



REPUBLIC OF NAMIBIA

Ministry of Finance

Tabling Statement

FINANCIAL SERVICES ADJUDICATOR BILL, 2018

**Hon. Calle Schlettwein, MP
MINISTER OF FINANCE**

25 June 2019

Honourable Speaker,
Honourable Members,

1. I herewith table the Financial Services Adjudicator Bill, providing for the appointment of the Financial Services Adjudicator for the financial services sector as a whole and the establishment of the Office thereof.
2. The proposed establishment of the Financial Services Adjudicator Office is embedded in the policy aspirations of the Namibia Financial Sector Strategy. Specifically, the Strategic Outcome 3(a) of the Strategy states: *“Namibia shall have, and implement a consumer protection legal framework in the financial sector, which will ensure transparency and disclosure as well as consumer complaints and redress mechanisms.”*
3. This Bill is in furtherance of this policy objective.
4. The Namibia Financial Institutions Supervisory Authority (NAMFISA) and the Bank of Namibia being the regulators in respect of the non-banking and banking financial institutions respectively, are not empowered to effectively deal with complaints in terms of which compensation for financial loss or damage is claimed.
5. As such, NAMFISA and BoN do not have the power to order or direct a financial services provider to pay compensation to aggrieved consumers. Thus, aggrieved consumers of financial services must seek redress through the judicial system. The civil judicial process can, however, be time consuming and expensive, which excludes many consumers from actively pursuing the available relief.

6. The Adjudicator to be appointed in terms of this Bill, will possess relevant skills and knowledge of financial services which will assist in the speedy resolution of cases.
7. Determinations made by the Adjudicator will carry the same weight as that of a civil judgment of a competent court of law. Complaints will be adjudicated with the minimum of legal formalities and at no cost to complainants.
8. The Office of the Financial Services Adjudicator will lighten the burden on the court system of Namibia, which will boost the confidence of consumers of financial services. It is a common trend and best practice in other countries to make provision for a specialized office of this nature, and it has proven to be essential and effective from best regional and global experience.
9. This Bill will provide the effective recourse to all those who are unable to approach the Courts of Namibia and will move Namibia closer to financial inclusion of all Namibians, without limiting any person's constitutional right to approach a competent court for available relief.
10. Complaints regarding market conduct will still be dealt with by NAMFISA and BoN or by the applicable regulator/supervisor of that specific institution. NAMFISA and the Bank of Namibia should not become embroiled in the complaints/disputes contemplated in the Bill, as there should be a clear separation of powers between the regulator and the adjudicator. The Adjudicator's purpose is to deal only with issues which could have been brought to a competent Court.

Honourable Speaker,
Honourable Members,

11. The object of the Bill is specified in Section 3; namely, to create the legal and institutional framework for the enquiry into, and determination of complaints lodged by consumers of financial services in a just, procedurally fair, economical and expeditious manner.
12. The enquiry and determination of complaints will be done free of any charges to the complainant, which will effectively improve access to justice and will make access to justice affordable.
13. In practice, complaints referred to NAMFISA and the Bank of Namibia mostly involve amounts which do not justify the costs of litigation in the normal course of business and the complainants are therefore left without any recourse if a financial institution refutes the complaint/claim.
14. An inquisitorial approach will be followed in respect to the hearing of complaints. Such complaints will be heard and determined with the minimum of legal formalities.
15. Determinations of the Adjudicator will carry the same weight as that of a competent court of law, with the High Court of Namibia having jurisdiction to hear appeals against any determinations or orders by the Adjudicator or to review proceedings before the Adjudicator. This will ensure independence and preserve all parties' constitutional right to administrative justice.

16. Consumers of financial services will still have a choice in respect of which forum to approach (either the Financial Services Adjudicator or any civil court with jurisdiction). A person's constitutional right of access to court is thus not infringed by the introduction of this legislation.

MAIN PROVISIONS OF THE BILL

Honourable Speaker,

17. Let me now provide highlights of the main provisions of the Bill.

18. **Part 1** of the Bill provides the key definitions and sets out the scope of the Bill. The essence of the Bill is to set out mechanisms for dealing with complaints lodged by complainants or users of financial products and services.

