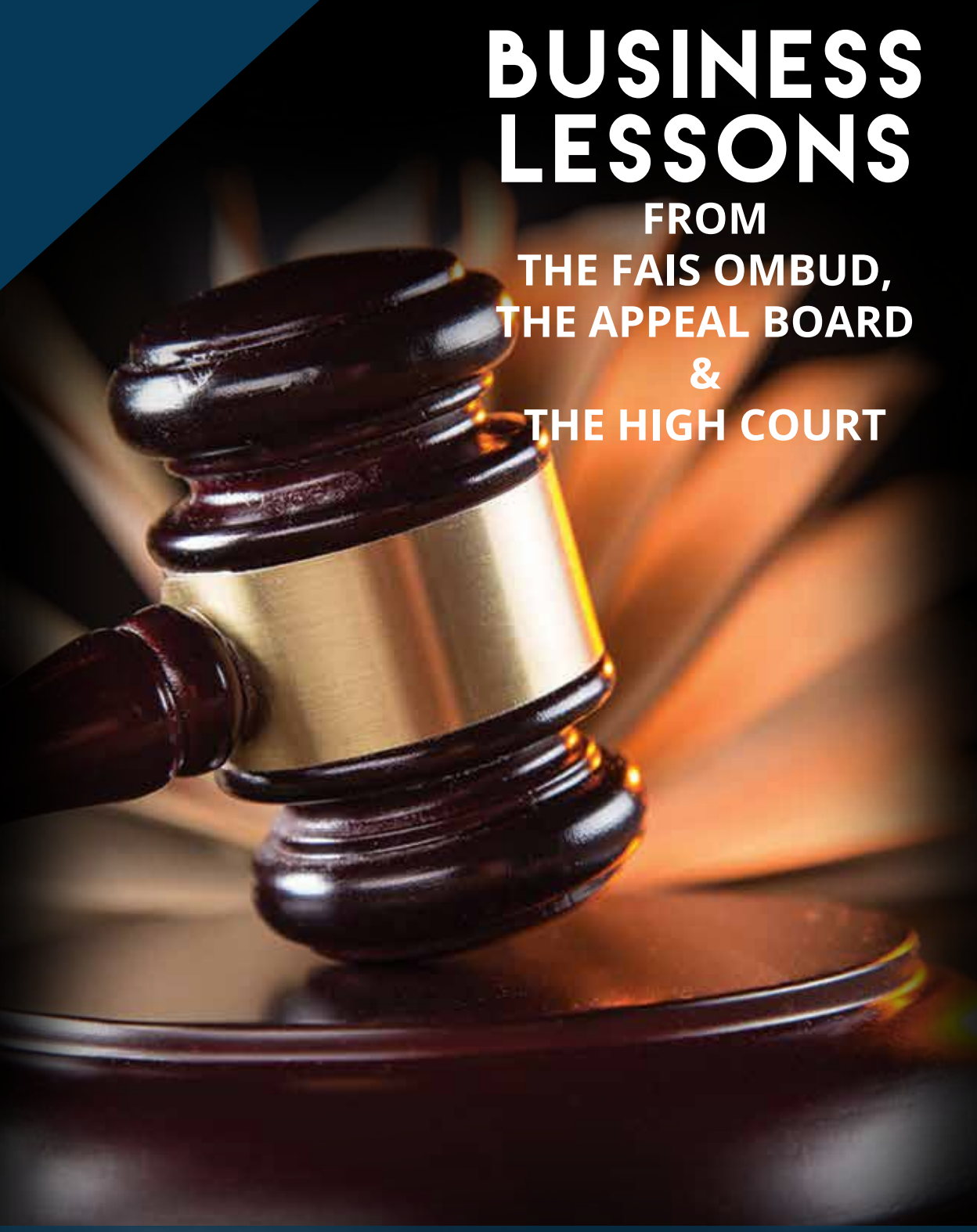

BUSINESS LESSONS

FROM THE FAIS OMBUD, THE APPEAL BOARD & THE HIGH COURT

ANTON SWANEPOEL

FPI Financial Planning Institute of Southern Africa
Recognised CPD Publication

Legal Support Worker. Aerospace Engineer. Author. Dental Hygienist. Biological Scientist. Surveying Technician. Geographer. Law Clerk. Office Clerk. Designer. Decorator. Punching Machine Setter. Dentist. Design Draughtsman. Financial Analyst. Brazier. Waste Treatment Plant Operator. Fire Inspector. Epidemiologist. Transportation Worker. Urban Planner. Boiler Operator. Biologist. Weapons Specialist. Court Clerk. Film Laboratory Technician. Air Crew Manager. Boat Builder and Shipwright. Crew Captain. Motorboat Mechanic. Landscaper. Heating Equipment Operator. Administrative Services Manager. Aviation Inspector. Healthcare Practitioner. Heating and Air Conditioning Mechanic. Surveying and Mapping Technician. Equal Opportunity Representative. Environmental Scientist. Fast Food Cook. Nutritionist. Maintenance Supervisor. Fashion Model. Graphic Designer. Funeral Attendant. Butcher. Maintenance Equipment Operator. Mail Machine Operator. Automotive Specialty Technician. Avionics Technician. 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BUSINESS LESSONS

FROM
THE FAIS OMBUD,
THE APPEAL BOARD
&
THE SUPREME COURT

The biggest business risk of all...

It takes hundreds, if not thousands, of transactions over many, many years to establish a successful advisory business in the financial services industry.

However, it only takes one transaction, which may be concluded in a couple of minutes, to ruin all that effort.

This book may just prevent you from becoming another FAIS Ombud statistic.

ANTON SWANEPOEL

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The suppliers funding of his publication made it possible to make it available electronically to all advisors and intermediaries at no cost. It is recommended that Key Individuals and Representatives read the books that are referred to in this manual, as they contain valuable guidance that may supersede the information contained herein.

DISCLAIMER

This manual was written in good faith and the author or publisher cannot be held responsible for the reader depending on the content of this publication when he/she makes business decisions in respect of compliance. It is recommended that the reader also consults with his/her compliance officer before its application in the business.
As legislation is amended from time to time, the reader must refer to the applicable sections in the FAIS Act and its subordinate legislation when considering the application of the Act in the business of the FSP.

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INDEX

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PREFACE

I have been a passionate supporter of the Regulator's efforts to regulate financial advisory and intermediary services ever since I first read the FAIS Bill in 2002, and to this day I fully support the objectives of the Financial Advisory and Intermediary Services Act and its subordinate legislation.

I also fully support the objectives of the Office of the FAIS Ombud as described in section 20(3) of the FAIS Act:

The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act.

Unfortunately, these provisions are easier to formulate than to execute, and it must be recognised that, like financial services providers, the FAIS Ombud has a very difficult task at hand to meet the requirements in terms of the FAIS Act. It should also be recognised that no FSP or Office is perfect and there will always be room for improvement.

With this publication I aim to identify the main problem areas that exist, on the part of financial services providers, compliance officers, the Regulator, and the Office of the FAIS Ombud and to offer some suggestions as to how these problems could be addressed. This means that there will be parts in this manual where stakeholders in the financial services industry may be criticised. However, in a sincere attempt to make a positive contribution to the financial services industry, I have made every reasonable effort to express an objective view when giving credit where it is due and when offering constructive criticism.

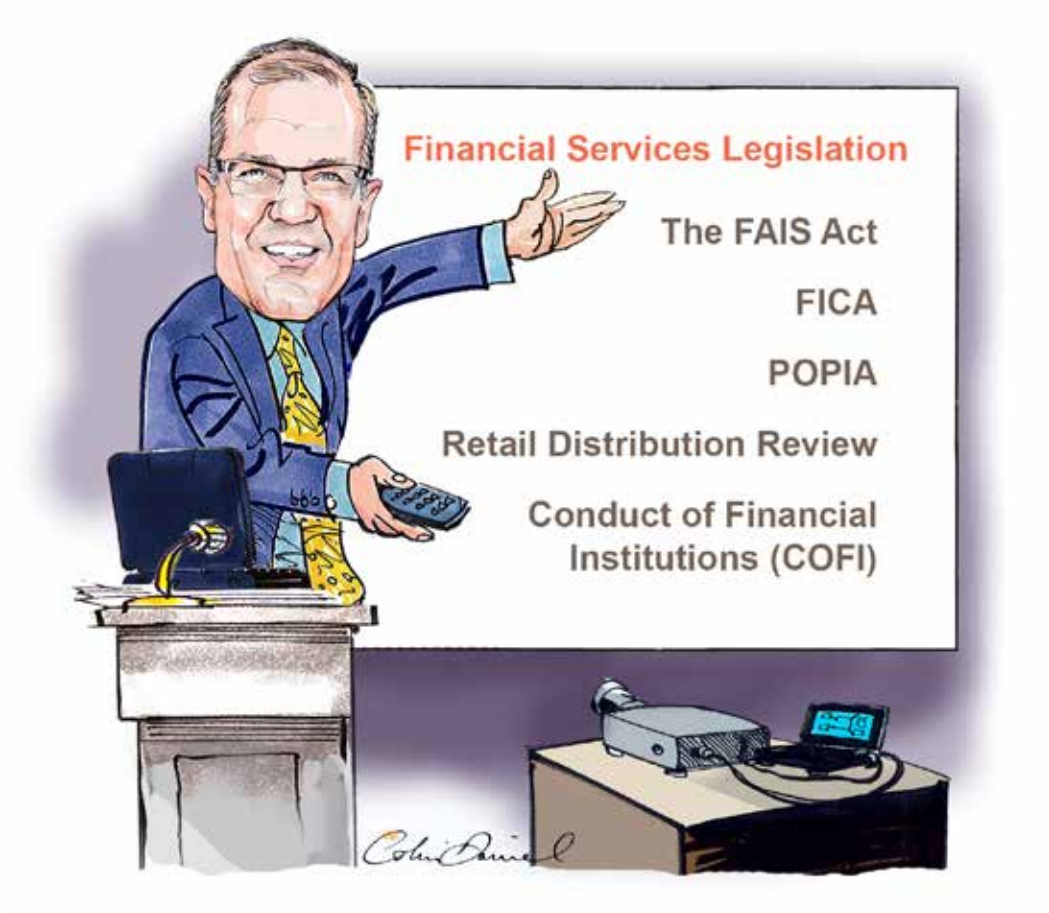
Therefore, any criticism expressed in this manual is intended to be constructive and will hopefully be considered by the key stakeholders to enhance the outcomes as published in section 20 of the FAIS Act, and to enhance the integrity of the financial services industry.

I certainly do not claim to know everything there is to know about our FAIS challenges, but perhaps this publication could help to stimulate a constructive debate amongst industry stakeholders, which may ultimately lead to better solutions.

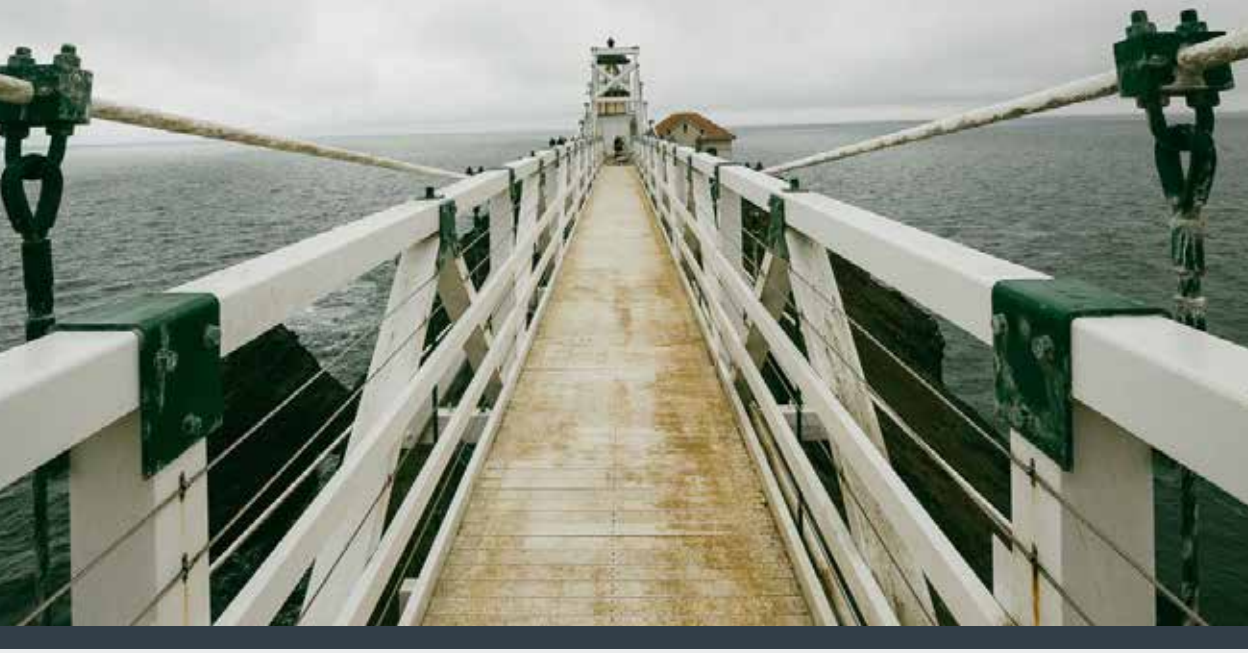
My role in the process is probably best described in the words of Edward Everett Hale, 19th Century Unitarian Clergyman and writer:

"I am only one, but I am one. I cannot do everything, but I can do something. And because I cannot do everything, I will not refuse to do the something that I can do. What I can do, I should do. And what I should do, by the grace of God I will do."

ANTON SWANEPOEL


Financial Services Legislation
The FAIS Act
FICA
POPIA
Retail Distribution Review
Conduct of Financial Institutions (COFI)

YOUR CLIENTS LOOK TO YOU TO GROW THEIR WEALTH IN REAL TERMS.



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CHAPTER 1

INTRODUCTION
AND OBJECTIVE

Over the years I have realised that reading about compliance and FAIS Ombud determinations tends to dampen the spirit of even the most astute and diligent advisors. Therefore, just to put a different spin on a somewhat depressing topic in this publication, I have decided to use a rugby analogy to explain some of the concepts and to clarify the roles and responsibilities of the various stakeholders.

These are some of the comparisons:

RUGBY	ADVISORY BUSINESS (FSP)
The game	Offering products and services
The rules	Financial services legislation
The Referee	The FAIS OMBUD
The linesmen	Compliance officers
The ball	Potential transaction
Administrator & Sponsors	LISPs & Product suppliers
Competing franchises	Competing FSPs
Franchise directors	Company directors
Vision for the team	Vision for the FSP business
Team management	Management of the business
Support staff	Support personnel / Outsourcing of services
The players	Your team – Representatives
The captain(s)	Your team leader(s) – Key individuals
The coach	Your business coach / authors
Penalties	Fines
Yellow card	Licence suspension
Red card	Licence withdrawal
The right to Appeal	The Appeal Board

KEY ROLE PLAYERS

The players

The players on the field represent provider representatives involved in a very competitive industry who compete against each other to win the trust of the public. Like rugby players, their performance is continuously scrutinised by the public, newspaper reporters, key individuals, supervisors, compliance officers, the regulator, and the FAIS Ombud.

THE CAPTAIN

Every rugby team has a captain, who needs to lead, encourage, and take responsibility for the discipline of his players. If anyone in the team is guilty of a transgression, the referee will engage with the captain, and call on him to instil discipline. The key individual manages and oversees the rendering of financial services by the representatives (players) of the FSP. Like the captain, the key individual of every FSP takes responsibility to lead, encourage, and guide its representatives, and take responsibility for the discipline (compliance) in his team.

