In the matter between:

THE COMPLAINANT

and

FINANCIAL SERVICE PROVIDER **RESPONDENT**

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 ("THE FSRA ACT").

INTRODUCTION

1. This complaint relates to consumer credit. The Complainant is the complainant, and the Respondent is Financial Service Provider. The Respondent is a licensed financial services provider in terms of the FSRA Act, 2010.

THE COMPLAINT

2. On 13 September 2019, the Complainant submitted a sworn statement of her complaint (the Complaint Form). The complaint form was supported by documents. The following are some of the documents:

Document	Dated
Letter to Respondent – Request for Review of Loan Repayments	3 July 2018
Annexure "A" – Loan Repayment History	As of 30 October, 2017
Annexure "B" Loan Repayment History	As of 31 August, 2019

3. The main facts to be gleaned from the complaint as articulated by the form are as follows.
   3.1.1. The complainant was loaned an amount, the sum of E40 000 – 00 (forty thousand Emalangeni).
   3.1.2. The loan was repayable within a determined period (5 years).
   3.1.3. The repayment instalments were a hybrid of source deductions and a debit order. (E901.00 and E349.00 respectively).
   3.1.4. The loan balance has not reduced as expected and there are discrepancies between the loan balances.
   3.1.5. The loan period has extended from its initial expiration date (on or about April 2019).

3.1.6. Respondent unilaterally changed the date of source deduction from the 24th day of the month to the 19th day of the month thus burdening Complainant with bank charges.

THE REPLIES / RESPONSE

4. On 25 October 2019, the Respondent submitted a response to the complaint. The response had several supporting documents, including,

Document	Dated
Loan Application Form	28 February 2014
Authorisation – Salary Deduction	28 February 2014
Letter to Respondent – Recommencement of Debit Order	15 June 2017
Amortisation Schedule – 60 months	N/A
Annexure "B" Loan Repayment History	As of 31 August, 2019
Bank Statement	27 September 2019

4.1. The Response – the following facts can be gleaned from the Respondent's defence

4.1.1. The Complainant had undertaken to pay E1250.00 per month in the liquidation of the loan.

4.1.2. There were, however, underpayments which, in the account of interest levied on the remaining balance, extended the period of the loan.

4.1.3. An amortization schedule was submitted to indicate how the loan would have been reduced but for underpayments.

4.1.4. The source deduction was pegged to Complainant's payday as from time to time determined by Complainant's employer.

THE REPLIES

5. The replies from both parties seem to seek clarity than provide facts rebutting the other party's narrative. There are no new issues coming out of the replies submitted. Therefore, the complaint is primarily covered by the complaint form and the response.

DETERMINATION AND REASONS THEREOF

6. It is the role of the Ombudsman to determine whether the extension of the loan repayment period was fair and in line with the agreements between the parties. Further, the Ombudsman is to determine whether the Complainant underpaid and, if so, the effect of the underpayments on the period of the loan as well as the cumulative balance of the loan.

COMMON CAUSE AND CONTENTIOUS FACTS

7. From a reading of the submissions, there are more common cause facts than there are contentious facts. Facts about the loan amount, the repayment amounts, and the initial repayment period are not in contest. The only contentious facts are the following:

7.1. The basis of the extended repayment period,

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz

7.2. The underpayments and the interest thereon (and the eventual influence on the repayment of the loan),
7.3. Any additional charges accruing because of the change on source deduction dates.

THE APPLICABLE LAW

8. The relationship between the parties is one of credit. The complainant is a consumer, and the respondent is a provider of the credit. This is a regulated activity in terms of the Consumer Credit Act, 2016 (the CCA). The enactment of the CCA was intended to "*provide for the regulation of consumer credit; protection of consumer credit rights and other incidental matters."* In one of its provisions, the CCA provides for transitional matters and how credit relationships preceding it will be approached.

9. In section 113, the CCA provides.

   "(1) an existing credit agreement entered into in terms of any 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."

   (2) Within twelve months of the commencement of this Act, a credit bureau, debt counsellor or credit provider shall, in relation to authorisation and other related matters comply with the provisions of this Act."

