

## Before the Arbiter for Financial Services

**Case ASF 130/2024**

**ZN**

**(‘the Complainant’)**

**vs**

**Optimus Fiduciaries (Malta) Limited**

**(C 90147) (‘OFML’ or ‘the Service**

**Provider’)**

### **Sitting of 14<sup>th</sup> November 2024**

#### **The Arbiter,**

Having seen the **Complaint** made against Optimus Fiduciaries (Malta) Limited (‘Optimus’ or ‘the Service Provider’) relating to The Optimus Retirement Benefit Scheme No. 1 (‘the Retirement Scheme’ or ‘Scheme’), this being a personal retirement scheme licensed by the Malta Financial Services Authority (‘MFSA’), established in the form of a trust and administered by OFML as its current Trustee and Retirement Scheme Administrator (‘RSA’).

The Complaint, in essence, relates to the Complainant’s claim of significant losses suffered on his Retirement Scheme in respect of *The Resort Group* (‘TRG’) investment. The Complainant attributed the loss to the alleged failures of the Service Provider as trustee and RSA of his Retirement Scheme, where it was mainly claimed:

- That the Service Provider allowed about half of his pension to be invested into TRG, which he claimed was a high-risk investment which was illiquid and of no financial value;

- That the Service Provider failed to do adequate due diligence before allowing his Retirement Scheme to be invested into the disputed investment.

In his Complaint to the Office of the Arbiter for Financial Services ('OAFS'), the Complainant also claimed that OFML did not send annual statements with him only receiving a few statements.

### *The Complaint*<sup>1</sup>

The Complainant explained that OFML informed him that they took over the trusteeship (of the Retirement Scheme) on the 29<sup>th</sup> of May 2020 and that OFML did not exist as a company in 2016 and was thus not responsible for his pension losses.

He noted that his Complaint is against the company that took over the running of his pension in February 2016 into the Retirement Scheme.

The Complainant explained that it appeared that there were two Optimus companies in existence in 2016, Optimus Pension Administrators Limited and Optimus Fiduciaries Limited, which he assumed is a different company to Optimus Fiduciaries (Malta) Limited. He submitted that all these companies are the same people even if they changed their company name and responsibilities over the last eight years.

The Complainant noted that he transferred his pension into the Retirement Scheme in March 2016. He claimed that they allowed about half of his pension, GBP 103,921, to be invested in The Resort Group, which is now an illiquid asset. He held the Service Provider responsible for allowing his pension into this high-risk offshore investment, which he claimed was now of no financial value.

The Complainant claimed that OFML failed to do any or enough due diligence before allowing his pension to be paid into the TRG investment.

It was further claimed that as OFML is responsible for allowing this investment, he believed that he was entitled to compensation from OFML.

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<sup>1</sup> Complaint Form on Page (P.) 1-5 with extensive supporting documentation on P. 6-63.

The Complainant explained that he withdrew his 25% tax-free lump sum about three years ago and has not withdrawn any money since then.

He noted that he only had a few valuation statements and claimed that OFML did not send annual statements but only sent him a few, as their policy was that if one wanted a statement, one would have to request it; otherwise, it would not be sent.

*Remedy requested*

The Complainant requested the amount of GBP 103,921 from OFML as compensation, together with an 8% compound interest per year, to be put in the same position as if the investment had not occurred.

He calculated this to amount to GBP 192,350 over an 8-year period.<sup>2</sup>

**Having considered, in its entirety, the Service Provider's reply, including attachments,<sup>3</sup>**

Where, in essence, the Service Provider explained and submitted the following:

1. That the Complaint contains accusations and statements that are not factual, and intentionally ignore the various explanations and evidence given to the Complainant prior to this Complaint. Furthermore, the claims for compensation made by the Complainant do not relate to the Service Provider's conduct in any way.
2. Without prejudice to the detailed response below, it submitted that the Complaint was time-barred pursuant to Article 21(1)(c) of the Arbitration Act for Financial Services Act (Chapter 555 of the Laws of Malta). According to this provision, a complaint must be registered in writing with the Service Provider '*not later than two years from the day on which the complainant first had knowledge of the matters complained of*'. It submitted that, in this case, the Complainant declared that he first became aware of the matters giving rise to the Complaint on 23<sup>rd</sup> November 2020, while the Complaint

