

# FSB BULLETIN

SECOND QUARTER 2004



trade in financial services 6

consumer education programme  
firmly on track 10



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#### Editor

Dr Franso van Zyl

#### Sub-editor

Ms Bessie Venter

#### Editorial Committee

Mr Jeff van Rooyen

Mr Russel Michaels

#### Front page and designs

IE Communications

(012) 347 2882

#### Lay-out

Ms Bessie Venter

#### Subscriptions

All subscription enquiries should be directed to Francisca van der Merwe at the contact details below.

#### Contributions

Contributions to the *FSB Bulletin* are welcome and should be sent to the sub-editor at the address below. The editor reserves the right to edit contributions.

#### Postal information

PO Box 35655

Menlo Park

0102

Republic of South Africa

Tel: (012) 428 8155

Fax: (012) 347 0669

e-mail: francise@fsb.co.za

The *FSB Bulletin* is available on the Internet: [www.fsb.co.za](http://www.fsb.co.za)



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Letters to the editor may be submitted to Bessie Venter,  
PO Box 35655,  
Menlo Park, 0102 or to  
[bessiev@fsb.co.za](mailto:bessiev@fsb.co.za)

## New DEO for insurance appointed



Mashudu Munyai, formerly a partner at PricewaterhouseCoopers, has been appointed new deputy executive officer, insurance of the Financial Services Board (FSB). He will succeed André Swanepoel, who will be retiring at the end August 2004.

Jeff van Rooyen, executive officer of the FSB said he was delighted with Munyai's appointment.

Munyai studied at the University of the Witwatersrand and qualified as a chartered accountant. He served his articles with Arthur Andersen and Company.

He joined ECAS (Eskom Catering and Accommodation Services) as divisional manager during the time he was seconded to the Ministry for Public Enterprises. Here he advised the minister on various matters, mainly dealing with restructuring and privatisation. He was group audit manager and executive assistant to the Deputy CEO at Eskom before joining PricewaterhouseCoopers in 1999.

Source: FSB media release  
1 April 2004

## Appointments

### FSB announces new board appointments

Dr Cyrus Rustomjee, who joined the board last year, has been appointed new chairperson of the FSB board.

Abel Sithole, chief executive officer of Employee Benefits Metropolitan Life, who joined the board in 2002, is the new deputy chairperson.

The FSB also announced the names of three new appointments to the board. They are Brian Hawksworth, retired partner of Ernst & Young, who serves on the FSB's licensing committee, Kensani Holdings' Jabu Mogadime and Nosipho Molepe, group financial executive of Viamax.

The appointments are effective from 1 March. The minister of finance, Trevor Manuel, appoints the FSB's board mem-

bers.

Jeff van Rooyen, executive officer of the FSB, said he was pleased with the appointments.

Rustomjee, who consults to academic, governmental and international institutions, holds six graduate and post-graduate qualifications, including a doctorate in economics from the University of London. He recently served as executive director for 21 African countries in the Executive Board of the International Monetary Fund (IMF).

Board members Prof Philip Sutherland, Louisa Mojela and Hilary Wilton have been re-appointed.

Source: FSB media release  
30 March 2004



*Dr Cyrus Rustomjee*



*Abel Sithole*



# Appointments

## New board members



**Nosipho Molope**

Nosipho Molope was appointed to the FSB board in March 2004. She trained at Fisher Hoffman Sithole Inc. where she qualified as a chartered accountant in 1999. After qualifying, she joined Akulalwa Corporate Advisers as a financial executive from September 1999 to January 2001. Ms Molope was appointed senior manager: Specialised Funds Management at Wipcapital (Pty) Ltd where she worked until September 2001. She is the group financial executive at Viamax (Pty) Ltd, a position she has held since 1 October 2001.

She has been a member of the Armscor board of directors since 1 April 2004 and has been an independent member of the Armscor Audit Committee since June 2002. She is also attached to Zico (Pty) Ltd since July 2002.

She holds a B.Sc. (Med), B. Compt. (Hons)(CTA) and a CA (SA).



**Brian Hawksworth**

Brian Hawksworth joined the FSB board in March 2004.

He started his career in a London-based accounting practice. He joined the predecessor firm of Ernst & Young in Pietermaritzburg in 1964. Mr Hawksworth lectured at the University of Natal and Vista University. He is also a past member of the Faculty of Commerce at Witwatersrand University.

He is a director of several companies, including Tagbe Investment Corporation and Teba Bank Limited. He is a fellow, founder member and former Vice-chairman of the Institute of Commercial and Financial Accountants of Southern Africa. He is also a fellow and former Chairman of the Institute of Directors of South Africa. He served on its council from 1986 to 2000.

Mr Hawksworth is a past president of the Transvaal Society of Chartered Accountants. He also serves on the South African Institute of International Affairs, the Public Accountants and Auditors Board and the South African Institute of Race Relations. He holds a CA.



**Jabu Mogadime**

Jabu Mogadime joined the FSB board in March 2004.

She previously worked at the offices of the Auditor General of Botswana and Zimbabwe, between 1984 and 1993. She was Group Internal Auditor for Rural Industries Promotions, Botswana, from 1993 to 1996.

She returned to South Africa in 1996 to work as financial advisor for Northwest Transport Investment. She is a founding member of Kensani Women's Empowerment Group.

Ms Mogadime served on the board and audit committees of Kensani Holdings, Kensani Consortium, Kensani Corrections and South African Custodial Services. In 1998 she was appointed as internal auditor for the CCMA. She is the financial manager at the Army Foundation.

Ms Mogadime holds a BA Marketing Diploma and an MBA.

# Appointments

## Meet Jabulane Hlalethoa, new HR head

Since 1 April 2004, HR boasts a new head — Jabulane Hlalethoa, or Jabu as everyone calls him. And from day one, Jabu has been up and about. He made a point of meeting everyone on his first day, and if you have not met him yet, you'll soon do as he plans on positioning HR as a centre of service excellence.

Jabu was manager: public sector industry leader at Deloitte's Human Capital Corporation. "My focus was on winning business and providing HR and change management consulting services to Deloitte's clients. During the last two years I specialised in managing projects which focused on reward strategy development, performance management, job evaluation systems, review of human resource policies, restructuring of entities and climate study interventions," he says.

He does not view his new job as much different to what he has done at Deloitte's, besides that the goals within the FSB's HR department are stretched over a year period whereas his previous job's goals were over four to six weeks.

"My greatest challenge will be to educate the entire staff about HR's role as most staff members are unaware that HR's admin function firstly lies with heads of departments and then with us. I also plan on launching programmes aimed at creating an awareness of valuing diversity in the work place and assisting with the creation of an organisational culture that strives to position the FSB as "the best company to work for."

He also believes that the only way to succeed in his new role is an output and deadline driven team that will not compromise any implementation and day to day running of the department. "I am very happy to say that the current team has committed in ensuring that we change perceptions about the role of HR in FSB."

