OMBUDSMAN
OF FINANCIAL SERVICES
Umlamuli wetindzaba tetimali

Reaching Milestones Together

ANNUAL REPORT
2023/2024

Welcome to our 2023/24 Annual Report. This presents reviews of our year at the Office of the Ombudsman as well as key information about our performance and work.

Annual Report for the year ended 31 March 2024

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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.

INTERNATIONAL NETWORK
FINANCIAL SERVICES
OMBUDSMAN SCHEMES

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"The milestones we have reached are not just about numbers and statistics; they represent lives impacted, trust rebuilt, and a stronger, more resilient financial ecosystem for all emaSwati"

Nondumiso Simelane | Ombudsman

FOREWORD

Reaching Milestones Together

As we present the Annual Report for the Ombudsman of Financial Services (OFS), I am filled with pride and gratitude as we celebrate a significant milestone: our ninth anniversary. **Reaching Milestones Together** encapsulates not only our journey over these past nine years but also emphasizes the collaborative efforts that have defined our mission in resolving financial services disputes in Eswatini.

Over the past year, we have made substantial strides in engaging with stakeholders across various sectors. Our commitment to fostering open dialogue has led to the implementation of several initiatives aimed at reaching consumers effectively. We recognize that educating consumers on their rights is paramount in empowering them to make informed financial decisions. Through workshops themed Non-Bank Financial Services (NBFS) industry series, community outreach programs, and partnerships with our MOU partners and like-minded organizations, we have actively sought to demystify financial services provision and ensure that consumers understand their rights.

Stakeholder Engagement: Consumer Education

One of our key initiatives this year was the launch of a series of educational campaigns tailored specifically for the diverse demographics that exist within Eswatini. These campaigns were designed not only to inform consumers about their rights but also to provide practical guidance on how to navigate financial products and services safely and effectively. By utilizing various platforms, such as social media, radio broadcasts, and community outreach events, we have successfully reached thousands of individuals who may otherwise remain unaware of their rights in financial services transactions.

Stakeholder engagement has been at the forefront of our operations. We have solidified a regular financial services providers' (FSPs) engagement forum where FSPs are urged to effectively make use of their internally established complaint resolution processes, where consumers can voice their concerns directly to them. This initiative has fostered a culture of transparency and accountability within the financial services sector, allowing us to address issues promptly while ensuring that consumer voices are heard.

Looking Ahead

As we reflect on our achievements over the past nine years, it is clear that collaboration has been key to our success. We are grateful for the cooperation from all stakeholders. Together, we are building a more informed public that can engage confidently with non-bank financial services. O**ur achievements are a testament to the dedication of our team and the increasing willingness of both consumers and Financial Services Providers (FSPs) to embrace a collaborative approach to dispute resolution.** The milestones we have reached are not just about numbers and statistics; they represent lives impacted, trust rebuilt, and a stronger, more resilient financial ecosystem for all emaSwati.

In conclusion, as we look forward to more years of service, let us continue this journey together—reaching new milestones while ensuring that every consumer in Eswatini is equipped with knowledge and support to navigate the financial services landscape.

Nondumiso Simelane
Ombudsman

"We have seen a significant increase in the number of disputes resolved. These resolutions result in compensation, redress, or a clear explanation, which helps to restore trust and confidence..."

Mandisa Mcanyana | Lead Adjudicator

FROM THE LEAD ADJUDICATOR'S DESK

Reaching Milestones Together: The Power of Alternative Dispute Resolution

This theme isn't just a phrase; it's a reflection of our collective commitment to fostering fairness and a stable financial services industry in our nation, which has had a significant impact on our work, particularly through the use of Alternative Dispute Resolution (ADR).

At the core of the OFS's mission is the belief that consumer complaints can and should be resolved without the need for lengthy, costly, and complex proceedings. This is where ADR proves to be not just an alternative, but the preferred mechanism for dispute resolution.

The Effectiveness of ADR in Consumer Complaints

The **effectiveness of ADR** lies in its inherent nature: it's a process that is **accessible, fair, and efficient**. Instead of a formal courtroom setting, we provide a neutral platform where financial services providers (FSPs) and consumers can engage. Our adjudication team thoroughly reviews each case based on its specific facts and legal merits.

This approach has yielded remarkable results. Over the years, we have seen a significant increase in the number of disputes resolved. **These resolutions result in compensation, redress, or a clear explanation, which helps to restore trust and confidence** in the non-bank financial services sector.

I extend my gratitude to the entire team at the OFS and our stakeholders who trust us to resolve their concerns. As we look ahead, we will continue to champion ADR as a cornerstone of consumer protection, ensuring that **"reaching milestones together"** remains a guiding principle for our work.

Mandisa Mcanyana

Lead Adjudicator

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.

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The Office of the Ombudsman of Financial Services (OFS) is an independent body whose purpose is to receive, investigate and make binding decisions on complaints against non-bank financial services providers (FSPs) licensed by the Financial Services Regulatory Authority (FSRA)

OUR VALUES

Independence

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

Accessibility

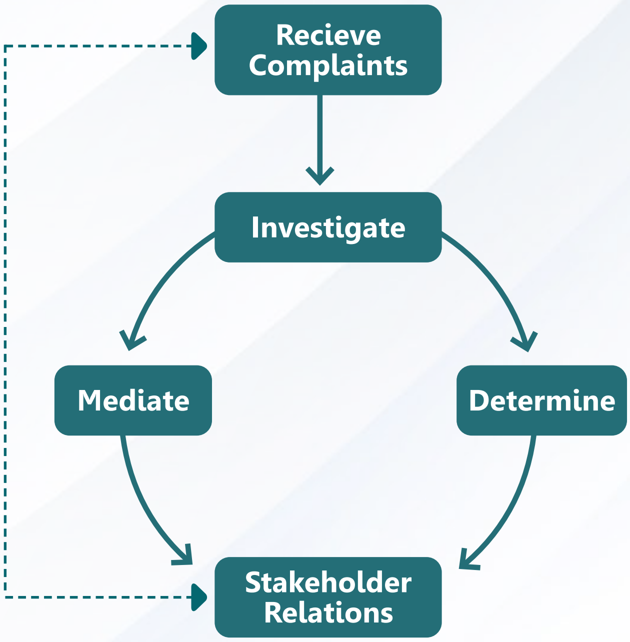
We provide a service available to all and our processes are less formal and easy to grasp.

Confidentiality

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

THE DISPUTE RESOLUTION PROCESS OVERVIEW

The Ombudsman is an independent function of the FSRA whose purpose is to receive, investigate and resolve complaints against authorised 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-ompliance 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

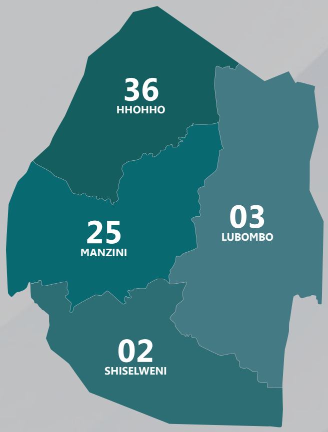


Figure 1. Complaints registration across the regions

In the financial year under review, a total of **66 complaints were registered, as illustrated by Figure 1 above.** This is a **substantial decrease from the previous (2022-2023) financial year, which recorded 84 complaints.** There were 36 complaints recorded from the Hhohho region, 25 were recorded from the Manzini region, while 3 were recorded from the Shiselweni region and 2 from the Lubombo region.