THE REFEREE

The referee ensures that the game is played in accordance with the rules. In the event of a client complaint, the FAIS Ombud fulfils the role of the referee. I explain this role in a bit more detail in the next chapter.

THE LINESMEN

The linesmen represent an extra pair of eyes on the field, simply because the referee cannot be everywhere on the field at the same time. The linesmen are responsible for helping the referee to ensure that the game is played within the framework of the rules. Sometimes, when a player transgresses a rule, and the referee cannot see it from the other side of the ruck or scrum, the linesmen must bring the transgression to the attention of the referee.

If a player puts his foot into touch, the linesman is responsible for raising his flag to attract the attention of the referee to blow his whistle and call for a lineout.

The linesmen's key responsibility is to assist all the stakeholders on the field to ensure that the game is played fairly and safely in accordance with the rules of the game.

Compliance officers have the same responsibility in the financial services industry.

** Note the linesman's attention to detail.

Some people may say that compliance officers form part of the business prevention unit of an FSP, but don't be fooled. They form a very important part of the business, because risk management in the financial services industry has become a vital component of building and growing sustainable financial advisory businesses.

EVERY GAME HAS ITS RULES

Every professional sport has its rules, whether it is rugby, soccer, netball, hockey, or cricket, to name a few. The rules ensure that every team can compete on equal grounds and together they offer a framework within which the game can be played honourably and safely. Without rules every sport will result in chaos. The rules are necessary, not only because they establish the boundaries of the game so that every contender has a fair, and reasonable chance of success, but also in limiting exposure to injuries. Therefore, not only do the rules establish a sound framework within which to play the game, they also offer essential protection to all the players.

The most valuable players in any team sport are not only those who are talented and hard-working, but also those players who manage to demonstrate discipline and play within the framework of the rules. Every penalty, yellow card or red card may ultimately cost the team the match. Therefore, it is essential for all the players not only to know the rules, but to apply the rules on the field.

The Financial Advisory and Intermediary Services Act (the FAIS Act) and its subordinate legislation, such as the General Code of Conduct, represent the rulebook for financial advisors and intermediaries. Just like professional sports people, financial advisors and intermediaries are required not only to know the rules, but also to demonstrate discipline and conduct their business according to the rules as contained in the FAIS Act. As far as advice is concerned, the provisions contained in the FAIS General Code of Conduct regulate the client interaction process. Every representative is expected to know the rules, and comply with those rules in the same way that any team member of a sports team is expected to know the rules and obey them, regardless of whether they agree with them or not. All professionals are expected to know and apply the rules, even in the heat of battle. Providers, like rugby players, must therefore not be surprised for being penalised when they transgress the rules.

Not all the rules are created equal

Some rules are more critical than others, simply because transgressions of the various rules are treated differently. For example, in rugby the penalty for a knock-on is a scrum and the opposing side will have the benefit of putting in the ball, but a dangerous tackle may result in a red card and the end of the game for the transgressor. It is far easier to make a come-back and compete after a knock-on and scrum than it is for a side to compete after a red card with 14 men against 15.

This publication highlights those rules that have caused financial services providers the biggest headaches since the introduction of the FAIS Act. A comprehensive study of FAIS Ombud determinations, Appeal Board decisions and High Court decisions revealed that the Pareto Principle (The 80/20 Rule) also applies to FAIS Ombud determinations. Just over 20% of the provisions of the FAIS General Code of Conduct have been instrumental in more than 80% of FAIS Ombud determinations against advisors since 2004. This study of FAIS Ombud determinations, together with this publication, now makes it possible for advisors to focus on those vital few sections of the General Code of Conduct to provide suitable advice and comply with the essence of legislation and, by doing so, they could limit or even avoid client complaints.

Theme

Since the introduction of the FAIS Act in 2004 some of the FAIS Ombud determinations have been tested by the Appeal Board and some decisions have even been reviewed by the High Court. This publication reveals that there is a golden thread that runs through the majority of Ombud determinations and Appeal Board decisions that advisors should be aware of when they engage with their clients. It also offers insight into the way the Ombud, the Appeal Board and the High Court interpret the legislation that applies to financial advisors and intermediaries, which will help providers to avoid unnecessary complaints and findings against them. This publication not only reveals which sections in the Code cause the most problems, it also provides guidelines on how to improve compliance with these sections to achieve better outcomes for customers and limit, or even avoid, complaints against advisors.

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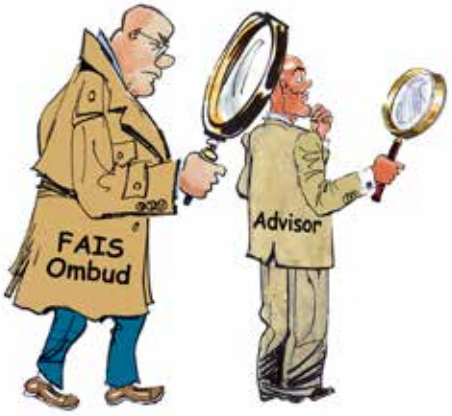
CHAPTER 2

THE FAIS OMBUD
EVERY GAME HAS ITS REFEREE

All professional sports have their own referees. In our case the game of rugby probably offers the best analogy to explain the role of the referee in the financial services industry. The Financial Advisory and Intermediary Services Act (FAIS) regulates the business of financial advisors, whilst the General Code of Conduct regulates the client interaction, advice and intermediary services process. From a practical point of view, both the FAIS Act and the General Code of Conduct have their own referees.

THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES (FAIS) ACT

The FAIS Act is the primary legislation that regulates the business of advice and intermediary services in the financial services industry. The Act has established a legal framework within which financial services providers (FSPs) are established and must be maintained. FSPs are required to submit annual Compliance / Conduct of Business Reports to enable the Regulator to evaluate whether the business is managed in accordance with the legislation. The Financial Services Board, officially rebranded as the Financial Sector Conduct Authority (FSCA) as of 1 April 2018, acts as the referee that can award penalties (fines), hand out yellow cards (suspensions of FSP licences), and red cards (withdrawals of FSP licences).
Therefore, from a broad advisory and intermediary business management point of view, the FAIS Act contains the rules and the Financial Sector Conduct Authority (FSCA) is the ultimate referee. However, the FAIS Act also established the existence of another referee who only deals with client complaints, namely the Ombud for Financial Services Providers.



THE OBJECTIVES OF THE FAIS OMBUD

As stated in the preface, the objective, or the mandate of the Office of the FAIS Ombud, as described in the FAIS Act is to consider and dispose of complaints[1] in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –

1 - My emphasis

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint
(b) the provisions of this Act

Complaints are client driven and the FAIS Act prescribes a very specific process that the Ombud must follow when dealing with client complaints.[2] Although the FAIS Ombud has made references to the Act in determinations, the primary benchmarks for the Office of the FAIS Ombud when considering client complaints are the provisions of the General Code of Conduct, which is explained below.

THE GENERAL CODE OF CONDUCT .....

The General Code of Conduct, as sub-ordinate legislation to the FAIS Act, as referred to in sections 15 and 16 of the Act, specifically regulates the ethical standards of financial services providers (representatives in particular) and the client interaction process, with specific reference to rendering advice and intermediary services as defined in the Act. This piece of legislation therefore regulates a very specific component of the rendering of financial services to customers, under the watchful eye of the FAIS Ombud, who ultimately serves as the referee when clients complain. In the same way that rugby players and spectators do not always agree with the referee's decision, financial services providers who disagree may take determinations issued by the FAIS Ombud on Appeal.

THE APPEAL BOARD / NOW REPLACED BY THE FINANCIAL SECTOR TRIBUNAL ....

When the International Rugby Board concludes a disciplinary hearing and finds against a player, he has the right to appeal the decision. In the same way, the FAIS Act stipulates that any person who feels aggrieved by any decision of the Registrar or the Ombud under this Act which affects that person, may appeal to the Board of Appeal established in terms of section 26(1) of the Financial Services Board Act.[3] The Appeal Board, replaced by the Financial Sector Tribunal, is an independent tribunal, comprising members who are neither employees of the FSB /FSCA nor active participants in the financial services industry. The Appeal Board consists of as many members, appointed by the Minister of Finance (the Minister), as the Minister considers necessary. The Chairperson of the Appeal Board must be an advocate or attorney with at least 10 years' experience or a retired judge. Other members must include persons with wide experience and expert knowledge of the financial services industry.

2 - See section 27 of the FAIS Act
3 - See section 39 of the Act

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CHAPTER 3

INTERPRETATION
BY THE FAIS OMBUD

As highlighted in the previous chapter, the players do not always agree with the referee's interpretation and application of the rules during a match. There are countless examples, one of the most infamous examples being the Bryce Lawrence episode during the quarter-final between South Africa and Australia at the 2011 RWC. Lawrence has been widely criticised for his handling of the match and South Africans have accused him of getting several key decisions horribly wrong, and particularly of failing to rein in Wallaby openside flanker David Pocock from illegally spoiling the Springboks' ball and flow.[4]

It is also well documented that Northern hemisphere referees have a different interpretation of rugby rules than Southern hemisphere players, and if you really want to take interpretation of the rules to the next level, you get the French... My sincere apologies, I just could not help myself for slipping this one in...

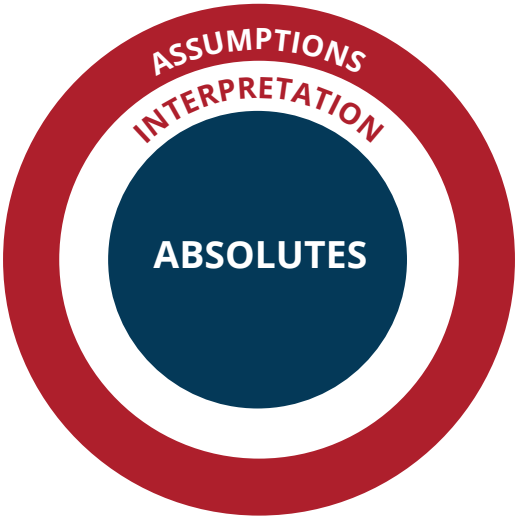
It is sometimes extremely frustrating for the players, and the fans go nuts, when a referee makes a wrong call. However, whatever your views as a rugby player or spectator, the ruling of the referee on the field stands. Some referees are known for how they apply the rules and the only way the players will survive, is if they abide by the referee's way of interpreting the rules. In the same way, it will be better for financial services providers if they take note of the way the FAIS Ombud interprets and applies the rules, learn from it, and adapt their strategy accordingly. Over the years there have been a few contentious issues that have been interpreted differently by the various stakeholders in the financial services industry, but some opinions weigh heavier than others. In some cases, every Tom, Dick and Harry has his opinion and applies his own interpretation of the rules, but at the end of the day, the opinion of the FAIS Ombud generally outweighs that of a financial advisor.

The same goes for a rugby player's opinion, which does not matter much when the referee has already made his decision. Arguing frantically with, or "chirping", the referee about his decision on the field may just result in a yellow card or even a red card. The lesson here is to know when to pick a fight, and with whom. Logically, it would be foolish for a rugby player to pick a fight with the referee, because the referee's whistle, and the rules of rugby are more powerful than even the strongest player in the team.

4 - https://www.telegraph.co.uk/sport/rugbyunion/international/southafrica/8820911/Rugby-World-Cup-2011-referee-Bryce-Lawrence-may-quit-following-South-Africa-and-Australia-quarter-final.html

In the same way it would be wise to firstly, avoid picking a fight with the FAIS Ombud, because the Ombud's interpretation weighs heavier than yours and mine, especially when the Appeal Board has already endorsed the Ombud's findings in similar cases. Secondly, if you do decide to take on the Office of the FAIS Ombud, you will have to make very sure that you have what it takes in your file to back it up. Over the years, the FAIS Ombud determinations have become a valuable source of information to guide advisors in their understanding of how the Ombud interprets the provisions of the Act, and the Code of Conduct in particular.

When it comes to interpretation, I learned a very important lesson many years ago, which may be of value to you. I attended a leadership program at Doxa Deo and the senior pastor at the time, Alan Platt, explained a principle pertaining to authority by using the following illustration, which I will never forget:



I later realised that this principle is particularly relevant in the financial services industry.

Please allow me to explain...

ABSOLUTES: .....

Absolutes are those rules, principles, fundamentals, givens, and truths that cannot be argued. It is written into the rugby rule book that a player may not execute a high tackle. It is a rule – an absolute. If a player transgresses this rule, he will be punished. Section 2 of the Code of Conduct demands that providers must render the services to clients honestly, fairly, with skill, care, and diligence, in the interests of clients. This provision is written in the FAIS General Code of Conduct and it cannot be argued. It is a rule of law - it is an absolute. If a provider transgresses this rule, he will be punished.

INTERPRETATION: .....

Interpretation refers to our own version of clarification, explanation, education, analysis and understanding. The better we know the rules and the deeper our understanding of what the rules mean, the better our interpretation of the rules will be. This means that if we fully understand the provisions contained in the Code of Conduct, and the implications if we do not comply with these provisions, our insights will be based on sound fundamentals, which ultimately impact the quality of our decisions.

However, if our interpretation is based on our own assumptions and suppositions opposed to sound fundamentals, it also affects the quality of our insights and subsequent decision-making.

ASSUMPTIONS: .....

According to the Cambridge English Dictionary assumption is defined as something that you accept as true without question or proof.[5]

SYNONYMS: .....

supposition, presupposition, presumption, premise, belief, expectation, conjecture, speculation, surmise, guess, theory, hypothesis, postulation, conclusion, deduction, inference, thought, suspicion, notion, impression.[6]

Advisors will do very well to remember the advice of political scientist Mr. Eugene Lewis Fordsworth, when he said: "assumption is the mother of all mistakes". Of course, the stronger version of this statement is better known, but the principle most certainly deserves serious consideration. From personal experience over the years, I do not mind telling you that most of my personal disasters originated from decisions based on assumptions instead of sound fundamentals.

5 - https://dictionary.cambridge.org/dictionary/english/assumption
6 - https://www.google.co.za/search

Therefore, I believe that financial services providers must consider the interpretations of the FAIS Ombud, the Appeal Board / Tribunal and the High Court before confronting the FAIS Ombud with their own interpretation of the rules. In this publication, I aim to highlight those decisions that have been made and endorsed by the Appeal Board, from which financial services providers should learn, rather than to argue otherwise. There are just some sections in the Code of Conduct that have been tried and tested by the Ombud and the Appeal Board, and financial services providers will benefit significantly by adapting and amending their processes and record-keeping accordingly. As the saying goes –

Prevention is always better than cure!

When it comes to client complaints this is most certainly the case, because you can only work with the evidence that was recorded at the time when the financial service was rendered. Therefore, I strongly urge providers and their representatives to learn from the Ombud determinations and then evaluate their processes and recording of their advice accordingly. Always remember the following absolute:

Transactions must be accurately accounted for.[7]

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

The Springboks' "Key individual", Fourie du Preez speaking to the French during the 2015 Rugby World Cup. If you disagree with the Ombud's interpretation, make sure that you communicate respectfully.

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CHAPTER 4

FAILURE TO COMPLY:
ANY PLAYER CAN MAKE A MISTAKE!

The All Blacks beat the Springboks 29-15 at Eden Park, in a game marred by the controversial sending-off of Bismarck du Plessis, wrote SIMON BORCHARDT. The Bok hooker was yellow-carded for a perfectly legal tackle on Dan Carter in the 17th minute and then got a second yellow, and a red, in the 42nd minute, after going into contact with a leading elbow that struck Liam Messam in the neck.