"Although all HR services are important, the most is to ensure that our policies and procedures comply with labour legislation requirements and that all staff apply them correctly. The HR department will con-



***'My vision for the department is to position it as a centre of service excellence (as strategic partner and change agent), adding value to our most significant client, employees of the FSB,' says Jabu Hlalethoa, new HR head.***

tinuously scan the FSB environment and propose necessary interventions to ensure service excellence."

In his free time, Jabu enjoys reading academic books, aerobics, soccer and road running. He likes people who listen and try their best to contribute constructively, and dislikes those who judge others without having given them an opportunity to perform.

And his life philosophy? "Utilise today effectively because tomorrow may never come."



## Willemien ready for risk management challenge

"Life is a journey and I enjoy the ride." This is the life philosophy of the risk officer of the FSB, Willemien de Jager. She was recently appointed to establish a risk management department, which include the audit function, quality management, insurance, compliance and conglomerate groups.

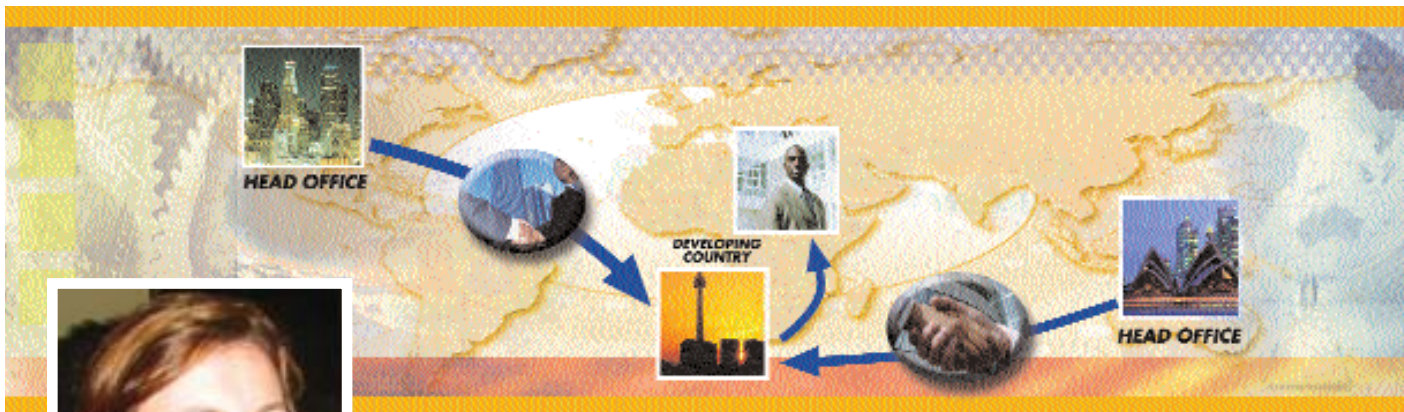
Willemien regards the opportunity to start something from nothing as a big challenge. "Risk management is one of the major development areas in the industry. To develop the strategy and implement it is a great challenge, as we need to set an example for industry," she says.

"Ian Strydom from management services has done some groundwork and established a sound base for the department. It is required that the risk officer should be independent and report directly to the EO and board," she says.

Willemien previously worked in the insurance prudential department as a project manager, mainly responsible for the research and implementation of conglomerate supervision. "The first part of the research is in a final stage and I am writing the legislation required for insurance groups. I will complete this project as well as others which I am still involved in."

In her free time she travels to foreign countries. She aims to visit 100 countries in her lifetime, and has already visited 58. "To do what you have to in life involves a number of risks. One just has to make sure that you manage them well," is her advice.





# The trade in financial services

*By Samantha Anderson, Director of Financial Markets at National Treasury*

**T**here is a growing awareness of the importance of trade to economic development and as a result, the trade in goods is a hotly debated topic internationally. The Ministerial Meetings of the World Trade Organisation (WTO) have become the scene of violent protests and emotive calls for developed nations to stop subsidising farmers and agricultural exports. Unfair trade diminishes the ability of poorer nations to compete for a limited market share in developed nations. Subsidies also distort world commodity prices and further erode the profits of the unsubsidised.

Similarly, developed nations are concerned about low wage economies competing in sectors that utilise technology to export jobs. The rise of business process outsourcing was initially hailed as a major opportunity for cutting costs and decreasing the time taken to process information. However, this perception is changing because public opinion in developed nations is now focussed on the loss of middle and lower income jobs. Concerns about job losses in developed nations are politically charged and a reality that worsens in times of economic downturn.

## Trade in goods

While the spotlight is on the trade in goods, particularly agricultural goods, other categories of business across international boundaries are no less important. Statistics show that the value of trade in services globally far outweighs goods. The service driven economies of developed nations are hungry for market share in

developing countries that often have inefficient and underdeveloped service sectors. Although developing nations are increasingly articulating their intentions in relation to the trade in goods, the World Bank points out that services account for over 50% of GDP in many developing countries. Furthermore, developing nations are more dependent on the trade in services to meet their domestic demand than developed nations.

The General Agreement on the Trade in Services (GATS) became effective in the late 1990's and sets a far more aggressive agenda for liberalisation than that General Agreement for the Trade in Goods. The GATS covers a wide cross-section of services including health, environmental, professional, business, financial, educational, communications, transport, cultural, sport, construction and engineering services.

## Responsible department

The National Treasury is the line department of the South African Government responsible for the trade in financial services. The Minister of Finance is ultimately responsible for the system of legislation and regulation that governs the supply of financial services by foreign providers. The Minister, through the National Treasury, is also responsible for negotiating market access for South African financial services providers into other markets. The regulation or management of the import and export of financial services is a key policy issue.

South Africa has a list of specific commitments in terms of the GATS regarding

foreign access to South Africa's financial services industry. The commitments reflect the regulatory status quo of the mid 1990's. South Africa has made changes to legislation and regulation over the past five years that are not as yet reflected in the WTO schedule of commitments.

For example, the Banking Supervision Department of the South African Reserve Bank (SARB) used to require branches of foreign banks not incorporated in South Africa to maintain a minimum balance of R1 million on the deposit accounts of natural persons. This had the effect of severely limiting the participation of foreign banks in the domestic retail banking market. The requirement has since been removed, but is not as yet reflected in the WTO schedule of commitments.

The FSB used to require that all foreign asset managers and providers of collective investment schemes be locally incorporated in South Africa in order to conduct business. The FSB now only requires such services providers to register with the FSB and be certified fit and proper and adequately supervised in their home jurisdiction before being legally able to supply products to South African investors.

The Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) also has provisions governing foreign service providers' ability to market and sell their products in South Africa. Persons not living in South Africa who wish to act as financial services providers must apply for a licence under section 8 of the FAIS Act. The foreign provider would then be subject to the same requirements as a local provider.

