



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)

1. **INTRODUCTION**

This complaint relates to consumer credit. The Respondent is a financial services provider. The Respondent is also a licensed financial services provider in terms of the FSRA Act, 2010. Accordingly, the Ombudsman has jurisdiction to resolve this matter by virtue of s 74 & 75 of the FSRA Act.

2. **THE COMPLAINT / MAIN FACTS**

On 14 July 2020, the Complainant submitted a sworn statement of his complaint (the Complaint Form). The complaint form was supported by documents, being emails sent on various dates.

Document	Dated
Emails exchanged between the parties	Exchanged on different dates

3. **MAIN FACTS**

The main facts to be gleaned from the complaint as articulated by the form are as follows:

- 3.1. Complainant had several accounts with the Respondent, being the main account (account number 1), sub-account no.1, sub-account no.2, sub-account no.3, savings account (account no. xx) and a permanent shares account (xy).
- 3.2. On 30 April 2015, Complainant took a short loan amounting to Seventy-Eight Thousand Emalangi (E78 000.00), against his permanent shares, which stood at One Hundred and Twenty-Six Thousand and Seventy-Seven Emalangi Sixty Six Cents (E126 077.66) as at 3 October 2019;
- 3.3. On 17 April 2015, Complainant deposited a sum of Forty Thousand Emalangi (E40 000.00), which was allocated by the Respondent to Complainant's main account, as there was no instruction from the Complainant.
- 3.4. On 17 February 2015, a sum of One Hundred and Ten Thousand (E110 000.00) was received from permanent shares account, which was initially deposited

into Complainant's main account, but later reversed to Complainant's sub account no.2 on 10 December 2015, as per Complainant's request, in the email of 9 December 2015;

- 3.5. On 9 December 2015, Complainant then issued an email instruction that the sums of monies paid should be used to pay his sub-accounts, which reversal was done by the Respondent on 10 December 2015;
- 3.6. On 22 and 28 December 2015, Complainant further deposited a sum of One Hundred and Fifty Thousand (E150 000.00), which were received by the Respondent and initially deposited to Complainant's main account, but after queries they were transferred to clear the sub-account no.2;
- 3.7. The Complainant states that the then Managing Director (M.D.) acknowledged receipt of the above sums of money and instructed the responsible officer to effect the transfers of the money to the sub-accounts, instead of the main account;
- 3.8. The Complainant states that his instruction or request of 9 December 2015, requesting the Society to reverse the payment towards the main account and transfer the monies to the sub-accounts, were not carried out, which Respondent insists that they were carried out;
- 3.9. On 21 May 2020, Complainant paid a sum of Fifty Thousand Emalangeni (E50 000.00) towards the mortgage account under Family Trust to the Respondent, which monies Complainant claims were allocated by the Respondent against his instruction to clear the sub-accounts;
- 3.10. On 5 June 2020, a meeting was held between the Complainant and Respondent, to discuss, amongst other issues, the instruction of 9 December 2015, where the Respondent promised to reverse their allocation on condition evidence was produced that such instruction was not carried out;
- 3.11. Complainant states further that no reversals have taken place, following the meeting of 5 June 2020;
- 3.12. Complainant prays that his permanent shares, which is a more than 30 years investment be re-instated;
- 3.13. Complainant further prays for a refund and payback of all charges, levies, costs and penalties wrongly applied to his [permanent shares] account;
- 3.14. Complainant further prays that Respondent should send him monthly statements, regularly through emails and that Respondent should communicate with him in an event there is a change in his investments;
- 3.15. Complainant prays for a payment of dividends on the account;
- 3.16. Complainant further prays that the Respondent should apologise for not respecting or adhering to his instructions to redeem his accounts.

