



In the matter between:

THE COMPLAINANT

and

FINANCIAL SERVICES 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 Services Provider. The Respondent is a licensed financial services provider in terms of the FSRA Act, 2010.

THE COMPLAINT

2. On 22 December 2020, the Complainant submitted a sworn statement of his complaint (the Complaint Form). The complaint form was supported by documents. The following are some of the documents:

Document	Dated
Loan Statement	7 December 2020
Letter to Respondent	9 September 2020

MAIN FACTS

3. The main facts to be gleaned from the complaint as articulated by the form are as follows.
 - 3.1. Complainant took a loan with Respondent on or before 18 May 2018. The principal loan was E46 820. 70 (forty-six thousand eight hundred and twenty Emalangeni seventy cents).
 - 3.2. The total amount due including interest was E53 175. 61 (fifty-three thousand one hundred and seventy-five Emalangeni sixty-one cents).
 - 3.3. The monthly repayment was E3 173. 28 (three thousand one hundred and seventy-three over a period of 19 months).
 - 3.4. The initial date of final instalment was 30 December 2019.
 - 3.5. Sometime in February 2020, Complainant received communication from the Respondent informing him that his loan was not fully settled.
 - 3.6. The Respondent attributed the extended period of the loan to repayment shortfalls which attracted penalties.

- 3.7. The Complainant was told to make means to repay the arrears, which he did.
- 3.8. The complainant seeks redress from the Ombudsman in the following manner;
- 3.8.1. Respondent gives Complainant his statement;
- 3.8.2. Respondent refunds Complainant E13 533.11 (thirteen thousand five hundred and thirty -three Emalangeneni eleven cents).
- 3.8.3. Respondent refunds E2 417.82 (two thousand four hundred and seventeen Emalangeneni eighty-two cents) deducted before the loan schedule was in effect.
- 3.8.4. Complainant requires Respondent to stop fluctuating its deductions and stick to agreed terms.

THE RESPONSE / REPLIES

4. On 26 January 2020, the Respondent submitted a response to the complaint. The response had several supporting documents, including the following:

DOCUMENT	DATED
Loan Agreement	18 May 2018
Loan Agreement	7 April 2020
Loan Repayment Schedule	
Salary Deduction and Debit Order Instruction	Undated
Loan Agreement	7 March 2020
Emails with FSRA	24 November 2020
Letter to C	22 December 2020
Email to FSRA	22 December 2020
Loan Statement	26 January 2021

5. The following facts can be gleaned from the Respondent's defence or response.
- 5.1. Complainant submitted a complaint per annexure A;
- 5.2. The Complainant applied for a loan sometime in 2018 and received it. As of December 2019, the outstanding balance was E12 295. 76 (twelve thousand two hundred and ninety-five Emalangeneni seventy-six cents).
- 5.3. On 9 March 2020, Complainant sourced and received a top-up loan from Respondent for an amount of E25 278.60 (twenty-five thousand two hundred and seventy-eight Emalangeneni sixty cents.) Further, Complainant applied and received a top up loan for the value of E51 528 (fifty-one thousand five hundred and twenty-eight Emalangeneni) on 2 April 2020.
- 5.4. On 2 April 2020, Complainant acknowledged the outstanding amount and it formed part of the sum of the new loan.
- 5.5. Respondent is not in a position to refund the Complainant.
- 5.6. The fluctuations in the amount are a result of Complainant's account falling into arrears.
- 5.7. The debit order drawn against his account has corrected the arrears and Complainant was advised there will be no debit orders drawn against his account if the full instalment is received.

THE REPLIES

6. The Complainant was extended the opportunity to reply to the submissions made by the Respondent. the Complainant was also guided to the chief issues which required a response. However, by email dated 11 February 2021, Complainant forewent the opportunity to reply and authorized the Ombudsman to decide on the strength of the affidavit submitted by Respondent. To quote the instruction, Complainant said:

"I xxxxx authorise the office of the OMBUDSMAN of Financial Services to use the information provided by Financial Services Provider as a form of an affidavit to decide my case... Otherwise I do give the OMBUDSMAN permission to proceed and make decision based on the information in our provision by Financial Services Provider."

7. There are no substantive replies, therefore.

DETERMINATION AND REASONS THEREOF

8. It is the role of the Ombudsman to determine whether the Complainant was treated fairly in the loan repayment period and amount in line with the agreements between the parties. Further, the Ombudsman is to determine whether the Complainant is owed a refund by the respondent in the amounts particularized in the complaint form.