The general trend in services liberalisa-

tion is for countries to commit to treating foreign providers no less favourably than local services providers. This principle governs negotiations that take place in the WTO through a long process of offers and requests. This may sound reasonable, the fact is that services providers in developing countries are often at a severe competitive disadvantage to foreign providers.

In trying to assist South African service providers to gain access to foreign markets, especially the US or EU, the South African Government must negotiate commitments that reduce the cost of access. This is a very difficult endeavour given that prudential requirements are the most effective barriers to entry in any market. If we use South Africa as an example, the SARB requires a foreign bank, either on its own or within the banking group that it forms a part of, to hold net assets to the total value of at least US\$1 billion for no less than 18 months before applying for a branch licence in South Africa.

Very few banks in Africa satisfy this prudential requirement. In fact, this requirement limits entry into the South Africa retail banking market to major foreign banks mostly from developed countries. There is accordingly a handful of smaller foreign banks in our market, generally serving niche markets.

Similar issues apply in the insurance sector. Currently South Africa does not permit branching of foreign long or short-term insurers. A foreign long-term insurer wishing to sell policies in South Africa must be a locally incorporated subsidiary of its parent with a minimum of R10 million capital held locally. A foreign short-term insurer must be locally incorporated and hold a minimum of R5 million capital locally. In both cases local capital must equal local liabilities. These are prudential requirements necessary to protect local policyholders in the case of an insolvency of the foreign parent.

However, major foreign insurance companies are generally well regulated in their home jurisdictions, have lower funding costs as a group than a subsidiary would have, and can leverage administrative and other resource costs off a far larger pool of policy holders.

The question of whether or not South Africa should permit branching of insurers is a debate for another article. However, the question is how restricted or not is access to our market by reputable services providers from both developed and developing nations? How free is the trade in financial services between South Africa and other countries?

While South African insurers, banks and other financial services providers have made progress in accessing various African markets, the balance of trade is heavily skewed in our favour. Does this mean that South Africa has a comparative advantage in the provision of certain financial services and are we exploiting this fully? Is there a case for the increased import of certain other financial services?

Our domestic banking sector is argued to be lacking in competition. This is

## **A balance is clearly lacking in terms of foreign versus local participation in the financial services sector.**



because it is dominated by increasingly fewer large banks, while 60% of the adult population remain unbanked. The balance between maintaining and growing an internationally competitive financial sector while facilitating greater access to financial services by ordinary South Africans is a difficult one to strike. However, it could be possible to achieve these goals simultaneously through increasing the trade in financial services from and into South Africa.

Old Mutual, Investec and Alexander Forbes are success stories of South African providers exporting financial services.

However, we also need success stories of foreign providers, regardless of whether they are from developing or developed countries in our own market. There is no foreign bank that is competing with our big four in the retail market. There are no foreign insurers with a market share close to Old Mutual or Sanlam. This is a result of a highly protectionist history which does not bode well for a competitive future. On the other hand, South Africa does not have one provider of global reinsurance services. A balance is clearly lacking in terms of foreign versus local participation in the financial services sector.

Competition is not the only goal that can be achieved through increasing trade. South Africa's financial sector is unlikely to grow and innovate successfully without increased foreign participation. If South Africa would like to assume the role of a financial centre for Africa, African and other service providers must gain access to our markets. Other established financial centres such as Singapore or London have a high concentration of foreign financial services providers.

### **Protecting interests**

The Department of Trade and Industry (DTI) is responsible for protecting South Africa's interests in terms of the trade in goods. However, trade in services is a relatively new area and specialist skills and knowledge still need to be developed within the DTI and the Treasury to adequately address the above issues. Striking a trade balance in financial services, or other services sectors, is a more difficult and complex task than in goods. The data available on the trade in services is not well developed and yet the key contributor to economic growth is the services sector. Much work needs to be done by Government, but also by the private sector.

The Treasury is seeking input from the financial services industry regarding barriers to entry into other markets. Consultations have been held with industry, but the results have been limited and there needs to be an ongoing exchange of information between industry and the Treasury on this critical issue.

*If you are a financial services provider and you would like to comment on this article, please contact Samantha Anderson at the National Treasury on: (012) 315 5061 or e-mail [samantha.anderson@treasury.gov.za](mailto:samantha.anderson@treasury.gov.za).*





# In search of information that is adequate, relevant and material



***By Anton Swanepoel, Director: Products and Training at PSG Konsult, author of Invest like a Pro, Retire like a Pro and Protect your business like a Pro***

Conduct, that provide significant practical guidelines pertaining to FAIS compliance.

With this article I aim to point out some of the clues contained in the Act, starting with its main objectives, which are to ensure that:

- All financial services providers are properly qualified to render specific financial advisory and intermediary services;
- Consumers of financial services are in a position to make well informed decisions; and
- Clients' financial needs regarding financial products are appropriately and suitably satisfied.

Yet another clue is contained in section 16 (2) of the Act, which state that financial services providers will be obliged to make: (a) adequate disclosures of relevant, material information..., and (b) keep adequate and appropriate records.

As an industry we have spent too much time on selling skills in the past, which I believe contributed a great deal to our cur-

rent status as a "profession". It is for this reason that the guidelines contained in FAIS is so vital if we want to establish financial planning as a true profession.

As financial and investment planners we have learnt over the years that only the relevant material (essential) elements in any plan or strategy will bring success.

Therefore, the inclusion of section 16 of the Act is to be applauded as it removes much of the "open-ended" liability feared by most financial planners.

If one understands the main objectives of the Act and have the desire to comply, it is my contention that if:

- A planner is qualified (fit & proper) to render advice in a specific field, and
- he/she discloses to any client only the relevant, material information,
- that is aimed at satisfying the financial needs of the client,
- which is adequate and puts the client in a position to make a well-informed decision, and
- he/she maintains these records...

Our provider would comply with the

In my view, the legislator should be congratulated with the principles and guidelines contained in the Financial Advisory and Intermediary Services Act, 2002 (FAIS). The main reason for this statement is that I have come to realise that if one spends enough time in trying to understand the main objectives of the Act, there are more than enough clues, especially in the Codes of



main features (more than 80%) of the Act.

Our next practical step seems to be to identify what information would meet the requirements of being adequate, relevant and material. The rest of the article deals with an attempt to identify the relevant, material information that will be necessary to enable clients to make well informed decisions.

The best place to start is, and always will be, to identify the need(s) and objective(s) of the client. This not only gives meaning to any plan, but it is also a specific requirement in terms of the Act as section 8 (1) of the General Code of Conduct (inter alia), specifically states that:

"A provider ... must, prior to providing a client with advice-

(a) take reasonable steps to obtain from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice."

Suffice to say:

"Without a purpose, nothing should be done"- Marcus Aurelius.