That second incident was perhaps worthy of a yellow card, but the fact is the hooker should not have been in a position to receive a red. French referee Romain Poite's ridiculous decision ruined the game as a contest, as the All Blacks scored a try while Du Plessis was off the field in the first half, and added another two against 14 men in the second. It all could have been so different for the Boks.[8]

Later, the controversial red card awarded to Springbok hooker Bismarck du Plessis in that fiery Test against the All Blacks was wiped from the record. A judicial hearing late on the Monday following the game, conducted by SANZAR -- the South Africa, New Zealand and Australian body that runs the championship -- found French referee Romain Poite was wrong to issue one of the yellow cards. The hearing was brought forward after originally being scheduled for the Tuesday, after the sport's governing body, the International Rugby Board, issued a statement stating that the referee was mistaken. SANZAR judicial officer Terry Willis of Australia found the first yellow card was issued for a tackle on All Blacks flyhalf Dan Carter that was "within the laws of the game". However, the second yellow card for elbowing All Black Liam Messam in the throat will remain on du Plessis' record for the remainder of The Rugby Championship, he said.[9]

There are a few lessons that financial services providers should take from this case study on the rugby field. Some of the most important lessons are:

8 - http://www.sarugbymag.co.za/blog/details/red-card-ruins-epic-clash
9 - https://www.smh.com.au/sport/rugby-union/bismarck-du-plessis-red-card-struck-from-record-20130917-2tvpv.html

1. ON THE FIELD, THE REFEREE RULES.....

When a client complains, the game is on and the FAIS Ombud rules. Do not add insult to injury by being disrespectful to your referee. In 1993, during the second test match against Australia in Brisbane, James Small answered back to referee Ed Morrison in a way that he, the referee, did not appreciate, and Small became the first Springbok to be sent off the field during a test match.[10] Although the Ombud does not have exactly the same powers in terms of the Act, being disrespectful will not help your cause in any way. If, and when a client complains, my advice is to respect the referee, and follow the process as set out in the Act in a courteous and professional manner.

2. SOMETIMES, EVEN THE MOST VALUABLE PLAYERS ARE VULNERABLE....

In rugby, there are no guarantees that even the best players will never make a mistake or suffer injuries. For example, due to serious injuries, Jean de Villiers, one of the most celebrated Springboks ever, has never completed a Rugby World Cup. As they say, "every sport has its injuries." The same risk applies to providing financial advice. The risk is called advice risk. As an advisor, the moment you enter into the world regulated by the FAIS Act, you are vulnerable. During the last 28 years I have had the privilege of being introduced to some of the most astute financial planners in South Africa. I have also had the privilege of addressing thousands of financial planners over the years, and I can assure you that not one of them has any guarantee that any of their clients will never lay a complaint against them. Since the introduction of the FAIS Act, I have been approached by even the most astute advisors on a few occasions to assist them with responding to a client complaint.

At the Financial Planning Institute's Annual Convention 2016, during one of the sessions, I asked delegates whether any of them could confidently say that not one of their clients will ever complain, and in a room full of astute and even award-winning financial advisors, not a single hand was raised.

The point is, whether you are a newcomer to the financial services industry or the most experienced financial advisor, the rules and potential risks apply to everyone. Do not make the mistake of thinking that a complaint cannot happen to you. Unfortunately, this is one area of your business where it is better to -

Hope for the best, but to plan for the worst.

3. ON THE FIELD, WHEN THE REFEREE RULES, THE PENALTY FOR THE PLAYER IS IMMEDIATE. .....

During a match, when the referee blows the whistle and makes a decision, that decision is very seldom, if ever, reversed. In the same way, during the evaluation of a complaint it is important to provide the

10 - Edward Griffiths & Stephen Nell, The Springbok Captains, Jonathan Ball Publishers, page 380

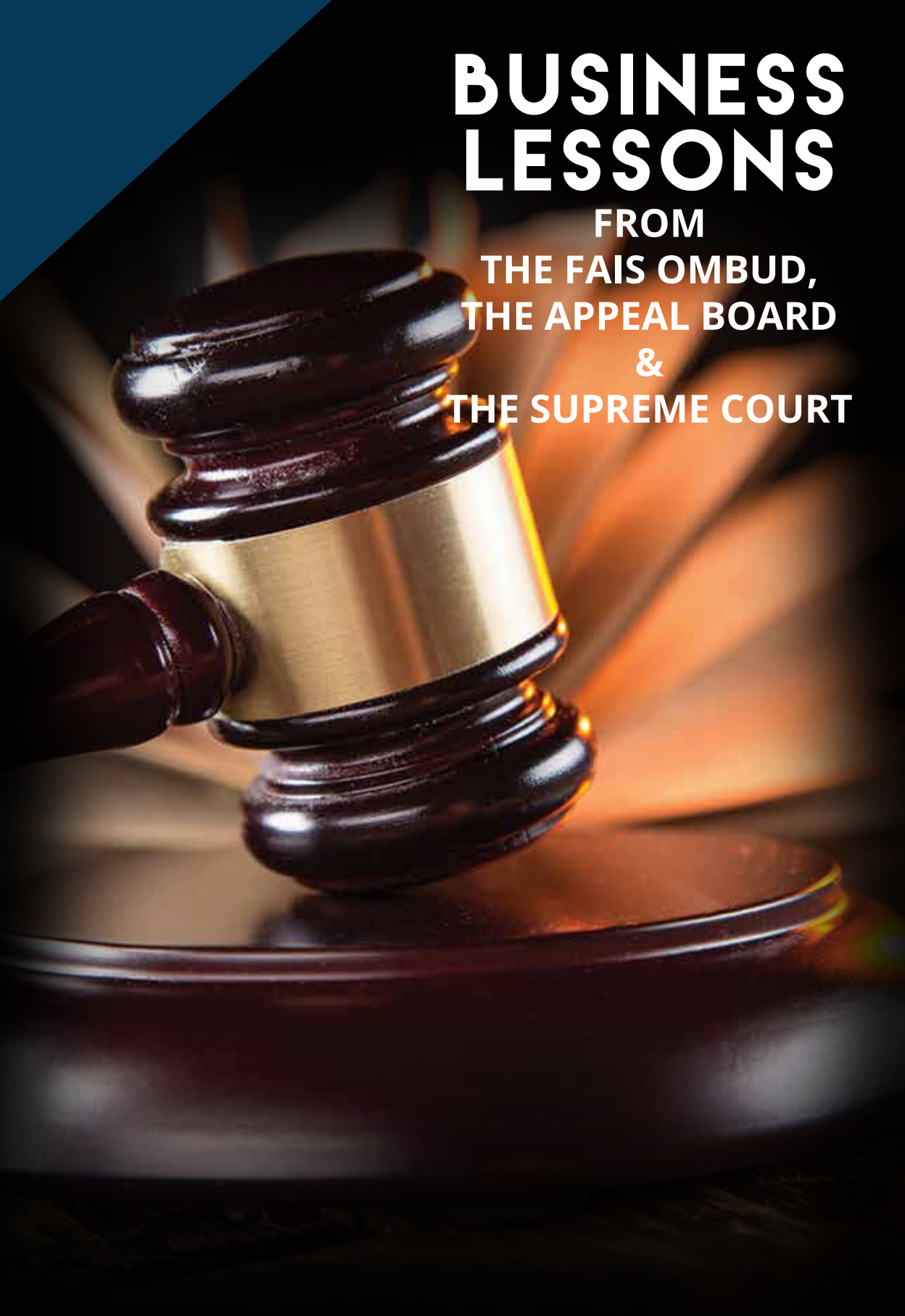
Ombud all the necessary information and evidence that can help your cause. The FAIS Ombud has a mandate to consider and dispose of client complaints, therefore, if you want to avoid a penalty against you as a provider, it is in your own interest to assist the Ombud to make an informed decision. As in rugby, when the Ombud makes a decision (determination) against a provider, the penalty is immediate and will not be reversed. The damage will be done. As you read through this book, from a reputation point of view, you will see that when dealing with client complaints, prevention is always better than cure.

4. EVEN REFEREES MAKE MISTAKES.

As previously highlighted, the judicial hearing conducted by SANZAR found that French referee Romain Poite was wrong to issue one of the yellow cards. The International Rugby Board issued a statement stating the referee was mistaken. In the same way the Appeal Board has also recorded that some of the FAIS Ombud's determinations were incorrect.

5. WHEN REFEREES MAKE MISTAKES, RECTIFICATION TAKES A LONG TIME, AND THE DAMAGE IS DONE.

A mistake by the FAIS Ombud can only be rectified by the Appeal Board / Tribunal long after the determination was published, and an Appeal has been granted. This can take many years, which can result in closing down the advisor's business.



BUSINESS LESSONS

FROM THE FAIS OMBUD, THE APPEAL BOARD & THE SUPREME COURT

CHAPTER 5

TRANSGRESSIONS:
THE USUAL SUSPECTS

Since the introduction of the FAIS Act in 2004, some of the FAIS Ombud determinations have been tested by the Appeal Board and some decisions have even been reviewed by the High Court. This publication reveals that there is a golden thread that runs through the majority of Ombud determinations and Appeal Board decisions that advisors should be aware of when they engage with their clients. My study of FAIS Ombud determinations, Appeal Board- and High Court Decisions revealed that the Pareto Principle, also referred to as the 80/20 Rule, also applies to FAIS Ombud determinations. Just over 20% of the provisions of the FAIS General Code of Conduct have been instrumental in more than 80% of FAIS Ombud determinations against advisors since 2004. It could even be as high as 95%.

This study of FAIS Ombud determinations, and this publication, now makes it possible for advisors to focus on those vital few sections of the General Code of Conduct that will assist them in providing suitable advice and complying with the essence of legislation. By doing so, they could limit, or even avoid client complaints.

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CHAPTER 6

COMPLAINTS:
EVERY GAME HAS ITS POTENTIAL INJURIES

Not all injuries are created equal. On the rugby field we have all witnessed how, sometimes, a player will get a hard knock, but after a little bit of attention and "wonder" water, the player will get up and continue with the game.

In other cases, like when Jean De Villiers broke his jaw against Samoa in the 2015 Rugby World Cup, the injury was so serious that he was unable, not only to continue with the game, but he was out for the entire tournament.

There are very few things other than a client complaint that can bring a business to a complete halt. Just as a serious injury on the rugby field will bring the game to a complete stop, a client complaint is something that disrupts any FSP business. A client complaint is like a serious injury, which should be treated very carefully. In some cases, a client complaint could be a temporary setback, but in other cases it could even bring an end to a career. It is my advice that when, not if, any of your clients complain, it should be treated with the utmost care, because it has the potential of causing serious damage to your reputation as a professional.

When dealing with client complaints it is important to start with understanding exactly what a complaint is. In the FAIS Act a complaint is very clearly defined:

"complaint" means, subject to section 26(1)(a)(iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative -

(a) *has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage*

(b) *has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage*

(c) *has treated the complainant unfairly*[11]

More recently, this term was broadened in the proposed amendments to the General Code of Conduct:
"Complaint" means an expression of dissatisfaction by a person to a provider or, to the knowledge of the provider, to the provider's service supplier relating to a financial product or financial service provider or offered by that provider which indicates or alleges, regardless of whether such an expression of dissatisfaction is submitted together with or in relation to a client query, that-

(a) *The provider or its service supplier has contravened or failed to comply with an agreement, a law, a rule, or a code of conduct which is binding on the provider or to which it subscribes*

(b) *the provider or its service supplier's maladministration or wilful or negligent action or failure to act, has caused the person harm, prejudice, distress or substantial inconvenienc*e

(c) *the provider or its service suppliers have treated the person unfairly*

Financial services providers will be wise to consider how easy it would be for a client to express dissatisfaction in relation to a financial product or service. Therefore, financial services providers should implement a proactive strategy to ensure that they avoid, or at least limit, their exposure to potential client complaints. To do that, they can once again take a few lessons from professional rugby players:

- Be teachable
- Understand that, as in rugby, our game consists of attack (getting the business) and defence (protecting the business against client complaints)
- In any game the defensive strategy is as important as the attacking strategy, because giving away a penalty in the last minute can cost you the match and even the tournament
- Listen carefully to the advice of your strength and conditioning coach
- Be proactive and deliberate when designing your defensive strategy
- Implement your defensive strategy with conviction

11 - See section 1 of the Act

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CHAPTER 7

THE X-FACTOR

ON THE ONE HAND–

- ***A customer is the most important visitor on our premises.***
- ***He is not dependent on us. We are dependent on him.***
- ***He is not an interruption of our work. He is the purpose of it.***
- ***He is not an outsider to our business. He is part of it.***
- ***We are not doing him a favour by serving him.***
- ***He is doing us a favour by giving us an opportunity to do so.***

–MAHATMA GANDHI[12]

I fully agree with the values, as articulated so beautifully by Gandhi. Yet at the same time, due to the nature of human beings, the same people that we serve, can hurt us in many ways, even to the point where it could end our careers.

Financial advisors and intermediaries have many challenges in an extremely onerous regulatory environment, but there is one element in our type of business that always has been, and will always remain, the single biggest challenge for any FSP – CLIENTS!

I refer to clients as the X-factor, because on the one hand, clients are the reason for the existence of every FSP business, whilst at the same time clients also pose the single biggest threat to advisors and intermediaries.

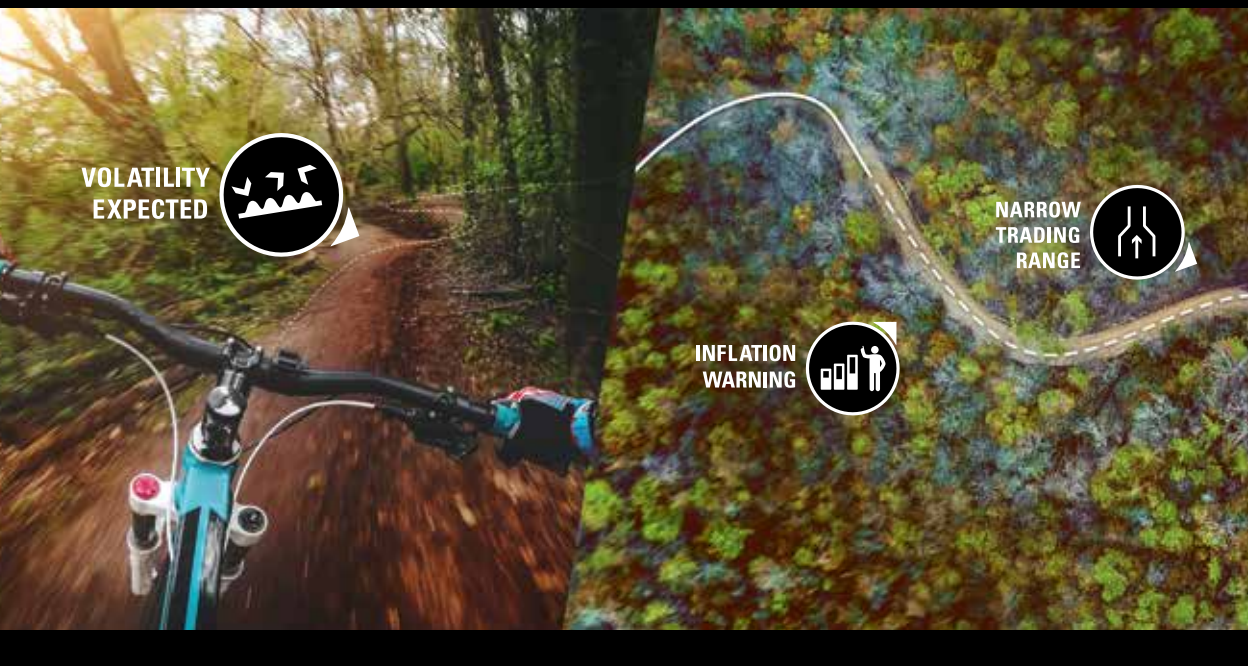
Over the years I have seen enough evidence of advisors giving poor advice to clients, but I have also seen the bad side of clients when money is at stake. **Generally**, the following characteristics of some clients are seldom, if ever, reported:

- ☞ Clients refuse to set aside sufficient time to enable advisors to put them in a position to make informed decisions.
- ☞ Clients want to take shortcuts and they battle to read past the first paragraph of any document.
- ☞ People are greedy, which creates all kinds of risks for advisors.
- ☞ At the time when investment advice is given most clients focus on the returns, but when the market is under pressure, they focus on the risks.
- ☞ Clients want advisors to offer them investment returns that are better than the market offers them, and when the market is under pressure and their investments are negatively affected, their first reaction is to blame the advisor.
- ☞ Clients have poor and/or selective memories when the chips are down.
- ☞ When markets are under pressure, clients tend to remember the returns that were offered, and they forget about the risks that were disclosed when the advice was offered.
- ☞ I have seen evidence of clients who blatantly lie about disclosures made, just to save themselves from financial loss.
- ☞ I have also seen evidence of clients who do not treat their advisors fairly.
- ☞ Clients have very little, or no appreciation of professional time spent with them when giving advice and/or implementing insurance or investment solutions. The number of replacements within months of implementation of financial products is proof of how easily policies are replaced.

