



# TERMS OF REFERENCE

*In effect as from date on which recognition under FSOS granted – 27.10.2006*

# **TERMS OF REFERENCE OF THE OMBUDSMAN FOR BANKING SERVICES**

## **INTRODUCTION**

The Ombudsman for Banking Services scheme (the OBS) exists to provide individual and small business bank customers with a fair, quick and effective dispute resolution process, free of charge. It provides an informal, easily accessible alternative to other remedies, such as court proceedings.

## **MAINTAINING THE INDEPENDENCE OF THE OMBUDSMAN AND THE OBS**

The OBS is a scheme recognised under section 11 of the Financial Service Ombudscheme Act (FSOS) and has statutory jurisdiction to deal with matters arising from the National Credit Act (NCA).

The OBS is a section 21 (non-profit) company, with a board comprising of four independent directors that are not associated with the banking industry, three directors that represent the banks and an independent chairperson. The composition of the Board assists in assuring that the scheme is and remains independent. The Board is responsible for appointing the Ombudsman.

The Ombudsman acts independently and objectively in resolving disputes and is not influenced by anybody in making his or her decisions. The Ombudsman enjoys security of tenure and can only be dismissed on the ground of incompetence, gross misconduct, or inability to effectively carry out his or her duties. The Ombudsman may not be dismissed for being unpopular with the banks or the consumer groupings.

The independence of the OBS and the Ombudsman is further assured by the fact that the Ombudsman and employees of the OBS are:

1. entirely responsible for the handling and determination of complaints;
2. accountable only to the Board; and
3. adequately resourced to carry out their respective functions.

## **CRITERIA USED TO RESOLVE DISPUTES**

1. The law, especially FSOS and NCA;
2. Applicable industry codes or guidelines;
3. Good banking practice;
4. Banking practice in other jurisdictions; and
5. Fairness in all the circumstances.

## **PART 1**

### **TERMS OF REFERENCE**

These Terms of Reference have been adopted by the Board of the OBS in accordance with its Memorandum and Articles of Association as those which shall govern the OBS and the member banks.

These Terms of Reference define the powers and the duties of the Ombudsman and the OBS and the member banks. The Operational Procedures define the manner in which those powers and duties are to be exercised and fulfilled

#### **1. THE OBS'S PRINCIPAL POWERS AND DUTIES**

- 1.1 (a) The OBS's principal powers and duties are to consider disputes within these Terms of Reference and to facilitate the satisfaction, settlement or resolution of such disputes whether by agreement, by making recommendations or determinations or by such other means as seem expedient, subject to these Terms of Reference and the Operational Procedures.
- (b) It is a function of the OBS to educate bank customers regarding its existence, role and procedures and how to avoid encountering problems while using the banking system.
- (c) The OBS may report to the registrar and to the Banking Association on matters which may be of interest to them, as contemplated in section 10(1)(e)(v) of FSOS.
- (d) It is not a function of the OBS to provide advice to individual bank customers about banks or banking services.

1.2 The OBS shall:

- (a) receive and deal with complaints arising relating to the provision of banking services by a bank to a bank customer;
- (b) at the Ombudsman's sole discretion, determine whether or not a complaint falls within his or her jurisdiction within these terms of reference;
- (c) explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to both parties;
- (d) report any material or persistent non-compliance with the Terms of Reference or Operational Procedures by a member bank to the Board, in order for it to act in terms of clause 6.9 of the Memorandum of Association;
- (e) report to the Board regarding complaints which have not been completed within a time laid down by the Board. This time period shall initially be set at four months calculated from the date that a complaint became a dispute;
- (f) provide the Board with any information and assistance which it reasonably requires;
- (g) provide the FSOS Council with any information and assistance which it reasonably requires;

- (h) comply with any requirement under the Financial Advisory and Intermediary Services Act (FAIS), FSOS, NCA or other legislation.