The second element that will be necessary to consider would be any specific requirements, limitations or exclusions that may apply to the client's specific needs. For every client it will be vital to know whether there are any specific conditions that may apply to his/her circumstances, as it will have a specific impact on whether the solution that is offered will be appropriate or not.

On the other hand, if there are specific exclusions or limitations as a result of taxation, legislation or product specifications and the client did not know about it, it would prevent the client from being in a position to make an informed decision. Therefore, after the objective(s) have been determined, it will be necessary to deal with specific requirements of the client and/or possible exemptions, which may require a different solution than the client had in mind initially.

*Once again  
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credit for being  
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needs.*

Only after these two relevant, material elements have been considered can one truly look for the appropriate financial/investment product solution. Historically, product salespeople were very good in taking a product to their clients and selling it to them without making sure that the first two elements were in place first. Once again FAIS must take credit for being instrumental in focussing our minds at the needs of our clients first and then towards seeking appropriate products to meet their needs.

In view of the above, I would argue that the first three relevant, material elements that will be vital to disclose would be:

- Identifying the client's objective(s) after obtaining all the relevant material information from the client,
- Identifying and explaining appropriate investment benchmarks in order to keep

the score and discussing specific key features that will help to make the objective as clear as it could possibly be. When dealing with any other financial planning subject other than investments, it will be important to discuss and agree upon any specific requirements or exclusions that may apply in the client's specific circumstances, and

- Explaining the key features and essential elements of the solution or product.

Some people may argue that this would be enough, but I would say that there are two more relevant material disclosures required to meet the requirement of having communicated all the relevant, material information that will be necessary for any client to make a well informed decision, which are:

- The financial services provider's service model; and
- What the advice and service model is going to cost the client.

In summary, I believe that if any financial planner has —

- communicated the objective;
- explained the specific benchmark or specific requirements;
- presented the material features of the solution;
- shared the service model; and
- showed what it will cost the client,

all the relevant, material information have been dealt with and if he/she took reasonable steps to ensure that the client understands the advice as illustrated above, then the client should be in a position to make an informed decision."

I further believe that if we, as a profession can only focus on being innovative and continuously improve in these five areas, it will be instrumental in enhancing the integrity of the industry. If we succeed in that respect, we will be amazed at how quickly we will earn the respect of all consumers.

# Consumer





# education programme firmly on track



*By Olivia Davids,  
head, consumer education department, FSB*

**T**he FSB's consumer education programme is firmly on track and will soon be ready for implementation. Aimed at furthering financial literacy among consumers, the programme will be conducted with the support of various role players in the industry.

The programme will be launched towards the end of July.

The department has called for partnerships to facilitate the printing and distribution of financial literacy booklets. Negotiations are taking place with possible sponsors.

To give impetus to the department's fund-raising efforts and provide prospective sponsors with the necessary information, a booklet is also being developed in which some of the major initiatives requiring funding are detailed.

## **Funeral assistance programme**

A funeral assistance brochure, prepared by the Life Offices Association (LOA) and the FSB's consumer education department, is hot off the press and ready for distribution. Two staff members were rotated to the consumer education department to pilot a project on disseminating information to consumers about what to look out for when purchasing a funeral policy. They will also distribute the brochures on the funeral assistance business. They have completed a month's training and will soon be ready to go to the communities for supervised trial runs.

## **Consumer education booklets**

The consumer education booklets are ready for pre-print, editing and then mass production. The department is grateful for all the comments it received for updating the information in the booklet.

## **Audio project**

An audio project, which is aimed at producing edutainment-style "talking books" to be distributed to target audiences on audio cassette and CD in different languages, is progressing well. Audio Trax (an entity which is involved in the production of sound tracks) has produced a sample CD in English and Zulu for the FSB, using the funeral assistance business brochure as its source of information.

Audio material is regarded as useful when working with consumers who are illiterate or consumers with visual impairment. It is a cost-effective means for conveying information in terms of updating material and has a variety of applications such as use by commuter organisations, radio stations, in classrooms, workshops and in other areas. It may also be possible to produce soap operas for radio, based on the FSB's consumer education materials. This option will be considered when funds become available.

## **Formal education**

The consumer education department, together with a group of industry and academic experts, provided input into the National Curriculum Statements of the Further Education and Training Department. The FSB proposed the integration of consumer education into seven subjects for Grades 10 to 12. The next step will be to provide content and advisory input into empowering teachers as well

as the development of textbook materials for the new curriculum, which is scheduled to be implemented in 2006. To facilitate the provision of input, the consumer education department has proposed the establishment of an interdepartmental committee of the FSB. This proposal is under review by departments.

## **Trust**

An FSB Consumer Education Foundation is in the process of being registered.

A group of twelve eminent trustees have been identified and their appointments are expected to become official soon.

## **Provincial strategies**

The department's two community relations consultants have either met or have been in touch with the Provincial Consumer Affairs Officers in Limpopo, Gauteng, KwaZulu-Natal and the Eastern Cape to discuss the provincial consumer education strategies for 2004. Staff of the consumer education department provided an update of the FSB's consumer education activities and plans to a meeting of Provincial Consumer Affairs Officers, organised by the Department of Trade and Industry in Pretoria.

## **Long-term planning costs**

The Consumer Education Department has been maintaining a list of possible consumer education initiatives and the costs of it. This document is based on a number of project proposals received and provides some ideas for prospective partners.



# The requirement of “Judgment” in FAIS Act

*By Dr Franso van Zyl, senior specialist: legislation and research (FSB)  
and Salmon van Tonder (SC)*

**T**he Financial Advisory and Intermediary Services Act, 2002 (FAIS Act), subjects two types of “financial services” to regulatory control, namely “advice” and “intermediary service” regarding a “financial product” (see definitions in section 1(1)).

The rendering of such services is provided in terms of the FAIS Act to licensees and their representatives. A “representative” is defined in section 1(1) of the FAIS Act as a person who renders financial services to a client for or on behalf of a licensee, but excludes certain persons rendering services in “a subsidiary” or “subordinate capacity” and which services comply with paragraphs (a) or (b) of that definition.

The focus in this contribution is directed to the exclusion provided for in paragraph (a), which determines that for the exclusion to operate, the person must render services which do not require judgment on the part of the person. Two submissions are made -

- reading the said words in context, the intention could not have been to attach to “judgment” a meaning which relates to the judicial acts of judicial functionaries; and
- applying the interpretation rules which are used to determine implied provisions in a law, one can reasonably infer on the basis of the *ex contrariis* rule (by virtue of contrary considerations), that a ‘true’ representative must always be a person from whom “judgment” is required.

But what is then the legal essence of this concept?