COMMON CAUSE & CONTENTIOUS FACTS

9. 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 fact(s) are the following:

- 9.1. The basis of the varied monthly repayment amounts between the joint parties.
- 9.2. Whether there are any monies due and payable to the Complainant resulting from the varied monthly repayment amounts.

THE APPLICABLE LAW

10. 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." The CCA provides for transitional matters and how credit relationships preceding it will be approached.

11. 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.”

12. In the present complaint, the agreement was entered into sometime in 2018. It goes without saying that the applicable law is the CCA. Since this case brings to the fore the question of fairness in the conduct of the Respondent, it is important to appreciate the principles underpinning the CCA. In providing judicial understanding to the core principles underlying the National Credit Act (South African)¹, the learned judge Fisher J in *Njolomba and Another* said;

“[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. 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...”²

13. The CCA, the provisions of which were mainly adapted from the National Credit Act, to which the above words of the learned Fisher J relate, is therefore concerned with the conduct of credit givers. From the above quotation, it is not enough for the credit relationship to be lawful, it must also be fair, reasonable, etc. In answering the questions raised in this complaint, recourse will be sought from the submitted documents. The complaint raises factual questions as opposed to legal ones.

¹ The National Credit Act (NCA) is a South African piece of legislation that governs and regulates the business of credit provision. The local Consumer Credit Act (CCA) was heavily modelled and adapted from the NCA. It is for this reason that decisions expounding on the NCA are persuasive in our jurisdiction.

² *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)

14. The Complainant has not replied to the responses of the Respondent. In fact, he has explicitly instructed the Ombudsman to accept the response and use it as a basis of a decision. While this is unusual, the Ombudsman will interpret the conduct of the Complainant as an acceptance and / or admission of the allegations presented by the Respondent. In providing context to the impact of the Complainant's instruction, the following excerpt is instructive:

"What is the situation as regards new matter in replying affidavits?

The affidavits in motion proceedings fulfil a dual purpose namely, to place the essential evidence in support of or in opposition to the granting of the relief claimed before the court and to define the issues between the parties ...On the other hand the purpose of a replying affidavit is to deal with the averments made by the respondent in an answering affidavit (See: *Bayat & Others v Hansa & Another* **1955 (3) SA 547** (N) at 553C-E). Except where the averments in an answering affidavit provide additional grounds for the relief claimed (See: *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* **1976 (2) SA 701** (D) at 705A-C..."³

15. On the premise of the excerpt above, the Complainant did not deal with the averments made by the Respondent. As a matter of procedural law, those averments remain uncontroverted and accordingly admitted. Here are pertinent averments for purposes of this complaint as extracted from paragraph 5 of the response:

- 15.1. Complainant's loan as of December 2019 had an outstanding amount of E12 295. 76 (twelve thousand two hundred and ninety-five Emalangeni seventy-six cents).
- 15.2. Complainant further sourced and received top-up loans in March 2020 (E25 278.60 (twenty-five thousand two hundred and seventy-eight Emalangeni sixty cents) and April 2020 (E51 528 (fifty-one thousand five hundred and twenty-eight Emalangeni) on 2 April 2020).
- 15.3. Complainant acknowledged the outstanding amounts and were incorporated in the loan top-up of April 2020.
- 15.4. Complainant's account was in arrears and these were corrected via a debit order drawn against his account.

FINDING

16. The Complainant's account was in arrears. In terms of Clause 2 of the Loan Agreement, under the heading "Terms of Loan and Repayment", clause 2.13 is instructive. It provides that:

"2.13 In addition to 2.11 above the Borrower hereby irrevocably authorises the Lender to draw against the Borrower's bank account (details of which will appear in Section A of this Agreement)...the sum reflected as the instalment payment due by the Borrower to the Lender for repayment of the Loan, as set out in the Schedule, together with any

³ Maes v Hancox (A219/02) [2003] ZAWCHC 43 (3 September 2003)

arrear payments due as well as any accrued interest or interest on arrear payments and fees by the Lender...

17. Per this clause, it is conceivable why therefore the Respondent as Lender in the relationship would have drawn fluctuating amounts against the Complainant's bank account. This was a key term of the lending relationship that where arrears are found to have accrued, a debit order would be drawn to repay them including any interest on arrears that may have also accrued. Respondent acted within the scope of the enabling document, being the loan agreement(s). Her conduct is justifiable in terms of the law and contractual obligations. It is, therefore, in view of the above that the Respondent's conduct is deemed to be in line with the spirit of the CCA, in that it is fair, was done in good faith and is reasonable. In the circumstances the Respondent has acted within the dictates of the statutory as well as contractual rights and obligations of the parties' credit relationship.

THE ORDER

18. The complaint is not upheld.

19. 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