1.3 The OBS may:

- (a) in respect of matters not falling within NCA, make a recommendation or determination up to R2 000 000.00<sup>1</sup> which may include amounts awarded for damages and interest or amounts for distress and inconvenience not exceeding R50 000, where appropriate;
- (b) make an award up to R10 000 in favour of a complainant when a bank unnecessarily delays the proceedings or fails to respond to a request from the OBS;
- (c) make a suggestion or recommendation to the parties regarding how the matter should be settled, in order to resolve a complaint speedily by conciliation;
- (d) follow and implement any procedure (including mediation) which the OBS deems appropriate;
- (e) require a bank or complainant involved in a complaint or dispute to provide any information which in the view of the OBS relates to that complaint and is necessary for its resolution;
- (f) in determining the principles of good banking practice, consult within the industry as the Ombudsman thinks appropriate;
- (g) advise the public on the procedure for making a complaint to the OBS;
- (h) set down and extend a time limit for any aspect of the OBS's procedures other than that mentioned in 4.2;
- (i) take account of a bank's security measures of which he or she has knowledge notwithstanding that no disclosure of those measures has been or will be made to the complainant;
- (j) collect information concerning any issues which may, in the opinion of the Ombudsman, be indicative of systemic problems pertaining to one bank or the banking industry generally, conduct research and formulate proposals for the rectification of the problems, submit them to the Banking Association and monitor the response thereto;
- (k) issue bulletins or other information notes regarding banking practice and the approach of the OBS in a manner approved by the Board;
- (l) apply for recognition under FSOS;
- (m) at any stage of the procedure dismiss a complaint on the grounds that:
  - (i) the complainant has misled the OBS;
  - (ii) the complainant has failed to:
    - (aa) cooperate in the process; or
    - (bb) respond to requests for information or comments within a reasonable time; or
  - (iii) there does not appear to be a reasonable prospect of the OBS eventually making a recommendation or determination in favour of the complainant for whatever reason; or

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<sup>1</sup> Previously R1 000 000. Increased to R2 000 000 as from 31 May 2011

- (iv) a real dispute of facts exists that cannot be resolved on a balance of probabilities; or
- (v) any of the grounds for exclusion from jurisdiction referred to in 3. 2 of these Terms of Reference are established or come into existence after the complaint has provisionally been determined to fall within the OBS's jurisdiction.

1.4 The Ombudsman and any member of the OBS staff may not be subpoenaed to testify in court by either of the parties to a dispute considered by the OBS.

## **2. THE OBLIGATIONS OF THE MEMBER BANKS**

2.1 The member banks shall:

- (a) act within these Terms of Reference;
- (b) act according to the rules of procedure;
- (c) abide by the provisions of the Code of Banking Practice (the Code);
- (d) abide by the standard complaints handling procedures compiled by the Banking Association;
- (e) compile and make readily available brochures or other materials advising customers of those procedures;
- (f) expeditiously comply with requests made by the OBS in terms of the Terms of Reference and Operational Procedures; and
- (g) display notices in a prominent position in all their branches stating that they participate in the OBS and that copies of the Code are available on request.

2.2 The member banks shall not:

- (a) resort to litigation while a complaint is being dealt with by the OBS and, in respect of matters not falling within NCA, unless the Ombudsman gives his or her written approval on the application of a bank whose rights would otherwise be prejudiced;
- (b) prevent a customer who would otherwise be eligible to use the services of the OBS from doing so through the use of an arbitration clause in a contract;
- (c) provide the OBS with any misleading information or answer;
- (d) provide any customer with any misleading information regarding the operation of the OBS.

## **3. THE OBS'S JURISDICTION**

### **3.1 Eligible complainants**

The OBS may consider a dispute brought by or on behalf of a customer or prospective customer of a bank who is:

- (a) a private individual; or

- (b) a small business, including a sole proprietor or trader, a juristic person, partnership or trust, that had a turnover in the last financial year of less than R10 million<sup>2</sup>; or
- (c) an executor or beneficiary of a trust or estate in respect of which a banking service has been provided; or
- (d) the nominated beneficiary of the financial product which is the subject of the relevant complaint; or
- (e) a person for whose benefit a contract on insurance was taken out or was intended to be taken out; or
- (f) the true owner or the person entitled to the immediate possession of a cheque or the funds that it represents, collected by the bank for someone else's account; or
- (g) the provider of a suretyship or security for a mortgage or loan; or
- (h) a person whose information is the subject of a dispute relating to confidentiality; or
- (i) a person entitled to complain to the OBS under the provisions of FAIS, FSOS, NCA or other legislation; and who
- (j) in respect of matters not falling within NCA, or other legislation that specifically empowers the OBS to act, as a recognised ombud, has suffered some significant monetary loss, distress or inconvenience as a result of the bank's conduct; and who
- (k) has or should have received the banking service that is the subject of the dispute or advice given by the bank's own staff, either in relation to the bank's own products or to the products of other institutions; and
- (l) has tried unsuccessfully to resolve the dispute through approaches to the bank's management or its internal complaints handling section or the complaint has been repudiated, or there has been an undue delay by the bank in resolving the complaint.

