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Audit comittee must understand the risk of business

Curatorship orders : Are there suitable alternative remedies?

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Audit committee must understand the risks of business

It is said that a board of directors has three providers of assurance with regard to the information on which it reflects, deliberates and makes decisions. These are management, internal and external audit. In modern governance the audit committee has the important role of reviewing not only the reliability of financial statements, but also the quality of information furnished by management, internal and external audit.

By Mervyn E. King S.C., Chairman of the King Committee on Corporate Governance

The modern audit committee consists of at least three non-executive directors, with the majority typically being independent non-executive directors. The requirement for appointment is financial literacy, which is generally defined as having an understanding of balance sheets, income statements and cash flow statements. At least one of the members, or an invitee, should have expertise in and be up to date with all changes in accounting standards.

The KPMG audit committee forum, of which I am a member, has described issues for consideration by an audit committee. I share some of these issues.

In order to do its job effectively, an audit committee needs to understand the industry in which the company operates. This will allow it to better comprehend the financial results and representations made by management by means of the financial statements. The committee also needs to recognise how changes within the company or the industry have been reflected in the financials statements.

The audit committee has to have an understanding of the risks of the business of the company and the regulatory environment in which the business operates.

The audit committee also needs to discuss the results presented by management with them, but always against the informed background of the performance of the company's competitors as well as the performance against budget and forecasts furnished by management.

Questions need to be asked as to whether the results are consistent with the expectations created by management at board level and whether these are in line with the reports and opinions of the internal and external auditors.

The audit committee should also consider whether the accounting policy employed by management is appropriate and applicable. This is where the currency of knowledge in respect of accounting and auditing standards becomes so important. Moreover, the audit committee should check the rationale behind management changing the accounting policies and whether these are appropriately disclosed in the results.

The committee also needs to look at business transactions enacted during the year under review. It needs to understand how management has responded to the transactions and any changed circumstances in the company and whether the

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Challenges facing Africa in providing social security for the informal sector

By Dr Franso van Zyl, Chief Counsel Legislation, FSB

The persistent growth of informal sector employment in middle- and low-income economies has played a significant role in undermining the contributions base and in highlighting the design limitations of financed social security systems among developing countries, particularly in Africa. The "universal" expectations placed upon contributory social security in many African countries may have become an unrealistic ideal seen against the background of low and declining national levels of formal sector employment.

In particular, a continuing emphasis on the conventional approach to social security funding, whereby entitlement to social security benefits is, most commonly, achieved through contributions deducted from the wages of formal sector employees, renders the majority of individuals within national labour forces across much of Africa ineligible for any form of formal social security protection. As Roger Charlton and Roddy McKinnon[1] point out this situation is set to continue in the foreseeable future. The fact that the vast majority of African countries operate financed social security systems within economic environments in which non-formal sector activities underpin a significant proportion of national productivity, highlights this point well.

Despite the merits of having formal social security funds, it cannot be expected that such funds will satisfactorily alleviate old-age poverty in Africa. According to Charlton and McKinnon[2] the acknowledged failure of social insurance systems to provide a reasonable degree of protection to those in irregular, unregulated or any other form of non-formal employment, including those working in subsistence agriculture, is one of the reasons why the social security approaches that were central to the development of European-style welfare states have become increasingly irrelevant to especially the poorer, developing countries such as those in Africa. Nevertheless, established systems of formal protection should not be abandoned; rather, existing systems should be reformed and strengthened.

The challenges facing African policy makers are clear. Firstly, they are faced with the problem of consolidating and improving the governance and cost-effective administration of social security funds. Secondly, they face the task of extending the scope of the population coverage provided by current social security arrangements. Thirdly, policy makers should be encouraged to seek and harness alternative and additional mechanisms, including "traditional" non-formal social security arrangements to address the welfare needs of the growing numbers of the destitute elderly in the region.

Regarding to unorganised groups from the informal sector, a different approach would be to encourage workers to join or form self-help associations or cooperatives. Here the Government could assist them, and encourage the development of a social security system which takes into account the social and economic circumstances of groups such as self-help organisations and cooperatives, where a process of mobilising these groups for social security has been initiated. The Government should build on their experience and strengthen these organisations. This could be done by providing them with financial support and technical assistance.

The collaboration of all social security partners is necessary to design and carry out a comprehensive social security policy. These partners are first of all the working people and their families, sometimes represented by trade unions, cooperatives and NGOs. Employers, as a second partner, play an important role in respect of wage workers. Insurance companies and social security agencies are a third group of partners. The Government also needs to be involved and committed at all levels to assure the sustainability and consistency of the entire social security structure. The

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Government should in particular seek to mobilise NGOs to initiate social protection programmes for the informal sector.

Promoting contributory schemes

As pointed out by Wouter van Ginneken[3] contributory schemes may be organised by a variety of associations or organisations, such as producer and employer organisations, cooperatives, credit associations and self-help groups. Sometimes intermediate carriers such as trade unions, NGOs and private insurance companies may also be involved. It is believed that in most instances such schemes will be limited to small groups of workers, resulting in relatively high administration costs. There are two fundamental requirements for setting up a successful contributory scheme:
• the existence of an association based on trust; and
• an administration that is capable of collecting contributions and providing benefits in a cost-effective manner.

Of particular importance are affordability and meeting the priorities of workers. However, there are a number of other issues to be taken into consideration so as to establish conditions for replicating and extending such schemes. These include:
• dependence on the input and charisma of one person or a group of people;
• dependence on external funding for the scheme's long-term financial viability;
• an evaluation of the implicit costs and the capacity of the scheme's administrators, who usually are not remunerated;
• the possibility of pooling resources among different schemes; and
• the possible link-up with private insurance companies and social security agencies.

Link-up of social assistance programmes with other anti-poverty programmes

It is necessary to link up social assistance programmes with other anti-poverty programmes, such as job creation and food security schemes. There is indeed significant scope for coordinating social assistance with other promotional anti-poverty measures.

Pensions and survivor benefits to widows can for instance be combined with training programmes to enhance the beneficiaries' income.

Pensions for the physically disabled can be linked with rehabilitation therapy and suitable employment.

Instead of merely providing conventional social assistance, small capital loans and technical assistance can be provided to those seeking aid. If the client is successful in establishing a business, additional loans and support can be provided, and thriving clients may subsequently be referred to banks for further credit. A great variety of income-generating projects, including street vending, bicycle, motorcycle and vehicle repair, craft manufacturing and small agricultural ventures, may be created in this way. As a result, not only are the poor being assisted to become self-sufficient, but they are also helped to contribute positively to economic development.

Role of government

The government is the ultimate guarantor of the sustainability of social security programmes. It has the power to regulate their design and has access to the necessary resources and administrative infrastructure to regulate implementation. One important function of the government would be to determine the legal framework for the efficient and transparent operation of contributory schemes. In collaboration with international agencies, such as the International Labour Office (ILO) and the International Social Security Association (ISSA), governments need to encourage research into the functioning of contributory programmes and provide technical assistance to promote the development of such programmes.

References

[1]*Pensions in Development* (2001:197-198)
[2]*Pensions in Development* (2001:197-198)
[3]*Social security for the excluded majority* (1999:180)

Audit committee *from p 3*

existing control measures are sufficient as regards any new situation.

Generally, the committee should obtain management's assessment of the internal control environment in order to gauge the reliance which can be placed on the system of control. The committee should have an intense discussion with internal audit with reference to their assessment of the overall control environment. This will enable the committee to make a recommendation to the board concerning the adequacy of controls in the business of the company.

Furthermore, the committee should check whether the internal audit plan has been carried out and whether management has adequately responded to matters raised by internal audit. Here too, the audit committee should review all pending internal audit issues.

The committee also has to consider issues involving the external auditors. A discussion must be held with the external auditors about whether the financial statements fairly represent the results of the company, including details of accounting estimates, which are approximations used when there is no precise means of measurement. These estimates pose significant risk, since control systems are very seldom in place to manage them.