COMPLAINTS PER QUARTER

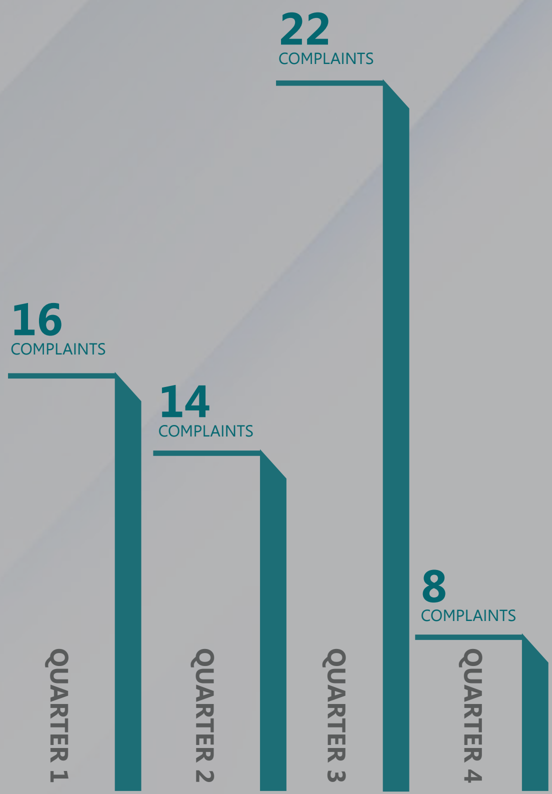


Figure 2. Complaints breakdown by the quarter

Of the 60 complaints that were registered, the highest number recorded was in the third quarter, with 22 complaints registered, as shown in Figure 2 above. The year had begun with 16 complaints registered for the first quarter; the second quarter experienced a decrease with 14 complaints registered. The fourth quarter saw a decrease with 8 complaints recorded.

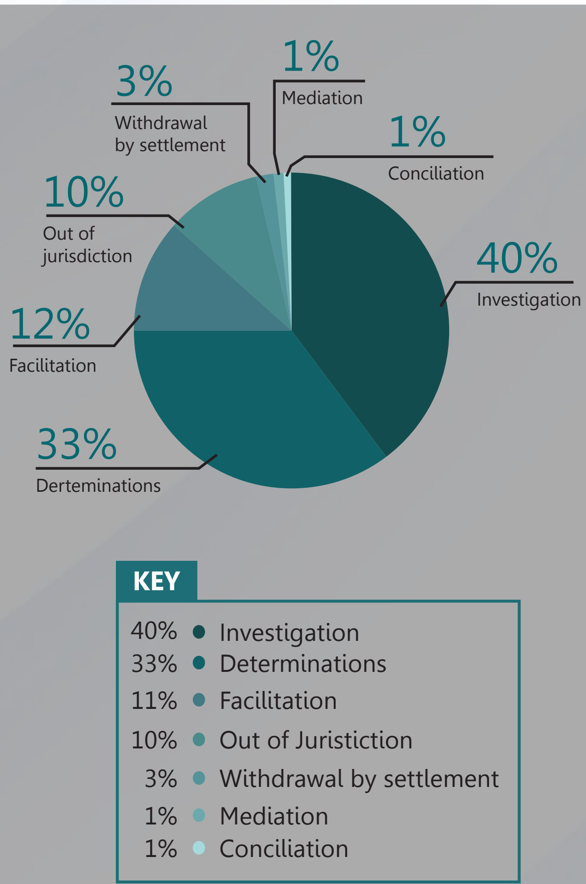


Figure 3. Complaints status breakdown

COMPLAINTS STATUS

Figure 3 highlights that in the 2023-2024 year, 33% of the complaints recorded were concluded by way of determination, 10% were found to be outside the jurisdiction of the Ombudsman, 13% were settlements (12% were resolved through facilitation and 1% were mediated), and 3% were withdrawn. 40% of the cases recorded for the year under review were still under investigation at the close of the financial year.

TYPES OF COMPLAINTS

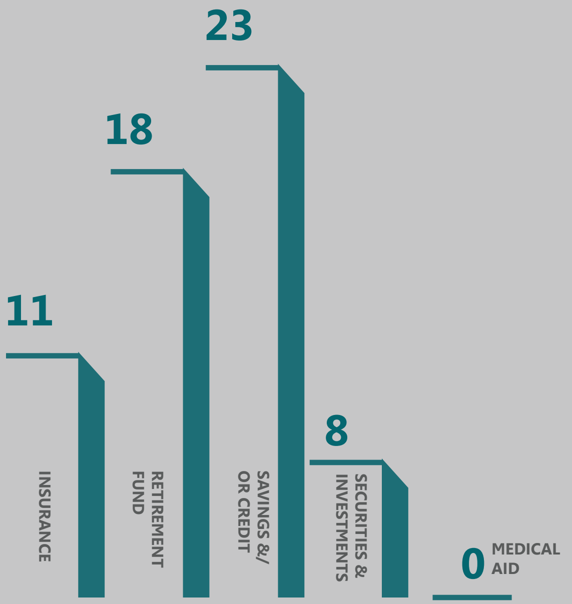


Figure 4. Different types of complaints received

The year under review received a high number of complaints relating to savings and/or credit, with 23 complaints as indicated in Figure 4 above. The Retirement Funds complaints category received 18, and Insurance had 11 complaints, with fewer complaints received from securities and investments, with 8 complaints, and no complaints were received on the medical aid category.

Of the 60 complaints received in this financial year, there were 35 males and 25 females whose complaints were registered, respectively, as shown in Figure 5 below.

GENDER STATUS

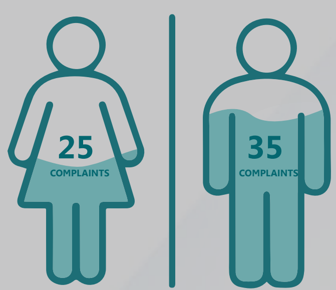


Figure 5. Distribution of complaints by gender

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"The Ombudsman's office actively cultivates partnerships with various organizations... These collaborations are formalized through Memorandum of Understanding (MOUs) and are crucial for achieving the Ombudsman's strategic goals and fostering productive relationships..."

STAKEHOLDER ENGAGEMENT AND CONSUMER EDUCATION

MEMORANDA OF UNDERSTANDING (MOU)

The Ombudsman's office actively cultivates partnerships with various organizations, such as the Conciliation, Mediation and Arbitration Commission (CMAC), the Central Bank of Eswatini (CBE) Ombudsman, the Eswatini Competition Commission (ESCC), and the Federation of the Disabled People in Swaziland (FODSWA). **These collaborations are formalized through Memorandum of Understanding (MOUs) and are crucial for achieving the Ombudsman's strategic goals and fostering productive relationships with key stakeholders.**

The Ombudsman works to operationalize key partnerships by:

Proactively identifying opportunities: This involves analysing emerging trends and potential business ventures to optimise collaborations that enhance innovation and problem-solving capabilities. For instance, the partnership between OFS and CMAC capitalizes on the widespread presence of CMAC branches across the country, allowing OFS to place its Complaint Forms in all these locations to effectively reach the public.

Strategically managing reputation: We achieved this by collaborating with diverse industry partners, like the ESCC and the CBE-Ombudsman, through different campaigns that aim to increase visibility, thereby promoting a transparent and responsive corporate culture essential to the functions of the OFS.

Mitigating stakeholder engagement risks: This is achieved by assessing and reducing potential risks before determining the appropriate level or method of engagement. The mitigation of stakeholder engagement risks is done through our aligned strategic plan risk register, where all the risks are identified.

Establishing clear engagement processes and communication guidelines: This attribute ensures consistency and clarity in all the OFS' interactions in both internal and external stakeholder engagements.

Monitoring and evaluating engagements: The Ombudsman identifies and implements suitable tools to enhance stakeholder management, allowing for the measurement of engagement effectiveness. In this regard, we developed a questionnaire as a tool to measure the impact of our engagements.

ENGAGEMENTS

Eswatini Green Indaba

The Ombudsman attended the Eswatini Green Indaba. Conceptualized around 'Green Financing in Eswatini', the overall objective of the Inaugural Climate Finance Indaba was to create awareness and understanding of the green opportunities available to mobilize private capital to finance climate action, promote a just transition, and meet Sustainable Development Goals. This Indaba was aimed at initiating discussions and consolidating potential partners to help advance the green financing initiative. The Indaba was centred around the following four key conversations:

- **Climate change**: National Context and what it means for the private sector.
- Unpacking Climate Financing with a focus on **Green Bonds and Carbon Credit Framework**
- **Environment, Social and Governance** Safeguards
- The Role of **Youth in the Climate** Agenda

OFS and the Bank Supervision Application Support Office (BSO)

To ensure that the OFS has an effective system for capturing complaints, including its own complaint process, a meeting was held with BSO officials. The goal of this meeting was to explore how the system could be better aligned with the functions and processes of the OFS. This collaboration sought to identify any gaps in the system's capabilities and usage, ensuring that it fulfils the needs and requirements of OFS processes.