### **3.2 Limits on the Ombudsman's jurisdiction**

- (a) Amount involved
  - (i) In respect of matters falling within NCA or other legislation, the OBS may not consider a complaint or dispute that relates to an amount that exceeds the limit determined by the Minister;
  - (ii) In respect of matters not falling within NCA , the OBS may not consider a complaint or dispute that relates to an amount that:
    - (aa) exceeds R2 million unless the bank concerned has agreed in writing to this limitation being exceeded; or
    - (bb) is part of a larger claim by the complainant against the bank involving more than R2 million, unless the complainant agrees to limit the claim to R2 million; or
    - (cc) together with another claim which the complainant could make against the bank would add up to a total of more than R2 million,

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<sup>2</sup> Previously R5 000 000. Increased to R10 000 000 as from 31 May 2011

unless the other claim is separate or unrelated.

(b) Time limit

- (i) The OBS may not consider a complaint or dispute that relates to:
  - (aa) an act or omission which occurred more than three years prior to the date when the complaint was lodged with the Ombudsman;  
or
  - (bb) a claim that has become prescribed by law.
- (ii) The period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(c) Other processes

The OBS may not consider a complaint or dispute that:

- (i) falls within the jurisdiction of any statutory ombud as defined by their enabling legislation; or
- (ii) is based on the same event and facts as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal or regulator or other independent dispute resolving body or an investigation by a statutory ombud of any jurisdiction, unless the proceedings were instituted by the bank and the OBS has considered it appropriate to intervene and is not prohibited from doing so under any law ; or
- (iii) is under consideration by a legal practitioner, whether or not with a view to instituting legal proceedings, unless the OBS determines that the involvement of a legal practitioner is appropriate in the circumstances; or
- (iv) would more appropriately be dealt with by a court of law or through any other dispute resolution process.

(d) Charges

In respect of matters not falling within NCA or other legislation, the OBS may not consider a complaint or dispute that relates to a bank's general interest rate policy or fees and charges policy, unless it relates to a fee or charge being incorrectly applied by the bank having regard to any scale of charges generally applied by that bank or maladministration which involves an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the bank and the complainant.

(e) Unreasonable complainants

The Ombudsman may, at the Ombudsman's sole discretion, determine that a

dispute should not be considered on the grounds that the complainant is pursuing it:

- (i) in an unreasonable manner; or
- (ii) in a frivolous, vexatious, offensive, threatening or abusive manner.

(f) Termination by complainant

A complainant may, at any time prior to the issuing of a determination, terminate the OBS's handling of the complaint and resort to litigation or other dispute resolution process by withdrawing the complaint in writing.

#### **4. PRESCRIPTION**

4.1 Prescription shall not run against a complainant or bank during the period that the complaint is under consideration by the OBS.

4.2 For purposes of 4.1, the time during which a matter is before the OBS shall (provided that the complaint is determined to fall within the OBS's jurisdiction) commence on the day that a properly completed application form is lodged with the OBS until thirty days after the closure or withdrawal of the complaint, or the review process is complete.

#### **5. RULES OF EVIDENCE**

The OBS shall not be bound by any legal rule of evidence.

#### **6. DOCUMENTS**

6.1 Correspondence, communications and documents which came into existence in the course of a genuine and bona fide attempt to settle a dispute will be considered to be privileged and not subject to the rule of discovery in any ensuing court action.

6.2 Documentation relating to assessments, recommendations and determinations shall not be admissible in a court of law.

6.3 The OBS shall return all original documents to the parties from whom they are received, unless the documents are required for the purposes of investigation. The OBS shall ensure that any such documents are safeguarded and returned upon the closure of the case.

#### **7. ASSESSMENT, MEDIATION, HEARING, RECOMMENDATION AND DETERMINATION**

##### **7.1 Assessment**

The OBS may, in order to settle a dispute speedily, make an assessment of its merits without undertaking an investigation and suggest to the parties how the matter should be settled.