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<sup>2</sup> P. 3

<sup>3</sup> P. 69-76 with extensive supporting documentation on P. 77-131

was registered with the Service Provider on the 29<sup>th</sup> December 2023. It argued that consequently, given the time elapsed since this date, the Complaint falls outside the permissible period for filing and the Arbiter therefore lacked the requisite competence in accordance with Article 21(1)(c) of Chapter 555 of the Laws of Malta. The Service Provider submitted that the Complaint is therefore subject to dismissal on these grounds.

- A. *Allegation that the Service Provider was the retirement scheme administrator since 2016, albeit through its affiliated entities, Optimus Fiduciaries Limited and Optimus Pension Administrators Limited ('the Affiliated Entities'), registered in the Isle of Man*
3. OFML noted that on page 3 of the Complaint, the Complainant states that *'My complaint is against the Company that took over the running of my pension in February 2016'*.<sup>4</sup>

The Service Provider submitted that it was not the trustee and retirement scheme administrator ('RSA') of the Retirement Scheme when the investments were accepted into the Complainant's portfolio. OFML was incorporated on the 8<sup>th</sup> of January 2019 (as per Doc A to its reply),<sup>5</sup> and appointed as trustee and RSA of the Scheme on the 29<sup>th</sup> May 2020 ('the Appointment Date') (as per Doc B to its reply).<sup>6</sup>

4. It noted that on page 3 of the Complaint, the Complainant further states that: *'It appears that there were two Optimus Companies in existence in 2016 Optimus Pensions Administrators Limited and Optimus Fiduciaries Limited, which I assume is a different Company to Optimus Fiduciaries Limited. All these Companies are the same people even if they changed their Company name and responsibilities over the last 8 years'*.<sup>7</sup>

OFML submitted that this statement was devoid of any factual basis. It noted that if it was indeed true that the Complainant felt aggrieved by the

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<sup>4</sup> P. 70

<sup>5</sup> P. 70 & 77

<sup>6</sup> P. 70 & 79

<sup>7</sup> P. 71

conduct of the Affiliated Entities, then it would follow that he should be seeking redress from these entities and not the Service Provider.

5. It noted that the due diligence and acceptance of investments is the responsibility of the trustee and RSA, a role which at the time when the Complainant's investments were executed, was occupied by Integrated-Capabilities (Malta) Ltd ('ICML'). OFML submitted that the annual statements annexed to the Complaint, specifically on pages 17, 19 and 21 clearly show that ICML was the trustee and RSA of the Scheme and not the Service Provider.
6. The Service Provider noted that, furthermore, the Application Form signed by the Complainant on 30<sup>th</sup> November 2015, specifically pages 12-16 (as per Doc C to its reply),<sup>8</sup> clearly state that ICML is the trustee and RSA of the Scheme and that the Affiliated Entities were back-office administrators.
7. OFML submitted that Optimus Pensions Administrators Limited previously served as back-office administrator to the Scheme. Its role was authorised by the Malta Financial Services Authority ('MFSA') and limited to the provision of back-office services and did not extend to approving investments. Optimus Fiduciaries Limited is the holding company of Optimus Pensions Administrators Limited. The Affiliated Entities ceased providing back-office administration to the Scheme when a Maltese company, OFL Administrators (Malta) Ltd, was set up and continued to provide back-office administration after Optimus Pensions Administrators Limited. It further noted that the function of back-office administrators eventually became defunct pursuant to the enactment of revised legislation governing RSAs.
8. The Service Provider submitted that the Complainant is well aware of these facts and that, as evidenced in Doc C to its reply, the respective roles of the Affiliated Entities were transparently communicated in the Application Form signed by the Complainant on 30<sup>th</sup> November 2015.