Non-Bank Financial Services Industry Series (NBFS Series)

The NBFS Series aims to encourage the industry to abide by the provisions of their relevant industry codes of conduct, as well as promote awareness about and understanding of the mandate and processes of the Ombudsman. The series further seeks 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 in the sector. Towards this end, six (6) Savings and Credit Cooperative Societies (SACCOs) were capacitated about the role, mandate, and processes of the OFS.

The Eswatini International Trade Fair (EITF) 2023

The OFS took part in the 2023 EITF, which provided a platform where the OFS was able to exhibit its services, meet with stakeholders and enable informative interaction with consumers.

Customer Service Week 2023

Customer Service Week (CSW) represents a globally recognized initiative dedicated to acknowledging the vital role that service professionals play in the success of organizations and the satisfaction of their clientele. Established over three decades ago, this annual event serves as a strategic period for businesses to boost employee morale, enhance service quality, and foster stronger relationships with stakeholders. The OFS, in collaboration with the Eswatini Competition Commission (ESCC), the Eswatini Communications Commission (ESCCOM), and the Central Bank of Eswatini (CBE) Ombudsman, utilized this week to conduct targeted outreach programs at major industrial sites, including Rhodes Food Group, Montigny, and the Royal Eswatini Sugar Corporation. The primary objective of these activations was to bridge the information gap between regulatory bodies and the public, thereby managing expectations and increasing the visibility of these institutions. By engaging directly with employees in the Shiselweni and Lubombo regions historically characterized by lower complaint volumes, the OFS and its partners aimed to proactively educate the workforce on their respective mandates and processes to achieve stakeholder satisafaction.

World Consumer Rights Day Roadshow

This roadshow was a collaboration of the OFS with the Eswatini Competition Commission (ESCC), where the other MOU Partners and other like-minded entities were invited to participate in the Roadshow. The MOU partners and like-minded entities that were invited were:

FSRA

CBE Ombudsman

Conciliation, Mediation and Arbitration Commission (CMAC)

Eswatini Communications Commission (ESCCOM)

The Roadshow took 3 days, and we visited three regions through the towns of Nhlangano, Buhleni, and Siteki. The purpose of this roadshow was to raise awareness of consumer rights, as the commemoration of World Consumer Rights Day was on the 15th of March 2024.

Tinkhundla Visits

The Eswatini Competition Commission (ESCC) and the OFS partnered in the Tinkhundla Engagement Visits campaign. There was a media launch for the campaign, held in March 2024, where the Minister of Commerce, Industry and Trade, and the Minister of Tinkhundla Administration and Development were present. The visits began soon after the launch.

The Tinkhundla that were visited were the Timphisini Inkhundla (Hhohho Region), Mafutseni Inkhundla (Manzini Region), Nkwene Inkhundla (Shiselweni Region), and Matsanjeni North Inkhundla (Lubombo Region), respectively. The initial selection of the first batch of Tinkhundla that were visited was made by the Ministry of Tinkhundla Administration and Development. The goal is to carry out visits to all the 59 Tinkhundla centres so as to sensitize Emaswati on the different mandates, functions, and processes of our organizations.

CAREERS FAIR

In an attempt to engage with the future workforce, the OFS attended career fairs hosted by the Waterford KaMhlaba United World College of Southern Africa and U-Tech Technical and Commercial College to engage directly with pupils and promote financial literacy and consumer protection know-how from a young age.

This engagement is vital for both the pupils and the OFS, as it provides a unique platform to educate the high school pupils on the role of the OFS and the broader financial services industry. The engagement with these 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 personnel capacity, 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.

Bank Supervision Application (BSA) Training

The FSRA arranged refresher training for all technical staff, Management and EXCO on the use of the BSA System's automated environment.

The purpose was to establish gaps in the system's capabilities and utilization. The training aimed to enable technical staff to comprehend it, and the mapping of all workflows on the system. Included as part of the training was a complaints handling module that the OFS now looks up to in having an electronic complaints management system.

UCT/MiM Live-Online Advocates, Attorneys and other qualified legal practitioners mediation training course

The Lead Adjudicator, Adjudicator and Case Officer, attended the above mediation training. Mediation is one of three methods through which the Ombudsman fosters amicable resolution between the parties.

Data Protection Act Training

The Ombudsman invited the Eswatini Communications Commission (ESCCOM) to train OFS employees on the Data Protection Act of 2022. The training and it gave the OFS employees insight into how to manage and protect the data of parties to complaints.

Advanced Excel Training, Regent Business School

The OFS team underwent the Advanced Excel Training with Regent Business School to offer training to capacitate the employees with Advanced Excel skills. The staff that participated in the training were the Ombudsman, the Lead Adjudicator, the Case Officer, the Research and Communications Officer, and the Administrative Assistant.

INTERNATIONAL STAKEHOLDER

International Network of Financial Services Ombudsman Schemes (INFO Network)

The OFS is a member of the INFO Network, which is a worldwide association for financial services ombudsman schemes, 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.

INTERNATIONAL NETWORK
FINANCIAL SERVICES
OMBUDSMAN SCHEMES

The INFO Network Conference 2023 was held in Malaysia-Kuala Lumpur, co-hosted by the Ombudsman for Financial Services (OFS) and the Securities Industry Dispute Resolution Centre (SIDREC). The 2023 Conference marked a reconnection in-person of the INFO Network members' family, after a four-year-long absence of in-person discussions owing to the COVID-19 pandemic.

Themed, 'The future is here – no time to look away', and, as always, the conference agenda was packed with topics rich with engagement drive, coupled with the network family spirit of sharing experiences across members. The conference covered the following topics, among others:

- **Artificial intelligence and robots – now on board -** Discussions here covered considerations of applying artificial intelligence & robotic process automation to the practice of ombudsmen.

- **Fraud & scams – is there an antidote for this global pandemic? -** With an observation of fraud and scam complaints trending among most scheme members, the conference discussed what could effectively support our respective schemes' abilities to resolve these complaints.

Hot issues discussions

In line with the Network family's spirit to share experiences, this aspect covered discussions of trending complaint issues in respective member schemes, with sharing ideas on how these may be addressed.

- **Defining fairness – a dispute resolution dilemma -**This discussion touched on how respective ombudsman schemes applied this (fairness) fundamental principle of dispute resolution in the day-to-day execution of our duties and carrying out of our mandates. It further covered any challenges schemes may be faced with in this regard, sharing solutions from our respective experiences.

- **Staffing challenges post-pandemic -** The conference could not have shared enough among members without touching on the wealth of our experiences born by Covid-19, concerning hybrid working, remote management, attracting & keeping staff in our schemes, in the wake of the great resignation/ attrition or the great attraction and the great retention.

Key Takeaways

Takeaway on AI and robotics process automation, which the Ombudsman coupled with an extra (voluntary) session on 'Braving the new world', which came as a value add, as the Ombudsman grabbed the opportunity to receive from those who had traversed the path, where participants took a deeper dive into how one member scheme had begun the application of AI and Robotics to its dispute resolution operations. The key takeaway was the importance of collecting correct, accurate and appropriate data in one's dispute resolution process for the ability of suitable machine learning, come time to implement AI and robotics in our processes automation.

INTERNATIONAL STAKEHOLDER (CONT.)

A Neuro-Linguistic Programming approach to dealing with angry or emotional parties – Webinar

The OFS participated in a webinar on the Application of Neuro-Linguistic Programming to Dispute Resolution. The object of the webinar, the speaker of which was Professor Joel Lee of National University of Singapore, was to have this expert explain a Neuro-Linguistic Programming approach to dealing with angry or emotional parties in members' dispute resolution processes. This topic was in acknowledgment of apparently increasing numbers of consumers/complainants presenting as aggressive, emotional, or otherwise 'difficult' before processes of external dispute resolution (EDR) bodies.

INFO NETWORK TOWNHALL: Does early 2024 see you and/or your office breaking new ground?

The OFS took part in the member Townhall held virtually where members were requested to present on the theme as highlighted above "Does early 2024 see you and/or your Office breaking new ground?" The INFO Network, planning a theme or agenda for the 2024 conference in September, would take inspiration from the trending complaint issues from this Townhall and address these during the 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.

