For instance, the Ombudsman noted the use of ACTIVE MEMBERS stated in the Rules where the formula for pensions was expressed. Similarly, the Rules dealing with Benefits payable by the Second Respondent demonstrated the use of the distinctive term, ACTIVE MEMBER, as defined.

The second interpretation issue was that of membership to the Second Respondent. Put differently, does retirement extinguish one's status as a member of the fund? The Complainant was a pensioner, and the Rules provided that "A MEMBER who had left SERVICE for any reason and had received all the benefits which may be due to him in



terms of these RULES shall cease to be a MEMBER..." The Ombudsman noted that the cessation of membership after leaving service occurs when "all the benefits which may be due" have been received by the member. This complaint was distinguishable as the Complainant was still receiving a pension.

The third issue for interpretation was that of trustees; particularly what the Second Respondent termed "employee representatives." The Ombudsman noted that the trustees elected under this provision are EMPLOYER TRUSTEES and MEMBERS' TRUSTEES. The Rule does not distinguish between active and retired members. As earlier noted in preceding paragraphs, the Rules did distinguish between ACTIVE MEMBERS where the distinction is necessary. The Rules stated "The members shall elect 4 TRUSTEES (hereinafter referred to as "Members' Trustees) from among their numbers." Considering the definition of MEMBER, as previously captured, there was no distinction in terms of the Rules between ACTIVE MEMBER and PENSIONER when it comes to election into the management board.

The last issue subject to interpretation was that of the disqualification of members from being elected to the board of trustees. The pertinent rule provided that:

No person in any of the following categories shall be eligible for appointment as a TRUSTEE and if a TRUSTEE at any time falls into any such category, he shall cease to hold office:

- a) A minor or any person who is insane or otherwise incapable of acting.
- b) An un-rehabilitated insolvent.
- c) Any person removed from an office of trust on account of misconduct.
- d) Any person who has been convicted and sentenced to either imprisonment or a fine exceeding E100.00 of one of the following: theft, fraud, forgery or uttering a forged document, perjury, any offense involving dishonesty or any offense in connection with promotion, formation, and management of a company.



FINDINGS

The Ombudsman found that there is no basis under the Rules of the Second Respondent to justify the exclusion of pensioners as eligible candidates in the electoral process for a new board of trustees. The provisions did not distinguish between active members and pensioners; indeed, this is a distinction that could only be attributable to what the Acting Principal Officer termed a “general practice to conduct elections.” Unfortunately, retirement funds are not governed by practices. They are governed and administered per their established rules as endorsed by the Financial Services Regulatory Authority as a regulator. The Rules, read in conjunction with the definition clause, did not provide a basis for the exclusion of the Complainant, nor any other person in his class, from standing candidacy in elections under the Rules.

The Ombudsman also found that the deferment of this complaint to the next board of trustees was not fair and reasonable. The complaint raised by the Complainant, and by and large other pensioners as he was a chairperson of a working committee, was that they were being excluded from participating in an important activity of the fund; namely, forming part of the management board. To advise them to wait for the election of a new management board so that their grievance is addressed was not only unreasonable but profoundly prejudicial to their rights and interests as members of the fund.

The Rules stipulated that members will elect from one of their numbers. The language and intention are clear, to have members, active or pensioned, participate in the governance of the Second Respondent. To expect the Complainant and the class of members he represents as a chairperson, to accept the exclusion and wait for the goodwill of a new management board (or returning given the possibility of re-election) was unfair and not in keeping with the letter and spirit of the Rules.

It required to be borne in mind that the jurisdiction of the Ombudsman is premised on the resolution of disputes fairly and reasonably. 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.”



To give the Complainant what he asks for would be reasonable and fair to the Fund and existing members of the Fund, especially other pensioners who may have been denied the opportunity to stand for elections outside the letter, breadth, and spirit of the Rules.

The last consideration point was whether the Ombudsman confirmed the interdict placed on the Respondents. It would be unreasonable to expect the Second Respondent to operate perpetually without electing its governing body, the Board of Trustees. The interdict had therefore served its purpose, which was to preserve the *status quo* while the interests and rights of all the parties were being considered by the Ombudsman. Consequently, this decision would substitute the interim order as it fully considered all the issues arising out of this complaint, including the pertinent law and practice.