It noted that consequently, with respect to the Complainant's contentions pertaining to the due diligence and acceptance of investments carried out

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<sup>8</sup> P. 71 & 80

prior to the Appointment Date, it was evident that the Service Provider was not the proper defendant.

- B. Allegation that the Service Provider allowed the investments in The Resort Group to take place and that these investments are now of no financial value*
9. The Service Provider re-iterated that it didn't allow the investments to take place and explained that the regulatory responsibility to allow or refuse investment lies with the trustee and RSA which, as previously stated, was ICML. It submitted that it was thus unclear why the Complainant has insisted on seeking redress from the Service Provider and not ICML.
  10. OFML further pointed out that the Complainant omits that ICML had executed the investments in The Resort Group upon his specific instruction, and upon presentation of investment advice he had procured from Strategic Wealth Limited, an investment advisor registered and regulated in Gibraltar. The investment advice, in the form of a Suitability Report (as per Doc D to its reply),<sup>9</sup> indicates that the Complainant was well aware that his funds would be invested in The Resort Group and that these investments were by their very nature, illiquid investments. It submitted that the Complainant's reticence in seeking redress from his investment advisor appears to be nothing more than a forum shopping exercise.
  11. OFML noted that the Complainant also incorrectly states that The Resort Group investments are worthless, when independent valuations obtained by the Service Provider indicate that they are impaired but not worthless (as per Doc E to its reply).<sup>10</sup>
  12. The Service Provider further noted that it was worth mentioning that prior to the Appointment Date, the investments in The Resort Group were still being valued and recorded at their acquisition cost, despite The Resort Group already facing financial difficulties. It noted that it was the Service Provider, in consultation with its auditors, that devalued the investments until such time as independent valuations were obtained. OFML submitted

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<sup>9</sup> P. 72 & 96

<sup>10</sup> P. 73 & 115

that the investments are now valued and recorded in accordance with such independent valuations and reflected in the audit of the Scheme.

13. The Service Provider argued that it has always been transparent in its communications with the Complainant and has kept the Complainant up to date with developments related to his investment. It noted that this reflects the diligent monitoring of the operations of The Resort Group and the due diligence carried out by the Service Provider prior to the Appointment Date.
14. OFML noted that it has also submitted a contingency plan to the MFSA in respect of the TRG investments prior to the Appointment Date, in virtue of which, it satisfied the MFSA about the actions it planned to take in respect of problematic investments such as those in The Resort Group.

It further noted that, in fact, the tax-free lump sum withdrawn by the Complainant in 2022 was based on the total valuation of the whole portfolio as of that date. The value of The Resort Group investments was also included in the Pension Commencement Lump Sum calculation, which further demonstrates that the assets are not worthless. It accordingly submitted that to date, the Complainant still has liquid assets available in his portfolio.

*C. Allegation that the Service Provider failed to send annual statements unless requested*

15. The Service Provider denied this allegation as completely unfounded. It submitted that in accordance with applicable rules, OFML is obliged to send an annual statement to the Complainant in accordance with rule B.5.1.4 of *'The Pension Rules for Personal Retirement Schemes issued in terms of the Retirement Pensions Act, 2011'*.

It noted that the rules require annual statements to contain information in relation to the yearly portfolio valuation, contributions into the scheme, benefits taken out from the scheme and an indication of the applicable charges in connection with the reference year for which the annual statement is produced.

OFML further noted that as evidenced in Doc F to its reply,<sup>11</sup> annual statements were sent to the Complainant for each and every year since the Appointment Date.

It also noted that ad hoc valuations, on the other hand, are provided upon request by members and only contain current valuations of the portfolio. Such ad hoc valuations were requested by the Complainant on several occasions and have always been provided by the Service Provider as per Doc G to its reply.<sup>12</sup>

*D. The Complainant sought compensation from the Service Provider, when he has already obtained compensation from the Financial Services Compensation Scheme ('FSCS')*

16. OFML pointed out that as noted in the Complaint, the Complainant has received compensation from the FSCS on the 28<sup>th</sup> November 2019 in the amount of eighty-five thousand pounds sterling (£85,000). The basis of the claim for compensation from the FSCS was the incorrect pension transfer advice supplied by Gerard Associates, a UK-based pension transfer advisory. OFML submitted that it is unclear why the Complainant has stated before the Arbiter that he became privy to the matters complained about on the 23<sup>rd</sup> November 2020 when a year prior he received compensation from the FSCS in relation to the same matter over which he seeks compensation from the Service Provider.