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 everyone by informing, 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.

Publication: Eswatini Observer

Date	Article
Apr 2023	**OmbudsDay: A Look at SACCO Membership**
May 2023	**OmbudsDay: Complaints - Handling Quarterly Update**
Jun 2023	**About the Ombudsman of Financial Services**
Jul 2023	**OmbudsDay: Medical Benefits and Pre-Authorisation - WHY**
Aug 2023	**OmbudsDay: The Youth and the Importance of Financial Literacy**
Sep 2023	**OmbudsDay: Customer Service Week 2023!!**
Oct 2023	**Customer Service Week 2023**
Nov 2023	**Let's Talk: Pre-Authorization of Medical Aid Benefits**
Dec 2023	**Season's Greetings: A Focus on Consumer Credit**
Jan 2024	**Know Your Policy: Start the Year by Reading and Understanding Your Policy Wording**
Feb 2024	**Consumer Focus: Financial Services Providers Must Consider Writing Policies in Plain Language**
Mar 2024	**It's World Consumer Rights Day! Will you be there with us?**

Publication: Times of Eswatini

Date	Article
Jul 2023	**Finance Supplement: The Ombudsman of Financial Services**
Aug 2023	**Personal Finance Supplement: Free. Fair. For All.**

Publication: INFO Network Newsletter

Subscribed Institution – INFO Network

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

Date	Article
Apr 2023	**Quality & Timelines – "a timeless tension" Survey**
May 2023	**Exploring Electronic Case Management**
Jun 2023	**The Ombudsman Market Research Exercise** The purpose of this article was to highlight the OFS' research exercise objectives.
Jul 2023	**Current Hot Issues: Member Survey**
Aug 2023	**The Ombudsman Complaints-Handling Quarterly Update** The purpose of this article was to highlight the Ombudsman's insights from the first quarter of the 2023/2024 financial year.
Oct 2023	**The Benefits of AI (Artificial Intelligence) in Dispute Resolution**
Nov 2023	**Customer Service Week: Consumer Education and Outreach**
Dec 2023	**Manzini Consumer Education Activation and Survey**
Feb 2024	**Quarterly Complaints Handling Report**

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:

Quarter	Platform	Consumer Education & Awarenes Information content posted	Page Followers	The highest Number of people reached through published content in one day	Number of Queries	Number of New Followers
QUARTER 1	Facebook	19	6, 517	35, 423	15	6, 089
	LinkedIn	1	364	2, 493	0	18
	X	0	0	503	0	0
QUARTER 2	Facebook	25	6, 555	3, 542	8	6, 127
	LinkedIn	12	413	2, 767	0	18
	X	0	0	503	0	0
QUARTER 3	Facebook	69	6, 588	1, 808	4	33
	LinkedIn	84	443	2, 582	0	30
	X	0	0	0	0	0
QUARTER 4	Facebook	109	6, 603	20, 882	5	15
	LinkedIn	206	504	2, 080	0	61
	X	3	22	68	0	0

FOLLOWER GROWTH PERCENTAGE

39% LinkedIn

1.32% Facebook

22% X

39%

OVERALL SOCIAL MEDIA GROWTH PERCENTAGE

528

TOTAL CONTENT POSTED

BEST PERFORMING PLATFORM (Facebook)

35,423
Highest
Single-Day Reach

Peaked
in the first
quarter

6,603
Follower count

MATTERS OF INTEREST: CASE STUDIES

DETERMINATIONS
Securities Investments

The Complainant made an investment of E1,000 000.00 (One Million Emalangeni) to the Respondent and it was supposed to be redeemed in two years at a dividend rate of 12.5% per annum. It transpired that when the payment was due the Complainant approached the Respondent but did not receive payment. Despite numerous visits, the Complainant only received payment once amounting to E 50,000 (Fifty Thousand Emalangeni) with the Respondent asserting that they are awaiting investments payout in South Africa. The Complainant is unhappy because he has not received his investment payout.

MAIN FACTS AS SUBMITTED BY THE RESPONDENT

The Respondent then avers by generalisation that through the tenure of the previous directors, several investments were made to various entities linked to them based in South Africa which at the time were presented as attractive with a yield of around 19% per annum.

That the Respondent through these directors were made to invest in these instruments for 3-to-5-year periods. In terms of the agreements, the Respondent was meant to receive monthly interest payments therefrom which have not been forthcoming, according to the Respondent. Further to that, the Respondent alleges that upon instruction from the Financial Services Regulatory Authority (FSRA), the Respondent has been looking to divest from these mentioned instruments since January 2022. That the Respondent received sporadic payments, insufficient to cover the obligations to their customers like the Complainant.

DETERMINATION AND REASONS THEREOF

The Ombudsman must determine whether the Complainant is entitled to the amount he alleges as redeemable after two years. The Ombudsman will also consider the conduct of the Respondent considering its obligations under the FSRA Act, 2010.

APPLICABLE LAW

The relationship between the parties is one of investment and this is a regulated activity. In issuing the decision, the Ombudsman will refer to submitted documents in support of the allegations. The principles of contract law will be under consideration in analysing the law and facts in this matter. At all material times, the Ombudsman will be guided by section 75 of the FSRA Act, 2010 which enjoins her to make decisions based on what is fair and reasonable in each case.

PRINCIPLES OF CONTRACT

The relationship between the parties is governed by the principles of the law of contract. The Ombudsman, in ascertaining whether there was an agreement between the parties, will investigate what constitutes a legally binding agreement and then determine whether there was an agreement between the parties. *JTR Gibson, South African Mercantile and Company Law, (2003)*, define 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, <u>without vagueness, each to the other and being of the same mind as to the subject matter</u>..."

It is 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 is no dispute that the parties in this case signed a contract. For this reason, the Ombudsman will find that there was a contract between the parties.

This is notwithstanding that the Complainant has not attached such a contract. The fact of the existence of the contract is an inferable fact based on the share receipt which stipulates that the Complainant is a registered holder of 1 000 000 (One Million) class B fixed Period Shares, as well as the Respondent's acknowledgment of the Complainant as "the above-named client..." in Respondent's response.

The share receipt further stipulates that the Fixed Period Shares are only redeemable after a period of 2 years, sold at a nominal value of E1 per share in the above-mentioned Building Society held at an interest rate of 12.50% per annum.

The law of contract must align itself with the dictates of statutes. Therefore, this contract must be considered against the Building Societies Act, 1962 and the FSRA, 2010.

At all material times, the Ombudsman will be guided by section 75 of the FSRA Act which enjoins her to make decisions based on what is fair and reasonable in each case. The convictions of the legal community have a tendency of influencing Judges who must adjudicate on issues of contract law, and the Ombudsman is no different from other legal scholars and practitioners. Such is the influence that the remarks of Sachs J, in Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) have, when he states that "the doctrine of sanctity of contract and the maxim pacta sunt servanda have through judicial and text-book repetition come to appeal axiomatic, indeed mesmeric, to many in the legal world." This is an example of how these principles influence the decisions of jurists.

A caveat subscriptor rule, a consequence that flows from the doctrine of freedom of contract, has and continues to play a cardinal role in the application of the law of contract, universally. The rationale for the continued recognition and implementation of the rule is said to give stability to written agreements or to enshrine an element sacrosanct to writing. This position has taken centre stage especially since the adoption and recognition of standardized contracts, or, as they are sometimes referred to, contracts of adhesion. The contract between the Complainant and the Respondent is a contract of adhesion.

DOCTRINE OF SUPERVENING IMPOSSIBILITY

According to the submissions by the Respondent, one reads an invitation of an inference that the investment amounts would not be paid to the Complainant due to the legal processes cited by the Respondent. This submission by the Respondent has the tendency to imply a supervening event. A supervening event is any event which causes the terms and conditions of a contract to be suspended or interrupted. Wherefore, the doctrine of supervening impossibility is utilized to illustrate the legitimacy of such an event and the legality thereof. The supervening impossibility of performance, in the South African law of contract recognizes a "general rule", which entails that performance is excused if the impossibility is brought about by vis major or casus fortuitus.

Supervening Impossibility of Performance – A Conceptual Conundrum and Restatement of Principles – Jacques Du Plessis. Vis major means irresistible natural occurrence that causes damage or disruption, and the latter Latin term means a fortuitous event or a loss that is not caused by human fault.