19. Such complaints arise as a result of the financial services provider, its employee, representative or agent, having:-

- (a) *contravened or failed to comply with a provision of the applicable establishing legislation;*
- (b) *contravened or failed to comply with a provision of any agreement or the law or a code of conduct subscribed to by the financial services provider;*
- (c) *intentionally or negligently provided, or failed to provide a financial service;*
- (d) *intentionally or negligently provided wrong advice; or*
- (e) *treated the complainant unreasonably or unfairly,*

20. In regard to the scope of this proposed legislation, the Financial Services Adjudicator will deal with complaints against the entities listed in the Schedule to the Bill; namely, the Agricultural Bank of Namibia; a banking institution; a building society, the Development Bank of Namibia; a financial institution; a financial intermediary, a microlender; the National Housing Enterprise; the Savings Bank; a person, organisation or institution categorised as such in an Act, regulation or other law; and a person, organisation or institution which provides financial services without being duly registered, licensed or authorised to provide such financial services.

Office of the Financial Services Adjudicator and Board of Office

21. **Part 2** of the Bill establishes the Office of the Financial Services Adjudicator, while **Part 3** sets out the appointment and functions of the Board.

22. The Board is responsible for the policy oversight and overall governance of the Office, except that the Board may not manage or influence the Adjudicator when he/she performs the function of adjudicating complaints. The Adjudicator, being the Chief Executive Officer and Accounting Officer, will perform the functions of the Office.

23. The functions of the Office are set out in *Section 5* and are to enquire into, and determine complaints lodged by consumers against financial services providers in a just, procedurally fair, economical and expeditious manner and to advise the Minister of Finance on matters related to the Act or to financial services providers.

24. The Board is appointed by the Minister and must possess adequate knowledge and experience pertaining to governance, accounting, financial services, economics, law or other related fields of expertise.
25. The Board's powers and functions are specified in *Section 7*, while their fiduciary duties are detailed in *Section 12*.

Financial Services Adjudicator

Honourable Speaker,

26. Section 16(1) provides for the Board to appoint an Adjudicator, Deputy Adjudicator(s) and, if necessary, ad-hoc Adjudicator(s). The Adjudicator must be an admitted legal practitioner with at least 10 years' relevant experience.
27. The Adjudicator is the Chief Executive Officer and may appoint employees of the Office in accordance with the organisational structure to assist the Adjudicator, Deputy Adjudicator(s) or the Office in the performance or exercising of powers or functions under the Act.
28. The Adjudicator, Deputy Adjudicator and an ad-hoc Adjudicator must at all times be impartial and independent from any interference from any person, including the Board, when performing his or her functions or exercising his or her powers under the Act.
29. He or she must not attend to any complaint when there is an actual or perceived conflict of interest.

30. *Section 16(5)* further stipulates that the Adjudicator, Deputy Adjudicator or an employee of the Office appointed as an *ad-hoc* Adjudicator may not accept or hold any other office for profit or receive remuneration other than the remuneration contemplated in this Act, unless authorised by the Board.

31. Although the Adjudicator must carry out the functions of the Office and the decisions of the Board subject to the general control of the Board, section 16(7) determines that the Adjudicator must at all times be free from interference of the Board in the discharge of his or her function to determine complaints.

32. *Section 17* provides for the criteria which would disqualify a person from being appointed as an Adjudicator, Deputy Adjudicator or *ad-hoc* Adjudicator and it provides for non-Namibians to be appointed as Adjudicators only in circumstances where the necessary expertise is not found in Namibia.

Funds of the Office

Honourable Speaker,

33. *Part 5* of the Bill provides for the financial provisions of the Bill. In terms of Section 19(1)(a), the Office may be funded by funds provided by NAMFISA and BoN.

34. It is anticipated that the funds to be provided by NAMFISA and BoN will be limited for purposes of establishing the Office and for the initial functioning of the Office. Later on, the Office will become self-funded through fees and levies to be imposed on the financial services providers by way of Regulation, and through administrative penalties imposed and

the punitive monetary awards which can be made against financial services providers.