4. THE REPLIES / RESPONSE

On 13 October 2020, the Respondent submitted a response to the complaint and the relevant correspondences between the Respondent and the Complainant were attached. The following documents were attached to the response:

DOCUMENT	DATE
Application for Re-advance	4 May 2009
Application for Re-advance	3 March 2010
Application for Re-advance	27 March 2012
Application for Re-advance	28 January 2015
Application for a Loan Secured by the Pledge of Deposits	29 April 2015
Statement of Loan Account dated 4 October 2019 to 1 June 2020	1 June 2020
Short Loan Statement	1 June 2020
Permanent Share Statement	1 June 2020

4.1. The Response:

The following facts form part of the Respondent's defence or response.

- 4.1.1.1. On or about 19 November 2015, a complaint was lodged by the Complainant on instructions issued to the Respondent:
- 4.1.1.2. The instructions by the Complainant to the Respondent were handled accordingly and adjustments were carried as per Complainants' instructions:
- 4.1.1.3. On or about January 2017, Complainant re-lodged his previous complaints:
- 4.1.1.4. In January 2017, Complainant was advised that his instructions were carried out and adjustments were made to the accounts accordingly:
- 4.1.1.5. Complainant alleges that the funds were meant to pay a loan he had against his permanent shares:
- 4.1.1.6. Respondent alleges that the funds were used to clear a sub mortgage account, charged at a higher interest as per complainant's instructions:
- 4.1.1.7. The permanent shares were eventually utilised to clear the loan, following non-payment of the short loan:
- 4.1.1.8. On notification the Complainant demanded that the Respondent reverse the funds back to the permanent shares account and allow him to pay the loan:
- 4.1.1.9. Complainant was advised that in view of the passage of time, he may use the funds earmarked for the repayment to open and operate a new permanent shares account:
- 4.1.1.10. Complainant had intended to open the permanent shares under his "Family Trust", an arrangement that failed as one of the trustees was outside the country;
- 4.1.1.11. Emails and letters were written to the complainant on these issues, but complainant was not satisfied;
- 4.1.1.12. Following several engagements between the parties, the Respondent felt that they had adequately dealt with the matter and advised Complainant to

seek further redress at some other forum, as nothing would change in his account.

5. **THE REPLIES**

There were no further replies received from the parties and there are no new issues coming up. However, the Respondent was requested to provide further information (i.e., loan agreements and advance loan agreement's, supporting their position and that the Respondent's response dated 13 October 2020, be signed and commissioned before a Commissioner of Oaths.

6. **DETERMINATION AND REASONS THEREOF**

It is the role of the Ombudsman to determine whether the Respondent did fail to carry out the instructions of the Complainant, and, if so, if Respondent acted within its rules and the law in so failing to carry out the Complainant's instructions. Further, the Ombudsman is to determine whether Complainant's permanent shares should be re-instated and whether there are any charges, levies, costs and penalties due and payable to the Complainant. The Ombudsman is further requested to issue a pronouncement on the issuance of monthly statements to the complainant.

7. **COMMON CAUSE & CONTENTIOUS FACTS**

From a reading of the submissions, there are common cause facts and there are contentious facts. Facts about the loans, loan amounts and the existence of the permanent shares in the name of the Complainant are common cause facts. It remains a common issue that the Complainant had loans with the Respondent and that he paid some monies towards the settlement of these loans. The Complainant also had permanent shares held by the Respondent. The only contentious fact(s) are the following:

- 7.1. Whether the Respondent failed to carry out the Complainants' instructions;
- 7.2. Whether the respondent should re-instate Complainant's permanent shares;
- 7.3. Whether there are any charges, levies and penalties due and payable to the Complainant, resulting from the failure to adhere to Complainant's instruction;
- 7.4. Whether the respondent should issue monthly statements to the Complainant;
- 7.5. Whether the respondent should offer any apology to the Complainant.

8. **THE APPLICABLE LAW**

8.1 The relationship between the parties is one of consumer 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, No.07, 2016 (the Credit Act) read together with the Building Societies Act 1962 (The Building Societies Act) and the Swaziland Building Societies Rules 2001 (The Rules). Further, one has to consider the loan agreements entered into between the parties. The main aim of these Acts is to provide for the controls of building societies, regulation of consumer credit, protection of consumer credit rights and other incidentals.