According to Glencore Grain Africa (Pty) Ltd v Du Plessis NO and Others [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002) , if provision is not made contractually by way of a force majeure clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Moreover, for this context, force majeure means unforeseeable circumstances that prevent someone from fulfilling a contract. In terms of this Latin term, this takes the form of a contract.

According to **LAWSA Vol 5(1) First Reissue para 160,** "The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a peculiar contracting party because of his personal situation, that is, if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.

Furthermore, Scott JA, in Transnet Ltd v The MV Snow Crystall 2008 (4) SA 111 (SCA) held that, "In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied".

In Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd 2000(4) SA 191 (W) at 198 D – E, it was held by Flemming DJP that "Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable".

It should be noted that according to the above-mentioned case, "for one to rely on the defence of supervening impossibility, the obligation must be objectively impossible due to unforeseen events, and not merely frustrated or subjective.

APPLICATION OF LAW TO THE FACTS

- From the documents submitted to the Ombudsman, the following has been established as fact:

- The Complainant had an investment relationship with the Respondent as shown in the share receipt in support of the complaint.

- The investment amount was E1 000 000 (One Million Emalangeni)

- The reasons which have been advanced by the Respondent are that several investments were made to various entities linked to the Respondent based in South Africa which at the time were presented as attractive with a yield of 19% per annum. The Respondent was made to invest in these instruments for 3 – 5-year periods.

- The Respondent was meant to be receiving monthly interest payments therefrom which have not been forthcoming and upon instruction of the Financial Services Regulatory Authority (FSRA) they made strides in disinvestment from these instruments.

- The Respondent has received sporadic payments over the period which are insufficient to cover the Respondent's obligations.

- A decision was then taken to enforce the Respondent's rights which is a process that is currently underway.

It should be noted that the gist of the Respondent's response encapsulates the main reason the payout cannot be honoured. The Ombudsman acknowledges all strides that the Respondent alleges to have taken in pursuit of the recovery of the funds, but such efforts do not negate the implementation of the agreement as per initial contracts.

It should be noted that by applying the principles of supervening impossibility to the facts, it cannot be concluded that the Respondent has established the impossibility of performance as a legally cognizable defence. It should be noted, however, that the Respondent has not expressly invoked the doctrine of supervening impossibility, but it is impliedly read into the Respondent's submissions by the Ombudsman. It should be noted even further that the Respondent has failed to submit any documentary evidence to support its submissions. Secondly, the impossibility with which the Respondent impliedly aims to rely on is subjective. Consequently, the Respondent's financial position is not, as required by law, absolute.

For the doctrine of supervening impossibility to apply, the circumstances ought to have been unforeseen. The Ombudsman hereby rejects this submission because the Respondent is supposed to have at least foreseen the possible ramifications of their investment decisions. Hence the potential prejudice which the Complainant experiences.

FINDINGS

The Ombudsman finds that the investment is indeed redeemable because the redemption period lapsed as confirmed by the share receipt.

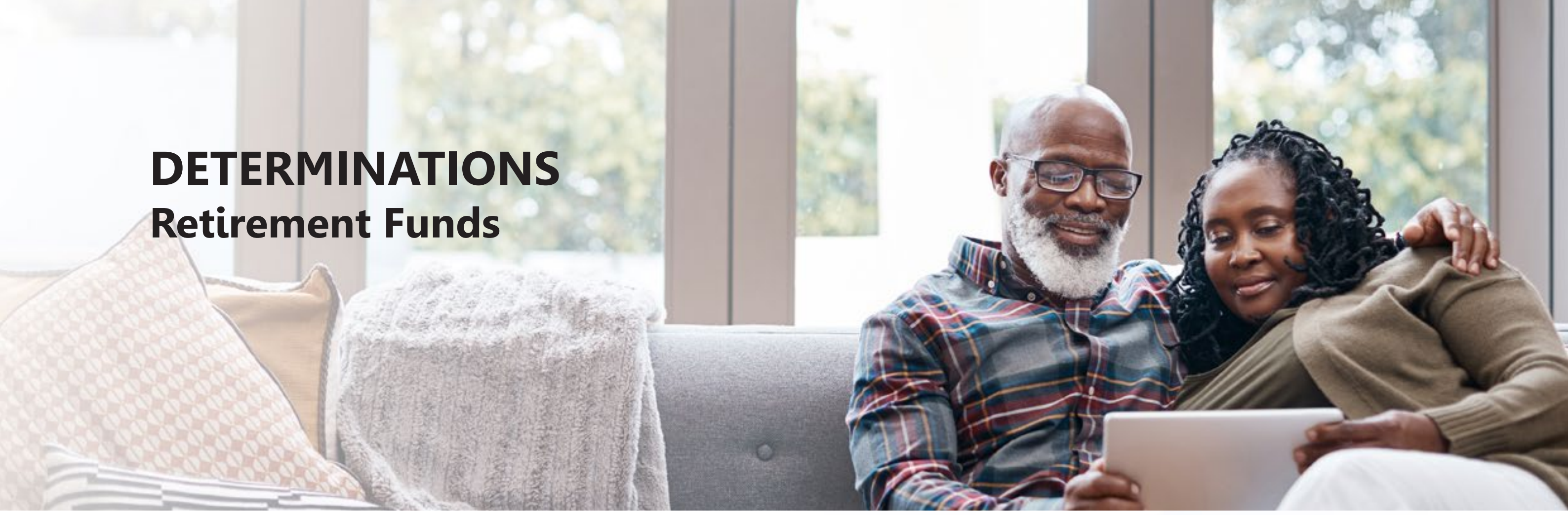
The Ombudsman finds that the Respondent ought to pay the investment value in line with the maturity date as stipulated, including all interests, subject to the terms of the agreement.

ORDER

The complaint is upheld.

The Respondent is ordered to pay the Complainant the investment value of the investment subject to the investment agreement as of the date of receipt of this order.

The investment amount should be paid with interest at the rate of 9% per annum from the date of maturity.



DETERMINATIONS
Retirement Funds

The Complainant was employed by an employer subscribing under the Respondent. During this period, the employer deducted from the employee and also made employer contributions to the fund and sent these payments to the Respondent. After the contract ended, the Complainant sought to claim benefits from the Respondent but received only the total contributions made, without any accumulated interest.

The Respondent in his response asserted that the payment was processed according to the provisions outlined in Respondent's Rules, which stipulates that a certain category of employees is ineligible for membership in the Fund.

The Respondent stated that the refund processed was in accordance with such rules, which provides for refunds of excess contributions to be made to either the employer or employee. The Respondent confirmed that a total of E28,640.00 was thus refunded to the Complainant, which included contributions from both the employer and employee, as the employer had consented to the employer contributions being paid to the employee. However, it was noted that the amount paid was only the contributions and interest was not included in the refund, because the employee did not qualify or fell into the category of employees who were ineligible to be a member of the Fund.

The Complainant contended that the Respondent, as an Accountable Institution, was obligated to conduct due diligence and verify the identities of its members during the onboarding process. He argued that part of his personal identity particulars should have raised suspicions regarding the category of employees he fell under. Furthermore, the Complainant pointed out that the Respondent had collected the contributions, invested those funds, and generated profits from them.

ISSUE

The central issue in this case revolved around whether the Respondent acted fairly in denying the Complainant the interest accumulated from the contributions.

RULES

The matter at hand is a retirement fund matter and is thus governed by the Retirement Funds Act of 2005 and the Respondent Fund Rules.

The Retirement Funds Act of 2005

The Retirement Funds Act of 2005 (RFA) governs various types of retirement-related funds, including pension and provident funds. It outlines statutory contributions for employees, clarifying that when an employer makes contributions to a provident fund on behalf of an employee, the legal relationship is primarily between the employer and the fund itself, rather than directly involving the employee.

Correspondingly the RFA, in its definition of an "employer", provides that:

> "(a) in the context of retirement funds referred to in paragraph (a) of the definition of retirement funds, [it means]… a person representing the person or group of persons whose employees are members of the retirement fund or a person representing the governing body of an organisation whose employees are members of the retirement fund; or
>
> (b) in the context of retirement funds referred to in paragraph (b) of the definition of retirement funds, [it means] … a person representing a business carrying on the business of a retirement fund."