35. Concerns were raised regarding the independence of the Adjudicator because of funding provided by NAMFISA and BoN and that the Adjudicator may be self-serving in imposing administrative penalties or award punitive monetary awards with the aim to generate funds for the Office.

36. NAMFISA and BoN will however not, as a regular feature, be parties to complaints before the Adjudicator. The requirements of administrative justice, as well as the right of appeal and review against determinations or orders by the Adjudicator, safeguards parties to complaints from abuse of the process.

37. *Section 19* further provides for the preparation and approval of the budget of the Office, the financial year-end, funds to be held in reserve and for the Board to establish an investment policy, with the approval of the Minister, in respect of the funds to be held in reserve.

Submission of complaints to Office and Determinations by the Adjudicator

Honourable Speaker,

Honourable Members,

38. *Part 6* of the Bill sets out the complaints mechanism and determinations to be made by the Adjudicator as well as the penal measures arising from this process.

39. The Adjudicator is empowered to enquire into, and determine any complaint submitted, to consider any applications made to the Adjudicator in terms of the Act, to issue declaratory orders in relation to the application or interpretation of any provision of a financial services law, an agreement or of a code of conduct subscribed to by the financial services provider and to make any order a court of law can make.

40. In terms of Section 23(7), a person who, after having been sworn or having made affirmation, gives false evidence before the Adjudicator on any matter knowingly such evidence to be false, commits an offence and is on conviction liable to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.

41. The Adjudicator must, where a complaint has not been withdrawn or settled by the parties, make a determination which may-

- (a) dismiss the complaint; or
- (b) uphold the complaint, wholly or in part,

42. The determinations by the Adjudicator shall have the effect of a civil judgment given in the court at which such determination is registered for a liquid debt in the amount specified in the determination. This is provided for in section 24(9).

Legal representation or other expert representation

43. The Adjudicator must enquire into and determine complaints with the minimum of legal formalities and may follow and implement an inquisitorial approach.
44. The Bill, in section 28, prohibits legal representation at proceedings before the Adjudicator, subject to certain exceptions, namely if the parties agree to it, or upon application made to the Adjudicator and he or she is satisfied that the complaint is of such complexity that it is appropriate for a party to be represented by a legal practitioner. These provisions are similar to the provisions of the Labour Act, 2007 (Act No. 11 of 2007).
45. The aforementioned provisions of the Bill will curb the costs of the determinations of complaints and ensure that complaints are determined expeditiously without unnecessary formalities and technicalities.
46. The Adjudicator must, in terms of section 30, submit reports to the Minister, NAMFISA and BoN regarding complaints received, the number of complaints determined and finalised and provide reasons for why complaints are pending.

Appeals and reviews

Honourable Speaker,

47. In regard to appeals and reviews, Section 32(1) provides that a party may appeal to the High Court against a determination or an order made by the Adjudicator and must cite, as respondents to the appeal, the Adjudicator and any other person who was a party to a complaint.
48. The grounds upon which the proceedings of the Adjudicator may be brought under review before the High Court are specified under section 32(5).

49. The Court may confirm, review, correct or set aside the determination which is subject to the review, or make any order which the circumstances may require.

GENERAL PROVISIONS

Honourable Speaker,

50. *Part 7* sets out general provisions of the Bill in regard to the winding up of the Office of the Adjudicator, delegation of authority, preservation of secrecy and setting of rules not inconsistent with a provision of the Act.

CONCLUSION

Honourable Speaker,

Honourable members,

51. The Financial Services Adjudicator's primary function is to provide recourse for all users of financial services who are unable to approach the Courts of Namibia due to financial constraints and aims to move Namibia closer to financial inclusion for all.

52. The Bill will considerably enhance the credibility of the financial services industry and will strengthen Government's powers to enforce compliance with operational requirements and fair conduct.

53. With these remarks, I table the Financial Services Adjudicator Bill to the House and, welcome your support for the passing of this Bill.

I thank you.