ORDER

1. The complaint was upheld.
2. The Interim Order dated 28 July was thereby discharged.
3. The Respondents were ordered to proceed and conduct elections for Trustees in terms of the Rules.
4. The Complainant was declared an eligible MEMBER to stand elections under the Rules of the Second Respondent.

Insurance – Repudiated Claim

The Complainant was a policyholder of the 1st Respondent. The Complainant's policy was taken through the 2nd Respondent as a Corporate Agent. The Complainant had an additional cover for extended family relationship "grandparents" E 15 000.00. The insurance cover commenced in 2017 and on the 21st of May 2022, the Complainant's grandmother died, and this was followed by the submission of a claim. On the 15th of June 2022, the Complainant submitted the claim for the policy, on the 27th of June 2022, the 1st Respondent responded to the Complainant's claim and advised her that the claim was rejected.



The Complainant alleged that the Respondent advised that the reason for declining the claim was that the Complainant “submitted deceased documents of a different person from the one covered”. On the 24th of August 2022 the Complainant responded to the rejection letter and stated that the deceased had a dual citizenship as she was born in South Africa and then later married a Liswati to which an affidavit from the Complainant was also attached in the response.

The 1st Respondent perceived the person covered as different from the person claimed for due to the different date of birth and different citizenship, the respondent therefore alleges that the claim by the Complainant indicates material misrepresentation.

The Complainant as a result prayed that the 1st respondent honours the initial agreement made in the policy.

THE RESPONDENT’S RESPONSE

The 1st Respondent assessed the claim against the above-mentioned requirements and found the following:

1. The Complainant took the policy for the deceased with Eswatini Identity Document. At claims stage the Eswatini Travel Document and the South African ID indicated two different citizens with different identity numbers. The Burial Order, Abridged Death Certificate, Mortuary Death Confirmation Letter, Shandu’s Funeral Undertakers (Soweto) confirmed the death a South African Citizen.
2. The 1st Respondent averred that the proof of death documents related to a different individual who was a South African citizen and the burial order including the letter from the Funeral undertaker gave permission for burial in South Africa. The 1st Respondent maintained that there are two different individuals from two separate countries. The claim was declined on that basis.

On the 24th of August 2022, the Complainant appealed the decision in writing regarding the claim in line with the process which allowed claims to be appealed within



90 days of repudiation. The 1st Respondent alleged that the Complainant submitted an affidavit acknowledging that the date of birth on the death certificate was 01 January 1936 which conflicted with the 24 January 1936 as signed at the inception of the policy.

The Complainant further acknowledged that the deceased had a dual citizenship as she was born in South Africa and married in Eswatini. The 1st Respondent in re-assessing the appeal in the additional documents submitted, found the following:

1. The 1st Respondent noted the misrepresentation of facts by the same Complainant.
2. The claim was repudiated based on the above information.
3. The 1st Respondent viewed the claim by the Complainant to be fraudulent in nature.
4. The 1st Respondent alleged that the claim by the Complainant indicated material misrepresentation.

DETERMINATION AND REASONS THEREOF

The Ombudsman's role was to determine whether or not the Respondent rightly repudiated the Complainant's claim, based on a material misrepresentation of facts. Furthermore, the Ombudsman's role was to determine whether the Respondent was fair in repudiating the claim based on the alleged material misrepresentation.

THE APPLICABLE LAW

The relationship between the parties is one of insurance. This is a regulated activity in terms of the Insurance Act, of 2005. In issuing this decision the Ombudsman made reference to case law and correspondences exchanged between the parties.

Principle of Utmost Good Faith

One of the key principles in insurance is that of utmost good faith (*uberrima fides*). In stating the principle, the following is captured:

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party." The phrase "utmost good faith" is also known by its Latin equivalent



as uberrima fides. (Mutual and Federal Insurance Company Ltd v Municipality of Oudtshoorn (240/82) [1984] ZASCA 129; [1985] 1 All SA 324 (A) (16 November 1984))

This is an obligation placed on both parties. For the insured, it manifests itself by disclosing everything known to him (or her) that can influence the assessment of risk and the rights and obligations under the insurance contract.