17. The Service Provider submitted that the description given to the FSCS by the Complainant is evidence that the compensation was received in respect of the investments in The Resort Group. It referred to pages 54 and 55 of the Complaint, where it noted the Complainant stated the following:

*'I was advised to invest in Cape Verde Property which is high risk and I only requested medium risk. I was charged 3% of £218,613.18 for the poor advice and was not informed about the charge. This is an excessive*

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<sup>11</sup> P. 74 & 117

<sup>12</sup> P. 74 & 127



*charge. I was told that the Cape Verde yield was currently about 9%, statements show 2 to 3% quite a low yield...'*<sup>13</sup>

The Service Provider noted that, clearly, based on the above wording, the Complainant sought to be compensated for purported losses relative to the investments in The Resort Group.

18. OFML noted that, furthermore, the Complainant also declared to the FSCS that he would not seek compensation from third parties in relation to the same subject matter as follows:

*'I declare that I have not received any payments in connection with the losses I am claiming for except those I have already notified to FSCS, and that I have not made any claims to any third parties for these losses, nor do I expect to receive any future payments other than from the FSCS. If I do receive such payment I will pay it to the FSCS'*<sup>14</sup>

The Service Provider submitted that, once again, the Complainant's attempt at seeking damages from it is in violation of the declarations made before the FSCS and an attempt to obtain double compensation in respect of the same loss.

*The Service Provider's concluding remarks in its reply*

19. OFML submitted that the arguments raised in its response raise serious questions on the motives of the Complainant in promoting this Complaint and the clear pattern amongst certain members who are in receipt of compensation of the FSCS who yet insist on seeking additional compensation from the Service Provider as opposed to the investment advisor, Strategic Wealth Limited or the previous trustee and RSA, ICML.
20. OFML further noted that in light of these arguments, it is evident that it has acted within its legal and regulatory framework and should not be held liable for the matters raised by the Complainant. It, therefore, respectfully

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<sup>13</sup> P. 75

<sup>14</sup> *Ibid.*

requested the Arbiter to dismiss the claim in its entirety and that all costs associated with the proceedings are borne by the Complainant.

## Preliminary

### *Competence of the Arbiter*

In its reply to the Complaint filed with the OAFS, the Service Provider submitted that the Complaint is time-barred pursuant to Article 21(1)(c) given that the Complaint was registered with the Service Provider on 29<sup>th</sup> December 2023, which is later than two years from the day the Complainant indicated he first had knowledge of the matters complained of, this being 23<sup>rd</sup> November 2020.<sup>15</sup>

The Service Provider also raised the preliminary plea that it is not the proper defendant in this case, pointing out, *inter alia*, that *'the claims for compensation made by the Complainant do not relate to the Service Provider's conduct in any way'*.<sup>16</sup>

Another preliminary aspect raised by OFML involves the claim that the Complainant had already sought compensation on the TRG investments from the Financial Services Compensation Scheme ('FSCS') in the UK, even earlier than the date of 23<sup>rd</sup> November 2020.<sup>17</sup>

During the hearing of 21<sup>st</sup> October 2024, the Arbiter referred to the preliminary plea raised by the Service Provider that the Arbiter has no competence to hear this Complaint based on Article 21(1)(c) of Chapter 555 of the Laws of Malta (the 'Act'),<sup>18</sup> and asked the Complainant to file his written submissions on this aspect first.