## **7.2 Mediation**

The OBS may, in its sole discretion, mediate any matter that it believes is appropriate for mediation, taking into consideration the wishes of the parties and the nature of the complaint, without undertaking an investigation.

## **7.3 Hearing**

- (a) If the Ombudsman and all the parties concerned are in agreement that a complaint or a material and conclusive dispute of fact can best be decided by the hearing of evidence, it may be so decided.
- (b) A hearing as aforesaid may be conducted in an inquisitorial manner by the Ombudsman or any other person or persons appointed for that purpose by the Ombudsman.
- (c) The decision arrived at in a hearing shall be of the same effect as a determination made under 7.5.
- (d) No party shall have the right to be legally represented at a hearing, whether by a practicing lawyer, legal advisor or counsel.

## **7.4 Recommendation**

- (a) The OBS may, in any case where a matter has not been settled, make a written recommendation setting out how the matter should be resolved and the reasons for the recommendation.
- (b) Neither a complainant nor a bank shall be bound to accept a recommendation made by the OBS, but if a bank does not accept a recommendation that has been accepted by the complainant and that satisfies the requirements of 7.5, the Ombudsman may then proceed to issue a determination.
- (c) A complainant who does not accept a recommendation may institute legal proceedings at his or her own expense, if so advised, or request the Ombudsman to make a determination, if the requirements of 7.5 are satisfied.

## **7.5 Determination**

- (a) The Ombudsman personally may in a case where a recommendation has not been accepted by all parties concerned, make a binding written determination based on the law or the Code, provided that:
  - (i) all the material facts are agreed or the facts have been established on a balance of probabilities;
  - (ii) the total amount involved in the dispute exceeds R10 000;

- (iii) if the determination is sought by a complainant, the complainant has agreed to be bound by it, subject to the right to a review under 8.2; and
  - (iv) the Ombudsman is satisfied that valid grounds have been advanced by the party seeking the determination; and
  - (v) the subject matter of the complaint does not fall within the provisions of NCA or other legislation.
- (b) A determination is binding on both the parties, subject to the right to a review under 8.2.
  - (c) A determination may order that the bank or complainant take such steps in relation to the complaint as the Ombudsman deems appropriate and just.
  - (d) The bank must give effect to any order made in a determination within the time stipulated by the Ombudsman.
  - (e) Should the bank fail to give effect to any order made in a determination within the time stipulated, that bank will be liable to have an award made against it under 1.3 (b) and to be reported to the board under 1.2 (d).

## **8. REVIEW**

- 8.1 The Board shall select a panel of at least three retired high court judges. The chairperson of the Board shall allocate a single member of the panel (the panel member) to conduct a review.
- 8.2 A bank or a complainant shall have the right to request the single member of the panel to review any adverse determination made by the Ombudsman provided that:
  - (a) the panel member shall only agree to review a determination if he or she is of the opinion that there is a reasonable prospect that he or she could come to a different finding;
  - (b) if the panel member agrees to review a determination, the costs of the review, as determined by the board from time to time, shall be borne by the parties as decided by the single member of panel;
  - (c) no new evidence shall be produced by any party to the proceedings of a review;
  - (d) no party shall have the right to appear in person or be represented before the panel member;
  - (e) both the bank and the complainant will be bound by the panel member's finding;
  - (f) the complainant must give such an undertaking before the leave to review shall be considered;
  - (g) the Ombudsman may assist the complainant if a review is brought by a bank;
  - (h) the Ombudsman may appoint an amicus curiae at the request of the panel.

## **9. PUBLICATION**

- 9.1 In cases where a recommendation may not be made a determination in terms of 7.4 (b), the Ombudsman may, at his or her discretion, publish the details of the recommendation and the fact that the bank has refused to abide by it. The decision of the Ombudsman on this issue shall not be subject to review.
- 9.2 The details of all determinations and review decisions, including the names of the parties, shall be published, irrespective of which party they are made in favour of.

## **10. EXTINGUISHING OF LIABILITY**

Acceptance by a complainant and bank of the terms of the Ombudsman's determination, or a recommendation, assessment or agreement reached during mediation or other such conciliatory process will finally extinguish the liability in law of the bank and complainant to each other on the cause of action concerned.