8.1.1 Financial Services Provider Act 1962

The objective of this Act is to provide for the controls of Building Societies. It should be noted that a building society's operations are guided and controlled by this legislation and they do not do as they please. It is in terms of this Act that one derives the definition of what permanent shares are. *S2 of the Financial Services Provider Act*, defines a permanent share as:

“a fully paid-up share of which the holder shall not be entitled at any time to demand redemption but which the Respondent may redeem after six months' notice to the holder if its rules so provide.”

From the above definition, a permanent share is defined as a fully paid-up share (where the purchaser has paid in full the price of the issued share) where redemption of such shares (permanent) is to be done after notice had occurred to the holder by the Respondent. The Respondent has the powers to redeem these shares, provided they have notified the holder and such notice should be for a period of six (6) months. Such redemption must be provided for in the rules of the Respondent. These rules shall be dealt with in the following paragraphs.

8.1.2 Financial Services Provider's Rules

8.1.2.1 These rules provide further guidance on how such societies and holders of shares will deal with them. Article 4 of the Rules states that:

“The board may, in its discretion, issue from time to time fully paid-up Permanent shares in different classes, subclasses and/or series.

The holder of these shares may, after the expiry of 30 months from the date of issue of the shares, request that the shares be redeemed after a further period of six months. Redemption of Permanent Shares is at the discretion of the Respondent's Board of Directors.”

8.1.2.2 Shares are issued by the board using its discretion. Once issued the holder of such shares can request that they be redeemed after lapse of thirty (30) months and after a further period of six (6) months. In as much as the shares are issued by the board, a holder may apply that such shares be redeemed. The redemption of such shares may occur after a period of thirty- six (36) months.

8.1.3 Consumer Credit Act

Consumer Credit agreement

8.1.3.1 The objective of this Act is to protect consumer credit rights, regulate and safeguard the consumer credit industry in our economy. The Consumer Credit Act has been enacted to provide for the regulation of consumer credit, protection of consumer credit rights and other incidental matters. S20 of the Consumer Credit Act 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.”

8.1.3.2 The parties herein entered into a credit agreement regarding the loans that the Complainant has with the Respondent and such can be dealt with under the Act. Further in terms of s113 of the Consumer Credit Act,

“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.”

8.1.3.3 The current agreement was entered into in 2015, which is before the Consumer Credit Act commenced. However, the above section does stipulate for transitional provisions and the agreement may then be construed under the Consumer Credit Act.

8.1.3.4 The Respondent is also a Financial Services Provider in terms of the First Schedule of the FSRA Act, read together with s83(2) of the FSRA Act, which states that, “the Authority shall perform the functions of the Registrar under the Building Societies Act, 1962”.

8.1.3.5 The Act does also provide for the regulation of such and the protection of consumer credit rights. The Respondent in this matter offered the credit and the Complainant accepted the offer, which was payable in thirty-six (36) months. What then flows from such agreements is that the consumer is granted the credit and should pay the loan as per the credit agreement. It is evident from the correspondences exchanged between the parties that the parties entered into these agreements and such should be honoured by all parties. Complainant should service these loans in line with the agreements entered into between the parties. The Respondent also should act within the perimeters of the credit agreement(s). It was part of the agreement that the permanent shares were pledged as security and that, should the Complainant fail to pay the loan, Respondent was authorised to sell, transfer, redeem or treat as surrendered the deposits pledged.

