



In the matter between:

THE COMPLAINANT

and

THE CREDIT 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 The Credit Provider. The Respondent is a licensed financial services provider in terms of the FSRA Act, 2010.

THE COMPLAINT

2. On 19 March 2020, 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
Deed of Sale	27 December 2011
Mortgage Statements	2 October 2018
Loan Statement 1	24 January 2019
Loan Statement 2	24 January 2019
Insurance Cancellation Letter	12 July 2019
Insurance Policy Documents	27 July 2019

MAIN FACTS

3. The main facts to be gleaned from the complaint as articulated by the form are as follows.
 - 3.1. Complainant together with 4 others bought a block of flats from their employer. The flats are situated at XXX Flats.

- 3.2. All incurred expenses were divided equally amongst the buyers.
- 3.3. The deductions in service of the loan commenced sometime in October 2012.
- 3.4. The Complainant was made to pay a monthly instalment of E1596. 00 (One thousand five hundred and ninety-six Emalangeni) while the others paid E1416. 00 (One thousand four hundred and sixteen Emalangeni).
- 3.5. Complainant made several complaints to Respondent about the anomaly of paying a higher instalment, as opposed to the other joint loan Applicants.

THE RESPONSE / REPLIES

4. On 5 May 2020, the Respondent submitted a response to the complaint. The response had several supporting documents, including the following:

Document	Dated
Letter from Employer	18 January 2012
Loan Application Form	24 January 2012
Letter of Offer – Mortgage Loan	29 May 2012
Letter from Complainant to her Employer	22 May 2012
Application for Re-Advance	25 February 2013
Application for Re-Advance	14 November 2013
Letter from Respondent to Complainant	7 October 2019

4.1. The Response

The following facts can be gleaned from the Respondent's defence or response.

- 4.1.1. An initial mortgage loan of E349 250. 00 (three hundred and forty-nine thousand two hundred and fifty Emalangeni) was advanced to five joint loan applicants.
- 4.1.2. The loan repayment value was split equally amongst the 5 applicants.
- 4.1.3. However, monthly repayments were calculated based on several factors which included, each applicant's remaining years to retirement.
- 4.1.4. The joint members were further readvanced certain sums on two occasions, namely, E42 800. 00 (forty-two thousand eight hundred Emalangeni) and E20 300. 00 (twenty thousand three hundred Emalangeni).
- 4.1.5. The monthly repayment amount of the Complainant was E1596. 00 (one thousand five hundred and ninety-six Emalangeni), which was informed by her remaining years to retirement, allowable deductions, the complainant's financial position and rate to pay at a certain scale.
- 4.1.6. The monthly remaining amounts of the other joint applicants to the loan were equally informed by their age and remaining years to retirement as shown by Annexure 6 (a) – (d).

4.1.7. Each of the joint applicants to the loan, including Complainant, signed an instrument authorizing their employer to deduct the repayment amount from their salary.

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 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 the difference of what was paid by her and that paid by the other joint applicants.

COMMON CAUSE & 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 fact(s) are the following:

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

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." 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 2012. 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. 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

11. The CCA 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 and reasonable. 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. The paramount complaint raised is that the Complainant was made to repay the loan at a value higher than her co-applicants to the loan. This fact has been admitted by both parties and is accordingly not in contention. The only inquiry is why Complainant was discriminated against, if at all and whether there are monies due and payable to the Complainant, resulting from the repayment of the loan.

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)

12. At paragraph 1 (b) of the response submitted by Respondent, a justification of the treatment / conduct is presented. Respondent states that:

"b. As also highlighted by the Complainant the total loan was split into equal amounts, and the monthly repayment for each applicant was based on one's remaining years to retirement. See Annexure 2 for Complainant's application.

13. The Respondent further says at paragraph 1 (f) that:

"It must be clarified that the group members were not repaying the same instalment amount of E1,416.00 as put forward by the Complainant. For instance, one of the other four members was making monthly repayment of E2, 454.00, and this was based on his age when compared with retirement period. See Annexure #6 (a) to (d) confirming the repayment amounts that were paid by the four members."

14. The excerpts above disclose age towards retirement as the decisive factor in the repayment amounts. Annexure 2 is the loan application form. Accompanying it is the statement of liabilities and assets of the Complainant. It bears mentioning that this document was signed by the Complainant (24 January 2012). This annexure, on a balance of probabilities, reasonably supports the Respondent's version that at inception of the business relationship, the Applicant individually was assessed. This assessment appears to have been communicated to Complainant as evidenced by her signature to the documents. Furthermore, Annexure 3 is also instructive. It is a letter from the employer advising Respondent of allowable deductions against the applicant's salaries. These annexures present a reasonable impression of a rational assessment of not only Complainant's financial position at the time, but her rate (ability) to pay at a certain scale. For example, had Complainant's repayment value been E4000.00, based on Annexure 3 that amount would not have been deductible from her salary. Either the repayment period would have been extended, or an alternative repayment method agreed upon to compensate for the balance. On the premise of the above, the Ombudsman finds that at inception, the Respondent based the repayment value of the Complainant on a fair and equitable assessment that was known to the Complainant.

15. To also support the above position, the Complainant at inception of the business relationship / transaction signed an instruction to her employer authorizing deduction of the repayment amount. The authorization was directed to the Human Resources Manager of the employer. The letter is dated 22 May 2012 and marked Annexure 5 by the Respondent. The amount that was authorized for deduction is E1596. 00 (one thousand five hundred and ninety-six Emalangenis). This is the same amount as in the complaint form.

FINDING

16. The Complainant repaid according to an instruction she signed. The repayment amount was calculated based on remaining years to retirement, and as such a variance is not only reasonable, but expected. On account of this, there is no evidence to suggest that there was unfairness in the repayment amounts, and, by extension, the conduct of the Respondent. While the total loan amount was split among the joint applicants equally, the

repayment was informed by the factors identified above, being age towards retirement, employer's quota of allowable deductions and financial position as captured in the Assets and Liabilities Schedule signed by Complainant.

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 constraints of the statutory arrangements.

THE ORDER

17. The complaint is not upheld.
18. 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