## **Common law considerations**

Financial services in terms of the FAIS Act are not intended to comprise unilateral acts, such as the rendering of an unsolicited service as a mere “gift”, but necessarily imply the existence of an agreement or contract between the person who furnishes

the advice or renders the intermediary services and a “client” as defined in section 1(1) of the FAIS Act. This underlying agreement or contract comes into existence through offer and acceptance (irrespective of whether the offer emanates from the client, the advisor or intermediary services provider).

In the case of all statutes regulating the issuing of financial products relevant to the FAIS Act (dealing with the establishment, nature and powers of the product suppliers concerned), the requirement of the pre-existence of such agreements and contracts with clients, when the latter purchases or invests in such financial products are clearly stated, whether directly or by necessary implication (see the words undertaking liability in return for a premium or contribution in the definition of “business of a medical scheme” in the Medical Schemes Act, 1998).

The elements of such agreements or contracts are unique. They must involve a “financial product” and imply specialised elements. An agreement or contract to



furnish advice as contemplated in the FAIS Act, implies that the person furnishing the advice has specialised knowledge, experience and qualifications determined by the FAIS Act. The same applies to a person rendering an intermediary service. In terms of the FAIS Act, no other person may lawfully be involved in the furnishing of advice or rendering of intermediary service to a "client" as defined in the Act.

Underlying all these additional require-

Impeding factors play a role in the determination of accountability for acts outside the contractual sphere, which cause prejudice or damage to others and which lead to delictual claims against the perpetrator. To be lawfully accountable (toerekeningsvatbaar) a person must have possessed the required mental abilities of being able to distinguish between right and wrong and to act in accordance with such insights and perceptions. Impediments may then be youthfulness, insanity, undue influence, etc.

When rendering financial services all these requirements for the lawful commencement existence of the relevant underlying agreements and contracts apply, and also the requirements for being held "accountable" for what has actually been done.

But in cases where statutory control is provided, additional requirements are added to those applying merely by virtue of common law, such as experience and knowledge based on additionally acquired (industry based or academic) qualifications.

The inevitable conclusion is that where an Act such as the FAIS Act refers to the rendering of a financial service it may refer to all the steps preceding the completion thereof (acquiring knowledge of all relevant and legally required factual circumstances or the disclosing of such relevant facts to a client who may have no knowledge thereof). But in the final instance the rendering of such service, leading to contractual accountability for the person who so renders, must be based on the indispensable basis of an agreement or contract between the licensee (or representative) and the client.

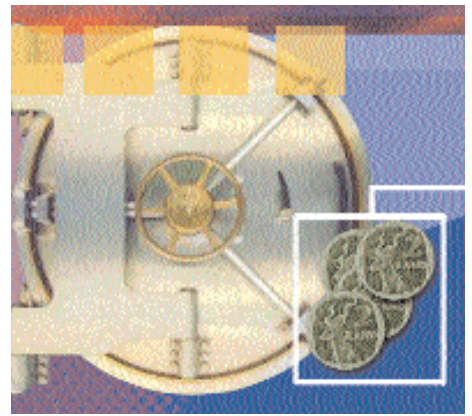
#### Application to FAIS Act

In terms of the FAIS Act, such result must be based on compliance with all the Act's requirements, as the FAIS Act through its licensing and market conduct requirements, adds to the mere common law requirements for the lawful existence of the underlying contractual arrangements.

The above background must be taken into account when considering the meaning of the word "judgment" in paragraph (a) of the definition of 'representative' in section 1(1) of the FAIS Act. The definition refers to an environment wherein "financial services" are rendered.

"Judgment" can then only refer to the final decision after interaction with the client on the service to be rendered.

The final decision must be based on a



lawfully recognised intention or will to conclude the relevant required agreement or contract with such client, and from which "accountability" for the decision will flow. In the case of advisory services such a decision may be required only once during interaction with the client. But in the case of an intermediary service, several "sub"-decisions may be called for (which product supplier and what product of such supplier must be utilised, what terms and conditions must be chosen to apply to the client, etc).

What paragraph (a) then excludes, are cases where, due to a person's subordinate capacity, and resultant lack of *iudicium*<sup>1</sup>, such a person is not required to and cannot perform the acts which finally leads to a contractual arrangement with a client. Such a person will be excluded, irrespective whether the person, as one of the links in the chain leading to the judgment to be made by the representative, acts as an employee, consultant, mandatary or outsourced functionary of the representative.

As the ordinary meaning of the word "judgment" usually implies some or other discretionary elements, it provides further justification of its use in the above context. When one considers all the FAIS Act's requirements, a decision to render an intermediary service under the Act must be preceded and accompanied by certain (albeit restricted) discretionary evaluations. This appears more distinctly in the case of the rendering of advisory services, as it is clear from the applicable General Code of Conduct promulgated under the Act, that such services imply the inevitable exercise of a much wider discretion than in the case of the rendering of an intermediary service.

<sup>1</sup>The power of discernment required for a decision by a person with the necessary skills, knowledge and experience that the contract to be entered into is appropriate.

***Financial services in terms of the FAIS Act are not intended to comprise unilateral acts, such as the rendering of an unsolicited service as a mere 'gift', but necessarily imply the existence of an agreement or contract between the person who furnishes the advice or renders the intermediary services and a 'client' as defined in section 1(1) of the FAIS Act.***

ments, the essential conditions for a lawful agreement or contract (mainly determined by the common law) remain intact, and there is nothing in the FAIS Act which detracts from this fundamental principle. Both parties must have the required contractual capacity to be accountable. In this regard, our law disqualifies minors or persons who are of unsound mind. The doctrines of Roman and Roman-Dutch law authorities, substantiated by court decisions, propounded the theory that contractual obligations must arise out of a free and full exercise of the human will or intention.

# Old Mutual first to obtain licence

**O**ld Mutual is the first of the major players in the financial services industry to be awarded a licence under the new law regulating financial advisors.

Head of the FSB's financial advisory and intermediary services department, Manasse Malimabe, said: "It is significant that the oldest and largest life insurer in the country, Old Mutual, is the first to be issued with a licence under the Financial Advisory and Intermediary Services Act, 2002 (FAIS).

"Old Mutual should be commended for fully embracing the aims and objectives of FAIS. We encourage other financial services providers to apply for their licences as soon as possible. So far 108 licences have been approved. However, this number is a drop in the ocean as we estimate there to be in excess of 20 000 financial services providers to be licensed."

Managing director of Old Mutual Roddy Sparks said: "Good advice is the foundation of wealth creation. The FAIS Act will play an important role in ensuring that customers receive the right guidance in making financial decisions. We are delighted to be the first major financial services company to be licensed under the new law."

The Act aims to regulate the provision of a wide range of financial advisory and intermediary services to clients. After September, a financial services provider may not operate without a licence issued by the Registrar of Financial Services and will be responsible for the actions of its representatives.

Old Mutual's efforts to comply with the legislation began when a team was set up to investigate the effects of the new law and provide feedback via various industry channels on ways to make the legislation more efficient.