The audit committee must review the independence of the external auditors and ensure that they have the resources to perform the planned external audit. The performance of the external auditors must be assessed and evaluated.

The committee also needs to examine any non-audit services that management has requested of the external auditors. If the fees charged for non-audit services form a significant percentage of the total fees earned by the external auditors, the audit committee should point out that this could compromise the independence of the external auditors. The audit committee must also look closely at any related party transactions, including compensation agreements or the use of company assets. Any unusual arrangements or transactions must be identified and closely examined by the audit committee.

Where necessary the committee should seek independent professional advice on any issue under consideration.

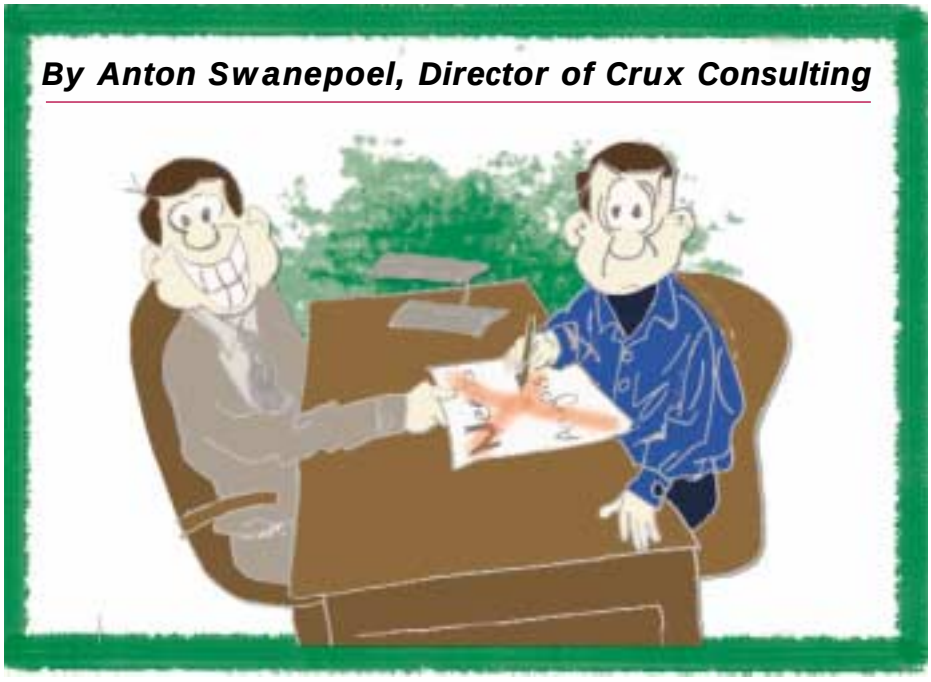
From the above it is clear that those matters for which the board does not have the time, nor collectively have the necessary financial literacy and expertise, are considered by the audit committee. Audit committee reports have added to the assurance to a board - particularly the non-executive board - of the quality of information on which the board relies in order to make its decisions.

It can be said that, in modern governance, the board has four assurance providers, namely management, internal audit, external audit and the audit committee – with the latter arguably taking the lead!

A full needs analysis versus a holistic one

Are financial services providers obliged to do a holistic needs analysis for every client in terms of FAIS and how does a holistic needs analysis differ from a full needs analysis in practice?

By Anton Swanepoel, Director of Crux Consulting



In the matter between *Alan Robert Stephenson versus Nedbank Limited*, the FAIS Ombud, Charles Pillai, held that the client may not waive the benefit of having a needs analysis done before being advised by a financial services provider. Section 21 of the General Code of Conduct clearly supports this decision:

"No provider may request or induce in any manner a client to waive any right or benefit conferred on the client by or in terms of any provision of this Code, or recognise, accept or act on any such waiver by the client, and any such waiver is null and void."

While this reference is technically correct, the practical implications for advisers, intermediaries and their clients are significant. Consider the following scenario:

A client, Mr. Jones, approaches provider/representative X with a specific need to take out bond cover. X informs the client that in order to do that, he/she needs to do a full needs analysis in terms of the General Code of Conduct. However, Mr. Jones will have to pay a fee of R750 (excluding VAT) for such an analysis. Mr. Jones is taken aback by this attitude and repeats his appeal. "Maybe you did not understand my request. All I want you to do is to provide me with a quotation or quotations in order to take out life cover for my bond."

Section 8 (1) of the General Code requires that the provider must, prior to providing a client with advice-
(a) take reasonable steps *to seek 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;
(b) *conduct an analysis*, for purposes of the advice, based on the information obtained;

Furthermore, in terms of section 8 (4): Where a client-
(a) has not provided all information requested by a provider furnishing advice, as part of the analysis referred to in subsection (1)(b), or where the provider has been unable to conduct such an analysis because in the light of the circumstances surrounding the case, there was not reasonably sufficient time to do so, the provider must fully inform the client thereof and ensure that the client clearly understands that-
(i) a *full analysis* in respect of the client referred to in subsection (1)(b) could not be undertaken;
(ii) there may be limitations on the appropriateness of the advice provided; and
(iii) the client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs.

The client insists: "All I want is a policy to cover my bond. I do not want a full needs analysis and, what is more, I do not want to pay R750 (plus VAT) for a full needs analysis. If you cannot help me I will go to someone else."

This leads to a situation where the adviser/intermediary who wants to comply with the Act loses the business. The client goes off in search of some salesperson (acting as his/her own compliance officer) who is not too familiar with FAIS and couldn't care to comply with the provisions of the Act. What's more, in these circumstances there is a very slim chance that such obscure sales people will ever be held to account.

Financial advisers and intermediaries will know that this case study is a very real example of a situation that presents itself every single day. It creates a number of difficulties, as advisers/intermediaries have to meet all the obligations under the Act as well as its subordinate measures, while clients seem to blame advisers/intermediaries for complicating matters. Consumers, in general, also seem to think that advice should be available to them at no cost. These are some of the issues that will have to be addressed in order to establish a fair playing field for adviser and consumer alike.

Important considerations

Although the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) prescribes that a needs analysis has to be done, it does not state that it has to be done for free. The adviser is entitled to charge a reasonable fee for a full needs analysis. If the client is not willing to pay for this service, an alternative option should be available to both parties. It does indeed appear that certain sections in the General Code of Conduct provide us with another option. Apart from the practical implications as we discussed above, this could also lead to an interesting legal debate.

Section 3(1) (d) of the Code of Conduct states that:
"the service must be rendered in accordance with the *contractual relationship and reasonable requests* or *instructions* of the client, which must be executed as soon as reasonably possible and *with due regard to the interests of the client*, which must be accorded appropriate priority over any interests of the provider; whereas Section 8(1)(c) requires that the provider must, prior to providing a client with advice-
"identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act *or any contractual arrangement*."

Question that deserves serious consideration:

How does one deal with the freedom to contract as implied in sections 3(1)(d) and the General Code of Conduct on the one hand and, on the other, the obligation of financial advisers/intermediaries to do a full needs analysis in terms of the same Code? For example:

A client instructs an adviser to prepare a quotation for a life policy for purposes of his/her bond. When confronted with the obligation of the adviser to do a full needs analysis, the client makes it very clear that he/she is instructing the adviser to do particular tasks only, which specifically excludes a needs analysis (inter alia because the client does not want to pay for this service).

The request is reasonable and the instruction/order should be clear. The client therefore wants nothing more and nothing less.

In terms of section 3(1)(d) the adviser's service must be rendered in accordance with this instruction from the client. From a legal point of view a contractual relationship is established between adviser and client when the instruction is accepted by the adviser.

If there is a conflict between sections 21 and 3(1)(d) of the General Code of Conduct, the current position needs to be reviewed and - if not - the industry will have to come to grips with how to deal with this issue.