"Total interest" means:

> ... (b) in the case of a retirement fund where a separate account is kept of each member's share of the fund for retirement purposes, <u>and which account is made up of an accumulation of contributions and investment returns thereon, the total amount of the member's account and any other amount which the member may become entitled to from the fund.</u>

The Respondent Fund Rules

Within the provisions of the rules of the Respondent are some key definitions relevant to this case, including the definitions of "member" and "eligible employee," which are essential for interpreting the roles and responsibilities outlined in the rules.

The rules of the Respondent highlight the need for the registration of contributing employees and members who may be considered eligible according to these rules.

APPLICATION

Eligibility

The rules of the Respondent provide that-

> 'any person employed under a contract of service becomes an eligible employee and then excludes from eligibility a casual employee, or a person who is not a citizen of the country or a person who is an employee in an excepted employment mentioned within the rules as not being so eligible'.

In essence, among other things, in terms of the Rules of the Respondent, non-citizens of Eswatini are not eligible for contributions to the Respondent Fund as per the Respondent Fund Rules.

Benefits and interest accrued by ineligible members

In terms of a provision of the Rules of the Respondent, the Board is responsible for periodically determining the interest rate applicable to members' accounts, which is calculated on the outstanding balances at the start of each financial year. This interest is then credited to the accounts of contributing members, indicating that it specifically pertains to those who hold accounts within the Fund.

The Respondent stated that, based on the Complainant's not being an eligible member, on account of his not being a citizen of Eswatini, the Complainant was not entitled to the benefits that were accrued from the contributions paid to the Respondent on behalf of the Complainant by his employer. That the Complainant, was therefore, not entitled to interest but to the refund that was accorded to him.

When the Ombudsman examined the Rules of the Respondent, it became clear that the relationship between the Employer and the Respondent involves the Employer making contributions on behalf of employees, as indicated by one of the tools (a Form) by which employers register with the Respondent. This form creates an impression that all employees are automatically accepted into the Respondent's system, as it lacks fields for vetting eligible versus ineligible employees. Notably, there were no requirements for employers to disclose the citizenship status of registered employees, nor did the form include any warnings against registering non-Eswatini citizens. Furthermore, the Respondent had not provided any mechanisms to inform employers about restrictions on certain individuals from contributing to the Fund. The Rules of the Respondent specify that non-EmaSwati individuals are excluded from eligibility, yet the Respondent continued to accept contributions from these excluded employees without providing clear communication to the Employer regarding their ineligibility.

The Ombudsman held that the responsibility for administering the Rules of the Respondent lied with the Respondent, who was expected to provide adequate guidance to employers regarding the proper registration of eligible employees in the Fund. The Ombudsman deemed unfair and unreasonable to hold the employee (the Complainant) accountable for his registration as member or for contributions made by his employer over a decade, as he could not have anticipated any inaccuracies in these contributions. The Ombudsman also considered it unjust for the Respondent to withhold any interest accrued on these contributions given that the Complainant was unable to prevent this situation. The Ombudsman also found that the Respondent was responsible for administering the Rules, but failed to provide adequate and reasonable guidance to the Complainant's employer. This lack of guidance led to the improper registration of the Complainant and the payment of contributions into the Fund for an employee deemed ineligible by the Respondent's Rules, particularly concerning the period during which these contributions were made.

Guidance was sought in the case of **V v V** where the court looked at the interpretation of contracts. The judgment summary provides a useful synopsis of the approach followed namely:

Distinguishing descriptions

In the current matter, the exclusion from eligibility for membership was not clearly set out in the Respondent's registration tools (Forms), which required personal details such as the employee number, first name, surname, the date of birth, personal identity number, graded tax number, contribution, supplementary contribution, monthly pension salary, the gender and mobile number. None of these required fields would clearly distinguish the Complainant from other employees who happen to be eligible.

The exclusion was not reflected in the overall actions of offer and acceptance that took place between the Complainant and his employer. Neither did it come out clear in the Fund membership registration of employees between the Complainant's employer and the Respondent.

The Complainant had been contributing to the Respondent Fund since 2000 without any objections, and thus, in the interest of fairness, he was entitled to receive interest on those contributions.

The Respondent's acceptance of the monthly contributions bred confusion within the confines of offer and acceptance despite the Respondent's delineation of eligible and non-eligible members.

FINDINGS

1. The Ombudsman found that the relationship that exists was between the Respondent and the Contributing Employer. The Complainant's relationship with the Respondent was only through the employer and for all intents and purposes, the Complainant formed part of the contributing pool.

2. The Ombudsman found that the Respondent Fund was established to manage and administer retirement benefits for all employed Eswatini citizens and therefore the Complainant's citizenship disqualified him from obtaining full benefits. The Ombudsman further found that the Respondent's lack of screening guidance to Complainant's employer at employee registration for Fund membership was a contributor to the mishap of contributions being paid to the Fund on behalf of the Complainant

3. The Ombudsman also found that the interest that the Complainant requested was interest that he was fairly and reasonably entitled to as a contributor in the totality of the circumstances of this case.

ORDER

1. The complaint was upheld.

2. The Respondent was ordered to pay the Complainant the interest requested.

DETERMINATIONS
Insurance

The Complainant had taken up insurance cover with the respondent. Pursuant to this, he submitted a claim to the Respondent for a motor vehicle collision. However, the Respondent contended that the insurance policy had expired at the time of the incident, leading to the claim's denial. The Complainant attributed this to the Broker's failure to communicate any non-renewal of the policy, and since premiums were paid monthly without cancellation instructions, the Complainant believed his coverage was still active. He was thus dissatisfied with not receiving proper notice regarding his policy status, which caused him to assume he was insured during the event.
In response, the Respondent noted that premiums for two (2) months were unpaid due to dishonored debit orders; the policy had not been renewed for the current term despite communicated intentions through the 2nd Respondent (the broker). Renewal notices were sent in October of the previous year with no follow-up received. That the Complainant only paid outstanding premiums in February of the current year, but coverage had expired in December of the previous year, necessitating payment for renewal.

The 2nd Respondent, an insurance broker, asserted that it was solely the client's responsibility to manage and ensure the accuracy of all monthly premium payments. The broker claimed that they were not informed of any financial issues by the insured, which resulted in missed premium payments up until the accident in February 2024.

ISSUE

Whether the missed premiums justified repudiation of the claim at the instance of the Complainant, and whether this exonerated the 1st Respondent from the payment of any claim.

THE APPLICABLE LAW AND RULE

The relationship between the parties was based on insurance, which is governed by the Insurance Act of 2005. It is well-established that insurance operates as a contract. This means that the insurance contract is the main tool used to manage the interactions between the parties. According to (Prof) MFB Reinecke (2016), an Assistant Ombudsman at the Office of the Ombudsman for Long Term Insurance, in his article titled "INSURABLE INTEREST IN THE CONTEXT OF LONG-TERM INSURANCE":

> *"The authorities simply emphasized that a contract of insurance is a contract to transfer a risk threatening the patrimony of the insured. This implied that the insured must prove an interest upon the insured event to prove that he has in fact suffered a loss..."*

The policy document (insurance agreement) is of critical importance when it comes to understanding the relationship between the parties. In issuing this decision the Ombudsman referred to case law, policy documentation, and the relevant correspondence exchanged between the parties.

INSURANCE ACT NO. 7, 2005 (the Act)

Section 51 of the Act stipulates:

(1) *Any person who receives payment of a premium in bank notes or coins shall issue a written receipt for the payment.*

(2) *The receipt referred to in subsection (1) shall contain in print or stamp the name of the institution that is receiving the payment*

that any person who receives payment of a premium in bank notes.

For the purposes of this complaint in question, the premiums were being received through a debit order basis.

Section 63 (3) of the Act stipulates:

(2) *A broker shall, remit to the insurer premiums due under subsection (1) within sixty days of the receipt of the premiums.*

(3) *A broker shall, prior to the remittance in terms of subsection (2) deposit all premiums received from a client in a separate trust account.*

The previous sections highlight that premiums should be paid on time. Additionally, the 2nd Respondent stated that it was the client's responsibility to ensure that all monthly payments were made correctly and efficiently. This meant that the 2nd Respondent was not responsible for making any payments. All premiums were paid directly to the 1st Respondent.