Extensive work was done to analyse the impact that FAIS would have on the structure and operation of each business area. An audit was conducted to assess staff in terms of qualifications and experience to ensure they met the stringent requirements imposed by the FSB. Only staff who met these requirements could be put forward for



**Manasse Malimabe, head of the FAIS department at the FSB (left) congratulates Roddy Sparks, managing director of Old Mutual, on being the first of the major financial services companies to be licensed.**

*Picture: Emile Wessels*

approval as part of the licence application.

The audit revealed that less than 4% of Old Mutual's advisors did not meet the qualification requirements. Most of these staff had ten years or more experience, but lacked the formal tertiary qualifications that FAIS required. These staff wrote the assessment arranged by INSETA and UNISA at the beginning of March which enabled them to meet the fit and proper requirements.

Work began on the preparation of the licence application in September last year and included a walkthrough of the licence application with the FSB in December. The valuable input received from the FSB was then incorporated in the final licence submission. OMLACA(SA) made their FAIS licence submission on February 4. The submission totalled more than two hundred pages and included a register of all representatives.

Analysts at the FSB reviewed the application before tabling it with the FAIS licensing committee. At this sitting, OMLAC(SA) was formally approved as a

licensed financial services provider - five months ahead of the required deadline.

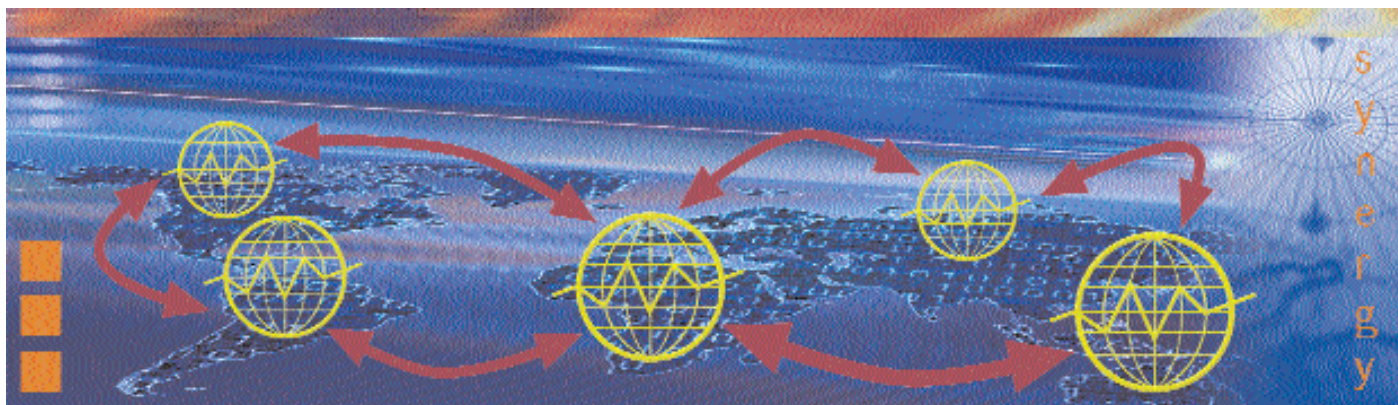
The next few months will be used to ensure that any new processes and structures and properly entrenched across the business and will culminate in an internal audit being conducted to detect and correct any remaining compliance issues.

Malimabe added: "When the effective date for licensing was announced at the beginning of March, the FSB indicated it would take up to two months to process applications for licences.

"The FSB has issued guidelines to prospective licence applicants. Completed applications received before the end of April will be issued before the end of June; applications received before the end of May will be issued before the end of July; and before the end of July in order to be issued by the end of September. The FSB has given the undertaking that all complete applications received by 31 July will be finalised by the effective date."

**Source: Joint FSB and Old Mutual media release 20 April 2004**





# FSB rubs shoulders with world heavyweights

**T**he high regard which South Africa's financial services industry enjoys internationally received a further boost when the FSB was elected by the president's committee of the International Organisation of Securities Commission's (IOSCO) to serve on its executive committee.

FSB Executive Officer, Jeff van Rooyen, who held the position of deputy chairperson of the IOSCO executive committee during the past two years, said the FSB's appointment did South Africa's financial services sector and regulatory system proud.

"Our election by the president's committee, which comprises more than 100 jurisdictions from developed countries and emerging markets, not only recognises the progress South Africa has made in the past few years, but also the contribution the FSB has made to the work of IOSCO," he said.

The FSB has served on the executive committee since 1997, but was elected via the Africa/Middle East regional committee on previous occasions.

The president's committee elected South Africa together with international heavyweights Australia, China, France, Italy, Japan, Canada, the UK and the US during the recent IOSCO's annual conference in Amman, Jordan.

"Our election is also proof that the world views South Africa as a role model for other emerging markets," Van Rooyen added.

During the conference Van Rooyen was

appointed chairperson of the Monitoring Group of the IOSCO Multilateral Memorandum Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU), and re-appointed as deputy chairperson of the executive committee for a further two-year term.

Jane Diplock of the Securities Commission of New Zealand is the new chairperson.

Adopted in 2002, the IOSCO MMOU represents the organisation's seminal work in the fields of regulatory cooperation and information sharing. South Africa is one of only 26 jurisdictions whose application to sign the MMOU has so far been accepted.

"Applicants to the MMOU are rigorously screened by a panel of IOSCO experts from all over the world. South Africa's qualifying as a signatory confirms our commitment to reforming our financial environment to world-class standards," Van Rooyen said.

The objectives of IOSCO include improved international cooperation, the exchange of information, promoting high regulation standards, effective surveillance of international securities transactions and successful enforcement, among other things.

Full details regarding the elections and other events at the IOSCO annual conference are available on the organisation's website [www.iosco.org](http://www.iosco.org).

Source: FSB media release  
24 May 2004

*'Our election by the president's committee, which comprises more than 100 jurisdictions from developed countries and emerging markets, not only recognises the progress South Africa has made in the past few years, but also the contribution the FSB has made to the work of IOSCO.'*

# Incomplete forms delay FAIS licence applications

**W**ith only weeks to go for financial advisors and intermediaries to be licenced, the FSB is pulling out all stops to process the applications, but incomplete forms are delaying the process.

In terms of the Financial Advisory and Intermediary Services Act, 2002 (FAIS) anyone who conducts the business of rendering financial advice or intermediary services must be licenced by the FSB.

FSB head of the FAIS department, Manasse Malimabe, says as at 21 May 2004, 1 056 applications for licences have been received by the FSB. About 50% of those applications have been processed, while the remainder are incomplete. "The

1 056 applications exclude those being dealt with by the twelve recognised bodies who are assisting the FSB in the licencing process.

These applications have already been processed, or are being processed. In excess of 5 000 reference numbers have been allocated to prospective licencees. No difficulties are being experienced by the FSB.