## **11. ENFORCEMENT OF OUTCOME**

- 11.1 The decision of the review panel, in the case where a determination has been reviewed, or a determination in the case where an review has not been sought in respect of a determination within the prescribed time limit, may be made an order of court by the party in whose favour the matter was decided.
- 11.2 If any matter that falls within the provisions of NCA is resolved by agreement between the parties or through the making of a determination, the OBS may record the resolution of that dispute in the form of an order and, with the consent of the parties, submit it to a court or the NCA Tribunal to be made a consent order.

## **12. PRECEDENTS**

Only decisions on review in terms of 8.2 and test cases, and not determinations and recommendations, shall establish precedent in the OBS's office. No decision reached in terms of these Terms of Reference shall establish legal precedent.

## **13. INFORMATION NOT PROVIDED TIMEOUSLY**

If a bank does not provide information requested or does not provide it timeously, the OBS shall have power to assume that the evidence is against that bank and to make a recommendation or determination accordingly.

## **14. TEST CASES**

- 14.1 The Ombudsman may, upon the request of a bank or on his or her own initiative, refer a matter that may have important consequences for the banking industry in

general or that may involve an important or novel point of law or a contentious banking practice or policy to the review panel as a test case, in order to obtain a ruling.

14.2 The Ombudsman may grant or refuse the application in his or her sole discretion.

14.3 If, at any stage after the application has been granted, the OBS is of the opinion that the bank is causing an undue delay in the finalisation of the dispute, the OBS may reopen the file and proceed with the complaint in the usual manner and inform the parties accordingly.

## **15. ANNUAL REPORT**

The Ombudsman shall prepare a report on the activities of the company for each calendar year and shall publish that report by 30 April of the following year. The report must comply with any requirements imposed by FSOS.

## **16. AMENDMENTS TO TERMS OF REFERENCE**

The Ombudsman may make recommendations to the Board (including a committee of the Board) for changes to these Terms of Reference and Operational Procedures.

## **PART 2**

### **OPERATIONAL PROCEDURES**

#### **STEP 1**

##### **17. RECEIPT OF ENQUIRY**

- 17.1 Upon receipt of an enquiry, the OBS will ascertain if the complainant referred the complaint to his/her bank and allowed the bank at least twenty (20) days to deal with the complaint.
- 17.2 If this has not been done, the OBS will advise the complainant to refer the matter to the relevant bank and supply the complainant with the relevant contact details of the person/s responsible for complaint resolution within the complainant's bank.
- 17.3 The bank shall provide the complainant with a reference number or other suitable proof that a complaint has been lodged.
- 17.4 If it would, in the OBS's opinion, cause a complainant undue hardship or inconvenience to refer a matter to his or her bank, before obtaining the OBS's assistance, the OBS may refer the complaint directly to the bank concerned.

#### **STEP 2**

##### **18. COMPLAINT RETURNED TO / RECEIVED BY OBS**

- 18.1 When a complaint is received, the OBS shall establish that:
- (a) the Application for Assistance form has been correctly completed; and
  - (b) the complainant has followed the bank's internal complaints procedure; and
  - (c) the complainant is not satisfied with the outcome or has not received a response from the bank within twenty (20) working days,
- 18.2 The OBS shall determine whether or not the complaint falls within the Terms of Reference and, in reaching this decision may consider representations from both the complainant and the bank named in the complaint.
- 18.3 If the complaint falls within the Terms of Reference, the OBS shall inform the person responsible for complaint resolution within the complainant's bank, hereinafter referred to as the designated official (DO), in writing, that a complaint has been lodged with the OBS and that the bank shall have a time period set by the OBS, but not less than fifteen (15) working days from receipt of the communication, to resolve the dispute with the complainant or to provide its reasons for repudiating the complaint.