Financial advisors and intermediaries will do well to acknowledge that the X-factor will always be part of their business, and it will be of vital importance not only to focus on serving their clients' best interests, but also to consider a strong defensive strategy to protect themselves against the human flaws of the very people who they are called to serve.

12 - See section 1 of the Act


Client
Rules



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CHAPTER 8

THE FAIS OMBUD'S CHALLENGES

As highlighted in the preface, the FAIS Ombud's mandate is defined in section 20 of the Act, which states the following:

(3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to -

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint

(b) the provisions of this Act

(4) When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial.

"Procedurally fair" means that the Ombud must follow a process that is impartial, unbiased, objective, just and reasonable.

"Informal" means that the process must be easy and not treated as a typical legal battle between two parties before a court of law, where the correspondence contains lengthy legal definitions and Latin words that the layman cannot understand.

"Economical" means that the process must be inexpensive, reasonable, cost-effective and efficient.

"Expeditious" means that it must be efficient and quick, unlike some of the legal battles that take years to resolve**.**

"Equitable in all the circumstances" means that the outcome must be reasonable, just, rightful and justifiable in all the circumstances.

As highlighted earlier, these provisions are far easier to formulate than to execute, and in this chapter, I aim to put the Ombud's position in perspective. Perhaps, if advisors and intermediaries consider that the Ombud is appointed with a specific job description in mind, they would appreciate that, whoever accepts this job will never win a popularity contest amongst any of the industry stakeholders. To consider and dispose of complaints means that there is a high probability that at least one party will not be happy with the Ombud's decision - every single time.

SECTION 27 RECEIPT OF COMPLAINTS, PRESCRIPTION, JURISDICTION AND INVESTIGATION

In section 27, the Act prescribes the steps the Ombud must take when receiving complaints.

On submission of a complaint to the Office, the Ombud must first determine whether the complaint qualifies as a complaint. For purposes of this publication, we are going to assume that the complaint qualifies as a complaint as defined in the Act. Then, section 27 further prescribes that -

(4) *The Ombud must not proceed to investigate a complaint officially received, unless the Ombud -*

(a) *has in writing informed every other interested party to the complaint of the receipt thereof*

(b) *is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto*

(c) *has provided all interested parties the opportunity to submit a response to the complaint*

Whilst these provisions seem simple, and appear to give the Ombud wide powers, they also proved to be challenging, as the Appeal Board has overturned the Ombud's interpretation of these provisions, which could also have a very serious impact for financial services providers under the Retail Distribution Review.

CASE STUDY:

Between
SHAREMAX INVESTMENTS (PTY) LTD
(in business rescue)
1st Appellant

GERHARDUS ROSSOUW GOOSEN
2nd Appellant

JOHANNES WILLEM BOTHA
3rd Appellant

DOMINIQUE HAESE
4th Appellant

ANDRÉ DANIEL BRAND
5th Appellant

on the one hand, and on the other

GERBRECHT ELIZABETH J SIEGRIST[13]

In this matter Mr Cornelius Johannes Botha was a representative acting under his own license for certain financial products, but he also served as a representative under supervision of FSP Network (Pty) Ltd (also known as USSA) for purposes of promoting investment in unlisted property syndications. The client invested in Unlisted Property Syndications and eventually lost her money.

13 - FAIS 00039/11-12/GP1 and FAIS 06661/10-11/WC1

The complainant lodged a complaint against Cornelius Johannes Botha as a representative acting under his own license, and not against Botha as a representative of FSP Network (Pty) Ltd (USSA). The Ombud recognised that, as far as the advice and intermediary services rendered pertaining to the investment were concerned, Botha rendered these services as a representative of USSA, and not under his own license.

Technically, the services by Botha were rendered under the license of USSA, and not Botha's own license, and the complainant should therefore have lodged the complaint against USSA, but did not. It came as no surprise that the complainant did not include USSA in her complaint, because she was used to dealing with Botha under his own license. Technically, the complainant should have lodged the complaint against Botha as a representative of USSA. According to the Ombud, "She simply did not know that she could do this. In any event, section 27 (4) of the Act requires this office to inform all interested parties to the complaint".

The Ombud found, in my opinion correctly so, that USSA as the FSP should be cited as a party to the complaint. However, this finding was overturned by the Appeal Board.[14] The Ombud took the decision by the Appeal Board to the High Court of South Africa on review and the High Court found that the Ombud can only investigate a complaint against the party that was named by the client.[15]

It is worthwhile pointing out that the Appeal Board's decision in Moore and others v Black[16] conflicted with this finding, which means that the Ombud followed the decision made by the Appeal Board in the Moore case, but the Appeal Board came to a different conclusion in the Sharemax matter. The Ombud stated that she favoured the interpretation of the Appeal Board panel in the Moore case, as do I, but the High Court came to a different conclusion. On 20 February 2017, the High Court made the following rulings, which have a significant impact on equitable outcomes as envisioned in section 20(3) of the Act:

1. The Ombud may only investigate a complaint and make a determination against a party identified in the complaint as the person against who a complaint was made.[17]

This could mean that, if the party who was identified by the complainant is not legally the correct party as defined in the Act, it is possible that the complainant may lose the matter on a technicality. Would this be fair to the complainant?

2. It is troublesome for a Court or Tribunal to have conflicting decisions on a point affecting its functions from a higher court or Tribunal with appellate jurisdiction.

14 - See paragraphs 13.6, 42 and 44 of Case number FAIS 00039/11-12/GP [the matter that served before the Ombud initially.]
15 - See paragraphs 15, 16, 17, 21, 23, 25, 26 and 27 of case number 46293/15 in the High Court of South Africa, GAUTENG Division, Pretoria.
16 - See FAIS 0110/10-11/WC1
17 - See paragraphs 21 (page 11), 23 (page 12)

Sometimes one simply has to wait for the right case to reach a court with sufficient stature in the hierarchy of judicial authority to settle the matter.[18]

This begs the question: "How long could this take?"

3. The High Court upheld the following decisions by the Appeal Board of the Financial Services Board:

3.1 The Chairperson agreed with the argument in Special Investigating Unit v Nadasen [2001] ZASCA 117; [2002] 2 All SA 170; 2002 (1) SA 605 (SCA) at [5] where in a comparable matter it was pointed out that 'A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly.[19]

3.2 *There is nothing explicit in the provision which gives the Ombud a right to join a person through notice. As to necessary implication, the problem is that a sec 27(4) notice must be issued before the Ombud 'proceeds' with the investigation. This can only mean that the identity of the interested party, or parties, must appear from the complaint. An interested party need not be a person against whom a complaint has been laid. In addition, the object of notice is spelt out in sec 27(4)(c), namely to provide 'all interested parties the opportunity to submit a response to the complaint'. The 'complaint' is the complaint as defined - i.e., the complaint as submitted - and not the Ombud's complaint. There was nothing in the complaints as filed that called for a response from the appellants.*[20] *Perhaps, this calls for an amendment in the Act to ensure that the correct parties to the complaint are cited?*

3.3 *According to the rules, the person against whom a complaint is made is regarded as 'the respondent' and for a complaint to be justiciable it must be against an (identified) respondent. Before submitting a complaint, the complainant 'must' endeavour to resolve the 'complaint' with the 'respondent'. The 'respondent' must be informed of the 'complaint submitted to the Office' (not any other complaint or one conceived by the Ombud.*[21] *What if the respondent is not the correct party to the complaint as prescribed in the Act?*

3.4 *There is simply no scope within the Rules for the Ombud to determine without reference to the complaint as filed as to who should be a respondent.*[22] Again, perhaps this calls for an amendment in the Act to ensure that the correct parties to the complaint are cited?

18 - See paragraph 27 of the decision of the High Court on page 15
19 - See paragraph 22 of the Decision of the Appeal Board on page 9
20 - See paragraph 49 of the decision by the Appeal Board on page 19 and 20
21 - See paragraph 51 of the decision by the Appeal Board on page 20
22 - See paragraph 52 of the decision of the Appeal Board on page 20

The Appeal Board of the FSB and the High Court of South Africa have effectively confirmed that the FAIS Ombud does not have the authority to investigate whether the correct parties have been cited in a complaint. This means that, if a complainant does not remember under which license the representative provided advice, and he/she only cites the party which he/she can remember, the matter can only proceed against the parties that have been cited by the client. Therefore, where representatives provide advice under another license in terms of a supervision agreement (even after the implementation of RDR) the FSP that is legally responsible for the advice may not even be cited as a party to the complaint.

Surely this outcome ultimately prevents the Ombud from making determinations that are equitable in the circumstances? Sadly, this decision will remain intact and be used as a reference for future cases if something is not done about it. Judge Tuchten expressed sympathy for the Ombud's situation, and stated that "it is the way of the legal world. Sometimes one simply has to wait for the right case to reach a Court with sufficient stature in the hierarchy of judicial authority to settle the matter". [23]

PRACTICAL IMPLICATIONS FOR FSPs AND CLIENTS

With all due respect, ensuring that the parties to a complaint have been correctly cited is fundamental for equitable determinations in all the circumstances, and therefore I do not believe that as an industry we can afford to wait for the right case to reach our Courts to rectify this position. I respectfully submit that, if determinations are ultimately made against the wrong FSP, it will not serve the objectives of the Act, because it will not be in accordance with the principle of being equitable in all the circumstances. Therefore, I propose that the only solution is an amendment to section 27 (4) of the FAIS Act.

THE IMPACT OF THIS DECISION UNDER RDR

One might think that, because this matter relates to unlisted property investments, it does not apply to other products. Unfortunately, that is not the case. It applies to other products as well. Under RDR the Regulator has recognised that representatives may have to render services under more than one license if, and when, one license does not cater for all the product categories which the advisor may need to provide a holistic financial service. For example:

Advisor A may work under the License of XYZ (Pty) Ltd, which is not licensed for Health care products and/or Short-term Commercial Lines. If Advisor A wants to add Short-term Commercial Lines to his product category, he may do so under ABC (Pty) Ltd if the latter is authorised to promote Short-term Commercial Line products. In terms of the current RDR proposals, the Regulator will allow Advisor A to be registered under XYZ (Pty) Ltd for Long-term and Investments and as a Representative under Company ABC (Pty) Ltd for Short-term Commercial Lines (under supervision), for example.

23 - See par 27 of case number 46293/15 in the High Court of South Africa, GAUTENG Division, Pretoria

In the event that a short-term claim is repudiated, and the client wants to lodge a complaint against Advisor A, what are the chances of the client lodging the complaint against the correct FSP? If a client has dealt with Advisor A of XYZ (Pty) Ltd for many years, as was the case in the Sharemax matter, the client will most probably only remember Advisor A associated with XYZ (Pty) Ltd and not company ABC (Pty) Ltd. If the complaint relates to short-term products under ABC (Pty) Ltd, but the client only remembers company XYZ (Pty) Ltd, the complaint will be lodged against the wrong FSP. This poses a number of problems, not only for the industry, but also for clients.

Firstly, if the Ombud is not authorised in terms of the Act to investigate whether the correct parties to the complaint have been cited, FSPs are confronted with an additional risk that they cannot control, and it leads to unfair outcomes which are not equitable in all the circumstances. Again, with all due respect, this outcome flies in the face of a "procedurally fair" process that is impartial, unbiased, objective, just and reasonable. One has to ask the question: "How is that equitable in all the circumstances?"

Secondly, if the incorrect FSP is held liable, but cannot afford any pay-out, goes bankrupt and is liquidated, the client will suffer. Is that "equitable in all the circumstances?" Is that reasonable, just, rightful, and justifiable in all the circumstances?

Thirdly, when these matters go on appeal, they take years to be resolved, achieving the opposite of being economical and expeditious as required in the Act, if one considers the following:

"Economical" means that the process must be inexpensive, reasonable, cost-effective and efficient. **"Expeditious"** means that it must be efficient and quick, unlike some of the legal battles that take years to resolve.

It must be said that the decision by the Supreme Court poses a real practical problem for the financial services industry. Unfortunately, it will take years to rectify this position if the Act is not amended to allow the FAIS Ombud to investigate the contractual capacity in which a representative acted and ensure that the correct parties are cited as the respondents. If this situation is not rectified, it could lead to many unfair outcomes, not only against representatives and FSPs, but it could also prejudice clients. Therefore, the industry should, in my opinion, propose the following additions to the Financial Advisory and Intermediary Services Act:

27. RECEIPT OF COMPLAINTS, PRESCRIPTION, JURISDICTION AND INVESTIGATION

(4) The Ombud must not proceed to investigate a complaint officially received, unless the Ombud -

(a) is satisfied that the correct parties to the complaint have been cited

(5) The Ombud -

(a) may, in determining whether the correct parties have been cited in respect of an officially received complaint, or in investigating the complaint, follow, and implement any procedure (including

mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation.

The main purpose of this chapter is simply to highlight that the FAIS Act could be interpreted differently by the various stakeholders, and it will be important to create better legal certainty for the benefit of all stakeholders in the industry. There is clearly more work to be done in this area.

INVESTIGATIONS: CRITICAL QUESTIONS THAT THE OMBUD MUST ANSWER .....

1. Did the respondent render a financial service as defined in the Act?
2. Does the complaint qualify as a complaint as defined in the Act?
3. Does the Ombud have jurisdiction to investigate the matter?
4. Do the rules of prescription apply or not?
5. What are the facts?
6. Are the facts supported by the evidence?
7. Did the respondent comply with the provisions of the FAIS Code of conduct?[24]
8. In the event it is found that the respondent failed to comply with the Code, did such conduct cause prejudice, damage or loss?[25]
9. What is the amount of such damage or financial prejudice?[26]
10. Should the FSP be held liable for the conduct of its representative.[27]

If there is one case that I would highlight as a classic example of the Ombud's interpretation of the provisions contained in the General Code of Conduct, it is the matter between:

GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC 1st Respondent, RONALD WALSH 2nd Respondent, GUY ROBERT COLEMAN 3rd Respondent, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1

I strongly recommend that all investment advisors pay due regard to the Ombud's reasoning in this determination.