"However, we appeal to prospective applicants to read the application form thoroughly especially as it relates to submitting certified copies of qualifications and the fit and proper requirements."

"Financial services providers who do business without licences after September 30 risk a R1m fine or ten years in jail. Of the estimated 20 000 advisers we expect to

apply for a licence, only about 5 000 have done so and 230 licences were issued.

"At the March launch of the effective date of 30 September (section 7 date) - by which all financial services providers must be licensed - the FSB had guaranteed that financial services providers who applied before July and complied with the prescribed requirements, would get their licences before the September deadline."

Malimabe warned that anyone who applied after July would not be guaranteed a licence by the September deadline, and risked a fine, jail sentence or not being able to continue conducting business as a financial adviser or intermediary.

**Source: FSB media release  
3 June 2004**

## Independent trustees appointed for Joint Municipal Pension Fund

**T**he Pretoria High Court recently granted an order on application by the Registrar of Pension Funds to place the Joint Municipal Pension Fund under the management and control of an independent board of trustees.

Six trustees, three of whom are professional persons appointed by the Registrar, will serve on the board. A chairperson with both a deliberative and casting vote will be elected from these appointees.

The remaining three trustees are to be elected by the trustees who were in office on 1 January 2004 to ensure continuity in the administration of the Fund.

The term of office of all the other trustees of the Fund were terminated.

### Professional trustees

The three professional trustees appointed by the Registrar are Jan Mahlangu, Retirement Funds Coordinator of the Congress of the South African Trade Union, Nikki Howard, a practising Johannesburg attorney who specialises in pension law, and Karen Biggs of the South African Institute of Chartered

Accountants.

The order followed a failed attempt by the Registrar during September last year to have the business of the Fund placed into curatorship. The Registrar has been granted leave to appeal in that matter and the appeal is likely to be heard later this year.

The Registrar has succeeded to establish independent control over the Fund's affairs after the Fund lost a R1,4 billion of its assets through investments in agricultural derivative contracts between March 2001 and December 2002.

A second inspection conducted by the FSB during October 2003 concluded that the former trustees of the Fund had neglected their fiduciary duties by failing to exercise suitable control over the Fund's investments in agricultural derivatives over that period.

### Rules

The new board will perform its functions in terms of rules approved by the Court and have been assigned specific powers and duties. These include that the new trustees must -

- investigate all possible avenues of recovering losses suffered by the Fund.
- refer criminal irregularities to the prosecuting authorities.
- give priority to the submission of a scheme to the Registrar setting out proposals to restore the financial soundness of the Fund.
- effectively communicate with the beneficiaries of the Fund.
- consider and implement steps to improve the sound governance of the Fund.

Finally, the trustees have been ordered to report to the Court within six months. They will report on hardships of fund members, the recovery of any losses and when the Fund will be able to revert to normal governance in terms of its rules, among other things.

**Source: FSB media release  
11 May 2004**



# Staff members air their views at strategy alignment workshops



## Various issues under spotlight at CISNA



Jafet Katto, CEO of Uganda Capital Markets Authority (left) and the FSB's Norman Müller, head, capital markets, signing the MOU

In April, the bi-annual meeting of the Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA)'s took place in Mauritius to focus on various issues.

At the meeting, South Africa signed a bilateral memorandum of understanding with Uganda. The memorandum is an agreement of co-operation and sharing of information and surveillance between the

FSB and the Uganda Capital Markets Authority.

The FSB also initiated a special meeting for supervisory heads within CISNA. The aim of the meeting will be to discuss the way forward for CISNA and its action plans for the future. The meeting will take place in South Africa in July or August.

Various other bilateral memoranda of understanding for the exchange of infor

It was thumbs up for the FSB's aim to become a world-class regulatory service provider with its successful strategy alignment workshops, which took place in June.

The purpose of the workshops was to involve staff in the crafting and implementation of a strategy for the FSB.

The FSB has gone through a strategic planning process since April last year. Departmental planning processes in which all staff had the opportunity to participate, followed the first, general planning phase.

The strategy alignment workshops provided a platform for employees to express their views. They had the opportunity to challenge the status quo and to contribute to create a better working environment.

They reached consensus on the FSB's goals and values while ideas were shared on how to make a meaningful contribution to the process of change and transformation at the FSB. Self-empowerment and how to empower others were also placed under the spotlight.

mation, co-operation and consultation were also signed at the meeting.

Apart from the member countries, delegates of the World Bank, FIRST Initiative, the SADC Development Finance Resource Centre and members of the Eastern Africa Securities Regulatory Authorities also participated.

# Court rules on Rentmeester, Assupol dispute

**O**n 22 April 2004 the Pretoria High Court granted an application by the Registrar of Long-term Insurance for the placement of policies disputed by Rentmeester Assurance Limited (Rentmeester) and Assupol

Life (Assupol) under the management of Mr Nico Fourie. Mr Nico Fourie is a retired managing director of an insurance company and has experience in the supervision of the insurance industry.

In 1995 Rentmeester entered into an administration agreement and master policy agreement with an administrator, Cornerstone Brokers Corporate (Pty) Ltd (Cornerstone).

Cornerstone marketed and administered a voluntary group scheme of assistance policies (better known as funeral policies), exclusively to pensioners who qualified for a social grant from the state on account of age and/or disability.

## Termination

On 31 October 2002 Cornerstone gave notice to Rentmeester of its intention to terminate the administration agreement and master policy agreement with effect from 30 April 2003. Simultaneously Cornerstone entered into a similar administration and master policy agreement with Assupol as the new underwriter of Cornerstone's funeral policies with effect from 1 May 2003.

Following Cornerstone's termination of its agreement with Rentmeester and its conclusion of a similar agreement with Assupol, Rentmeester proceeded to issue a general notice to its policyholders informing them that Cornerstone had decided, with effect from 1 May 2003, to cease acting as administrator of the group scheme underwritten by Rentmeester.

The issuing of the general notice by Rentmeester prompted Cornerstone to launch an urgent application against Rentmeester and ten other respondents seeking certain interdictory relief against them relative to the notice issued by Rentmeester. The judge in the case found

that there was nothing unlawful about the general notice issued by Rentmeester. The court further found that while Cornerstone was entitled to substitute Rentmeester with Assupol as underwriter of the group scheme, the substitution could not take place without the consent of the policyholders.

Following the above judgment Cornerstone proceeded to procure the consent of the policyholders for the appointment of Assupol as the underwriter of these policies with effect from 1 May 2003. Cornerstone did this by issuing replacement policies to the policyholders.

## Replacement policies

The issuing of the replacement policies by Cornerstone prompted Rentmeester to make an urgent application against Assupol and Cornerstone seeking to interdict or restrain Cornerstone and Assupol from issuing these replacement policies. The court granted Rentmeester the application for an interdict.