In general contracts of this type (insurance contracts) have been said to impose a duty on both the contracting parties to be more frank and forthcoming, to be even better than good, during their negotiations preceding the contract, than in ordinary commercial transactions. Not only must they refrain from misrepresentations, but they may also be required to volunteer information that might otherwise be regarded as confidential.

The above principle places upon all the contracting parties a duty to be open to each other and disclose all information, no matter how confidential that information might seem to be. The parties to an insurance agreement are placed at a more demanding position than just in ordinary commercial transactions. The element of trust exists, and each party is required to be trustworthy and frank, in disclosing information that will assist in the risk assessment.

The Duty of Disclosure and Misrepresentation

The law applicable, as well as the facts presented called for the Ombudsman to further determine the duties and responsibilities placed upon the parties. It is acceptable practice in the insurance industry that such duties and responsibilities flow from both parties, being the insurance proposer and insurance provider (insurer). When concluding an insurance contract, it is important in the pre-contractual stage, to disclose all material facts which would be relevant to the assessment of the risk, the premium to be determined and decision to be made by the parties to conclude the agreement. A statement of fact which is false or misleading, amounts to misrepresentation, which if material, may affect the validity of the contract and result in certain adverse consequences. Even a non-disclosure, by way of an omission, may result in a pre-contractual misrepresentation. The aggrieved party may attempt to avoid the enforceability and the consequences of the contract. (Reinecke, MFB, van



Niekerk, JP and Nienaber, PM South African Insurance Law Durban Lexis Nexis 2013 at par 8.3,8.5 – 8.6.)

“The insurance proposer is under a duty to supply adequate information to enable the insurer to assess the risk. The insured remains under a continuing obligation to update material information up to the moment the insurer assumes the risk and actual cover commences, regardless of whether or not that duty is spelt out in the application form.” (Nienaber & Reinecke, Life Insurance)

The above quotation puts into perspective the duty upon the insurance proposer (insured) to supply adequate information that will enable the insurer to assess the risk. It is clear from the above that risk assessment is dependent on the information provided or disclosed by the life assured. The above also outlines the duty not to disclose false information to the insurer which may affect the insurer in the assessment of the risk.

According to the Respondent’s submission, it had clearly been established that there was indeed a misrepresentation from the Complainant as a result of the non-disclosure.

The Ombudsman found that indeed there was a misrepresentation due to the non-disclosure that the Complainant’s biological grandmother had dual citizenship. These were both Swazi and South African citizenships whose identity numbers did not match.

Materiality and Misrepresentation

The Ombudsman, having established the fact of non-disclosure on the part of the Insured, needed to determine whether the non-disclosure was material or not.

“Facts are deemed to be material if those facts, stated, implied or non-disclosed by the actual representor, would have influenced a notional representee, on a balance of probabilities, to conclude the contract as it stands, or, to put it conversely, if, absent those facts, the notional representee would not have concluded the contract at all or at any rate on those terms.” (*Mutual and Federal Insurance Company Ltd v Municipality*



of Oudtshoorn (240/82) [1984] ZASCA 129; [1985] 1 All SA 324 (A) (16 November 1984)).

The burden of proving materiality rests on the party alleging and relying on the misrepresentation. "The insurer had to establish all the requirements of its defence to a claim on the policy, including materiality of the facts and information," as per the case study, "not disclosed." Reinecke, MFB, van Niekerk, JP and Nienaber, PM South African Insurance Law Durban Lexis Nexis 2013.

According to *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop 2015 (3) SA 85 (SCA)* the onus of proving materiality is on the insurer, as is proving that the non-disclosure or representation induced it to conclude the insurance contract.

It is prudent to note therefore that it is vital for the facts and the circumstances of each case to be carefully considered to ensure that the misrepresentation is therefore material. From the facts, at the time of the conclusion of the contract, could it be readily ascertained from the policy documentation or questionnaire for completion that made provision for declaration of dual citizenship which possibly resulted in the omission of a material fact from the insured? Moreover, in the assessment of the materiality of the misrepresentation, with due regard to the legal convictions of the community, it is objectively assessed on a balance of probabilities, that there was a positive duty on the insured to disclose the existence of the dual citizenship documents. The main question was whether it would have been foreseeable to the reasonable person in the position of the insured, that the non-disclosure of the dual citizenship would have been relevant to the insurer in assessing the risk against which cover was sought at the time of conclusion of the contract? Was the insurer in response induced to conclude the contract with the insured? Would the insurer likely still have concluded the funeral policy, albeit under different terms, such as the imposition of higher premiums?