- 18.4 Subject to 29 below, the OBS will ensure that the bank concerned is given full details of the complaint, including copies of relevant documentation submitted to the OBS to the extent necessary. The OBS will identify the complaint to the bank concerned through inclusion of the reference number, as described in 17.3 above.
- 18.5 The notification referred to in 18.3 may be delivered by hand to the bank concerned, or be sent by post, telefax or e-mail.
- 18.6 The bank must acknowledge receipt of the notification and may do so by letter delivered by hand or sent by post, telefax or e-mail.
- 18.7 During the time set in terms of 18.3, the bank shall:
- (a) contact the complainant to clarify any issue, to ascertain the essence of the complaint and to attempt to settle the complaint to the reasonable satisfaction of the complainant;
  - (b) if able to resolve the complaint, provide the OBS with proof that the complaint has been settled and that any undertaking made by the bank has been complied with;
  - (c) undertake any investigation that is necessary;
  - (d) inform the OBS if it establishes any fact that would exclude the matter from the OBS's jurisdiction; and
  - (e) if the bank was unable to resolve the complaint within the time period stipulated by the OBS, provide the OBS with a report outlining the investigation that it undertook and the reasons that the matter was not resolved and its reasons for repudiating the complaint.
- 18.8 During the time set in terms of 18.3, the OBS may facilitate a settlement between the bank and the complainant if the OBS considers that it would be appropriate and helpful to do so.
- 18.9 Where two or more banks are involved in a complaint relating to a cheque or the use of an ATM, the drawee bank or the cardholder's bank shall conduct the initial investigation and be responsible for obtaining information from the other bank involved.
- 18.10 If the OBS is of the view that the bank has provided the assistance sought by the complainant or provided an acceptable explanation for its conduct complained of, the OBS may inform the complainant of this fact and close the file if no new information or response is received from the complainant.

### **STEP 3**

#### **19. COMPLAINT BECOMES A DISPUTE**

If the bank fails to respond to the referred complaint within the time stipulated in 18.3 or informs the OBS that it is not able to resolve the dispute or it appears from the bank's response that the complaint has not been resolved, the complaint becomes a dispute and the OBS shall then proceed to investigate the complaint and obtain such information or expert advice as it shall deem necessary. After the complaint has become a dispute, the OBS will direct all correspondence intended for the bank to the DO.

#### **20. INVESTIGATION**

- 20.1 The OBS may require the parties to clarify any issues raised by the complaint or to provide such information in their possession or under their control to the extent that the OBS deems necessary in order to arrive at a conclusion.
- 20.2 Subject to the considerations of confidentiality, the OBS shall, to the extent deemed appropriate, permit each of the parties to comment on the information provided to the OBS by the other.

#### **21. ASSESSMENT**

- 21.1 If deemed appropriate by the OBS, a brief assessment will be issued to the parties.
- 21.2 In the assessment the OBS shall set a time limit within which the parties must indicate whether or not they agreed to the suggested resolution of the dispute.
- 21.3 Should either party disagree with the conclusion reached in the assessment or should either party wish to submit new information that it believes might affect the final decision, it may make further representations to the OBS.
- 21.4 In making such further representations, the parties should avoid repeating arguments already put forward, unless they were clearly overlooked.
- 21.5 A bank wishing to provide new information shall explain why the information was not submitted sooner and shall advance reasons as to why it should not compensate the complainant for the inconvenience caused by the delay.
- 21.6 Upon receipt of representations from either of the parties, a final recommendation may be issued without further consultation with either party.

#### **22. MEDIATION**

- 22.1 If, after the consideration of a complaint, the OBS believes the complaint is suitable for mediation, the OBS shall establish from the relevant parties whether

they are prepared to take part in the mediation.

- 22.2 If any party declines the invitation to take part in the mediation, the complaint shall be dealt with in the usual way.
- 22.3 All parties that take part in the mediation shall sign an agreement to mediate, acknowledging their rights and duties during the mediation. Any individual that represents a party at the mediation must ensure that he or she has the necessary mandate and authority to settle the complaint.
- 22.4 In the event of the mediation not being successful, the person acting as mediator shall not proceed to investigate the complaint unless the parties to the mediation had so agreed prior to the commencement of the mediation.
- 22.5 If the parties have not so agreed, another member of the OBS staff shall take over the case.