8.2 Unilateral Amendments by Credit Provider

8.2.1 It is further provided for in terms of the Consumer Credit Act that the credit provider shall not unilaterally change or amend a credit agreement. S57 (1) (b) states that,

“notwithstanding any provision to the contrary in a credit agreement, a credit provider shall not unilaterally change-

a) The period for repayment of the principal debt;”

8.2.2 Consideration should be given to the Respondent’s decision to pay the outstanding short loan against the shares. Such a decision to pay the loan with the permanent shares was known to the Complainant as it was part of the agreement signed by the parties. The Consumer Credit Act provides that such decision must not be taken without the knowledge and consent of the other party. Complainant knew of this article in the agreement and had consented to it. Respondent cannot be said to have unilaterally changed the agreement, but she enforced the provisions of the agreement. The short loan statement as at 1 June 2020 reveals that no payment had been made by the Complainant from the date the short loan was advanced, which is 30 April 2015, until 3 October 2019. It was then on this date that Respondent then settled the loan with the permanent shares. The period of payment had already lapsed in terms of article 3 of the loan agreement. The loan was repayable in thirty-six (36) months, which was until 30 April 2018.

8.2.3 Complainant authorised Respondent through the loan agreement to sell, transfer, redeem the deposits pledged without notice, on the day on which the loan was payable. While the loan was payable by/on 30 April 2018, Respondent only exercised this right in terms of the agreement, only on 3 October 2019, which was way beyond a year after the lapse of the repayment date. In terms of article 3 of the loan agreement, the loan was supposed to be settled on 30 April 2018. The Respondent ought to have exercised its right in terms of article 6 of the agreement, which empowers the Respondent to sell, transfer, redeem or treat as surrendered the deposits pledged. Respondent’s failure to exercise this right could not be levied against the Complainant. This was a transaction governed by the agreement and the parties ought to have done everything in accordance with the agreement.

8.3 Secured Short Loan Agreement & Permanent Shares

The parties entered into a credit agreement dated 29 April 2015 (referred to hereinunder as “2015 loan agreement”). It is common cause that the parties agreed that the permanent shares held by the Respondent on behalf of the Complainant, shall be security for repayment of the loan. The above is derived from article 6 of the 2015 loan agreement. The Article provides as follows: -

“As security for repayment of the loan together with interest thereon, I/we hereby pledge to the Society the deposits specified below and being permanent shares, fixed period shares or fixed deposits as such, together with all benefits

accruing thereon. I/We hereby agree that unless the loan together with interest thereon is repaid before the deposits mature, they shall be reinvested on maturity at the discretion of the Society and the relevant new deposit receipts shall be deemed to have been pledged to the Society. Should I/We fail to repay the loan together with interest thereon on the day on which the loan is repayable, the Society is hereby authorised without notice to me/us, to sell, transfer, redeem or treat as surrendered to their face value the deposits pledged hereunder and to apply monies derived therefrom in reduction of my/our indebtedness and account to me /us for any balance.”

- 8.4 It is clear from the agreement that the parties agreed that the permanent shares held by the Respondent on behalf of the Complainant shall be held as security against the short loan facility. Further, the Complainant in this matter further pledged to the Respondent the permanent shares, against the short loan. It was also agreed that should the loan and its interest be repaid before the shares mature, reinvestment of such shall vest upon the Respondent.
- 8.5 The Complainant further authorised the Respondent to sell, transfer, redeem or treat as surrendered the deposits pledged, without notice. So, the Respondent acted within the ambit of the agreement, entered into between the parties in committing the shares which were pledged as security, to pay the outstanding short loan together with interest.
- 8.6 Under the strength of Article 6 of the 2015 loan agreement, the Respondent redeemed or treated as surrendered to their face value the deposits that Complainant pledged. The Respondent then applied the moneys derived from the permanent shares in reduction of Complainant’s indebtedness to the Respondent. The balance of the shares as at 03 October 2019, stood at E126 077.66. The short loan as at 30 September 2019 stood at E136 266.06, (**refer to the short loan statement dated 01 June 2020**). Respondent then exercised her authority as per the loan agreement and partially cleared the short loan with the permanent shares, leaving a balance of E10 188.40, in the short loan (**refer to the 01 June 2020 statement**).
- 8.7 The Ombudsman finds that the action(s) of the Respondent are justified. In dealing with the above, reference should be made to Article 10 of the short loan agreement, which provides as follows: -

“This application if approved by the Society will constitute an agreement for which the loan is granted to me / us and on any default, omission or breach by me / us the Society is hereby authorized to enforce and release any security held by it in respect of the loan.”