The Ombudsman duly considered the above line of questioning in the investigation of materiality. The Ombudsman found that the non-disclosure by the Insured was



immaterial in the assessment of risk, in that the insured had stated the information required in the application documents. The Insured had undertaken that he had disclosed all known material information relating to which would have an impact on the Insurer's acceptance of the risk or insured event. Full disclosure by the Insured would not have influenced the Insurer in concluding the contract, by either not concluding the contract or presenting different terms of the contract.

This was further supported by the case *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* [1985] 1 All SA 324.

The object of devising a means or criterion for determination of the materiality of undisclosed facts must surely be to ensure ... that justice is done to both parties. The insurer is to be protected against non-disclosure which could ... prejudice him but at the same time the insured ought not to be unfairly required to forfeit his rights under a policy which he entered into in good faith ...

Misrepresentation

In terms of section 53 (1) of the Insurance Act,

...a policy contract shall not be invalidated on account of the policy holder, or his agent having supplied the insurer or his agent with information that is proved to be false except if the false information was of such a nature that it has resulted in the assessment of the risk under the policy being materially affected at the time of its issue... [emphasis added]

False representation is not wrongful. For the representation to be wrongful it is required to be material. The test for materiality relates to the element of wrongfulness and is objective. Neethling, J, Potgieter JM and Visser, PJ Law of Delict 6ed Durban Lexis Nexis Butterworths 2010 42.

This in its entirety meant that the mere establishment of the misrepresentation was not entirely wrongful, the materiality of same was crucial in the assessment as outlined above.

The wrongfulness of a misrepresentation is judged on the standard of a reasonable man and based on the convictions of the community. An omission is wrongful if it is



occasioned in breach of a duty incumbent on a party to act in a positive manner. It is important to note that a misrepresentation by omission is only considered wrongful if the relationship is subject to a duty to disclose and the non-disclosure relates to material facts.

The important element which outlines the misrepresentation factor is causation. According to the principle of causation, the misrepresentation must have caused or induced the responding party to enter the contract or to agree to certain terms which otherwise the insurer would not have agreed to had it not been for the misrepresentation. It was the duty of the Ombudsman to deduce as to whether if it was not for the misrepresentation, the insurer would not have agreed to the contract.

In *Pretorius v Natal South Sea Investment Trust Ltd* it was further held that the misrepresentation "is material when it has the natural and probable effect of influencing the mind of the person to whom it is made."

In *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop*, the learned judge reiterated the principle that in case of a misrepresentation it required firstly, objectively, a consideration if the non-disclosure materially affected the insurer's risk assessment and then conversely, subjectively, if the non-disclosure of the material fact induced the insurer to issue the policy or extend the cover.

In the case of *Qilingele v SA Mutual Life Assurance Society 1993 (1) SA69 (A)*, the court found that although there was no doubt as to the falsehood of the information provided in the proposal form, that in order to show that the repudiation and subsequent voidance of the policy was lawful, the insurer had to show that the misrepresentation was material in the eyes of the reasonable man and that had it known the truth, it would have declined to undertake the risk or would have, alternatively, undertaken the risk on different terms. The court, having found that the insurer discharged the onus incumbent upon it, ruled in favour of the insurer with costs and in doing so upheld the repudiation and voidance of the insurance policy.



The above-mentioned case crystallizes the approach the Ombudsman took in this determination. The contrasting principles on the aspect of materiality aim to shed light on the circumstances with which a material misrepresentation may be sufficient to repudiate a claim. According to the Ombudsman, the Respondent had not discharged the onus incumbent on it.

The Ombudsman did not dwell on the issues of the separate identity documents nor its authenticity and verified that a separate and competent forum may be competent to do so. Moreover, according to the 1st Respondent's submissions that the claim was fraudulent in nature, the Ombudsman observed even further that a competent authority is more suited to engage in such.