In my view, the best way to solve the dilemma would be to firstly assess what exactly is meant by a full needs analysis and whether it is the same as a holistic financial needs analysis. It is the practical application of these exercises that is of great importance.

In view of the fact that "full needs analysis" is not defined in the Act or in the General Code of Conduct, one has to determine what the normal meaning of the words is.

The following definitions or descriptions from the Oxford Dictionaries may help us in this regard:

1. Full[1]

Abundantly supplied, *complete*, up to or beyond the need, with no room for more, satisfying, perfect, deep and clear.

2. Holistic[2]

As a whole, as distinct from an analysis of the results of its constituent parts.

3. Needs[2]

A *want, a requirement*; Circumstances requiring some course of action, require, want; Stand in want of, requirement.

4. Analysis[3]

Action a resolution into simple elements; Lead or guide resolution into simpler elements by analysing/*statement of results after all due consideration*; Activity or manner of directing or managing a detailed examination of elements or structure/statement of the result of this.

In my experience, *holistic financial planning* consists of the following generic disciplines:
• Financial planning, with specific reference to budget planning;
• Estate planning, with specific reference to providing dependents with sufficient capital and/or income after death;
• Investment planning, which refers to generic investment objectives;
• Planning for retirement, which refers to a specific need that requires specific planning and advice;
• Planning at retirement, which refers specifically to planning for income needs, the preservation of retirement capital and capital growth over the period after retirement;
• Health care needs, which refer specifically to medical aid insurance needs;
• Medical aid pre-funding, which refers to the funding of medical insurance benefits before retirement that will sustain the benefits after retirement;
• Short-term insurance needs, which refer to the protection of assets against unforeseen events like fire and theft; and
• Business insurance needs, which refer to the protection of business interests if one or more of the partners or shareholders should die or become disabled.

I am of the opinion that all of these disciplines will fall under holistic financial planning needs.

When the outcome leads to the recommendation and/or the purchase or investment in a financial product as defined in the Act, FAIS applies. Therefore, when one is required to do a holistic financial planning exercise, it would mean that all the aforementioned disciplines need to be analised as a whole.

In light of the aforementioned description of *full needs analysis* it is thus clear that it does not have the same meaning as *holistic needs analysis*.

Conclusion

It must be noted that there is a difference between a financial services provider that offers advice versus one that only renders an intermediary service.

When a client has a specific request or instruction pertaining to a specific financial need, such as a bond (life) policy in our example, a needs analysis must be done by the adviser/intermediary in terms of the General Code of Conduct[4]. In the event where the FSP presents a quotation to the client, this would constitute a proposal.

Therefore, this act falls within the definition of advice – not intermediary service. If a full needs analysis (applicable only to the specific request in question) is not done, the financial services provider will thus always be at risk as a result of the general provisions of the General Code of Conduct[5], which states that:

"A provider must at all times render financial services honestly, fairly, *with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry*."

In the absence of a needs analysis I am convinced that the Office of the FAIS Ombud will be able to question whether the aforementioned section has been complied with.

However, "the full needs analysis" refers expressly to the specific financial discipline or product that was highlighted in the client request or instruction [7]. It is this right that may not be waived by the client in terms of section 21 of the General Code of Conduct. In my view there is no obligation on financial services providers

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Curatorship orders: are there suitable alternative remedies?

By Louis Wessels: FSB Legal Department

Since the inception of the Financial Services Board in 1991 curatorships have frequently been used by the Registrar as a law enforcement remedy against institutions, especially when the existing management of the institution has proved to be dishonest or incompetent.

From the perspective of investor protection, curatorships have indeed been successful. Contrary to certain public perceptions, the Masterbond curatorship is a good example of how a curatorship enabled the best value to be extracted for the benefit of investors in this stricken Group. An expert valuation of the Group's realisable assets obtained at the beginning of the curatorship showed that investors could have expected to retrieve 10% of their money if the assets were to be fire-sold in a liquidation. As it were, under the curatorship the investors ultimately received 80% on average by way of repayments or scheme arrangements, a large proportion they received during the first three years of the curatorship. Many other curatorships were equally or even more beneficial to the interests of investors, policyholders or members of pension funds.

The reasons for the success of curatorships are mainly two-fold: The curators are selected by the Registrar with reference to the expertise and experience required in the particular case; and wide powers are conferred on them by the Court, allowing them time to recover assets which may be recoverable, to institute claims against parties who are liable to restore losses suffered by the institution, and, where appropriate (as in the case of Masterbond), to complete buildings or other projects so as to maximise value. In the case of winding-up orders this type of flexibility is not available to the liquidator, and neither to a judicial manager.

With the proven success record of curatorships, why then would the Registrar consider any alternative? There may be a few imperatives that explain this.

The legal matrix for the appointment of a curator is found in section 5 of the Financial Institutions (Protection of

Funds) Act, 2001. It requires an application to the High Court in which the Registrar must show "good cause" for the appointment of the curator. In one of the rare failed curatorship applications by the Financial Services Board, the Court held that the curatorship order applied for entailed the removal of the existing management of the institution and its replacement by a curator. Therefore the appropriate test to be applied should not be "more lenient than that set by the common law" for the removal from office of a trustee. (See Ex parte *Executive Officer of the Financial Services Board: In re Joint Municipal Pension Fund* [2003] 4 All SA 603 (T)).

Although the correctness of this judgment may, with respect, be questionable, the fact remains that curatorship orders are not there for the Registrar's taking. "Good cause" must be shown. Often the Registrar may himself or herself consider that the circumstances exposed in an institution, though warranting some regulatory action, do not necessarily justify the somewhat severe remedy of curatorship. Of course the Registrar will be guided by what would be in the best interest of the affected clients of the institution.

In the case of the pension fund referred to above, the Registrar eventually achieved independent control of the Fund through the mechanism of section 26 of the Pension Funds Act, 1956. That was the first instance where this provision was employed for the purpose of establishing independent external control over a pension fund in circumstances which would otherwise have required a curatorship. Section 26 has since been used in a number of other pension fund cases. A similar provision in the Friendly Societies Act, 1956, has been applied to substitute the trustees of a friendly society with an independent trustee who reports to the Registrar as well as to the court.

Section 26 and its equivalent provision in the Friendly Societies Act enable the court to amend the rules of the institution relating to its board of management, or to such other matters as the Registrar may regard as appropriate. By proclaiming new, temporary court approved rules for the institution, its existing rules may to the extent necessary be suspended and court or registrar appointed officers may be assigned control of the institution until it can revert to normal governance.

Although these remedies appear to be useful alternatives to curatorship, their application is limited to instances where the institution is in an unsound financial position or where such action becomes necessary as a result of an inspection into the affairs of the institution. These limitations do not necessarily apply to curatorship applications.

The curatorship application which the Registrar instituted in December 2003 against the Fedbond Collective Investment Scheme in Participation Bonds co-incidentally gave rise to a novel type of regulatory intervention. The application for curatorship, brought on an urgent basis, was opposed. Fedbond asked for leave to file opposing papers. The court recess was on hand and the matter had to be postponed. However, the presiding judge ruled that - pending the resolution of the application in the new year - some method had to be devised to ensure the oversight of Fedbond's activities in the interim in order to safeguard the interests of participants in the scheme.

By agreement between the parties, the Court proclaimed a "monitorship" over the scheme. An independent person with powers resembling those of a curator was appointed by the Court to act in a joint management capacity with Fedbond's management, with the specific mission to represent the interests of the participants. No mention was made of the legal basis for this monitorship, which lasted for 20 months until late in 2005, when the Registrar decided to have the monitorship replaced by an application for curatorship.

Whether or not a legal niche exists for a monitorship not voluntarily accepted by the institution, is debatable. Nonetheless, in circumstances where a drastic measure may be less appropriate, it may be useful to have the eyes and ears of the regulator present in the centre of the institution to guard the interests of investors. At the very least, the monitor's reports to the Registrar should enable him or her to assess the future needs of the institution more accurately.