8.8 The Ombudsman finds that Complainant did, through appending his signature in the agreement, authorize the Respondent to enforce and release the security held (permanent shares) by the Respondent in respect of the secured short loan, in terms of Article 10.

8.9 Statement of Amount owing

The Ombudsman will then look into the issue of provision of statements and statements of amount owing, in terms of our law.

S47 (1) of the Consumer Credit Act provides that;

“A credit provider shall, at the request of the consumer, deliver without charge a statement of all or any of the following:

- a) The current balance of the account of the consumer;
- b) Any amounts credited or debited during a period specified in the request;
- c) Any amounts currently overdue and when each such amount became due; or
- d) Any amount currently payable and the date it became due.”

8.10 From the above section it is clear that a credit provider is expected in terms of the law to issue statements at the request of the consumer. In this case the Complainant did request the Respondent to provide him with statements as required by the law and the respondent must provide such, without any charge. The Act further provides timelines within which such statements may be provided and further provides various methods of providing statements to consumers. S47 (3), provides that a statement under this section may be delivered: -

- a) Orally, in person or by telephone; or
- b) In writing, either to the consumer in person or by sms, mail, fax, email, or other electronic form of communication, to the extent that the credit provider is equipped to offer such facility, as directed by the consumer when making the request.”

8.11 The Respondent is required in terms of the law to honour the request of the Complainant by furnishing the Complainant with statements in the prescribed manner and using a mode as per Complainant’s request, because Respondent is capable of sending the requested email. Complainant avers that he has, on countless occasions, requested the respondent to provide periodic statements through email as he had been residing outside the country. Such requests must have been honoured by the respondent.

9. **FINDING**

- 9.1 The Ombudsman finds that the conduct of the Respondent in dealing with the permanent shares without notifying Complainant as the holder was in line with the loan agreement entered into between the parties. The transfer or treatment of the shares as surrendered to their face value without notifying the Complainant is found to be within the ambit of the agreement. Such shares are dealt with and in line with s4 of the Society's Rules, read together with the loan agreement signed by the parties on 29 April 2015 and the Consumer Credit Act;
- 9.2 The Ombudsman further finds that it would be just and proper for Complainant to honour and pay any outstanding loans between himself and the Respondent. Such payments should be in line with the loan agreement signed between the parties, in terms of s20 of the Consumer Credit Act;
- 9.3 The Ombudsman further finds that the Respondent should issue periodic statements to, and in the manner requested by, the Complainant, in line with s47 of the Consumer Credit Act;
- 9.4 The Ombudsman further finds that Respondent ought to have put into play article 6 at, or immediately after, the lapse of the period in terms of article 3. The failure by the Respondent to exercise this right is detrimental to the Complainant. Complainant cannot therefore be made to pay for an omission by the Respondent. There is no justification why Respondent took over a year to invoke articles 3 and 6 of the agreement.

10. **THE ORDER**

- 10.1 The complaint is partly upheld;
- 10.2 Respondent should calculate and reverse all levies, costs and penalties, charged against the Complainant from the period 30 April 2018 until 3 October 2019.
- 10.3 The levies, costs and penalties charged against the Complainant for the above period should be paid with interest at the rate of 11% per annum from 30 October 2018 until 3 October 2019, in line with article 2 of the loan agreement dated 29 April 2015;
- 10.4 Respondent should also calculate and furnish Complainant with statements of any monies due and owing by the Complainant regarding the loans applied for and granted to the Complainant;
- 10.5 Respondent should periodically issue statements to the Complainant;

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