24 - See Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 7 par 8.2)
25 - See Elise Barnes v D Risk Insurance Consultants CC (and another) 6793/10-11/GP 1 (page 11 par 17); Gert Cornelius Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 7 par 8.2)
26 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP (1) (page 7 par 8.2)
27 - (Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 7 par

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CHAPTER 9

FACING THE FAIS OMBUD

Most, if not all, advisors who have been confronted with a client complaint will tell you that it interrupts everything you do. Business comes to a complete standstill as the complaint dominates your thoughts and emotions. Business and family life suffer as you try to come to grips with all the facts, and what it is that you must do to minimise the threat that could potentially harm your reputation. The reality is that a client complaint could affect your entire future in the financial services industry.

The objective of this chapter is to guide you when you are faced with a client complaint.

An important starting point is a good understanding of exactly what it is that you are up against. If the matter cannot be resolved between you and your client, you must understand that every part of your advice process, the quality of your advice and the disclosures made to the client will be scrutinised by the FAIS Ombud's Office at a level that you have never experienced before.

The FAIS Ombud is mandated to investigate and to resolve matters, whilst paying due regard to all the provisions of the Act, with specific reference to all the provisions contained in the General Code of Conduct.

From the FAIS Ombud determinations it has become very clear over the years that the Ombud's Office does not treat its obligations under the Act lightly. With every determination the Ombud reminds the industry of their duty under the FAIS Act, as highlighted in section 20(3):

The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –

(a) *the contractual arrangement or other legal relationship between the complainant and any other party to the complaint*

(b) *the provisions of this Act.*

Do not underestimate the impact that a client complaint could have on you and/or on your business, because you may be dealing with a lot more than you think...

THE ACT FAVOURS THE CLIENT – MAKE PEACE WITH IT

In my experience in dealing with many client complaints since 2005, those clients, who reach a point where they are prepared to go through the trouble of putting the complaint in writing, are serious about complaining. If you are at the receiving end of such a complaint, you will do well to treat it seriously as well.

The Act allows for the client to act emotionally, but one of the first things you must appreciate is that, as a provider, legislation does not offer you the same luxury. Whilst clients have the right to make it personal, the Act demands that you act objectively and professionally - at all times! This is very difficult, because I have yet to meet an advisor who does not take a client complaint personally. However, on receipt of a client complaint, the worst thing you can do is to react emotionally, because it clouds your ability to be objective, which will affect your ability to respond professionally.

In 9 times out of 10 an emotional reaction to a client compliant will end very badly for you as the provider. Starting from the back foot when dealing with a complaint is never a good idea. Lesson number 1 when receiving a client complaint –

Calm down! Do not respond immediately!

Simply acknowledge receipt of the complaint and inform the client that you will investigate and be in contact in the next few days to address the complaint. This should give you sufficient time to calm down and to get all the relevant information to start preparing a response. At this point you should resist the temptation to add anything. You need time to settle down and get all the relevant information before you respond on the merits of the complaint.

Remember, ultimately the complaint will be resolved or settled based on the facts. You will do well to remember that, at this point especially, emotion is not your friend!

LEGISLATION

Right, or wrong, the provisions in the Act and the Code of Conduct, by their very nature, create an uneven playing field between client and advisor. According to the definition of complaint, the client merely has to **allege** (old definition) wrongdoing on the part of the advisor or **express dissatisfaction** (proposed new definition) to a provider or, to the knowledge of the provider, leaving the advisor to prove otherwise. It is important to note that the client is not required to prove the allegation or expression of dissatisfaction. There is no onus of proof on the client.

ONUS OF REBUTTAL

When a client complains, the prescriptive and onerous nature of the Act and the Code of Conduct puts the advisor in a position where he or she needs to understand that this is not an even match. Where the client can merely allege wrongdoing or express dissatisfaction, the advisor carries the onus of rebuttal. This means that, unlike any other civil matter, where the plaintiff must prove his/her case on a balance of probabilities, under the FAIS Act the advisor must prove that the client's allegation or expression of dissatisfaction is unjustified.

The only way the advisor can do so is to provide hard evidence of the records that must be kept by the provider as required in terms of the Act.

Note that there was **no evidence** *before this Office that respondents complied with the provisions of the FAIS Act at the time of rendering of the financial service.*[28]

It is the Ombud's job to assess the evidence provided in the matter. The record-keeping provisions in the Act[29] and its subordinate legislation[30] make it very clear that the onus of providing the evidence rests 100% on the shoulders of the provider (advisor and FSP). If the evidence does not satisfy the Ombud, it is sometimes easy for advisors to conclude that the Ombud is not impartial when a decision goes against them.

In the same way that rugby players sometimes disagree with the referee's decision, financial advisors may not always agree with the Ombud's assessment of the evidence. However, ultimately, it's the referee's decision that counts on the field. You have every opportunity to make your response count. So, this chapter aims to give you a heads-up on what questions you can expect from the Ombud when the complaint is official. These are some of the most prominent and repeated examples of correspondence between the Ombud and Financial Services Providers:

28 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 7 par 23.6)
29 - See section 18 of the FAIS Act
30 - See sections 3(1)(d), 3(2) of the General Code of Conduct

ETHICAL STANDARDS

Your conduct in this regard appears to have fallen short of the provisions of section (2) of the Code, 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 the clients and the integrity of the financial services industry."

SUITABILITY

Section 8(1) of the Code requires that a provider must, prior to providing a client with advice, 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.

Secondly, conduct an analysis, for purposes of the advice, based on the information obtained. Thirdly, 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.

A duty to provide us with any documentary evidence to demonstrate the appropriateness of the product to the complainant's needs … is placed on you by … the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code");

We request a demonstration that the final recommendation was reached in accordance with the requirements of section 8 of the FAIS Code of Conduct.

Please provide us with any documentary evidence to demonstrate the appropriateness of the product to the complainant's needs…

These records need to demonstrate… why the product was likely to satisfy the Complainant's needs and objectives.

Our Rule 6(b) correspondence in essence raised suitability and appropriateness of the option recommended as the pertinent issue we sought to have addressed. We requested a demonstration that the final recommendation was reached in accordance with the requirements of section 8 of the FAIS Code of Conduct.

RECORD OF ADVICE

Please provide us with your record of advice furnished to the client as required in terms of Section 9 of the General Code of Conduct for Authorised Financial Services Providers and Representatives…We request that you provide us with the record of advice compiled at the time of rendering the financial service…

On the applicants' own version, they did not keep proper records of the transaction nor was there a record of advice as contemplated in the Act and Code. Applicants simply replied on correspondence between the parties as a record of advice. The danger in this is that correspondence history does not amount to any accurate and/or unequivocal record of transaction and record of advice. It lends itself to inaccuracies of context and speculation as to what it actually means. Certainly, neither the Act nor the Code contemplated that FSPs should rely on correspondence only for compliance with the Act and Code.[31]

31 - See FAIS 06695/13-14/WC1, page 4 par 5

RECORD-KEEPING

To this end we require you to revert to this Office with your statement in terms of Section 27(4) of the FAIS Act together with all documentation, including any documents that support your version and compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives, ('the Code').

I would like your office to provide us with the records in terms of the above-mentioned section of the Code…Please take note that the Office will upon receipt of your response formally commence its investigation procedures. It is therefore imperative that your response is not only comprehensive but includes all the necessary documentation that supports your case. The information requested in our letter was to be demonstrated in the section 9 and section 3(2) records in terms of the Code of Conduct. In this regard, we request that you provide us with the requested documents.

We request that you provide us with the record of advice compiled at the time of rendering the financial service together with the section 3(2) record of the Code of Conduct for Authorised Financial Services Providers. These records need to demonstrate the identified needs and objectives of the Complainant, a summary of the information and material on which the advice was based, and the financial product considered and why the product was likely to satisfy the Complainant's needs and objectives. Be advised that I will not be able to accept any post facto account without support of records complied at the time in line with section 8 and 9 of the Code. If there was such a clear instruction, then applicants were expected to keep record of it in terms of section 8 (4) (b) of the code. There is no such record.

Should you be unable to show compliance with the above-mentioned sections of the Code, we recommend that you reconsider your stance with regards to the resolution of the matter in a manner that is both fair and equitable to the complainant. Failing which we will have no alternative but to escalate the matter to the Ombud for her final determination.

DISCLOSURE

The FAIS Ombud's Office always investigates whether sufficient evidence exists as proof that adequate disclosures were made to the client.

A striking feature of the respondent's record of advice and his response to this office is that there does not appear to have been any explanation given on the nature of the risk associated with the Edwafin investment.[32] *The financial product itself was not explained to complainant nor was she informed of any risks associated with this product.*[33]

The disclosure requirements are explained later in this publication.

32 - (Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/KZN/1 (page 11 par 40)
33 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 28.7)

LESSONS FROM THESE EXTRACTS FROM THE LETTERS OF THE OMBUD'S OFFICE TO RESPONDENTS.

When the Office of the FAIS Ombud has concluded that the complaint qualifies as a complaint and the parties have failed to resolve the matter between them, you should know the following:

The case manager will -

- inform you of their conclusion in writing
- instruct you to provide evidence that you complied with the provisions of the FAIS General Code of Conduct, with specific reference to sections 2, 3, 7, 8 and 9

You should also know that, should you not be able to provide sufficient evidence of compliance with these provisions, your chances of success are zero.

FAILURE TO RESPOND

One of the quickest ways to shoot oneself in the foot is not to respond to a letter from the Office of the FAIS Ombud. Believe it or not, it happens. In terms of the Act, respondents are obliged to give the Ombud their full co-operation in assisting this Office to dispose of the matter. The following extract from one of the letters form the Ombud's Office makes it clear how the Ombud deals with providers who do not respond to their requests:

Should you fail to respond, the matter will be investigated and determined without your version. A determination means that you as a respondent/s may be held liable.

The provisions of the Act aside, without a response, the only version of the facts that the Ombud can work with is the complainant's version. In the absence of evidence proving the contrary the Ombud is left with no alternative but to accept the complainant's allegation and make a determination against the provider.

CASE STUDY

Where a party fails to respond within a reasonable time, this Office may proceed to dispose of the matter on the available facts and information;[34] *Failure to respond will result in the Ombud making a final ruling in the form of a determination;* [35] *The matter then proceeded to determination in the absence of any response from respondents.*[36]

34 - See Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 6 par 23.1)
35 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 7 par 23.3)
36 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 27)

The FAIS Ombud has the same benefit as a rugby referee in the sense that they make use of the third umpire, who may go back and re-play the evidence in slow motion and scrutinise it again and again, until they are satisfied that they have looked at all the facts. When facing the FAIS Ombud, please understand that the Ombud's Office has far more resources than you. Therefore, make sure that you are fully prepared!

IN TERMS OF SECTION 27 OF THE ACT -

(5) The Ombud -

(a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation;

(d) may, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the Office;

(e) may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d).

(6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

Over the years I have had many advisors who approached me for guidance when one of their clients complained, and in most cases the advisor told me that **"but I told the client many times"**, but I do not have evidence to prove it. With the mandate that the Ombud must adhere to and all the resources at the Ombud's disposal, you must expect their Office to say:

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CHAPTER 10

TRUST AND ETHICS

In their determinations the Office of the FAIS Ombud frequently highlight the fact that clients rely on the advice of providers and that they are required to act in accordance with the FAIS Act.[37] A common theme in many Ombud determinations is how investors highlight that they trusted the provider to provide good advice and act in their best interest.

For example:

Of importance is complainant's statement that she trusted second respondent and did not check on exactly what fund was involved in the investment.[38] *She knew nothing about this investment but trusted second respondent to act in her interests;*[39]

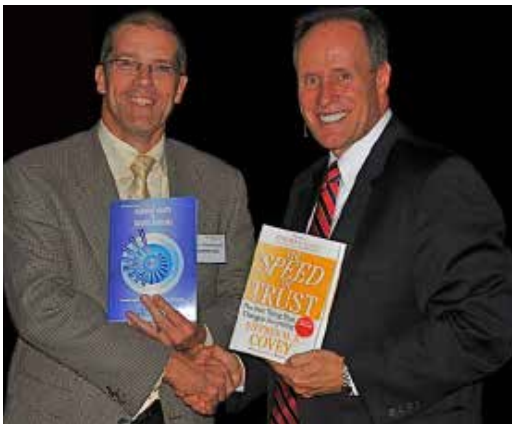
37 - See Natalina Natali v Impact Financial Consultants, FAIS 04032/12-13/ WC 1: page 5, par 13
38 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 3 par 8)
39 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 28.3)

Complainant made the investment in the belief that second respondent can be trusted to act in her interests bearing in mind her financial needs and status.[40]

TRUST

Trust is one of the most significant and fascinating concepts in business. Over the years I have read many books on the topic and I have had countless discussions with people in the financial services industry. One of the privileges I have as an author is to engage with some of the most influential academics, authors and financial planners to get a better understanding of the significance of trust. Of all the people I engaged with, Stephen MR Covey, New York Times bestselling author of The Speed of Trust was the most influential.

After reading the first few pages of Covey's book in 2008, I was hooked on the power and significance of trust in our day-to-day lives – and particularly in business. It ignited a powerful hunger to understand more. Covey's message was clear, simple and incredibly profound. Since reading his book, the meaning of trust and what we need to do to build, establish and maintain trust in our engagements with clients, changed the way I thought about business. Covey's book was instrumental to my first publication on Trust, titled *Essential habits of trusted advisors*, which Stephen graciously endorsed.



I had the privilege of meeting Stephen on the 14th of August 2009 when he hosted a Speed of Trust Seminar in Johannesburg. He is one of four authors whose influence has been life-changing. Stephen's encouragement at the time has left a lasting impression, and that is one of the reasons why I will find any excuse to talk, or write, about the significance of trust in the lives of financial advisors.

ACCORDING TO COVEY:

"As a financial advisor, trust is part of the job description; an economic necessity. Every service, every relationship, every transaction is based on trust."

Another professional, this time a lot closer to home, who left a lasting impression on me over the years, is Prem Govender CFP®, Former Director of the Financial Planning Standards Board, Denver, United States of America and Former

40 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 9 par 29)

Chairperson of the Financial Planning Institute of Southern Africa. According to Prem:

"As a practising accountant and a professional financial planner, I find that ultimately what keeps me in business is not my knowledge and expertise, although these do play a vital role, but the highest level of trust that I have built up over the years with my clients. This is something that I have to constantly work at to ensure that there is never any room for even the slightest breakdown in these trusted relationships. In as much as trust plays a pivotal role in every aspect of one's life, the question of trust and trusted relationships when conducting business or practising a profession is absolutely not a negotiable."

From a trust point of view, the following finding by the Ombud is typical in their published determinations against advisors:

Respondent failed to act with due skill, care and diligence in the interest of his client and the integrity of the financial services industry. I find that respondents failed to comply with their general duties as FSPs as contemplated in Section 2 of the Code; which provides as follows:

"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."[41] *This complaint is about the alleged failure by a former representative of the respondent to act in the interests of the complainants.*[42]

The provisions contained in section 2 of the Code are far reaching and extremely onerous. Most of the determinations that favoured clients are because the Ombud found that the provider breached the provisions in section 2 of the Code, which are meant to serve as important building blocks that build trust. There are many FAIS Ombud determinations that refer to clients testifying that they trusted their advisors to act in their best interest. Unfortunately, clients' trust can be a two-edged sword, as it can be a blessing, and a curse.

I attended, and testified as an expert witness in a High Court matter in August 2018 between an investor and a financial advisor, where the investor claimed that he did not read any of the documentation that was presented to him when he concluded investment transactions through the advisor, because he trusted the latter.[43] He claimed that the advisor simply asked him to sign where the advisor marked XXX and he did so because he trusted the advisor. At the time of publication, the outcome of this case is unknown.