The remedies discussed in this article are of course not the alpha and omega of enforcement measures available to the Registrar. A survey of the Acts administered by the FSB reveals a plethora of powers and remedies which the legislature has seen fit to grant the Registrar in the cause of the public interest and investor protection. These range from soft actions, such as to call for information or an inspection, to stringent measures such as applying in his or her own right for the winding up of the institution. The remedies discussed above lie somewhere between these extremes.

JSE Limited list new Exchange Traded Funds

In October 2005 the JSE Limited listed two new exchange traded funds (ETFs), namely ITRIX.

These ETFs track the FTSE 100 and Dow Jones Euro Stoxx 50 indices respectively. The funds have been listed on the JSE main board under the name ITRIX and complement the JSE's existing exchange traded funds, which track the local indices Satrix 40, Satrix INDI and Satrix FINI.

The ITRIX funds offer exposure to foreign currency denominated European and UK listed shares. However, there is no

limit on the amount of money that retail investors may place in the funds, because the ITRIX is viewed as a bundle of foreign companies listed on the JSE. In terms of exchange controls relaxation announced by the Minister of Finance in 2004, individuals may invest in foreign companies listed on the JSE without adhering to any exchange controls. Institutional investors will however still be subject to exchange controls that cap their offshore investments at between 15% and 20% of total retail assets under management.

Major victory for FSB in High Court

The FSB achieved a major victory for its inspection activities when the High Court dismissed an application by a previously FSB approved investment manager, which sought to challenge the constitutionality of certain provisions of the Inspection of Financial Institutions Act, 1998 (Inspection Act).

The Witwatersrand local Division of the High Court handed down judgment in the combined applications by Platinum Asset Managers (Pty) Ltd, Anglo Rand Capital House (Pty) Ltd, Neil Andrew Oosterlaak and Johannes Jacobus Stofberg against the FSB, certain of its officials and the Minister of Finance in December.

In both these cases the applicants contended that the inspection of their activities by the FSB was unconstitutional in certain respects; that the authorisation to conduct the inspection was overbroad, undefined and unspecified; that the inspection was initiated for an ulterior purpose; the independence of the inspectors was queried and importantly that the inspection was ultra vires the functions and powers of the FSB.

The applicants also contended that their fundamental right to privacy as enshrined in section 14 of the Bill of Rights had been violated by the search and seizure provisions contained in the Inspection Act.

The applicant in the Platinum matter also sought to review the decision by the Registrar of Securities Exchanges to instruct the inspectors to carry out the inspection of the affairs of Platinum and its associated institutions. On behalf of the FSB it was contended that the inspection was initiated as there were reasonable grounds to suspect that:

• Platinum was cold calling potential clients in a boiler-room type operation in which shares listed on foreign exchanges were being offered;

•. Platinum was using its status as an FSB-approved institution to promote its business and to give potential clients comfort;

• Platinum's operation in South Africa was the continuation of a similar operation which had been conducted in Barcelona, which operation had been shut down by the Spanish regulator;

• Oosterlaak, who had featured in Thibault Capital Markets/Thibault International Financial Advisory Corporation SA, the latter a Barcelona based operation that had been fined by the Spanish regulator for unlawful investment activities, was centrally involved in Platinum's South African operation;

• West Shore Ventures and ultimately, a Canadian citizen, Rakesh Saxena lay behind both the Spanish and the South African operations;

• Investors had previously been prejudiced by Thibault Capital Markets/Thibault International Financial Advisory Corporation SA's activities and stood to suffer potential harm in consequence of Platinum's operation; and

• Platinum's representatives had not been candid in the information furnished to the FSB.

Both applications were dismissed with costs. The Court held that in so far as the search and seizure provisions of the Inspection Act infringed the privacy rights of the applicants, that limitation of their rights was justified and the provisions of the Inspection Act were not unconstitutional. The report prepared by the inspectors had, pending the outcome of the applications, been withheld from the Registrar. This report can now be made available to the Executive Officer of the FSB for consideration and determination whether further steps, if any, need to be taken against the applicants.

Both the Registrar of Medical Schemes and the Registrar of Banks also use the Inspection Act for their respective regulatory responsibilities. They therefore joined as First and Second Amici Curiae in both applications and provided valuable assistance in defeating the attack on the constitutionality of the Inspection Act.

Gerry Anderson, Deputy Executive Officer: Market Conduct and Consumer Education of the FSB states that "the FSB is pleased that this protracted matter has finally come to an end and that the Inspection Act, which is relied upon by multiple regulators, has been found to be constitutionally sound". He added "that this is another example that investors, both locally and internationally must be alert when approached to make investments especially where promises of high returns are being made."

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or their representatives to carry out a holistic financial needs analysis for every client in terms of FAIS, unless it is specifically required by the client, or when the adviser/intermediary proposes that an analyses be done in order to determine the client's financial needs as referred to in section 8 of the General Code of Conduct and the client accepts this proposal.

References

(1)*The Pocket Oxford Dictionary* p 331; *The Oxford Dictionary for the Business World* p 329

(2)*The Pocket Oxford Dictionary* p 534; The *Concise Oxford Dictionary* p 677; *The Oxford Dictionary for the Business World* p 559

(3)*The Pocket Oxford Dictionary* p 166 and 26; *The Concise Oxford Dictionary* p 196 and 31; *The Oxford Dictionary for the Business World* p 170 and 26

(4)Section 8 (1)(a) refers to reasonable steps to seek from the client appropriate and available information…

(5)See section 2 of the General Code of Conduct

(6)My emphasis

(7)See section 3(1)(d) of the General Code of Conduct

From left to right are: Gary Colling (First National Bank), Jean Ochse (First National Bank), Neville Melville (Ombudsman for Banking Services), Theresia Spang (ABSA Bank), Tom Boardman (Nedbank) and Sharon Schroder (Nedbank).

Customers have their say on banks' services

Bank customers recently had their say during the Ombudsman for Banking Services' (OBS) annual awards, which recognise banks' excellence in dealing with customer complaints. For the first time, First National Bank was crowned the overall winner (Excellence in Complaint Management category). Last year's winner was Nedbank.

This result is based on a telephone survey of 400 customers of the four top retail banks in South Africa (ABSA, Standard Bank, Nedbank and FNB). The survey is conducted by an independent market research company, Markinor. Respondents were required to indicate which bank they considered to be best at dealing with customer complaints.

The OBS has sponsored the awards for the last five years. The aim of the awards is to encourage banks to focus on providing redress to customers with legitimate grievances.

Accolades went to Nedbank in the category "Code of Banking Practice Marketing Commitment Award" (the bank customers believe to have done the most to promote the Code) as well as the Marketing Commitment Award, which recognises the bank that excelled at promoting education about the work of the Office of the Ombudsman for Banking Services during 2005. The Individual Recognition Award was presented to Theresia Spang of ABSA. This award is presented to the bank employee involved in the Ombudsman liaison process who has provided excellent service, and is judged based on the employee's interactions with the OBS. One of the criteria for this award is evidence of having initiated measures to improve the bank's level of service.

Gary Colling of Wesbank received the OBS Independent Directors Award for the bank employee actively interfacing with customers who had excelled at handling customer complaints. Nominations for this award are received from the banks themselves and the independent, non-banker directors of the OBS board select the winner in this category.

At the function at which the awards were presented, Banking Ombudsman, Neville Melville, commented on the fact that - in spite of the perception that everyone had complaints against their banks - Markinor had in fact struggled to track down the requisite number of customers for the survey who had indeed lodged complaints.

By Zodwa Ntuli, Manager: Compliance Division, Competition Commission SA*

Blaming the legislature?