THE POLICYHOLDER PROTECTION RULES, 2014

According to clause 12:

(1) An insurer shall ensure that any debit order for the payment of premiums to the insurer has been drawn solely in favour of the insurer and has been signed by the premium payer. This has also been satisfied according to the UGI Motor Proposal Form which is the contract document.

Clause 15:

(1) A policy shall provide for the period of grace for the payment of not less than 30 days after the relevant due date.

The policy shall specify the consequences of late payment of premiums, including the treatment of claims incurred during the grace period.

The rules about policy protection are clear when it comes to late premium payments. In this case, the complainant's policy expired because they did not pay their premiums for November and December 2024. If a payment is missed, the first respondent should have informed the complainant about the missed payments. According to the Respondent's information, renewal notices were sent to the broker in October 2023 that included the policy in question. This communication was meant to help with reference. However, even though this notice was sent, it is not clear if the 1st Respondent informed the 2nd Respondent or the Complainant about the missed premium payments. Therefore, based on what the 1st Respondent had said, It could be concluded that according to the submissions of the 1st Respondent, that "upon reviewing the details of the policy we noted that the premiums for the period from November to December 2023 were outstanding at the time of loss following unhonored debit order", it can be deduced that this review took place upon the report of the accident. Therefore, it could be concluded that neither the 2nd Respondent nor the Complainant were notified that the Complainant's premiums were in arrears.

According to the clause 15 as highlighted above, the grace period ought to have covered the active state of the policy till the end of November 2023. This meant that if the insured event had taken place within the month of November 2023 even though the premiums had not been paid by the insured, the 1st Respondent ought to have satisfied the claim for the Complainant. However, the insured event took place on 14 February 2024 after the cover had expired.

Barkhuizen v Napier 2007 (5) SA 323 (CC) is an example of a case where there was a test in deciding whether a time limit clause was contrary to public policy. There is no express provision in the policy that speaks on the grace period for this policy in question. However, in the absence of the same, the standard was subjected to the relevant legislation or rules. It should be noted that when the grace period lapsed, the Complainant still did not pay his premiums.

The Complainant avers that the 2nd Respondent "being the Broker, had not advanced any communication of not renewing the policy as it was on a monthly ... debit order basis, and ran continuously unless an instruction to cancel was given". According to the submissions by the 2nd Respondent, renewal was subject to the settlement of the premiums which was the sole responsibility of the Complainant.

REPUDIATION

In summary, the reason the 1st Respondent rejected the claim is that on February 14, 2024, when the loss occurred, the Complainant did not have an active insurance policy with them. It is important to point out that the 1st Respondent did not inform the Complainant about any missed premium payments. After the grace period ended, the 1st Respondent should have notified the Complainant that their policy was canceled, but this notification did not happen. Therefore, because they failed to communicate about the cancellation, the policy should still be considered valid. Typically, an insurance policy specifies a deadline for paying premiums. However, if such a deadline is not provided, as mentioned earlier, the grace period can be used to support this argument. Thus, it is clear that the 1st Respondent did not communicate any default in payments as previously stated.

Moreover, cancellation of the policy was not communicated to the Complainant. For cancellation to be effected, there should have been an act by the 1st Respondent to ensure that the Complainant is knowledgeable of the cancellation. The recording of default in premiums was not sufficient to establish cancellation. This is confirmed by the fact that the 1st Respondent accepted the premiums for the policy on February 2024 after the insured event in question and after lodging the claim. However, even though an insurance policy may not be revived ex post facto, this signifies that the policy was still active as cancellation had not been communicated to the Complainant.

It should be concluded that according to **Hepner v Roodepoort Maraisburh Town Council 1962 (4) SA 772 (A)** Steyn CJ said:

"*There is authority for the view that in the case of waiver by conduct, the conduct must have no reasonable doubt as to the intention of surrendering the right in issue (Smith v Momberg 1895 (12) SC 295 at p 304*".

It should be noted that the 1st Respondent had the right to cancel the policy after the grace period but elected not to do so. The numerous reminders for the non-payment do not automatically amount to cancellation. However, the expiration of the insurance period is sufficient reason for repudiation.

FINDINGS

1) The Complainant bears the responsibility for timely payment of premiums.

2) The Policyholder Protection Rules stipulate that failure to make premiums within the stipulated time entitles the insurer to cancel the policy.

3) The Insurer's failure to cancel the policy meant that the policy remained in force, entitling the insured to the benefits that ought to accrue to the insured.

4) The contract lapsed due to expiration of the period of insurance, the repudiation ought to have been by virtue of that fact, solely.

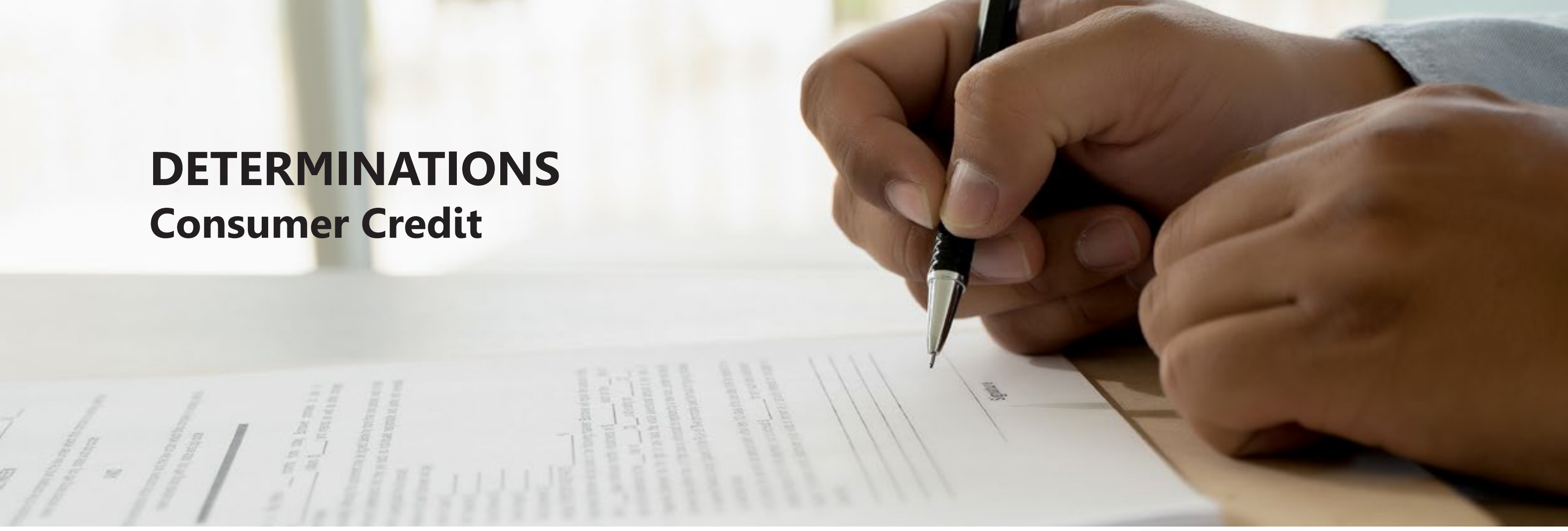
5) The receipted premiums for the months in arrears were wrongfully collected since the premiums ought to have been paid within the period of insurance.

THE ORDER

1) The complaint was partly upheld.

2) The 1st Respondent was ordered to refund the Complainant the premiums for the 2 months received.

3) No order was made to the 2nd Respondent.



DETERMINATIONS
Consumer Credit

The Complainant became unemployed in 2012 while still repaying a loan from the Respondent. In 2018, while employed as a contract teacher, the Respondent debited the Complainant's account without the Complainant's consent.

Following a meeting between both parties, the Respondent reimbursed the Complainant. During the COVID-19 pandemic, the Respondent initiated a stop-order at the offices that processed the salary of the Complainant (the so-called source deduction) for an amount of E164.94 without obtaining prior approval from the Complainant. On May, 2023, two unauthorized debit orders of E500.00 (Five Hundred Emalangeni) were effected from the Complainant's Bank account, which he had not disclosed to the Respondent.