The Ombudsman found that the risk assessment was immaterially affected by the non-disclosure of the information and the policy contract cannot be invalidated on account of the policy holder having not supplied the Respondent with such information.

FINDING

1. The Ombudsman found that the Respondent did not act in line with the policy in repudiating or declining Complainant's claim, in that the Complainant failed to disclose material information that was known to her.
2. The Ombudsman found that there was misrepresentation on the part of the insured.
3. However, the Ombudsman found that the Respondent had failed to prove the materiality of the misrepresentation and that it induced the Respondent to enter the contract, or indeed enter into the contract on the terms that it entered into on.

THE ORDER

The complaint was upheld.

The Respondent was ordered to pay the Complainant subject to the terms and conditions of the policy.



SETTLEMENTS

Consumer Credit

The complainant stated that he had applied for a loan with one of the banking institutions and was advised that he has been blacklisted with a credit bureau. The complainant stated that he had no current account with the Respondent as he had cleared all his accounts and further stated that the Respondent sent him a settlement letter which cleared him from any liability during the process of the bank loan application but same did not attempt to clear his name with the credit bureau. The complainant was thereby seeking compensation from Respondent for pain and suffering and further stated that he is open for discussion for negotiation for compensation.

In consideration of the fact that the Respondent acknowledged that the Complainant settled his account, he suffered prejudice and he failed to get a loan due to Respondent's conduct. Though the Respondent had been aware of the Complainant's defaults in payment of his instalment for the duration of the agreement, they allowed the conduct to persist. In accordance with Section 60 of the Consumer Credit Act, the Respondent could have terminated the relationship. The paid-up letter meant to clear the Complainant was said to have cleared the Complainant from the credit bureau portal, there was no evidence provided before the Ombudsman that justified the submission of the Complainant's data twelve months after the Respondent had issued the letter confirming payment of the outstanding balance.

It was found that the Respondent had acceded to the default and as a result prohibited the Complainant from using it as a predicated factor for defaults. The relationship between the parties turned into a swift reaction to default. It was established that the Complainant suffered prejudice because of the Respondent's conduct of failing to immediately inform the credit bureau of the Complainant's payment history following



her paid-up letter. Upon discovering this, the Respondent then settled the matter by rectifying the omission with the original credit amount as compensation for the omission.

This complaint is of vital importance to the credit provider with regard to the issuance of paid-up letters to their consumers as they are to get confirmation with the credit bureau as soon as clearance of credit is ascertained, and that the consumer has been cleared as this becomes costly to Respondent in terms of having to compensate consumer due to unforeseen negligence.

Loan Agreement

The Complainant stated that she took a loan with Respondent and was not happy with the fact the repayment period has been prolonged from that of their contract. It is of note that the Complainant attended a mediation process with the Respondent on the very same issue. The matter was concluded at mediation and the file was therefore closed.

SECURITIES

The Complainant stated that she had an investment with the Respondent and was one of the founding members. Part of the money paid was reserved for a once-off payment of administration costs and the rest was allocated into the investment. She further stated that there came a time when she discovered that part of the money that was reserved for the investment was now used for the administration costs which amongst others included the payment of staff salaries and, upon proper investigation, she mentions that they found that the money was never invested at all as per the agreement. Upon such discovery, she requested that she be paid back all the money she had invested. There were other members as well who requested that their money be paid back. The response that was received was that she would be paid a fraction of the money invested.



The board members agreed to pay the Complainant an agreed percentage of the total investment. The Complainant agreed to the arrangement so that all the other members who wanted out of the investment to benefit, to at best receive what they had invested exclusive of the amount paid in respect of administration fees.

It is of note that as members of an investment, it is vital to try and be on the level of a win-win situation. The Complainant was able to cater for the rest of the members when she agreed to the proposed percentage of the investment to accommodate the rest of her fellow members. On another note, it is important to look into the investment accounts as members.



This page is intentionally blank





OMBUDSMAN

OF FINANCIAL SERVICES

Umlamuli wetindzaba tetimali

ANNUAL REPORT

2022 – 2023



OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

 Tel: (+268) 2404 7653/4464

 (+268) 7698 7570

 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   