In his written submissions of 28<sup>th</sup> October 2024,<sup>19</sup> the Complainant explained that he only realised that he had a case against OFML in respect of the TRG investment on 10<sup>th</sup> July 2023. The latter was when the Complainant received a communication from his financial advisor *'that stated that someone had complained about Optimus and its Resort Group Investments to the Arbiter for*

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<sup>15</sup> P. 70

<sup>16</sup> P. 69

<sup>17</sup> P. 74, 75 & 76

<sup>18</sup> P. 132 - 133

<sup>19</sup> P. 134 – 136 with attachments on P. 137 - 138

*Financial Services and the Complaint had been upheld*'.<sup>20</sup> A copy of the said communication was attached to the Complainant's submissions as evidence.<sup>21</sup> The Complainant noted that he was advised that he should file a complaint and pointed out that prior to this communication he was not even aware that the OAFS existed.

In his submissions, the Complainant also pointed out *inter alia* that OFML took over as RSA and trustee of the Retirement Scheme 'on the 29<sup>th</sup> May 2020 and from this date became responsible for resolving and rectifying problems passed on to them by their predecessors, Integrated-Capabilities Malta Ltd'.<sup>22</sup> The Complainant submitted that OFML 'have a Duty of Care and responsibility to resolve the issues of The Resort Group investments being 100% illiquid and devalued'.<sup>23</sup>

*Decision on the preliminary plea raised with reference to Article 21(1)(c)*

Article 21(1)(c) stipulates that:

*'An Arbiter shall also have the competence to hear complaints in terms of his functions under article 19(1) in relation to the conduct of a financial service provider occurring after the coming into force of this Act, if a complaint is registered in writing with the financial services provider not later than two years from the day on which the complainant first had knowledge of the matters complained of.'*

Therefore, the Complainant had two years to complain to the Service Provider 'from the day on which the complainant first had knowledge of the matters complained of'.<sup>24</sup>

It is noted that the pension transferred by the Complainant into his Scheme in February 2016 was of GBP 218,613 where approximately 48% of this amount was then invested into the TRG investment, that is, GBP 51,500 in TRG

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<sup>20</sup> P. 135

<sup>21</sup> P. 137 - 138

<sup>22</sup> P. 135

<sup>23</sup> P. 136

<sup>24</sup> P. 69

commercial property and GBP 52,421 in TRG corporate bond, for a total of GBP 103,921.<sup>25</sup>

The matter complained of in this case involves the substantial losses the Complainant alleged he incurred on his Retirement Scheme due to the TRG investment which he claimed is now of no financial value. The remedy requested by the Complainant comprised the sum invested into the TRG investment (of GBP 103,921) and 8% compound interest over eight years. The Complainant held the Service Provider responsible for allowing his pension to be invested into this product and held OFML responsible for resolving and rectifying the problems passed by the original trustee and RSA of the Scheme as outlined above.

In his Complaint Form filed with the OAFS, the Complainant indicated that the first time he had knowledge of the matters complained of was on '23/11/2020'.<sup>26</sup> It is noted that in his submissions of 28<sup>th</sup> October 2024, the Complainant rectified this date and instead claimed that he realised he '*had a possible Complaint/ Case against Optimus Fiduciaries (Malta) Limited with regard to The Resort Group investments on the 10<sup>th</sup> July 2023*'.<sup>27</sup>

In the particular circumstances of this case, the Arbiter, however, cannot reasonably and justifiably consider the date indicated by the Complainant of 10<sup>th</sup> July 2023 as the date when he first had knowledge of the matters complained of. It is noted that the said date is when the Complainant was contacted by his advisor about a ruling that the Arbiter previously issued on 13<sup>th</sup> February 2023 with respect to another case involving OFML.<sup>28</sup>

The said Arbiter's decision of 13<sup>th</sup> February 2023, which the Complainant became aware of on 10<sup>th</sup> July 2023, however, did not add fresh knowledge to the matters complained of, this being the significant losses that were claimed to have been suffered. The date when the Complainant became aware of the significant loss complained about is considered to be the determining factor for the purposes of Article 21(1)(c) of the Act.