Looking at the Competition Act, 1998, with its 84 sections and three chapters, it is easy to conclude that this must be one of the easiest laws to implement. The Act is short and makes for interesting reading. But over the past five years of applying, interpreting and advising on the Act, it has in fact proven to be an extremely complicated

Undoubtedly, there are many practical challenges involved in administering the Competition Act. This article will focus specifically on difficulties arising from anticompetitive clauses contained in various pieces of legislation. In particular, the intention of the legislature will be questioned.

The objectives of the Competition Act appear to be ambitious and optimistic, which is of course a positive feature. Yet, the Act does not seem to provide for adequate means and mechanisms to achieve these objectives. It seems to raise in vain the hopes of vulnerable consumers and small businesses, most of which look to the regulators for immediate solutions to their problems. Objectives should be crafted in a realistic way, taking into account powers and remedies available in the legislation to achieve such objectives. Also, where specific functions are bestowed on regulators, such functions must be achievable and practicable. It is common cause that drafters do reflect on these issues, but it is doubtful if this is done in a coordinated and consistent manner.

Before 1998, competition regulation was fragmented, with various regulators being mandated to deal with competition matters. In 1998, the Competition Act was passed to introduce a new regime for competition law, which established independent and specialised agencies to deal with competition issues. The creation of this regime anticipated that the old laws would be revised to be in line with the current competition regime, but this, it seems, was wishful thinking. Most Acts remain totally unchanged and – even worse – the new laws that are drafted perpetuate the fragmentation that the 1998 Act sought to address.

**(The views expressed in this article are those of Ms Ntuli and not necessarily the views of the Competition Commission.)*

The Competition Act prohibits anti-competitive practices, and the competition authorities are mandated to deal with perpetrators who violate competition laws. However, other Acts exist which do permit these types of practices in various industries – and the industry players are quick to invoke the relevant sections when competition authorities attempt to take action against them. This raises legal arguments as to whether competition authorities should and can take action against "legalised violations". With the obvious legal challenges and limited litigation budget, the answer is probably "no". But if one thinks about the effects of these anti-competition practices, it is probably worth pursuing this line of action.

Looking at section 21(k), which states that the Competition Commission must over time review legislation and regulations and report to the Minister of Trade and Industry concerning any provision that permits anticompetitive practice, one may argue that the role of the competition authorities in cases of "legalised violations" ends with reporting these to the Minister. It is, however, not clear what the Minister is expected to do with such a report. What ís clear though is that this does not provide any timely relief to the person(s) affected by the conduct. Unfortunately this could certainly tarnish the image of the regulator, who may be perceived by stakeholders to be ineffective when it is not the case.

An example of such legislation is the Short-term Insurance Act, 1998. This Act allows for competition and consumer welfare to be compromised. While we preach freedom of choice and fair competition, section 43(5)(a) of the Short-term Insurance Act grants banks the prerogative to unilaterally impose insurance cover of their choice on customers in respect of immovable property financed by the banks. Following a complaint, the Ombudsperson for Financial Services Providers recently made a ruling against Nedbank, in which it ordered Nedbank to cancel the insurance cover that it had unilaterally imposed on the customer.

It seems that the interest of the consumer and competition were not paramount when this section was inserted. Its rationale is also questionable.

Why does it not apply to movable property, such as a motor vehicle? If a bank provides finance for a car valued at R800 000, you are at liberty to choose your own insurance cover, but if the finance is granted for a house of the same amount, the bank will choose your insurance cover for you. This happens irrespective of whether or not the consumer already has insurance cover or can obtain cover at a lower premium.

Did the legislature really give due consideration as to how this would affect competition? Many insurance companies regard the customers who are financed by the banks as a central element of its potential client base. In terms of this section, a bank may choose a certain company to deal with in providing clients with insurance cover, or may even create an in-house insurance division to provide insurance cover to its customers. The insurance company chosen by a bank, or the division of the bank concerned, would thus gain an unfair advantage over competing insurance companies that provide short-term insurance. This makes it impossible for insurance companies to compete on equal footing for the custom of clients financed by banks.

Furthermore, a section like this allows for the creation of small monopolies in various segments of the insurance market, thereby undermining the spirit of competition. Where a bank is dominant or has significant market power, forcing a customer to accept an insurance company that the bank provides is not too far removed from tying or bundling products, which is unacceptable under competition law. Smaller insurance companies may be disadvantaged in the process, as their ability to access customers that take up bonds with these banks may be limited. These small companies are often marginalised by conglomerates without the benefit of any recourse. Where they do attempt action for recourse, these big firms drag them through lengthy court cases, which they cannot afford.

Judges and lawyers often talk about the legislature and what the legislature intended. In this case, one may argue that there is more than one "legislature" in South Africa.

Judges and lawyers often talk about the legislature and what the legislature intended. In this case, one may argue that there is more than one "legislature" in South Africa. If "the legislature" that drafted the Competition Act and the Short-term Insurance Act was indeed one and the same, surely these contradictory outcomes could have been prevented. It is also interesting to note that both Acts were passed in the same year. How this contradiction could have gone unnoticed, remains a mystery. Maybe the legislature should have been more explicit in asserting the need for consistency in regulation, stating in the Competition Act that all laws that contain anticompetitive practices should be amended. Alternatively, the legislature should have provided for the Competition Act to supersede any legislation that contains anticompetitive sections or purports to deal with competition issues.

While one may well blame the legislature, the regulatory agencies are equally at fault for perpetuating this situation and failing to cooperate and speak with one voice in getting rid of anticompetitive provisions. Regulatory agencies are in a much better position to steer and influence the drafting of legislation, but we have seen few regulators calling for changes of their legislation to amend offending provisions. Government departments are also not helping much. Instead, we see them drafting more laws, such as the Electronic Communications Bill (previously Convergence Bill), which attempts to amend the Competition Act by incorporating competition regulation within the powers of ICASA. Quite a number of Acts regulating professions still contain price fixing provisions, thus permitting industry players to circumvent competition laws. It is at this point that one has to start questioning the notion of "one legislature".

Undoubtedly old laws need to be amended and new ones should not contain anticompetitive clauses. There is a need for a serious review and audit of South African legislation to eradicate these problems, which are obscuring the implementation of laws and regulations. Such a review would go a long way to assist the citizens themselves to evaluate relevant legislation and decide whether the laws that are passed in the interest of the Republic are worth the paper they are written on. More importantly, it would help assess if the desired objectives of the law are being achieved.

Editor's note: The regulation of credit insurance under the insurance laws will become less of an issue once the National Credit Bill, 2005, becomes law. Its provisions on credit insurance override those of the insurance law.

Benefits of Financial Sector Charter will become meaningful to average SA citizen

"The financial sector acknowledges that access to first-order retail financial services is fundamental to BEE and the development of the economy as a whole." (Financial Sector Charter – 2003)

By Gerhard Joubert, Executive Director, Life Offices' Association (LOA)

One of the unique aspects of the Financial Sector Charter (FSC) that gives the FSC weight as a transformational and broad-based instrument, is the focus on access to financial services for lower-income consumers. Whereas many aspects of the FSC are directed at the transformation of the South African economy, it is specifically by way of access that the benefits of FSC will in the short term become meaningful to the average South African.

It is also significant that access is one of the categories that carries the most scorecard points in the FSC – clear evidence of the commitment of the financial sector. Further evidence of the commitment of the LOA and its members is that the long-term insurance industry has elected to allocate three times as many points to this access commitment when compared to the collective investment and short-term insurance industries.

Finalising the access target for long-term insurance

Over the past two years, the LOA and its members have had to reconsider its traditional thinking about the lower income market. During the deliberations that led to the finalisation of the FSC, it was our contention that this market had been sufficiently penetrated by the long-term insurance industry and that we should therefore be exempt from participating in this aspect of the Charter.