### **23. RECOMMENDATION**

- 23.1 Once the OBS has investigated a matter to the extent necessary, a provisional recommendation may be made.
- 23.2 Should either party disagree with the conclusion reached in the provisional recommendation or should either party wish to submit new information that it believes might affect the final decision, it may make further representations to the OBS.
- 23.3 In making such further representations, the parties should avoid repeating arguments already put forward, unless they were clearly overlooked.
- 23.4 A bank wishing to provide new information shall explain why the information was not submitted sooner and shall advance reasons as to why it should not compensate the complainant for the inconvenience caused by the delay.
- 23.5 Upon receipt of representations from either of the parties, a final recommendation may be issued without further consultation with either party.
- 23.6 The bank and the complainant must advise the OBS in writing within 10 working days from receiving the final recommendation from the OBS whether they accept the terms of the recommendation or not.
- 23.7 If the complainant accepts the recommendation and the bank fails to respond to the OBS within the time limit referred to in 23.6, the Ombudsman may proceed to make a determination.
- 23.8 If the bank responds within the time limit referred to in 23.6 but the complainant

rejects the recommendation or fails to respond within the time limit, the recommendation will fall away.

- 23.9 If both parties accept the terms of the recommendation, they must comply within the period of time prescribed in the recommendation.

## **24. HEARING**

- 24.1 If, after the consideration of a complaint, the OBS believes the complaint is suitable for a hearing, the OBS shall establish from the relevant parties whether they are prepared to take part in the hearing.

- 24.2 If any party declines the invitation to take part in the hearing, the complaint shall be dealt with in the usual way.

- 24.3 All parties that take part in the hearing shall sign an agreement, acknowledging their rights and duties during the hearing. Any individual that represents a party at the hearing must ensure that he or she has the necessary mandate and authority to settle the complaint.

- 24.4 At any hearing, any party, if an individual, may conduct their case themselves (with assistance from any person if they wish) or may appear and be represented by any person who is not legally qualified, provided that, if in any particular case there are good and sufficient reasons for doing so, the Ombudsman or person appointed by the Ombudsman may refuse to permit a particular person to assist or represent the party at the hearing.

- 24.5 Neither party shall be entitled to be legally represented at a hearing.

- 24.6 Evidence before the Ombudsman or person appointed by the Ombudsman may be given orally or where the Ombudsman or person appointed by the Ombudsman considers appropriate, by affidavit or written statement, but the Ombudsman or person appointed by the Ombudsman may, if it is appropriate, at any stage of the hearing require the personal attendance of any deponent or maker of a written statement.

- 24.7 At such a hearing, which shall be conducted in an inquisitorial manner, all issues of a procedural or evidentiary nature shall be determined by the Ombudsman or other person or persons so appointed.

## **25. DETERMINATION**

- 25.1 The party seeking a determination shall concisely set out in writing their grounds for doing so, which shall reach the Ombudsman within the time limit referred to in 23.6.
- 25.2 If the determination is sought by the complainant, the complainant must agree to be bound by the determination, subject to the right to review.
- 25.3 The Ombudsman shall, at the Ombudsman's sole discretion, give the opposing party an opportunity to comment on the grounds referred to in 25.1
- 25.4 The Ombudsman will make a determination in the matter if satisfied that the party seeking the determination has advanced valid grounds, and deliver it to the parties. Neither party shall have the right to make oral representations to the Ombudsman.
- 25.5 The parties shall advise the OBS within ten (10) working days after receiving the determination whether they accept its terms or not.
- 25.6 If both parties accept the terms of the determination, they must comply within the period of time prescribed in the determination.
- 25.7 If either party does not accept the terms of the determination, it must apply to the panel under 8.1 for leave to review within fifteen (15) working days from receiving the determination from the Ombudsman.
- 25.8 When a determination is made at the request of a bank, a standard amount (R2 000 excluding VAT) shall be paid by the bank concerned to the OBS and shall become part of the income of the OBS. The standard amount may be reviewed by the Board from time to time.

## **26. REVIEW PROCESS**

- 26.1 The party seeking a review shall submit the grounds upon which the review is sought in writing to the review panel.
- 26.2 A determination made by the Ombudsman is only reviewable by the review panel with the leave of the review panel after taking into consideration:
- (a) the complexity of the matter; or
  - (b) the reasonable likelihood that the review panel may reach a different conclusion.
- 26.3 If the review panel becomes seized with the review, the review must be dealt with

in terms of the rules applicable to that panel, as approved by the Board.