41 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 11 par 34)

42 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 2 par 3) | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraph 51

43 - DURBAN HIGH COURT MATTER BETWEEN SHANE ALAN SYMONS N.O. AND JOHANNA ALETTA HELENA SYMONS N.O. v THE ROB ROY INVESTMENTS CC T/A ASSETSU

On the one hand, as advisors, we want clients to trust us, but on the other hand we also need clients to take some responsibility. Without trust we will have no clients, but at the same time trust brings huge responsibility.

Of course, trust goes far beyond the relationship between advisors and their clients. It applies to all relationships and particularly between representatives and Key individuals. In fact, the entire business relies on it. According to Prof Mervyn King, author of The Corporate Citizen and Chairman of the King Committee on Corporate Governance in South Africa-

"Trust is fundamental to every business, regardless of the products it sells or the services it provides, regardless of its size or the number of people it employs. Ultimately, trust is the glue that keeps all the stakeholders together and it lays a sound foundation for the business to prosper over the long term. The ethical conduct of enterprises, good faith, care, skill, diligence and practising good governance have always formed the foundation of the great sustained companies of the world."

ETHICS

For logical reasons the financial services industry places a high value on ethical behaviour of advisors.

Ethics can be defined as the moral principles that govern a person's behaviour, or how an activity is conducted;[44] *they are moral principles that control or influence a person's behaviour; they constitute the branch of philosophy that deals with moral principles.*[45]

'Moral' means concerned with the principles of right and wrong behaviour and following accepted standards of behaviour.[46] *Principles are rules or beliefs governing one's personal behaviour or general scientific theorem or natural laws.*[47] *Principles are laws or rules.*[48]

The principles or beliefs are often referred to as core values of the business. The core values of advisors and intermediaries should, as is the case of visionary (good-to-great) companies, form a rock-solid foundation which does not drift with the trends and the fashions of the day.[49]

This is one of the reasons that the Financial Planning Institute (FPI) deems it of the utmost importance to implement a Code of Ethics to guide its members. The FPI Code of Ethics contains those core principles that set a standard for the financial planning profession which, if practiced, will enhance the integrity of our profession and lead to high trust relationships between advisors and their clients. These core principles are:

44 - The Oxford English Dictionary, p 280
45 - Oxford Advanced Learner's Dictionary, p 498
46 - The Oxford English Dictionary, p 546
47 - The Oxford English Dictionary, p 662
48 - The Oxford Advanced Learner's Dictionary, p 1153
49 - J. Collins & J Porras, Built to last, PPPP: Random House Business Books London 2000, p 8

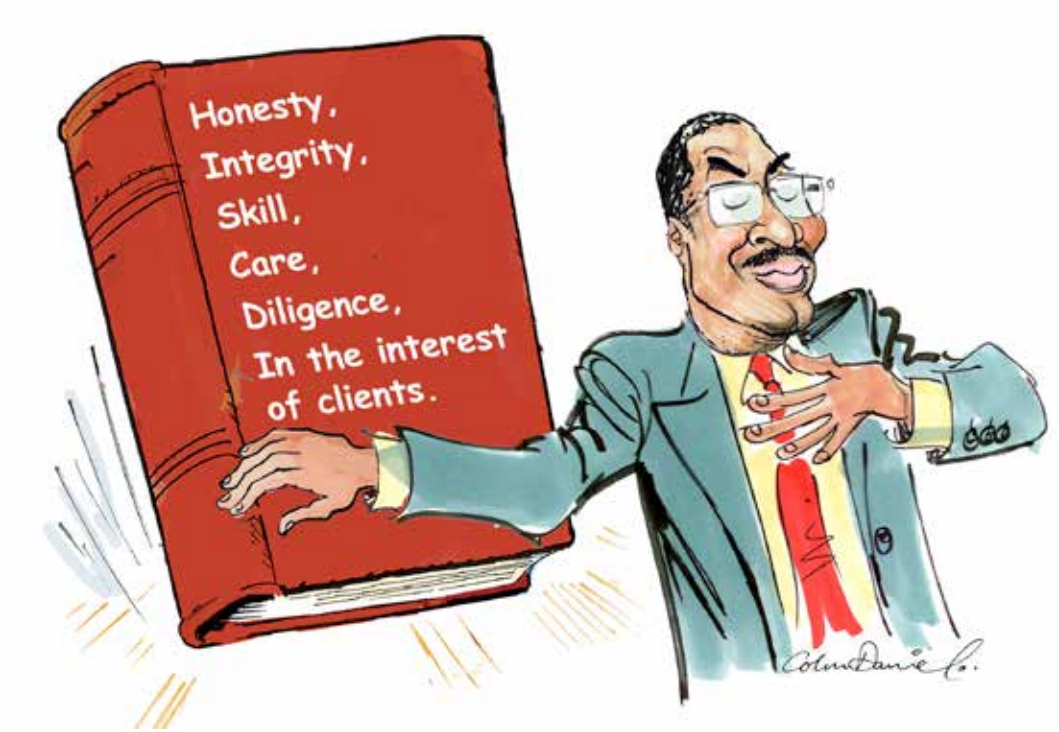
PRINCIPLE 1 – CLIENT FIRST

Placing the client's interests first is a hallmark of professionalism and is a core value of any profession. It requires the FPI members to act honestly at all times and not place personal interest or advantage, in any form, before their clients' interests. The Ombud does consider this obligation when investigating complaints.

This complaint is about the alleged failure by a former representative of the respondent to act in the interests of the complainants.[50]

PRINCIPLE 2 – INTEGRITY

FPI members are placed in a position of trust by a client and the ultimate source of that trust is the member's personal integrity. Allowances can be made for legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles. Integrity requires the member to observe both the letter and the spirit of the Principles of Conduct, the Professional Conduct Rules and the Practice Standards.



According to Dr Henry Cloud, author of Integrity, morals and ethics undergird our entire system of business, relationships, government, finance, education, and even our very lives. Integrity requires adherence to practices of honesty, fairness, consistency and candour in all professional matters.

50 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP (1) (page 2 par 3)

Integrity requires adherence to practices of honesty, fairness, consistency, and candour in all professional matters. The nature of an advisor's work places him or her in a position of trust with clients and the ultimate source of that trust is the advisor's personal integrity.

The benefit of integrity: Trust
John C. Maxwell & Jim Dornan[51]

Allowances can be made for legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles. Integrity requires advisors to observe both the letter and the spirit of the Principles of Conduct, the Professional Conduct Rules and the Practice Standards.

Don't lie to your bosses.[52] ***Don't lie to customers.***[53]
Richard Templar (Author)

Interestingly enough:

Salespeople who deliver value through honesty and integrity never need to close sales. That's because people want to buy from them.
Frank J. Rumbauskas
Author of Selling Sucks

PRINCIPLE 3 – OBJECTIVITY

Objectivity requires intellectual honesty and impartiality. Regardless of the services delivered or the capacity in which an FPI member functions, objectivity requires members to identify and manage conflicts of interest and exercise sound professional judgment.

PRINCIPLE 4 – FAIRNESS

Fairness requires providing clients with what they are due, owed, or could legitimately expect from a professional relationship. FPI members are fair and consider the needs and expectations of all stakeholders to their transactions in a balanced and unbiased manner. Information required by clients is provided in an unbiased way and in an easy to understand format. Members identify and disclose real and potential material conflicts of interest in a timely manner. Fairness implies treating others in the same manner as you would want to be treated.

PRINCIPLE 5 – COMPETENCE

Competence requires attaining and maintaining a high level of knowledge, skills and abilities in the provision of professional services. Competence also includes the wisdom to recognise one's own limitations, consulting with other professionals when in doubt and referring clients to other professionals should one not have the time, ability or inclination to optimally respond to a client's needs.

51 - Maxwell 1997: Becoming a person of influence: Thomas Nelson Publishers; p 27
52 - Richard Templar: The Rules of Management, Pearson Education Limited 2011, p 211
53 - Richard Templar: The Rules of Management, Pearson Education Limited 2011, p 211

Competence requires the FPI member to make a commitment to continued learning and professional development.

PRINCIPLE 6 – CONFIDENTIALITY

Confidentiality requires client information to be protected and maintained in such a manner that allows access only to those who are authorised. A relationship of trust and confidence with the client can only be built on the understanding that the client's information will not be disclosed inappropriately.

PRINCIPLE 7 – DILIGENCE

Diligence requires fulfilling agreed upon professional commitments in a timely and thorough manner, and taking due care in planning, supervising and delivering professional services. Taking due care in planning implies performing a due diligence, which is explained later in this publication.

PRINCIPLE 8 – PROFESSIONALISM

Professionalism requires behaving with dignity and showing respect and courtesy to clients, fellow professionals, and others in business-related activities, and complying with appropriate legislation, regulations, rules and professional requirements. Professionalism requires the FPI member, individually and in co-operation with peers, to enhance and maintain the profession's reputation and public image and its ability to serve the public interest.

The FAIS Ombud assesses the rendering of financial services in accordance with section 2 of the Code of Conduct, which implies compliance with all the principles highlighted above. When in doubt, weigh your actions against the principles set out in section 2 of the Code and the eight principles contained in the FPI Code of Ethics. After that, if still in doubt, rather don't do whatever you are wondering about. It is always better to err on the conservative side.

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*Best Fund House: Larger Fund Range, Morningstar Awards, 2016, 2017, 2018. Prudential Investment Managers (SA) (Pty) Ltd is a licensed financial services provider.

CHAPTER 11

SUITABILITY

The essence of the suitability requirements is contained in sections 8(1)(a), (b) and (c) of the FAIS General Code of Conduct, which states:

A provider other than a direct marketer, 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;

c) 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...

EXAMPLES OF OMBUD FINDINGS:.....

There is no evidence that the respondent complied with this section of the Code. One of the documents completed by the complainant, is entitled a "risk profile".

None of the information contained in this document provides any detail of the client's financial information, or an indication as to why the investments would be in line with the complainant's means and circumstances. The respondent further did not take time to ensure that his client understood the advice, nor treated her fairly.[54]

NEEDS ANALYSIS

From a suitability point of view the Ombud always refers to the provider's duty to do a needs analysis in accordance with section 8(1)(a) of the Code and the Ombud's Office always looks for evidence that proves that such an analysis was indeed performed.[55]

EXAMPLES:

No needs analysis was carried out by the second respondent;[56] *Respondents did not carry out any analysis to ensure that the proposed product was suitable for the client, bearing in mind the latter's needs and financial risk profile. Respondents were in breach of Section 8 of the Code;*[57]

54 - FAIS Ombud determination 2018 - FAIS 05349/14-15/ NW 1, par 31

55 - See recommendation dated 28 February 2018: FAIS 07380/12-13/ MP 1, page 6 par 18.4; Also see CASE NUMBER: FAIS 03315/14-15/ EC 2 In the case between: MAFA MKHOHLWA Complainant and WORKERS LIFE ASSURANCE COMPANY LIMITED Respondent, par 30 | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraph 48

56 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 28.5)

In the absence of such evidence, it constitutes a breach of the Code and if this breach was instrumental in providing inappropriate advice to the complainant and he or she suffered a financial loss as a result, the Ombud normally finds against the advisor.[58]

FAIS Ombud determinations frequently refer to the provisions of section 8(1)(c) of the Code, which specifically require that the provider identify the financial product or products that will be appropriate to the client's risk profile and financial needs.[59]

SUITABILITY: NEEDS AND RISK PROFILE APPLIES TO ALL PRODUCTS

Whilst the issue around the client's risk profile is mostly highlighted in investment cases, it must be clear that the FAIS Act, and the Code of Conduct apply to all financial products.

SUITABILITY: LONG-TERM INSURANCE PRODUCTS

It is fairly easy to establish whether a long-term insurance product meets the suitability test. In its purest form, once it is agreed that the client needs Life insurance cover, disability cover (lump sum and/or income) and critical illness cover, all that is needed is to quantify the level of cover and come to an agreement on the terms, conditions and exclusions.

However, we know that in most cases the affordability of life insurance cover and additional benefits plays a big role when it comes to implementation. The client may need an amount of R 5 000 000 life- and disability cover, but he may not be able to afford the R 7 500.00 per month premium, which may escalate by 10% per annum, for example. There may be a risk of lapsing the policy because of affordability.

In the case of life assurance, affordability is part of the client's risk profile. When considering the risk profile of an investor, the question is asked whether the client can afford the risk involved to achieve a certain return, but with life assurance the question that must be considered is whether the client can afford the premium to obtain, and sustain the cover required.

From a life insurance point of view the client's health also forms part of the client's risk profile. In certain cases, the client may not qualify for cover or there may be a loading on the premium, or there may be certain exclusions due to the client's profile from a health perspective. It therefore makes perfect sense that the Code refers to suitability as recommending a product that is appropriate in accordance with the client's **risk profile and needs**, because it may not be possible to satisfy the client's needs. There is almost always a trade-off between the two.

57 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 10 par 33.5)
58 - See Craig Steward Inch v Impact Financial Consultants, FAIS 04971-12/13-MP 1, page 8, par 26
59 - See Craig Steward Inch v Impact Financial Consultants, FAIS 04971-12/13-MP 1, page 9, par 27

RECOMMENDATION:

If the needs analysis shows that the client needs an amount of R 5 000 000 life- and disability cover, draw a quotation for that amount and make your recommendation. If the client cannot afford the premium, draw a quote based on the premium that the client can afford, and on acceptance then the client's instruction must be recorded in your record of advice. You will then be able to demonstrate that you provided the client with appropriate advice based on the client's needs, but that the client's limitations from an affordability and/or health point of view prevented you from implementing your advice. If this happens, you will still meet the suitability test because of the limitations imposed on you as the provider.

c) 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...**

SUITABILITY: INVESTMENTS

The FAIS Ombud's Office always poses the same fundamental questions to providers when investigating client complaints in terms of section 27(4) of the Act. These questions include:

- Please explain on what basis did you deem the investment product to be a **suitable** investment for your client?
- Please provide details of the **due diligence** you conducted, (if any); and
- What actually led you to conclude that the risk inherent in the product was suitable to your client's **risk tolerance**?[60]

ANALYSIS OF THE QUESTIONS

The first question relates to suitability in the broad sense, which include the provisions contained in sections 2, 8(1)(a), (b) and (c) of the Code of Conduct.

It is of vital importance for all financial planners to realise that understanding the client's needs and establishing the client's risk profile correctly, is fundamental to providing sound investment advice. Financial planners who do not have a comprehensive understanding of the provisions of sections 8(1)(a), (b) and (c) of the Code may find themselves totally exposed when facing a client complaint.

The second question was addressed in the previous chapter and the third question is the elephant in the room when it comes to the whole risk profiling debate, which many, if not most product suppliers ignore and avoid. In my opinion, this question cannot be answered if the client's risk tolerance is not quantified. If providers continue to subject themselves to the risk profiling questionnaires designed by product suppliers that lead to outcomes such as conservative, moderate or aggressive, without quantifying these categories of investors, advisors will not be able to answer this question.I firmly believe that risk profiling will continue to be the **"Achilles' heel"** of providers, until investment risk is quantified.

60 - See Craig Steward Inch v Impact Financial Consultants, FAIS 04971-12/13-MP 1, page 22, par 74

An Achilles' heel is a weakness in spite of overall strength, which can lead to downfall.[61]

After studying this topic over many years, I remain of the opinion that advisors who use traditional risk profiling questionnaires leave themselves wide open in the event of a client complaint. Regardless of their honourable intentions, these questionnaires may lead to their downfall. For a more comprehensive analysis pertaining to risk profiling and risk profiling practices, please visit: www.antonswanepoel.co.za or email me at anton@antonswanepoel.co.za.