One of the statistics that informed our view was the Swiss Re Sigma research, which showed that South Africa had the highest insurance penetration in the world (when measuring insurance contributions as a percentage of GDP). For this reason, and because we did not want to set targets that were based on a thumb-suck, the LOA agreed to do more research before a target for long-term insurance access could be agreed and inserted in the FSC.

Since then, Finmark Trust has conducted two annual Finscope surveys. These have clearly shown that the industry had a long way to go in penetrating the market. Whereas the industry's penetration in the Living Standards Measure (LSM) 6-10 income sectors stood at 51%, current penetration of the LSM 1-5 sector (which is the focus area for access as set out in the FSC) stood at a mere 13%. The research also showed that the industry had some work to do in creating an awareness of its products in this market and to gain the confidence and trust of consumers who often prefer to use community arrangements and other services. It was interesting to find that 30% of people in LSM 1–5 have "informal" insurance through membership of burial societies – they are thus clearly potential clients of the formal sector.

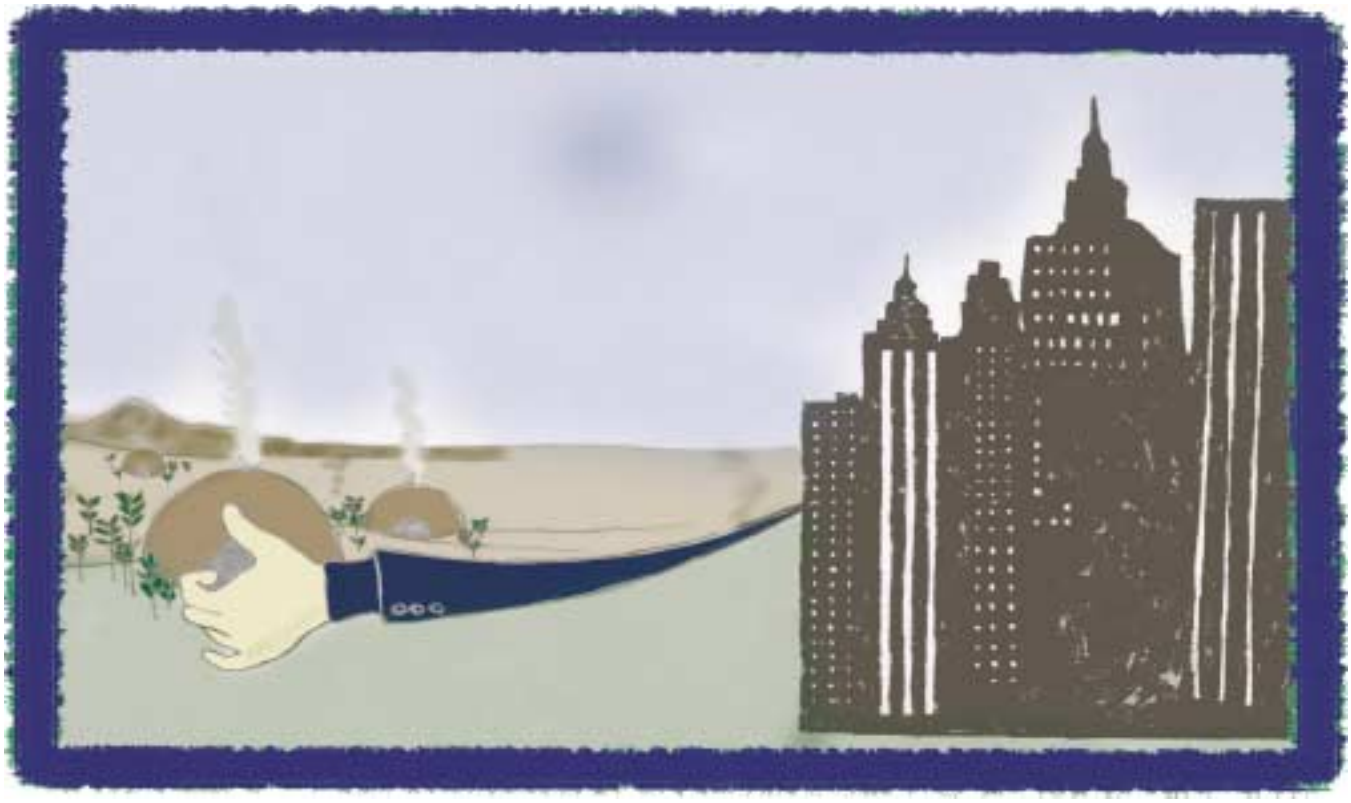
The LOA has in the past year done substantial work to come up with a meaningful way to set an access target for the long-term insurance industry and our proposals have since been submitted to the Charter Council for approval. Our approach to access is based on four pillars:

- product standards,
- transactional (geographical) access,
- penetration, and
- consumer awareness.

LOA approach: CAT standards

Unlike other industries in the financial sector, the LOA has chosen not to provide a standard (Mzansi style) product to the low income market. Instead, the LOA's proposal consists of minimum standards that companies have to meet in order for their products to qualify for accreditation. If the LOA proposal is accepted, the resultant accredited products would be governed by a set of minimum "CAT" standards where CAT stands for *fair Charges, easy Access and decent and simple Terms*. The rationale is that this will not only ensure that lower income consumers are presented with appropriate and reasonably-priced products, but that there will also be scope for healthy competition and differentiation.

Minimum standards have been developed for a variety of products, ranging from identified "first order needs" products, such as funeral policies, to credit life and mortgage protection, basic life and disability cover. These minimum standards cover aspects such as maximum waiting periods and a ban on the use of HIV exclusion clauses. Minimum stan-



dards for savings products will also be developed once the role of the proposed National Savings Fund has been clarified. In addition to the minimum standards, we are also proposing maximum prices for risk cover, which will offer the consumer additional protection.

How will LOA members score?

LOA members will only be able to score for new business that meets the above standards, but will be given credit for existing business in the LSM1-5 market sector – which will also provide an incentive to preserve existing business. In addition, the LOA will be allocating targets to each company, based on existing market share. These targets have been allocated in a manner that will encourage LOA members to not only concentrate on metropolitan areas, but also on rural areas.

The key measurement of success for the provision of effective access is the penetration level (usage) of appropriate products within the LSM 1-5 market. The final target penetration is 23% of the adult population of LSM1-5. This is approximately 180 % of current penetration levels.

LOA member companies will also score points for "transactional access", which will be defined in terms of the opportunity to, at least once a month, purchase the product, pay the premiums due and make amendments to the policy within 40km of that person's residence or place of work; and at least once every two working days to lodge a claim and receive payment of the claim within 80km of that person's residence or place of work. The target for transactional access is 80% of LSM1-5 adults.

Informed consumers

One of the key aspects of the industry's commitment is that consumers in the lower income sectors should have a proper understanding of the access products that are being developed for them.

Simplicity of documentation is an important focus area and a simple summary of key policy terms will be made available in all official languages, as it is envisaged that this will enable a better understanding of the products.

In addition, consumer education has been the subject of much discussion. The target for consumer education is that every company should spend 0.2% of post -tax operating profits each year. Generic standards are being developed against which consumer education programmes will be measured. This will ensure that these programmes are not sheer marketing programmes and are in fact focused on achieving the objectives of the FSC.

Way forward

The fact that 30% of people in LSM 1-5 are able to afford participation in burial societies clearly indicates both the desire of lower income people for risk mitigation measures such as insurance cover, as well as the failure of the current formal long-term insurance system to penetrate this market sector effectively. There is still a large untapped market out there. We are of the view that the FSC will change the face of risk cover and extend access to life insurance for lower LSMs dramatically.

There are still some dependencies: the products would require that Mzansi bank accounts permit debit orders for insurance policies; that bank fees for rejected debit orders be set at affordable levels and that the Persal facility of salary deduction remains available at affordable levels. In addition, the Competition Act, 1998, poses certain problems. Since these are not industry-specific concerns, it will be addressed at Charter Council board level.