In his judgement the judge said that he was satisfied that the replacement policies were within the ambit the Policyholder Protection Rules promulgated in terms of section 62 of the Long-term Insurance Act, 1998 as they appeared in Notice 73 of 1999 in the Government Gazette of 9 July 1999. He further said that the issuing of these replacement policies by Cornerstone before and until 30 April 2003 were an infringement of its contractual obligations towards Rentmeester.

## Rentmeester challenge

During April 2003 Assupol notified Rentmeester of the number of replacement policies accepted by Assupol and requested Rentmeester to remove these policyholders from Rentmeester's system. Rentmeester challenged the validity of the replacement policies and rejected the notification received from Assupol.

The result of the dispute was that both insurers were claiming premiums payable by those policyholders. The pension pay-

ment facilitators felt uncomfortable with the double request for premiums and decided to keep all premiums in a trust account. Claims were however being paid by the insurers on a practical basis in respect of these policies.

## Premiums in trust

The Registrar of Long-term Insurance was not comfortable with the pension payment facilitators keeping premiums in trust without being registered long-term insurers. In agreement with all the interested parties the trust accounts of the pension payment facilitators were transferred into a trust account under the control of the FSB.

The Registrar of Long-term Insurance went out of his way in an effort to solve the problem, through numerous meetings, an inspection and other methods. As no settlement could be reached between Assupol and Rentmeester, the Registrar of Long-term Insurance decided to approach the High Court.

The High Court ruled that the management and control of this disputed business, i.e. that part of the business of Assupol and Rentmeester

- which is in dispute between the said parties; and
- in respect of which the said two parties are exercising concurrent claims to premiums; and
- in respect of which premiums are kept in trust by the FSB,

have been made the responsibility of Mr Nico Fourie from 22 April 2004.

Mr Fourie will administer the business and is also responsible for recommending a reasonable and pragmatic allocation of the disputed policies and the premiums thereto between Assupol and Rentmeester. Mr Fourie will perform his functions under the supervision of the Registrar of Long-term Insurance. Mr Fourie will also have to submit a report to the court by 27 July 2004.

**Source: FSB media release  
29 April 2004**



# Book review

## Financial Advisory & Intermediary Services Manual

Author: Dr Franso van Zyl

By Anton Swanepoel

When the rules change, the first step of a true professional sportsperson is to study the material changes in order to understand fully the new competitive environment. Only then will the person be in a position to establish a game plan to compete at the highest level.

The Financial Advisory and Intermediary Services Act, 2002 certainly introduced significant changes in the field of financial advisory and intermediary services, which will undoubtedly change the way financial services providers will do business in the future.

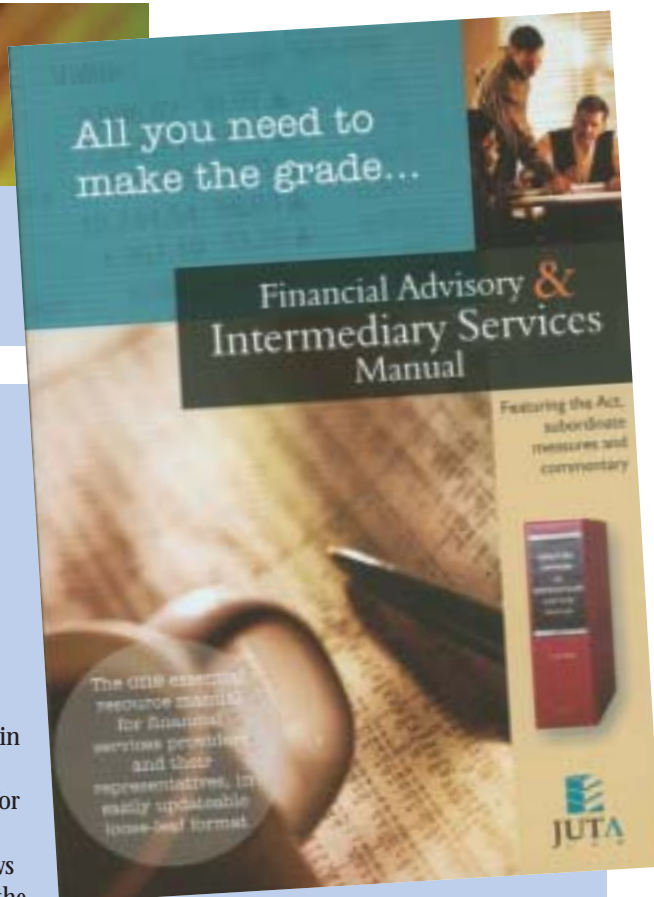
In order to interpret the new statutory requirements, one will be wise not to consult a weekend amateur, but rather a specialist in that area. In this publication the author, who was one of the principal drafters of the Act and therefore a true

expert on the subject, offers extremely important guidelines for any financial services provider who hopes to compete as a professional in the new legislative environment. For those, I have no hesitation in recommending this publication as a must read.

The publication is housed in an attractive, sturdy binder with post-lock mechanisms for ease of use.

The loose-leaf format allows incorporation of changes to the law, by simple replacement of updated pages.

It is available from: Customer Services, Juta Law, Business Reply Services CB0920, Lansdowne 7779.  
Tel: (021) 763 3600. Fax: (021) 761 5861.



E-mail: [cswec@juta.co.za](mailto:cswec@juta.co.za)

The cost of the publication is R395,00 plus postage and packaging. The total is R440,00 (including VAT).

## Publication provides a comprehensive source on long- and short-term legislation



*Insurance Legislation Service*, a comprehensive source of long- and short-term insurance legislation, was recently published by LexisNexis Butterworths. It also contains Financial Services Board (FSB) Directives, including Rules and Regulations, issued since the Insurance Acts came into operation in January 1999.

Prof. Pieter Havenga and Prof. Johan van Niekerk, from the Department of Mercantile Law at Unisa, compiled the publication.

Available in loose-leaf format, the work provides the full text of the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998, including the Act, Regulations and Rules, board Notices, FSB Directives as well as Notices issued by the Registrar.

Ancillary legislation included in the publication are:

- Export Credit and Foreign Investment Insurance Act 78 of 1957
- War Damage Insurance and

Compensation Act 85 of 1976

- Financial Service Board Act 97 of 1990 plus Selected Regulations and Board Notices
- Supervision of Financial Institutions Rationalisation Act 32 of 1996
- Inspection of Financial Institutions Act 80 of 1998
- Conversion of SASRIA Act 134 of 1998
- Financial Institutions (Protection of Funds) Act 28 of 2001.

The publishers aim to regularly update the publication with service issues. Newsletters updating readers with the latest developments in legislation and case law are also in the pipeline. These will be issued quarterly.

The publication is available from NexisLexis Butterworths at 0800 00449 3. A 10% discount applies until the end of August.

The price (including VAT and postage) is R573.42.



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