10. In the present complaint, the agreement was entered into sometime in February 2014. It goes without saying that the applicable law at the time was the Money Lending and Credit Financing Act No. 3 / 1990. Invariably, the agreement will be subject to the provisions of section 113. The transition period provided in terms of section 113 (2) of the CCA ended sometime on or about 10 March 2018. Therefore, the agreement between the parties will be construed as though, with necessary adaptations, it conforms with the CCA.

11. The CCA provides, in section 39, for the different charges that a credit provider may charge its customer. The said provision provides for the costs of credit to include the principal debt; initiation fee; a service fee; interest; costs of any credit insurance in accordance with section 44 and default administration charges and collection costs. For purposes of this complaint, given the submission of default payments, the charge of interest is that of default administration. In providing judicial understanding to the core principles underlying the CCA, the learned judge Fisher J in Njolomba and Another said[1];

[1] Absa Bank Limited v Njolomba and Another, Firstrand Bank Limited v Mbale, Firstrand Bank Limited v Kiwanuka and Another, Firstrand Bank Limited v Thomas, Changing Tides 17 (Proprietary) Limited N.O. v Wesley and Another, Changing Tides 17 (Proprietary) Limited N.O. v Lundberg, Changing Tides 17 (Proprietary) Limited N.O. v Getrude and Another, Changing Tides 17 (Proprietary) Limited N.O. v Ntombifuthi and Another (20321/2017, 39655/2017, 40453/2017, 00435/2018, 24653/2017, 41765/2017, 44904/2017, 45113/2017) [2018] ZAGPJHC 94; [2018] 2 All SA 328 (GJ); 2018 (5) SA 548 (GJ) (5 March 2018)

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz

"[5] Moseneke DCJ writing for the majority in Nkata, had the following to say in relation to this new dispensation created by the NCA:

> "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. <u>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.</u> 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. <u>The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality…</u>"

12. This complaint raises only factual questions. The central questions can be answered by reference to the agreement between the parties as well as the surrounding evidence supporting how the loan was repaid. In guiding the determination, it is the principle that where there is underpayment, there will be an impact on the remainder of the balance. Kemp A.J made this observation when faced with a similar issue of underpayments in a credit arrangement:

"It is important to note that in terms of the debt review arrangement that the payment of R7,967 would have covered the interest generated on the bond each month and would also have contributed approximately R958 per month towards the capital outstanding. <u>The short payment of, on average, R4,085 per month over eight months resulted in an underpayment of, on average, R3,218 per month less than the interest accumulating on the account. As in , the balance outstanding on the bond has grown, in this case from the initial R1,125,000 to R1,149,284."</u> (emphasis added)
<u>*Mvelase*</u>

<u>UNDERPAYMENTS</u>

13. Central to the questions to be answered by the Ombudsman is whether or not the Complainant underpaid in servicing her loan. To answer this question, the credit agreement itself, including its accompanying instruments will be instructive. On the 28 February 2014, the Complainant executed an authorisation in favour of the Respondent for deductions against her salary (source deduction). The crux of the instruction reads,

"I, the undersigned hereby authorize you to deduct from my salary and or bank account a monthly instalment not exceeding <u>E1250</u> (in words) <u>one two five zero.</u> And remit same by cheque to FINANCIAL SERVICE PROVIDER…"

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz

14. It bears mentioning that the above was not disputed by the Complainant. It is now accepted as a fact that the repayment amount was E1250. 00 (one thousand two hundred and fifty Emalangeni) per month. The loan statements submitted by Complainant as well as Respondent presents a peculiar narrative. The repayment amount was double – structured, with a portion of it deducted from source and the balance by debit order. From the annexures, E901.13 (nine hundred and one Emalangeni thirteen cents) was source deduction while E349.00 (three hundred and forty-nine Emalangeni) was debit order repayment. Below is a table of the instances where the debit order component of the repayment was missing, thereby constituting underpayment.

Table – Debit Order Underpayment of E349.00

2014	2015	2016	2017	2018	2019
June	January	January	January	February	January
July	February	February	February	August	February
August	March	March	March	October	March
September	April	April	November	November	April
October	May	May		December	May
November	June	June			June
	July	July			July
	September	August			August
	November	September			
	December	October			
		November			
		December			

15. The fact of loan underpayment as depicted above is supported by Complainant's letter dated 15 June 2017 where she commits to recommence debit order repayments. The Complainant had an opportunity to explain these anomalies in repayment through her reply, however, that did not happen. While a reply was submitted dated 23 July 2020, it does not explain how the underpayments were addressed. On the balance of the submissions, the underpayments contributed to the variance in the initial loan repayment period and balance. Also, the Respondent submitted an amortisation schedule which depicts how the loan would have been liquidated but for the underpayments. This schedule indicates that the loan would have been liquidated had repayments been diligently made.