INVESTMENTS: THE SUITABILITY TEST

Providing suitable advice is one of the key outcomes of the FAIS Act. According to the provisions of section 16 of the Act, a code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied.

EXAMPLE OF A FAIS OMBUD FINDING:

Section 8 of the Code, which pertains to suitability of the advice requires, inter alia, that the provider identify the product or products that will be appropriate to the client's risk profile and financial needs.

These were funds inherited by an individual during matric, which that had been earmarked for tertiary studies, yet it is clear that no attempt was made to identify a suitable product.[62]

Although the General Code of Conduct gives investment advisors a sound framework for appropriateness of advice, it is not that simple in practice. The reality is that most clients have financial needs that are difficult, if not impossible to address. Statistics show that less than 6% of South Africans are in a financially secure position to retire. This implies that more than 94% of people who want to retire are not in a position to do so. They simply do not have enough retirement capital to meet their needs. It may not be feasible for advisors to meet these clients' financial needs at retirement. Such clients usually require an unrealistic investment return on capital to meet their income needs. It is therefore necessary to put the obligations of providers under the suitability provisions into perspective to understand the meaning of risk profile and needs.

FINANCIAL NEED(S)

Financial needs have not been defined in the Financial Advisory and Intermediary Services Act (FAIS Act), 2002, and therefore the normal meaning of the words must be used. Financial means "connected with money and finance"[63] and need means "to require something because (it) is essential or very important, not just because you would like to have (it)"[64]

61 - https://en.wikipedia.org/wiki/Achilles%27_heel
62 - See the matter between TEDDY MADITSE Complainant and MAGAJANA TRADING AND PROJECTS CC and LINDIWE MTASA MAGAJANA: CASE NO: FAIS 04946/15-16/ GP 1, par 17.4
63 - Oxford Advanced Learner's Dictionary, p 551
64 - Oxford Advanced Learner's Dictionary, p 979

A person may need R10 000 per month after tax to pay for a roof over his or her head and to feed the family. It may be essential or important to have R 10 000 per month, which qualifies as a need.

However, an investment of R800 000 may not be enough to sustain this need over the life expectancy of the investor. To achieve this outcome, it may be necessary to invest in a financial product which offers a high return, but as we know higher returns are normally associated with taking on bigger risk.

It is for this reason that the General Code of Conduct measures the appropriateness of the financial product in accordance with the financial needs **and** the client's risk profile.[65] This means that the advisor will have to carefully consider both aspects before recommending a financial product. The general duty of providers serves as a reminder of what is expected from advisors.

Again, 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.[66]

In this case the emphasis is on due skill, care and diligence, and in the interests of clients, as it takes all those qualities to give appropriate advice to clients who may have needs, but who can ill afford to take on too much risk.

Consideration must also be given to the level of risk that clients can tolerate and risk they can afford to take. The Code makes it clear that it is not the one or the other. Appropriate advice is based on needs and risk profile.[67]

EXAMPLE OF AN OMBUD FINDING:

He failed to ensure that his client invested in a product that was appropriate for her needs and consistent with her tolerance for risk…[68]

MEANING OF RISK PROFILE

The term risk profile has not been defined in the FAIS Act and therefore the normal meaning of the words must be used in its application under the Act.

☞ Risk means the possibility of something bad happening (like losing capital)[69] or a situation that could be dangerous. To risk something is to do something even though the result could be unpleasant.[70]

65 - See Appeal Board Judge Harms, par 24
66 - See paragraph 2 of the General Code of Conduct
67 - See CS Brokers CC v James Bruce Wallace, Appeal No. FAB 5/2016, par 24
68 - See the matter between L Landman and JC Mostert, Case No: TPM FAIS 00493/13-14/KZN 1, page 19, par 69.4
69 - My insert
70 - Oxford Advanced Learner's Dictionary, p.1264

- A person's profile may also be defined as a character sketch.[71]

Risk profiling has been a topic of debate over many years and as far back as 2003, I conducted my first survey. In March 2009, I conducted another survey to establish what 25 top investment advisors think about its fundamentals.

OBJECTIVE OF THE SURVEY

The objective was to agree on the basic fundamentals pertaining to appropriate risk profiling of investors that will:

- truly serve investors, contribute to appropriate advice and enhance the integrity of the financial services industry
- ensure compliance with paragraphs 8(1)(a), 8(1)(b), 8(1)(c) and 9 of the General Code of Conduct, which address the topic of adequate record keeping.

PROFILE OF INVESTORS (CLIENTS)

The survey showed that all providers who took part had extensive experience in advising investors who require capital growth and income from their portfolios. These providers therefore have an understanding of both income and capital growth needs and objectives of their clients. Only a sound understanding of the risks and the ability to determine the risk profile of clients[72] will enable providers to offer appropriate solutions as required in terms of the General Code of Conduct.[73]

DEFINITION OF RISK

More than 80% of participants agreed that risk should be defined as the **risk of losing capital**. This is consistent with the meaning of the word as defined in the dictionary.

INVESTMENT TERM

All the participants agreed that, when doing investment planning, the investment term is more important than the age of the investor. This view is also consistent with those expressed by:

- Benjamin Graham in The Intelligent Investor; and
- Warren Buffet, who at the age of over 80 at the time still invests in long-term assets.

INVESTMENT OBJECTIVES

The majority of participants agreed that investment objectives should relate to matching, or outperforming, inflation, net of cost and net of tax. Eighteen percent (18%) of participants believe that outperforming cash is a better point of reference.

71 - Oxford Advanced Learner's Dictionary: p. 1160
72 - Par 8(1)(c) of the General Code of Conduct
73 - 8Par 8(1)(c) of the General Code of Conduct

SOUTH AFRICAN CASE STUDY.....

In the matter between Melcolm Arnold Birken and Fidentia Financial Advisors CC, the FAIS Ombud issued a determination in favour of the provider on the following provisions in the agreement between provider and client:

- The client's investment objective was clearly defined[74]
- There was agreement on the expected return (benchmark)
- The investment term was defined[75]
- There was agreement on the fact that the investment capital and target return could not be guaranteed was disclosed to the client and agreed to.[76]

What if there is a discrepancy between the client's cash flow, capital growth needs and risk profile? This is where the FAIS Ombud will consider the provisions of sections 8(1)(a), 8(1)(b), 8(1)(c), and ask the ultimate question, namely:

Did the provider render financial services honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry?[77]

If the client's risk profile indicates that he/she cannot tolerate a capital loss of more than what the client has to accept to achieve a certain return, the client's risk profile would be the limiting factor and therefore the dominant force in the decision-making process. If the needs of the client require an inflation plus 6% p.a. return, but the client cannot tolerate -25% "loss" of capital over a 12-month period, the client will have to accept a lower income and/or return. As they say, "you can't have your cake and eat it." Again, how can an advisor agree on the client's tolerance without quantifying it?

Advisors should therefore make very sure that they are able to reach an agreement with their clients as far as their needs and risk profiles are concerned. Advisors should attempt to find the balance between the two and document the agreement between the parties.

The process of risk profiling is a contentious issue, as was recognised by the FAIS Ombud in 2012:

- *The Ombud's office frequently encounters a disconnect between a complainant's risk tolerance, as calculated according to questions laid out in a risk profile document and the complainant's actual circumstances;*[78]
- *Risk profile questionnaires can be interpreted in several ways and are not always specific or relevant to the investment at hand;*[79]
- *Risk must be disclosed and in clear unambiguous language;"*[80]

These flaws are comprehensively explained in the industry white papers on risk profiling that are accessible on the website.

74 - As required in terms of par 8(1)(a) of the General Code of Conduct
75 - As required in terms of par 7(1)(c)(vii) of the General Code of Conduct
76 - 11As required in terms of par 7(1)(c)(xiii) of the General Code of Conduct
77 - See section 2 of the General Code of Conduct
78 - FAIS Ombud's Annual Report of October 2012
79 - FAIS Ombud's Annual Report of October 2012
80 - FAIS Ombud's Annual Report of October 2012

At the risk of irritating some of the industry stakeholders, I simply cannot resist highlighting some of the flaws again, in an attempt to entice the reader to read the more comprehensive studies. The majority of risk profile questionnaires do not quantify the risk categories of clients, and therefore the drafters of these risk profiling questionnaires have two options, namely draft their own definition of each category or use the normal meaning of the words as defined in the dictionary. For example:

RISK AVERSE

Risk averse means "expose to chance of loss opposed/disinclined"[81] or simply opposed to chance of loss. This meaning does not quantify the risk in the category.

CONSERVATIVE[82]

Conservative means "tending to conserve/averse to rapid changes/ seeking to preserve parts as far as possible/moderate/cautious/avoiding extremes"[83] or simply cautious and seeking to preserve. The Oxford Business English Dictionary defines conservative as not taking or involving unnecessary risk.[84]

I respectfully submit that, all these concepts, by definition, are abstract, vague and entirely open for interpretation and it will always be the case, unless some objective, measurable benchmark is added. The Appeal Board has also stated that *terms such as low, moderate and high are relative,*[85] *and therefore subject to interpretation.*

MODERATELY CONSERVATIVE

Moderately means "avoiding extremes/ low/temperate in conduct or expression[86] moderate/ cautious/avoiding extremes"[87] or simply cautious and seeking to preserve. The Oxford Business English Dictionary defines moderate as neither very good / large etc. nor very bad / small, i.e. reasonable.[88] Moderately means to an average extent, within reasonable limits.[89] As highlighted above, The Oxford Business English Dictionary defines conservative as not taking or involving unnecessary risk.[90]

THIS BEGS THE QUESTION:

How does one use these definitions without leaving them open for interpretation? Surely it must be quantified.

MODERATE

Moderate means "avoiding extremes/low temperate in conduct or expression"[91] or simply cautious and seeking to preserve.

81 - Sykes 1983:60
82 - See recommendation dated 28 February 2018: FAIS 07380/12-13/ MP 1, page 6 par 18.5 where the risk profile refers to Low to Medium without quantifying the level of risk.
83 - Sykes 1983: 200
84 - The Oxford Business English Dictionary, Oxford University Press 2005, p 111
85 - See CS Brokers CC v James Bruce Wallace, Appeal No. FAB 5/2016, par 32
86 - Sykes 1983: 650
87 - Refer to conservative above
88 - The Oxford Business English Dictionary, Oxford University Press 2005, p 353
89 - See The Advanced Learner's Dictionary, Oxford University Press 2005, p 946
90 - The Oxford Business English Dictionary, Oxford University Press 2005, p 111
91 - Sykes 1983: 650

The Oxford Business English Dictionary defines moderate as neither very good / large etc. nor very bad / small, i.e. reasonable.[92] Moderately means to an average extent, within reasonable limits.[93]

Again, what is reasonable for one person may be totally unreasonable for another. There is no objective benchmark.

MODERATELY AGGRESSIVE

Moderately aggressive means avoiding extremes/low "offensive/disposed to attack/forceful/self-assertive"[94] or simply cautious and seeking to preserve.[95] Moderately means to an average extent, within reasonable limits.[96] According to the Oxford Advanced Learner's Dictionary aggressive means angry and behaving in a threatening way.[97]

So how does one measure being angry and behaving in a threatening way within reasonable limits?

AGGRESSIVE

Aggressive means "offensive/disposed to attack/forceful/self-assertive"[98] According to the Oxford Advanced Learner's Dictionary aggressive means angry and behaving in a threatening way.[99]

As I have stated in some articles before, if this is the way an aggressive investor is defined, providers seem to agree that there is only one kind of aggressive investor and that is one who has just lost money. Unfortunately, then his aggression, anger and threatening behaviour is aimed at the advisor. Categorising an investor as aggressive, without quantifying it, will always leave room for subjective conclusions, which continue to contribute to this industry dilemma, whilst we really need much better solutions.

THE SIGNIFICANCE OF RISK PROFILING

The subject of risk profiling has been debated so often that many advisors may be wondering whether there is anything left over to talk about. However, in 2015 hundreds of financial advisors in South Africa added their voice to industry commentators, who have been warning investors for years that many of the risk profiling questionnaires used by advisors are fundamentally flawed. According to a 2015 survey, more than **80%** of advisors indicated that current risk profiling questionnaires are **insufficient** to provide clients with suitable advice.

These survey results were published in the Second Edition of the Industry White Paper on Risk profiling, which was released and debated at the FPI Annual Convention in June 2016. These results support concerns pertaining to risk profiling practices by regulators and

92 - The Oxford Business English Dictionary, Oxford University Press 2005, p 353
93 - The Oxford Advanced Learner's Dictionary, Oxford University Press 2005, p 946
94 - Sykes 1983:18
95 - My wording
96 - The Advanced Learner's Dictionary, Oxford University Press 2005, p 946
97 - The Oxford Advanced Learner's Dictionary , Oxford University Press, p 29
98 - Sykes 1983: 18
99 - The Oxford Advanced Learner's Dictionary , Oxford University Press, p 29

other commentators internationally. The purpose of including some of the insights from the survey into this publication is to highlight again why this topic is so significant and why the problems pertaining to risk profiling in South Africa need to be solved. There are at least four reasons why risk profiling is so important from an advisors' point of view, namely:

1. UNDERSTANDING, EXPLAINING AND RECORDING AN INVESTOR'S RISK PROFILE IS A REGULATORY REQUIREMENT .....

Section 8(1)(a), (b) and (c) of the General Code of Conduct, as highlighted at the outset of this chapter states that a financial advisor (provider) ..., must, comply with the provisions. The provisions are clear. It does not give providers any option to comply.

In fact, risk profiling has become even more important in view of the new proposed amendments of the General Code of Conduct, as obtaining relevant information to establish the client's risk profile is now included in paragraph 8(1)(a) of the Code as well.

CURRENT PROVISION:.....

"A provider, other than a direct marketer, 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.

PROPOSED AMENDMENT: .....

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

(a) obtain from the client such information regarding the client's needs[100] and objectives, financial situation, risk profile[101] and financial product knowledge and experience as is necessary for the provider to provide the client with appropriate advice, which advice takes into account -
(i) the client's ability to financially bear any costs or risks associated with the financial product;[102]
(ii) the extent to which the client has the necessary experience and knowledge in order to understand the risks[103] involved in the transaction.

Although this appears to be a very subtle amendment, providers must not underestimate the impact of the new proposed requirements. With these proposed amendments the Regulator has effectively closed the door on any argument that risk profiling prior to providing advice is irrelevant. There have been many advisors who argued that risk profiling is nonsense and therefore they do not do any form of risk profiling on a client.

100 - New requirement
101 - New requirement
102 - New requirement, which specifically refers to risk capacity
103 - New requirement

If the proposed amendments go through, which I believe they will, the FAIS Ombud will in future specifically request proof from advisors that they obtained from the client information regarding the client's needs and risk profile, prior to providing a client with advice. If they find no such evidence, it qualifies as an act of non-compliance as contained in the definition of complaint:

(a) The provider or its service supplier has **contravened or failed to comply**[104] with an agreement, **a law, a rule, or a code of conduct**[105] which is binding on the provider or to which it subscribes

(b) the provider or its service supplier's maladministration or wilful or negligent action or failure to act,[106] has caused the person harm, prejudice, distress or substantial inconvenience

(c) the provider or its service suppliers have treated the person unfairly

2. FINANCIAL ADVISORS ARE BEING HELD ACCOUNTABLE FOR RISK PROFILING

The FAIS General Code of Conduct makes it very clear that financial services providers and their representatives are responsible for following a sound advice process and for the quality of any advice tools being used to establish the needs, objectives and risk profile of clients.

