In the matter between

THE COMPLAINANT

and

SACCO **RESPONDENT**

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTION 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT 2010 ("the Act").

1. BACKGROUND

1.1 The complaint is against a Savings and Credit Cooperative Society established in terms of the provisions of the Cooperative Societies Act, No. 5 of 2003 ("the SACCO"). This SACCO comprises of members of the Employer. As an employee of the Employer, the Complainant is a member of the SACCO scheme.

1.2 The Complainant lodged her complaint with the Financial Services Regulatory Authority (FSRA) on the 18th August 2015. The complaint was then transferred for to be lodged with this Tribunal on 30 June 2016.

1.3 The Complainant brought a claim against the decision of the SACCO to charge her an additional 0.3% interest, contrary to an agreement entered into between herself and the SACCO. The additional charge was effected without her being given notice of it despite the SACCO knowing of irregularities in the prescribed interest rate just over a year after the loan was issued.

2 COMPLAINT

2.1 The complaint originates from the alleged SACCO's decision to unilaterally change the terms of a loan agreement without giving the Complainant notice. The Complainant states that in 8 June 2010, she obtained a special loan with the SACCO. The terms of the agreement were that she would receive E100, 000 repayable over 60 months at an interest rate of 18% per annum. She states that on or about October 2014 she requested her balance statement. To her surprise, her balance reflected that she still owed a substantial amount yet she knew she was left with only 8 repayment months.

2.2 She states that she approached the SACCO's Accounting Manager who informed her that the SACCO was facing challenges after funds were misappropriated in the scheme; consequently, some staff members were dismissed due to this. The Manager advised the Complainant to come back to the SACCO's offices on the month of her

last instalment. In June 2015 she attended at the SACCO's offices again. It was only then that she heard for the first time that there had been an error in calculating her interest. Her interest had been calculated at the monthly rate of 1.5% instead of 1.8% prescribed for special loans. She was informed that a newly engaged staff member discovered this anomaly that very month. The Complainant says she insisted that the agreement she signed was for 1.5%, not 1.8%, and that it was not her fault that the error was made. The SACCO was undeterred and insisted that the stop order will still be effected until she paid off the outstanding debt, having readjusted the amount to cater for the whole 1.8%.

2.3 The Complainant is challenging this decision and wishes to recoup the amounts she paid over and above that which she paid under the original agreement. She insists that she would not have taken up the loan had she known it would charge her 1.8%, not at the 1.5% rate.

3 RESPONDENT'S RESPONSE

3.1 The SACCO, on 13 July 2016, wrote to the Tribunal and responded to the Complainant's allegations. Its defence is that the Complainant obtained a special loan, with an interest charge of 1.8% per month. That, however, an error occurred when the special loans were issued, such that interest for the ordinary loan of 1.5% was used instead of the 1.8% for special loans. It explains that the rate for special loans is higher because members are given four times their special savings.

3.2 The SACCO states that the use of the low interest rate of 1.5% resulted in lower instalments for the loan than should have been. The SACCO attests that the error was discovered in August 2011 and rectified. Further, that the effect of the correction resulted in an increase in interest payable monthly and a decrease in the portion of the instalment reducing the principal loan.

3.3 The response further states that the change in the interest rate affected the instalment upwards of which the instalment was never adjusted to accommodate the increase of the 0.3%. Additionally, that since the proportion of the instalment reducing the principal loan decreased and the instalment remained the same, the repayment period was affected. It pointed out that even though the repayment period was 60 months that this became impractical since the instalment was lower than it should have been and was never adjusted to accommodate the increase in the interest rate by 0.3%. Consequently, the SACCO had to continue deducting funds from the Complainant's salary to repay the loan after the expiry of the repayment period as her account showed a balance still.

3.4 The SACCO ends with an appeal for its decision to be sustained, arguing that it was not its intention to inconvenience the Complainant, and that it had tried to explain the reasons for its actions to her.

4 DETERMINATION AND REASONS THEREOF

4.1 The task of the Ombudsman is to determine whether or not the SACCO acted lawfully in continuing with its deductions over the repayment period to recoup the interest initially not charged on the special loan advanced to the SACCO.

4.2 The facts of this case are straight forward. The Complainant entered into a loan agreement with the SACCO. The special loan agreement charged interest at 1.8% rate per month. Instead the agreement was mistakenly entered into for 1.5% interest. Since it was payable at a specified period of 60 months, the wrong interest entries would affect calculation of the instalments payable over the repayment period. Instead of paying a higher amount corresponding to the higher rate consistent with the correct interest rate, she ended up paying a lower instalment for a longer period.