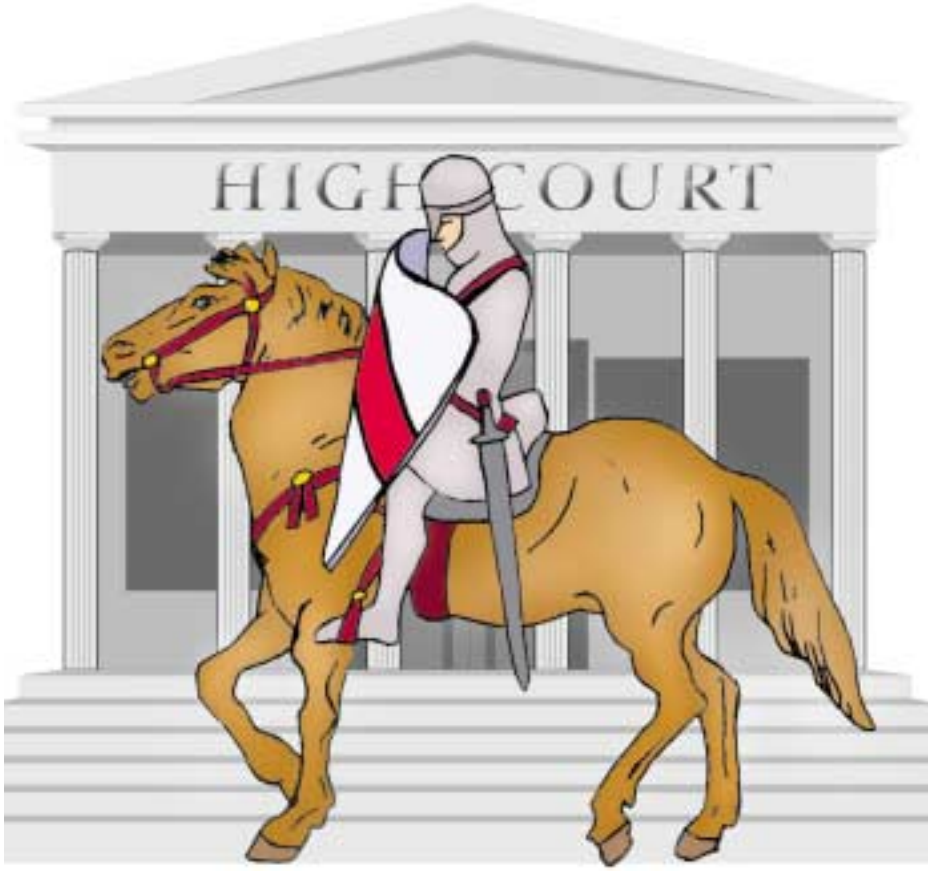
As soon as the LOA has received the green light, our members will be ready to go to market with their "CAT" compliant products so as to make affordable and appropriate long-term insurance products available to all South Africans.

Appreciation

The LOA Access Committee has done excellent work since the finalisation of the FSC, initially under the leadership of Thabo Dloti of Old Mutual and subsequently Nic Kohler of Hollard. Sid Kaplan (ex Liberty Active, now consultant to the LOA) also deserves a special mention for his dedication to this project and his excellent inputs.

Off to court to protect members

The Registrar of Pension Funds has recently been involved in a number of court applications to protect members of retirement funds



By Dr Elmarie de la Rey, Senior Legal Adviser: Pensions Division, FSB

The recent spate of determinations by the Pension Funds Adjudicator, Vuyani Ngalwana, involving underwritten retirement annuity funds, has focused attention on the efforts of the Registrar of Pension Funds to protect members of funds.

Adjudicator's decisions

In recent months, 25 applications have been made to courts in different jurisdictions to set aside determinations made by the adjudicator against underwritten retirement annuity funds, commonly referred to as RA funds, and their administrators. In 24 of these cases, the Registrar has applied for leave to intervene. In the remaining case, the life assurer who brought the application joined the Registrar as a party, of its own accord.

The Registrar's main concern is the question of whether or not the Adjudicator has jurisdiction to determine disputes about RA's.

In the first matter to come before court, Central Retirement Annuity Fund against the Adjudicator and F C de Beer, the Cape High Court (Judge Dennis Davies and Acting Judge Andre le Grange) found on 20 October 2005 that:

- the Adjudicator did have jurisdiction to hear the complaint;
- the Fund cannot be treated as an illusionary "go between" the members and the insurer. The Fund should be accountable to its members and hence subject to the discipline of the Act's complaint mechanism;
- The determination and order for the payment of illustrative values was set aside and De Beer's complaint was dismissed.

This settled the question of the Adjudicator's jurisdiction and also confirmed the duties of the boards of management.

RA funds are required, in terms of the Income Tax Act 58 of 1962, to register as pension funds. The Pension Funds Act, 1956 requires such funds to be administered by a registered long-term insurance company. The Act also places severe restrictions on such funds by for instance prohibiting RA funds from receiving payments, paying out benefits directly to members and beneficiaries, or even having a bank account.

The result is that insurers tend to see RA's as insurance business rather than pension funds, and deny that the Adjudicator has any jurisdiction to determine disputes about RA's.

The Registrar, on the other hand, sees RA's as pension fund business, so that complaints should be lodged with the Adjudicator rather than with the Ombudsman for Long-term Insurance.

The 24 other RA matters are not yet before court. These deal mainly with the reasonableness or otherwise of costs deducted from the value of the policy upon early termination or a reduction of premiums.

The Registrar is suggesting to the court, in most of these matters, that the matter be referred back to the Adjudicator for a determination of the reasonable costs by the FSB's Chief Actuary or someone appointed by him.

Costs and Disclosure

There is no provision of law contained in any of the Acts applicable to retirement annuities, stipulating minimum or maximum costs (other than the maximum commission payable that is regulated by the Long-term Insurance Act, 1998), which may be charged by a fund or the insurer. This is left to market forces in an industry that is highly competitive.

Provisions like section 46 of the Long-term Insurance Act, have, however, been enacted to ensure that there is a balance between the premiums charged on and the benefits provided by an insurance product, so as to ensure the financial soundness of the product as such and the consequential soundness of the insurer.

Continued on p 18

FSB has distributed R45m to claimants

The FSB in its five-year history had distributed about R45 million to over 1 200 claimants, said Gerhard van Deventer, Executive Director of the FSB's Directorate of Market Abuse.

Van Deventer was speaking at the company secretary symposium in Sandton last year, where he said the FSB and the division that used to be known as the Insider Trading Directorate, which can fine people or companies for insider trading and price manipulation, had collected over R50 million so far after investigating more than 160 cases. Once the organisation collected its costs of investigation, it was able to pass on the proceeds to those prejudiced by market abuse.

Van Deventer said insider trading occurred when anyone who knew that they had inside information dealt in the shares or encouraged or discouraged others to deal in the securities, or passed on the inside information.

Van Deventer pointed out that there were a number of instances in which dealing in shares would not be considered insider trading. These would include the officers of a company buying shares in another company for a takeover, or a person buying or selling shares who only became an insider after giving an order to a stockbroker. In this case the deal could go through as long as the order was not changed.

It was able to pass on the proceeds to those prejudiced by market abuse
In addition, a stockbroker could have inside knowledge and still deal for a client as long as the broker did not advise the client on the trade. Futures traders acting for government are also allowed to have inside information.

Further, officers of a company are allowed to disclose inside information to fulfil their duties, such as telling auditors what they need to know. But the "consenting adults" defence holds no water, according to Van Deventer. This excuse arises when two people who both have the same inside information want to trade with each other either on or off the market. Neither instance is acceptable because they represent insiders trading at a level, which is different from that of the market.

When it comes to price manipulation, there is only one instance in which it is acceptable and this is during an initial public offer and it is known as price stabilisation.