In Duplum Rule

16. The applicable law as it relates to the in duplum rule as articulated by section 41 (6) of the Consumer Credit Act, 2016. The provision reads:

> *Notwithstanding any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 39 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.*

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz

17. At the outset, one must be mindful that the statutory provision takes precedence over common law and or/other practices adopted over time. Owing to its explicit language as well as its unambiguous intent, the necessity for interpretation will be dispensed with. Suffice, however, to state that according to the Act, interest stops or ceases to accrue once it reaches the unpaid balance of the principal debt. The courts of the land have also pronounced on the subject and confirmed the above principle. In Cebile Nomzamo Simelane v Micro Provident Swaziland Letshego Financial Services Swaziland (Pty) Ltd (39/2015) [2015] SZSC 42 (9 December 2015), the court had this to say;

> *[22] In its basic form the in duplum rule 'provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.' (Paulsen supra at para 42). [23] In Commercial Bank of Zimbabwe v W.M. Builders Supplies (Pty) Ltd 1997 (2) SA 285 @ 303C-D the Court had this to say:*
>
> > *'...it is a principle firmly entrenched in our law that interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of the capital outstanding. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted.'*

18. There is a wealth of judicial authorities on this principle. However, for purposes of this complaint, there is no factual basis for the Ombudsman to make a finding in that regard. The submissions from both parties do not have any factual allegations that would be a basis of the finding that the above rule should apply. The following are important factors when dealing with the question of in duplum rule;

    18.1. The period or time that the default occurred.
    18.2. The capital amount outstanding, and lastly,
    18.3. The arear interest.

19. In the present complaint, the above factors have not been provided. The Ombudsman cannot therefore engage in a moot legal problem that does not assist the parties resolve their disputes. This also extends to the question of whether the change in deduction dates caused prejudice to the Complainant. The Respondent acknowledged the changes in deduction dates and explained that this was done at the instance of the Treasury Service of Government (Complainant's employer). She was then called upon to demonstrate the loss that came with this eventuality. At paragraph 4 of the Reply dated 23 July 2020, Complainant does not bring the Ombudsman into her confidence of the fact and extent of the prejudice or loss suffered.

20. The Ombudsman is also cautious not to unduly interfere in a relationship that the parties freely entered into. In the case of African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others [2011] ZASCA 45; 234/10, 2011 (3) SA 511 (SCA) the Court

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz

noted that applicant had freely entered into the agreement. There was no indication that applicant had been forced to do business with the money lender. There was also no indication that the transaction was out of the ordinary. It was found that "courts should not interfere with a bargain deliberately entered into by two parties dealing at arm's length with each other merely because [the court] subjectively believes the rate of interest stipulated was unfair."

20.1. While the above authority dealt with the rate of interest, the principle is an overarching caution to adjudicating authorities not to overzealously interfere with such agreements. In this complaint, intervention by the Ombudsman is not warranted.

FINDING

21. The Complainant did not repay the loan according to the agreed amounts. The repayment amount was E1250. 00 (one thousand two hundred and fifty Emalangeni) per month. However, for reasons not submitted to the Ombudsman, the repayments were on countless occasions short of the said sum. On account of this, the interest was levied on the balance (in this case, the balance computed on the underpayment). This, as Kemp AJ observed, has the net effect of increasing the outstanding balance.

THE ORDER

22. The complaint is not upheld.
23. No order is made against the Respondent.

THUS, DONE AT MBABANE AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.

____

THE OMBUDSMAN OF FINANCIAL SERVICES

3rd Floor, West Wing, Ingamu (PSPF) Building, Mhlambayatsi Road, Mbabane, Eswatini, Post Office Box 8490, Mbabane H100
Tel: +268 2404 7653/ 2404 4464, Fax: +268 2404 0636, Email: info@ombudsfs.org.sz, Website: www.ombudsfs.org.sz