Special loan

4.3 The fact that the Complainant took a special loan is indisputable. This is apparent in the "SPECIAL LOAN APPLICATION FORM" filled in and signed by the Complainant on 27 November 2009. Added as annexure to the form is the agreement's "LEGALLY BINDING TERMS AND CONDITIONS". Part 7 addresses the interest issue. It states that:

> "*Compound interest at the fixed rate of 18% per annum on the balance as at August subject to change from year to year per By-Laws reflected in the credit Agreement is calculated on the amount outstanding each day…..*"

4.4 The above effectively means that the prescribed interest rate Complainant signed up for was 18%. This translates to 1.5% per month x 12 months, amounting to 18%. Both parties therefore were bound to these terms and conditions as illustrated above. It is not accurate for the SACCO therefore to argue that the Complainant signed up for an agreement based on 1.8%, otherwise Part 7 would read "*Compound interest at the fixed rate of 21.6% per annum*."

4.5 The SACCO argues that this was not a true representation of the facts, or rather, the use of 18% annual interest was entered by mistake. In reality, until the time when the true facts became known, the contract signed between the two parties was valid. This principle finds authority in the South African case of ***Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (W) 344I** where the full court said:–

> '*a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs.*' [Emphasis added]

4.6 Thus, this common mistake between the parties did not render the contract void and unlawful. Having established that, it so happens that the calculations were erroneous, having entered the wrong interest rate. The SACCO's explanation is an acceptable account for the oversight, as one wrong entry into an accounting system would understandably yield a wrong result. The SACCO goes on to state that the mistake was

discovered in August 2011. This was about 14 months after the loan repayable over 60 months was issued. What was the SACCO's reaction to this new information?

4.7 The SACCO's discovery of the full facts should have led it to action such as seeking to rectify the written agreement signed between itself and the Complainant. It would have had to allege, citing evidence that the contract does not reflect the true intention of the parties **[*Strydom v Coach Motors (Edms) Bpk* 1975 4 SA 838 (T) at 840H]**. This is because in contracts regard must be had to the truth of the matter rather than what has been written **[*Weinerlein v Goch Building Ltd* 1925 AD 282 at 289]**. The essence of the contract was that the Complainant was supposed to pay interest of 21.6% annually and not the earlier signed for 18% as per the agreement.

4.8 With the SACCO providing a superior product by way of the special loan, it justifiably had the right to ensure that the Complainant, as its member, pays for what she was getting. Being aware of the true facts, the Complainant should have been given notice of the changes about to be imposed in the contract. However, the Complainant was not informed of this new information. Instead, she unknowingly carried on with her instalments until about 8 months before she was due to pay the last instalment. At this point, she requested a statement to see her outstanding balance. This was reasonable conduct on her part too, and it is in line with prudent behaviour to know one's financial standing and affairs. It was only at this time that she was cruelly jolted to a reality she had not anticipated – that in fact, the balance outstanding to her loan was much higher than she had thought all along, and would be payable over a period exceeding the 60 months.

4.9 It is the decision of this Tribunal that the SACCO's unilateral variation of the terms of the contract signed between the parties was invalid. Admittedly, the contract was for a special loan, and the Complainant would have been liable for the full amount had she been apprised of the facts. The SACCO could have disclosed the full facts and given an opportunity for a lawful variation of the contract from as far back as August 2011; it did not. The Complainant was only apprised of this when she made enquiries on her own, and long after the unlawful adjustments to the calculations were made. Consequently, she is liable only for the interest she paid for the first 60 months calculated at the 1.5% rate, and the last interest paid with her full knowledge in the last 6 months of the repayment period. This is only to recognise that, even though it was a special loan, she cannot be penalised for the SACCO's mistake, which the latter did not make right by making the necessary disclosure to a party to the contract.

DECISION

The decision of the SACCO to charge the Complainant in excess of the amount she would have paid under the agreement was wrong and should be set aside.

THE ORDER

1. The decision of the SACCO to charge the Complainant in excess of the amount she would have paid under the agreement is set aside.

2. The Complainant was liable for the total interest of E53, 960.00 calculated under the 18% annual rate, plus the E864.82 interest she paid in the last 6 months following full disclosure by the SACCO.

3. She is not liable for the rest of the interest which resulted from a unilateral variation of the contract she signed for.

4. The SACCO is ordered to pay the Complainant the difference between E64, 998.07 and (E53, 960.00 + E864.82)

5. The payment referred to in (3) above shall include interest at a rate of return on investments calculated from the date when the Complainant lodged the complaint with the regulator to the date of payment.

THUS DONE AT MBABANE ON THIS 07 DAY OF NOVEMBER 2017 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.

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OMBUDSMAN OF FINANCIAL SERVICES