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<sup>25</sup> P. 15 & 19

<sup>26</sup> P. 2

<sup>27</sup> P. 135

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[https://www.financialarbiter.org.mt/oafs/decisions?provider=9133&language=&year=&date\\_from=&date\\_to=&sector=&issue=&product=&outcome=&reason=&court\\_appeal=&case\\_reference=&sub=submit](https://www.financialarbiter.org.mt/oafs/decisions?provider=9133&language=&year=&date_from=&date_to=&sector=&issue=&product=&outcome=&reason=&court_appeal=&case_reference=&sub=submit)

The Complainant's awareness about the material loss on the TRG investment can reasonably be traced back to the year 2020 latest, taking into account the following:

- It is noted that through his claim with the FSCS of 2019,<sup>29</sup> which involved the TRG investment (referred to as *'the Cape Verde Property'*),<sup>30</sup> the Complainant was already clearly aware of: the alleged unsuitability of the TRG investment; the high risk of this investment which was not reflective of his risk profile; the low yield on the investment as compared to the yield he was told he would receive; the *'future problem'* that he could have in *'liquidating the assets'*; and the *'future losses could occur as a result of these investments and their ongoing charges and poor performance'*;<sup>31</sup>
- According to the evidence produced during the proceedings of the case, the awareness about the significant losses on the TRG investment, however, crystallised even more clearly through the communication of 23<sup>rd</sup> November 2020. The said communications included an Annual Statement as at June 2020 and a detailed overview about the status of the disputed investment<sup>32</sup> wherein the following aspects were pointed out to the Complainant:
  - (a) the illiquid nature of these investments;
  - (b) the financial difficulties experienced by TRG and the lack of assurances being provided on this investment;
  - (c) the material fair value reduction of 30% in the value of the investments that was done at that stage with the warning that *'These investments do not have a realisable value at this stage and may be valued lower or even of no value if or as and when they become realisable'*.<sup>33</sup>

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<sup>29</sup> P. 47 & 54

<sup>30</sup> P. 54

<sup>31</sup> P. 55

<sup>32</sup> P. 28 - 33

<sup>33</sup> P. 29 & 30

The Complainant himself originally corroborated the date of '23/11/2020' as the date when he first learned of the matters he was complaining about (that is, the significant losses on the TRG investment).<sup>34</sup>

In the particular circumstances of this case and for the reasons mentioned, the Arbiter accordingly concludes that the complaint that was registered in writing with the financial services provider of 29<sup>th</sup> December 2023 is later than two years from the day on which the Complainant first had knowledge of the matters complained of. The Arbiter is accordingly accepting the Service Provider's plea made in terms of Article 21(1)(c) of the Act, that he has no competence to hear this Complaint.

Whilst understanding and sympathising with the Complainant's situation, the Arbiter points out that the law permits him to have competence to hear only those complaints pursued within the time allowed and prescribed by law, as outlined in terms of Articles 21 and 19(3)(e) of the Act.

The Arbiter refers to other previous decisions where the plea of prescription was upheld as it was justified in terms of law.<sup>35</sup>

With respect to the claims raised about the lack of regular receipt of annual statements from OFML, it is considered that this aspect has no material relevance to the key aspects raised and neither to the redress requested in this Complaint by the Complainant.

## Decision

For the reasons explained, the Arbiter upholds the plea of prescription raised by the Service Provider in its first submissions that he has no competence to hear this Complaint based on Article 21(1)(c) of Chapter 555 of the Laws of Malta. The Arbiter accordingly dismisses this Complaint.

In view of the above, the Arbiter is not considering further the other preliminary pleas raised and will not be deciding on the merits of the case. This is without

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<sup>34</sup> p. 2

<sup>35</sup> Such as Case ASF 010/2023 and Case ASF 040/2022 amongst various others – <https://www.financialarbiter.org.mt/oafs/decisions?page=1>

prejudice to any right the Complainant may have to seek justice before another court or tribunal competent to hear his case.

As the case is being decided on a preliminary plea each party is to bear its own costs of these proceedings.

**Alfred Mifsud**  
**Arbiter for Financial Services**

### **Information Note related to the Arbiter's decision**

#### *Right of Appeal*

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.