In response the respondent stated that Complainant was granted a loan of E48,300 to be repaid over 60 months with monthly payments of E1,860. That deductions from the Complainant's account were made until around May 2013, based on a letter indicating approval for deferred retirement from Complainant's employer. However, the Respondent maintained that this did not absolve the Complainant from repaying the loan. In 2018, upon discovering that the Complainant had resumed earning an income, the Respondent initiated a debit order on Complainant's account as permitted by the Loan Agreement.

The Respondent further stated that it was authorized to draw funds from the Complainant's account and obtain banking and employment information. A debit order of E2,860 was processed on the Complainant's account, leading to a meeting with the Respondent's CEO and CFO where resolutions were made. Following the meeting, the Complainant did not make any payments regarding the new arrangement until November 2020. The Respondent claimed that reminders to the employee to make a payment were met with insults. The Respondent then initiated a debit order on the Complainant's Employer's Deduction System for E164.00 (One Hundred and Sixty-Four Emalangeni), which was less than the required installment of E1860 (One Thousand Eight Hundred and Sixty Emalangeni).

In his reply, the Complainant stated that: He did not voluntarily retire; he was forced to do so and informed the Respondent, who did not respond. That the Respondent was unauthorized to deduct money from his other Bank account as he had not provided the account number or consented to the deduction. That if the Respondent's actions were legal, they would not have refunded him the money. The Complainant noted that the Respondent's CEO apologized for the deduction upon learning of his unemployment. He deemed that the implementation of a stop-order on Complainant's Employer's deduction system without his consent was illegal. The Complainant requested that written consent for any deductions from his accounts should be obtained from him first.

ISSUE

The issue was whether it was lawful for the Respondent to make deductions from the Complainant's account.

THE RULE & APPLICABLE LAW

The relationship between the parties involved consumer credit, with the Complainant being the consumer and the Respondent as the credit provider. This relationship is governed by the Consumer Credit Act, No. 7 of 2016 (the Credit Act), which regulates consumer credit activities. The primary purpose of this Act is to regulate consumer credit and protect consumers' rights within this domain. Consequently, the Credit

Act ensures that the Complainant's rights are protected while overseeing the consumer credit sector.

The pertinent provisions in the Credit Act relate to the following themes:

Credit agreement

In terms of section 20 of the Credit Act, there must be an agreement between the parties. This Act is consumer eccentric in so far as it seeks to promote consumer rights within the credit industry. Section 20 (1) therefore provides that a credit agreement is:

> "an agreement where the credit provider agrees to grant a credit of any type requested by a consumer and the consumer accepts that credit from the credit provider."

The parties in this matter had entered into a credit agreement before the Credit Act became law, and such was to be dealt with under the Act. Further, the loan was advanced and persisted in the new credit legal dispensation, as section 113 is pertinent and provides:

> "An existing credit agreement entered into in terms of any other law and subsisting immediately before the commencement of this Act shall continue to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Act."

The agreement was entered into in 2010, before the Credit Act commenced. However, the above section does make transitional provisions, and the agreement would then be construed under the Credit Act. It became important to note that neither of the parties challenged the validity of the agreement per se, and as such it was not necessary for the Ombudsman to pronounce on the legality or otherwise of the said agreement.

PAYMENT

The parties involved in this credit agreement entered into a contract for a specified duration. The Respondent provided the credit, which the Complainant accepted, with repayment scheduled over sixty (60) months. Consequently, the consumer was required to repay the loan according to the terms of the credit agreement. The Complainant had an obligation to service the loan as stipulated in their agreement.

Each party was expected to act within the perimeters of the credit agreement. In terms of the Loan Agreement, that was signed by the Complainant, the period of 5 years (60 months) appeared as the loan period. The Complainant did not meet the requirements set out, to which a new agreement was entered into where the Respondent then offered a 50% discount. The Complainant again failed to honor this agreement, which had conditions of revocation in the event of failure to adhere to the stipulations.

While there was contention on the deductions from the Complainant's accounts, all the documents presented indicated that all the parties were aware of the rate of repayment.

Fisher J in **Njolomba** and Another1 states;

"Moseneke DCJ writing for the majority in Nkata, had the following to say in relation to this new dispensation created by the National Credit Act (which is in the same spirit as the Credit Act):

"The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible — particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality..."

According to documentation submitted by both parties, the initial loan taken by the Complainant was set aside in favour of the New Agreement. The sentiments of Fisher J above where he states, "not only rights but also responsibilities … they must act within the constraints of the statutory arrangements … particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults" ring true in the current matter as the Respondents acted in a reasonable way by allowing a 50% discount when the Complainant experienced financial difficulties.

The Contractual agreement

The Complainant entered into a contract with the Respondent, which contract states that the Complainant will pay off the loan from the Respondent. The relationship is one of offer and acceptance.

Ngcobo J in **Barend Petrus Barkhuizen v Ronald Stuart Napier** enunciated on freedom of contract and stated at para [57]:

"On the one hand, public policy as informed by the Constitution requires in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* as … noted gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity." (own emphasis)

In this case, the Complainant signed a loan agreement that confirmed their debt to the Respondent. The agreement allowed the employer to deduct payments directly from the Complainant's salary or other forms of remuneration and stated that no deductions could be delayed or withheld for any reason.

The agreement was signed by the Complainant on September 9, 2010, indicating that they were aware of its terms. The signer beware rule emphasizes the importance of reading documents carefully before signing. Due to the Complainant's failure to make payments, they took an active role in negotiating changes to the repayment terms.

To this effect in the case of National & Overseas Distributors Corporation (Pty) Ltd v Potato Board3 it was stated: -

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake would have to be reasonable, and it would have to be pleaded.

The Loan Agreement signed by the Complainant includes a clause (2.5.1) that indicates the number of instalments based on the assumption that payments will be made according to the schedule; any delays in payment may lead to additional instalments to recover overdue interest and fees, which the Borrower agreed to. The Complainant reported that in 2023, his account was debited twice within one month after he failed to adhere to a new payment arrangement made with the Respondent's CEO and CFO. These deductions were consistent with the Loan Schedule outlined in their original agreement.

Novation

In **Tauber v Von Abo** the Court stated that

"novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation". This simply means in the case of the Complainant, the original contract that was signed on the 9th September 2010 was replaced by the New Payment Arrangement signed on the 11th October 2018.

In **Swadif v Dyke**, Trengove AJA at 940G states that: "In our law there are two forms of novation, namely [voluntary novation] and [compulsory novation]. Voluntary novation has its origin in contract. Novation, in this sense, is essentially a matter of intention and consensus. When parties novate, they intend to replace a valid contract by another valid contract. Compulsory novation, on the other hand, takes place by operation of law;

it arises out of judicial proceedings between the parties whose rights and obligations are in issue between them.

The Loan Agreement, specifically Clause 2.5.1, indicates that voluntary novation occurred, and despite the terms outlined in the New Agreement, the Complainant failed to make payments to the Respondent. According to the New Agreement, if the Complainant does not pay the discount, they will be contacted to establish a debit order or another payment arrangement, resulting in forfeiture of the discount. The Complainant claims they were not contacted before debit orders were initiated. The New Agreement explicitly states that failure to comply with its terms will lead to forfeiting the discount.

FINDINGS

The Ombudsman found that the Complainant defaulted in his repayments. The Complainant had initially borrowed an amount of E48,300.00 (Forty-Eight Thousand Three Hundred Emalangeni), and was unable to fully discharge his debt as an amount of E30,104.03 (Thirty Thousand One Hundred and Four Emalangeni Three cents) was his outstanding balance when he was afforded a discount under a New Agreement.

1. The Ombudsman found that the Complainant failed to adhere to the conditions of the New Agreement and therefore forfeited the discount.

2. The Ombudsman found that the Complainant was indebted to the Respondent and the Respondent did not owe the Complainant

THE ORDER

1. The Complaint was dismissed.

2. The Complainant was ordered to pay the balance due to the Respondent, being the outstanding balance that would be stated by the Respondent.

3. The Respondent was ordered to revise its loan account statements to clearly reflect the outstanding balance and to provide proof of the deductions made.

OMBUDSMAN

OF FINANCIAL SERVICES

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