But the new and important part of the Securities Services Act, 2004, which was promulgated in February 2005, relates to the issuing of false and misleading statements. Van Deventer warned that not only are directors liable if they knowingly put out incorrect statements, but they are now liable if they "ought reasonably" to have known the statements were false or misleading.

Source:
Business Report,
14 November 2005

Enforcement Committee to start proceedings early in 2006

The envisaged Enforcement Committee, which will consider cases of market abuse, will start functioning early in 2006.

According to Gerhard van Deventer, Executive Director: Directorate of Market Abuse of the FSB, the FSB is currently securing candidates for appointment to the committee.

The Enforcement Committee was created in terms of the Securities Services Act, 2004, with the responsibility to hear cases "on the papers". This entails that the Committee will by and large make reference to the forensic report and written reply of the alleged offender. "It is envisaged that this will speed up enforcement of market abuse legislation. The Committee may, however, in exceptional circumstances, decide to hear evidence," Van Deventer says.

He says the FSB is in the process of drafting legislation to extend the jurisdiction of the Enforcement Committee to cases other than those dealing with market abuse and other contraventions of the Securities Services Act. "Once this becomes law, contraventions relating to the other regulated industries will also be referred to an Enforcement Committee. The directorate is consulting with a constitutional law expert with regard to the draft legislation," he said.

Cases in respect of all forms of market abuse, including insider trading, prohibited trading practices and false or misleading statements, may be referred to the Enforcement Committee. In certain circumstances the Committee will have jurisdiction to impose penalties and grant compensation orders.

According to Van Deventer a respondent may take the decision on appeal to the FSB Appeal Board, where the case will effectively be re-heard. "In addition, the respondent may take a decision of the FSB Appeal Board on review to the High Court."

SAIA and FSB initiative hits the streets

The FSB's partnership with the South African Insurance Association (SAIA) to address an identified need for consumer financial education in South Africa will soon leave a lasting impression on commuters countrywide.

Olivia Davids, Head of the Consumer Education Department at the FSB, said the project launched by the two organisations to create awareness among and educate commuters on personal financial management is running like clockwork. The department, together with representatives of SAIA and service provider ComutaNet, visited Johannesburg and Soweto in September to experience consumer reaction to the project first hand. ComutaNet specialises in taxi advertising, informal interactive educational activities at taxi ranks, broadcasting on rank television and broadcasting on railway station platforms. The group visited several places in the two cities where information on consumer financial education is aired through various media.

The project started on 18 July with television and radio promotions, followed by interactive promotions at taxi ranks on 25 July, and will end early in 2006.

SAIA and the FSB have co-produced the scripts for airing on Rank TV, Commuter FM and Star Radio, and as inserts in music tapes distributed to taxis. The scripts and inserts are based on four themes, namely budgeting and saving, responsible use of credit, insurance and rights, responsibilities and redress mechanisms of consumers.

The FSB and SAIA trained ComutaNet staff, who are presenting the interactive promotions, on the four themes.

The FSB signed a memorandum of understanding with the South African Insurance Association (SAIA) in April 2005 to undertake consumer education projects.

One of the projects was to conduct consumer financial education workshops for consumers in LSM 1-5 throughout the country, using the FSB's consumer education booklets.

The FSB and SAIA also launched the EnviroTeach Project this year. A teachers' handbook on consumer financial education has been developed and printed for use in countrywide workshops.

Off to court *from p 16*

It is hardly possible, even for a well-informed member of the fund, to gather from the documentation provided or accessible to him or her, what costs are inherent in participation in the fund. The rules of the fund do not spell out these costs; on the contrary have little reference to them.

Also the policy issued by the insurer to the insured stipulates neither the specific costs that the insurer may charge nor any formula or method that will enable the insured to calculate or assess these costs. In these circumstances, fairness and the law demand that what the insurer may charge must be reasonable.

What the FSB has for many years been trying to engender in the financial services industry under regulation of the FSB, is full disclosure of costs to the investor (whether it be a policyholder, a pension fund member or an investor in the capital markets). Over time these efforts have precipitated into various pieces of legislation. Reference may be made to:

(a) Section 62 of the Long-term Insurance Act was a prelude to the so-called Policyholder Protection Rules which initially came into force on 1 July 2001 and which contain specific requirements relating to the disclosure of costs to a prospective policyholder. These Rules in particular provide that retirement annuity policies shall be regarded as individual policies.

(b) On 15 November 2002, the overarching Financial Advisory and Intermediary Services Act, 2002 (FAIS Act), was promulgated which came into full operation on 30 September 2004. Under this Act have been passed a General Code of Conduct and other Codes dealing extensively with disclosure requirements, including those relating to costs, and a host of other measures to ensure that policyholders and other investors have a full appreciation of what they are committing themselves to, what they may expect to receive in exchange, the risks involved in certain products; and that this information process continues on an on-going basis.

While the South African Regulator, in line with international trends, has either refrained from introducing prescriptive measures relating to costs or, where there was some control (e.g. in commissions payable by insurers to intermediaries), relaxed such control, this approach went hand in hand with more stringent disclosure requirements on the industry. There must at all times be open, frank and fair treatment of the investing public.

This is what the Registrar is trying to convey to the Court when each determination is being reconsidered, and the reason why the Registrar applied for leave to intervene.

International links expanded

The FSB has expanded its liaison with the regulatory authorities of Israel and Tanzania.

The FSB signed an MOU with the Israeli Securities Authority at a conference in Frankfurt in October 2005. The aim of this MOU is to promote cooperation and the exchange of information between regulators.

This MOU is one of 44 similar agreements signed between the FSB and other regulatory authorities.

A delegation from the Tanzanian financial industry also visited the FSB in October 2005 with the aim of establishing how the FSB regulates the financial services industry. The four-member delegation participated in the familiarisation programme presented twice a year by the FSB, which is aimed specifically at visitors from other African states.

According to Norman Müller, Head: Capital Markets at the FSB, the programme provides a platform for the FSB and visitors alike to share their thoughts on the regulatory systems locally and in Tanzania.

"The idea of this two-way exchange is to learn from one another. We make use of the opportunity to familiarise participants with the role of the various departments of the FSB. Visitors are also informed about the nature and developments within the local capital markets. The practical programme includes visits to various institutions," Müller said.

The FSB and a delegation from Tanzania shared thoughts on the regulatory systems locally and in Tanzania in October. From left are Mphanama Tshwangwaho (FSB), Neil Acres (FSB), Gerhard van Deventer (FSB), Martin Dzviti (FSB), Esteriano Mahingila (Tanzania), Norman Müller (FSB), Manasse Malimabe (FSB), Abdurahman Jumbe (Tanzania), Rob Barrow (FSB) back, and Dr Fraterm Mboya (Tanzania).

At the signing of the MOU from left is: Hadas Magen (Israeli Securities Authority), Rob Barrow (FSB) and Liza Haimovitz (Israeli Securities Authority).

Manuel warns against pyramid schemes

Finance Minister Trevor Manuel has warned people against investing in companies offering unrealistic rates of return, such as so-called pyramid schemes.

He was responding in the National Assembly to Freedom Front Plus MP Willie Spies, who raised the issue of the recently liquidated Oude Molen group of companies.

Spies said institutions such as the FSB, the Registrar of Companies, the SA Reserve Bank and the police all shared a common goal - serving and protecting the public.

Manuel said all financial regulations were designed with a view to consumer protection. "So whether you're talking of the FSB — or the Reserve Bank and the banks supervision department in particular — the object of the exercise is to protect the end user, the consumer, from abuse. But, the systems work because you're dealing with registered institutions ... registered within the framework of the law.

"So if somebody sets up some shop, some bucket shop, and they call it a bank and people go and put their money there, you can't hold the Reserve Bank accountable for that. And unless there is actually a formal charge laid, the FSB or the Reserve Bank wouldn't automatically know about it."

Source: Daily Dispatch 16 November 2005

FOURTH QUARTER 2005