## **27. NATIONAL CREDIT ACT PROCESSES**

27.1 If any matter that falls within the provisions of the NCA is resolved, the OBS may:

- (a) record the resolution of that dispute in the form of an order; and
- (b) if the parties to the dispute consent to that order, submit it to:
  - (i) a court to be made a consent order, in terms of its rules; or
  - (ii) the Tribunal to be made a consent order in terms of section 138.

27.2 If in any matter that may be dealt with by the Regulator or the Tribunal under the NCA, the OBS concludes that either party to conciliation, mediation or arbitration is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the OBS shall issue a certificate in the prescribed form stating that the process has failed.

## **28. TEST CASES**

28.1 A bank may, once a complaint has been lodged with the OBS, apply to the Ombudsman for the complaint to be made a test case.

28.2 The bank shall set out the following in its application:

- (a) the reasons for the application;
- (b) the possible implications for the banking industry if the application is not granted;
- (c) the estimated time it would take to finalise the matter;
- (d) any possible prejudice the complainant may suffer;
- (e) an undertaking to pay all the legal costs associated with the test case; and
- (f) an undertaking to finalise the test case within a reasonable time.

28.3 If the application is granted the Ombudsman shall cease considering the complaint and inform the complainant accordingly.

28.4 If, after the application has been granted, the Ombudsman decides to reopen the file on the grounds that the bank is causing an undue delay in the finalisation of the dispute, the OBS shall proceed with the complaint in the usual manner and inform the parties accordingly.

## **29. CONFIDENTIALITY**

29.1 If any party to a complaint supplies information to the OBS and requests, in writing, that it be treated as confidential information, the OBS shall not disclose that information to any other party, except with the written consent of the first

mentioned party.

- 29.2 If consent is not given, the OBS is not entitled to use that information to reach a decision adverse to the party to whom the confidential information is denied.
- 29.3 Subject to 29.1, as far as is practical and at the sole discretion of the OBS, all documentation should be provided to both parties to a dispute. However, it is not necessary for documents and information used by the OBS to be provided to both parties as long as the OBS's written reasons clearly identify the documents or information relied on and the identified documents or information are provided on request.

### **30. INTERPRETATION**

- 30.1 In these Terms of Reference the following expressions have the following meanings:

**“Ombudsman”** means the South African Banking Ombudsman appointed from time to time by the Board to exercise the powers and duties of that office.

**“ATM”** means automatic teller machine.

**“Bank”** means a registered bank that is a member of the Banking Association of South Africa and wholly owned subsidiaries of that bank rendering financial services.

**“Bank customer”** means any small business or personal banking customer who makes use of banking services.

**“Banking Services”** means all services provided by banks in the normal and ordinary course of their business including the use overseas of credit or debit cards issued by banks.

**“Board”** means the Board of Directors of the company “The Ombudsman for Banking Services”.

**“Code”** means the Code of Banking Practice.

**“Complainant”** means any bank customer making a complaint to the OBS, in respect of any banking services provided by his or her bank.

**“Council”** means the council created in terms of s 2 of FSOS.

**“Dispute”** means a disagreement in relation to banking services between a bank and a customer of that bank which has not been resolved by the parties.

“**DO**” means the designated official responsible for complaint resolution within a bank.

“**FAIS**” means the Financial Advisory and Intermediary Services Act.

“**FSOS**” means the Financial Service Ombudscheme Act.

“**Maladministration**” means an act or omission in breach of any obligations or duty owed by the bank to the complainant for banking services between a bank and its customer.

“**Member bank**” means a bank that is a member of the Ombudsman for Banking Services company by virtue of its membership of the Banking Association.

“**NCA**” means the National Credit Act.

“**OBS**” means the Ombudsman for Banking Services scheme.

“**Scheme**” means the Ombudsman for Banking Services.

“**Small business**” means a sole proprietor, juristic person, partnership or trust whose turnover for the last financial year was less than R5 million.

“**Tribunal**” means the Tribunal created in terms of s 26 of NCA.

30.2 References to the provision of banking services include, where the context admits, references to their non-provision.

30.3 The use of the male gender in these Terms of Reference includes the other gender, as applicable, and references to the singular number (including without limitation, references to “recommendation”, complainant” and “bank”) include, where the context admits, the plural number and vice versa.

## **31. CONFLICTS**

If there is a conflict between the provisions of these Terms of Reference and the provisions of any Act, the latter take precedence.