Financial advisors – not product suppliers that design many of these questionnaires – are being held accountable for establishing a client's risk profile.

It is evident from the number of FAIS Ombud determinations that risk profiling questionnaires and the subsequent selecting of financial products pose a real threat to financial advisors. Not only does the FAIS Ombud investigate whether a risk profile was conducted, *the Ombud also examines the manner in which a client's risk profile was conducted as to determine whether such analysis was appropriate.*[107] The Ombud even considers the form and its content.[108] If investor risk profiling is not done properly, it is instrumental to inappropriate advice and it attracts significant risk to the advisor in the advice process. "Advice risk" is the term used by the industry when an advisor offers advice to clients and leaves himself exposed to client complaints as defined in the FAIS Act.

EXAMPLES:

Clearly, the entire exercise of going through a risk analysis was a mere formality performed to comply with the formal requirements of the FAIS Act.109 In breach of the FAIS Act and the General Code, the advisor completely ignored the results of the risk analysis and invested the complainant's money into a high-risk investment.[110]

104 - My emphasis
105 - My emphasis
106 - My emphasis
107 - See FAIS 05679-09/10 KZN 1 page 21 par 72
108 - See FAIS 05679-09/10 KZN 1 page 22 par 74
109 - See FAIS 02202/09-10/KZN/1 Page 14 par 46
110 - See FAIS 02202/09-10/KZN/1 page 14 par 47

3. THE UNDERSTANDING OF AN INVESTOR'S RISK PROFILE IS FUNDAMENTAL TO PROVIDING APPROPRIATE ADVICE

It is vitally important to understand that risk profiling is not primarily a compliance issue. Understanding an investor's risk profile is primarily about providing appropriate investment advice to clients. As it is necessary for a medical doctor to do a proper diagnosis on a patient, so it is necessary for an investment advisor to determine the risk an investor should be taking to achieve his objectives and to understand the risks an investor is willing and able to take.

4. UNDERSTANDING AN INVESTOR'S RISK PROFILE AND EXPLAINING THE RISKS TO INVESTORS, HELPS THEM TO MAKE INFORMED DECISIONS

Professional advisors will tell you that informed clients are good clients. Warren Buffett, arguably the world's most successful investor in modern times, has stated that he does not invest in something he does not understand. In fact, one of his most famous quotes is:

> ***Risk is not knowing what you are doing.***

If an investor does not know what the level of risk is that he must take to achieve his objective, or the level of risk that he may not be willing to take, the investor will clearly not be in a position to understand the investment he is about to make.

Just as a good doctor owes it to his patient to be in a position to make informed decisions that will impact his health, professional advisors have a duty to put their clients in a position to make informed investment decisions. Understanding and explaining each investor's objectives, required risk, risk tolerance and risk capacity are fundamental in helping clients to make those important decisions.

Risk profiling, if done properly, is not only a suitability requirement, it also speaks to consumer education and assisting them to make informed decisions. Risk means different things to different people. For investors risk generally means "chance of loss" and when fund managers refer to risk they generally refer to volatility. However, for investment advisors risk goes far beyond chance of loss and volatility.

PROPOSED NEW FRAMEWORK FOR RISK PROFILING:

The risk profiling workgroup that was established in 2014 agreed that risk profiling should be done much **SMARTER** in future. Subsequent to the publication of the first Paper I have put more thought into the framework, and propose that the following fundamentals should form the basis when establishing an investor's risk profile:

SPECIFIC AND SIMPLE

The concepts of "risk" must be properly defined in clear and simple language in the context of investment planning so that clients can understand it, advisors

can apply it and that it leaves less room for interpretation by any of the other stakeholders. It is proposed that defining risk as "standard deviation" is not the answer, but that consideration is given to the definition of **"Chance of loss"**.

After risk from an investor's point of view is defined, the next definition that needs to be articulated is: "What is the **required risk** that the investor needs to accept in order to achieve his required return?"

MEASURABLE

One of the main problems regarding the disclosure of risk to customers is that it is not quantified and vague. In the words of the Ombud:

> ***"Risk is not disclosed in clear unambiguous language."***[111]

I would argue that one of the main reasons why risk profile questionnaires can be interpreted in several ways is the fact that risk is not quantified properly. At the risk of repeating myself, if risk cannot be quantified, it is impossible for advisors to explain risk to investors and as a result, advisors will never be in a position to lead a client to make an informed decision, and it will be impossible to manage clients' expectations. In my opinion, we therefore desperately need the concept of risk and the risk profile of a client to be quantified, so that it can be measured and better managed. Apart from defining risk properly, from a customer's perspective, quantifying risk properly is arguably the single most important thing that industry stakeholders should agree on in our attempts to solve the problems highlighted by the FAIS Ombud in their report.

ATTAINABLE

We know that risk and return go hand in hand. The risk/return trade-off must be realistic and attainable. Sometimes even fund managers are instrumental in creating unrealistic expectations in the minds of advisors and their clients. For example: One has to ask whether a targeted return of inflation plus 6% net of cost over a rolling 5-year period with no chance of loss over any 12 month rolling period is attainable? If risk and return are quantified, all industry stakeholders will be able to establish whether it is realistic and attainable.

RISK PROFILE SHOULD BE PROPERLY DEFINED

Solving the problems as highlighted in the White Papers and this publication starts with a proper definition of risk from a customer's perspective and a proper definition of risk profile.

Risk profile is the appropriate level of investment risk having regard to the investor's risk required, risk capacity and risk tolerance.[112]

The workgroup of 2014 agreed on three elements, which should make up the risk profile of a client, namely:

111 - FAIS Ombud's Annual Report of October 2012
112 - FinaMetrica, courtesy of Geoff Davey, cofounder and director | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraphs 21, 42, 45 and 46

Risk required
Risk required is the risk associated with the (investment) return that is required to achieve the individual's goals from the resources available.

Risk capacity
Risk capacity is the individual's ability to sustain worse than anticipated outcomes without severely compromising their goals. This refers to the individual's capacity for loss.

Risk tolerance
Risk tolerance is the individual's general willingness to take financial risk. It is a psychological trait.[113]

The workgroup agreed that, although important, risk tolerance should not be the main consideration in determining whether suitable advice was given or not. As proposed above, there must be a balance between the components that make up the risk profile of a client.

TERM OF INVESTMENT PLAYS A VITAL ROLE

The investment term is absolutely vital in determining the customer's financial needs and it plays a key role in the evaluation of the customer's risk profile as defined in this publication. Not one of the risk components can be properly quantified without taking the investment term into consideration. The Advisor's Risk Profiling Workgroup agreed that the investment term, not the customer's age, should be the primary consideration in determining the customer's needs and risk profile.

EDUCATION IS KEY

Consumer education plays a critical role in the advice process and in the process of leading an investor to make an informed decision. This obligation is particularly challenging for providers in an onerous regulatory environment. The Workgroup agreed that, without investor education, investors will in all probability not understand their financial needs and objectives properly, nor will they understand the risk required to achieve those investment objectives, whether they can afford those risks or whether they will be able to tolerate those risks.

RISK / RETURN RESOLUTION

The risk / return expectation of the client must be agreed and recorded. From an investor's point of view one of the most important aspects that should be agreed on is the client's risk/ return expectation. One of the main contributors to provider liability over the years has been poor record-keeping on the part of financial services providers, with particular reference to the client's risk/return expectation. One of the most important parts of risk profiling is to agree and record the client's risk / reward expectation in writing to prevent selective memories to dictate the outcome of a complaint.

113 - Based on the research and articles published by FinaMetrica | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraphs 21, 42, 45 and 46

THE ROLE OF PRODUCT SUPPLIERS .....

Product suppliers, and investment management companies in particular, can play a significant role in solving the challenges as described in this paper. A number of leading fund managers have already started a process of change in their risk disclosures on their fund fact sheets, which is extremely encouraging.

However, my 2017 study of product suppliers' categorisation of risk profiles revealed disturbing discrepancies and inconsistencies between the various product suppliers. This study was included in my motivation to investigate risk profiling practices in South Africa. Unfortunately, our submission was unsuccessful and so the saga continues. Providers and product suppliers continue to be on different pages when it comes to the topic of risk profiling, and until such time as there is a meeting of the minds between these parties, I am afraid that the following irritations will remain:

- The frequent encounters of a disconnect between a complainant's risk tolerance, as calculated according to questions laid out in a risk profile document and the complainant's actual circumstances;[114]
- A myriad of ways of interpreting risk profile questionnaires that are not always specific or relevant to the investment at hand;[115]
- Risk disclosures that are vague and explained in ambiguous language;"[116]

Being unsuccessful in bringing industry stakeholders together to find a fundamentally sound risk profiling solution that truly serves the interests of consumers is one of the most spectacular failures of my professional career thus far. Whilst the disconnect between the various stakeholders on this subject remains, I believe that we must continue to build stronger and stronger arguments until the fundamentals of sound and consistent risk profiling triumphs.

To provide sound investment advice and meet all their legal obligations in terms of the Financial Advisory and Intermediary Services Act, advisors must consider a number of risk factors. For example:

- Investors may be too risk averse and when they invest, their investments may not outperform inflation. This means that investors will lose money in real terms. This principle must be explained to clients.
- Investors may have too little money to achieve their financial objectives, which often puts them in a position where they make desperate financial decisions. In these situations, investors often take risks they cannot afford. These clients pose a huge risk for advisors, simply because when investing they make decisions based on returns and do not spend enough time considering the risks. However, when the returns do not materialise or when they experience "losses" (even temporary losses because of up and down market movements) they focus on the risks "which were never properly explained to them".

114 - FAIS Ombud's Annual Report of October 2012
115 - FAIS Ombud's Annual Report of October 2012
116 - FAIS Ombud's Annual Report of October 2012

Be very careful when clients only focus on the upside. From experience I can testify that at some point these clients will in all probability come back and "bite" you.

- Investors often take uneducated risks by chasing high returns offered by people who designed Pyramid- or Ponzi schemes. An informed client is a good client. The obligations in section 16 of the Act and section 7(1) (a) of theGeneral Code of Conduct actually assist you in educating clients to become good clients.
- Some people make financial decisions based on greed without considering the potential downside. As I stated above, be careful, these clients will in all probability come back and "bite" you.
- Institutional risk – some companies fail, and it is important to consider a company's track record before investing money with them.
- There are other risks like political, market and currency risks, which are also important to consider, because it affects the up and down movements of investment portfolios.

Suitability of investment advice depends on the following main aspects:

- A proper needs analysis must be conducted.
- The investment returns a client requires to achieve his objectives must be established.
- The investment return associated with the required investment return(s) must be quantified and agreed.
- The risk associated with the client's required investment return must be articulated and quantified.
- Ideally, the client's risk tolerance must match the risk that he needs to take to achieve his financial objectives. However, seasoned advisors will tell you that this is seldom the case and this is one of the reasons why sound advice is so important.
- Advisors must further establish whether the client can afford to take the risks required and whether he has the financial capacity to take the risks necessary to achieve his objectives.
- If there are discrepancies between the client's required risk and the risk that he is willing to take (quantified), it must be highlighted, and the implications should be clearly explained.
- Just as a good doctor sometimes needs to recommend a painful medical procedure to heal the patient, a good financial advisor should not recommend a specific investment just because the client does not want to take any risk. Just as an operation, such as removing a prostate, may be required to save a patient's life, taking risk may be necessary for a client who wants to achieve his objectives.
- The client ultimately has to decide whether he is going to take on the risk required to achieve his objectives or whether he prefers not to take on the risk and accepts that he will not achieve his objectives.
- Just as a doctor cannot force a patient into accepting the advice to undergo an operation, an advisor cannot force a client into accepting the risks required to achieve his objectives. However, the implications of the patient's and client's decision must be fully explained, so that the patient and client can make an informed decision.
- Clients must understand that there is always a trade-off between taking the risk to achieve the objective or not taking the risks and accepting the certainty that he will not achieve his objectives.
- Just as a good doctor will recommend to his/her patient to undergo the operation, regardless of the short-term discomfort (perhaps even pain), a good advisor will recommend to a client to take on the risk of up and down movements to achieve his objectives, regardless of the discomfort of market volatility. Should the client accept the risks, it should be recorded as such. Unfortunately, when things do not go according to plan in bad markets, clients forget what was discussed and agreed at the time of making the investment. The recording of the agreement will go a long way to refresh even the weakest memory. However, if the client does not accept the potential downside, be sure to record it as well, because it remains the client's decision.


Financial needs
Risk profile
client
Jr. JONES

Even the most skilled carpenter **cannot build a chair with a jackhammer.**

As a highly-skilled financial adviser, you too need more than blunt tools to provide your clients with sophisticated risk cover that accurately matches their needs.

Claim-stage choice, another world-first innovation from BrightRock, allows your clients to choose a lump-sum or a recurring income pay-out for their income needs at claim stage. Because it is impossible to predict their exact needs in advance.

For example, a client may change from a regular monthly pay-out to a cash lump sum if their prognosis is poor. In this way, you can ensure your clients always get the most value from their pay-outs and remain firmly in the driver's seat – because they can decide what they need most, when they know exactly what they need. It's just one more way we empower you to offer your clients life insurance that matches their changing needs with absolute precision.

Get the first ever needs-matched life insurance that changes as your life changes.

BRIGHTROCK

CHAPTER 12

DISCLOSURE

Full disclosure enables financial advisors to lead clients to make informed decisions, which ultimately leads to trust. Unfortunately, non-disclosure of relevant and material information by advisors has been a common practice in many of the cases that I evaluated over the years. I fully appreciate that advisors may have told clients about the benefits, terms, conditions, risks etcetera, but in many cases I could not find sufficient proof.

Here is a classic example of an Ombud finding:

A striking feature of the respondent's record of advice and his response to this office is that there does not appear to have been any explanation given on the nature of the risk associated with the Edwafin investment.[117] *The financial product itself was not explained to complainant nor was she informed of any risks associated with this product.*[118]

117 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/KZN/1 (page 11 par 40)
118 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 28.7)

The provisions contained in section 7 of the Code of Conduct are onerous, and the trick is to cover these disclosures in the most practical way. Unfortunately, it is not that simple to spend the time to go over everything with a client who does not want to take the time to fully understand the product. Many clients get frustrated with all the time it takes to listen to the advisor and then complete all the paperwork. However, when things go wrong, it is easy for the FAIS Ombud to highlight non-compliance with the advisor's obligation to make full and frank disclosures about the product to clients. In the matter between L. Landman and J.C Mostert, the Ombud found as follows:

The respondent, in providing financial advice, failed to provide his client with information that was factually correct.[119]

He failed to provide information about the product that was adequate and appropriate.[120] *The respondent failed to provide full and frank disclosure of information complainant required to enable her to make an informed decision.*[121] *The respondent failed to take reasonable steps to ensure that the complainant understood the advice and was in a position to make an informed decision.*[122]

Therefore, advisors must find a way to record disclosures made to clients.

The interesting thing is that, although these provisions are onerous, compliance with these provisions will enable clients to make informed decisions about the product(s) they buy or invest in. Again, experienced advisors will tell you that, generally, informed clients are good clients. It will serve you well to take the time to explain the benefits, terms, conditions, exclusions, risks, penalties in case of early termination, tax implications and cost to your clients. I want to encourage you to find a way!

The following product information must be disclosed to clients prior to a contract being concluded.[123]

NAME OF PRODUCT SUPPLIER ……..

For example:
Allan Gray, Momentum, BrightRock, Coronation, Old Mutual, Liberty, Investec…

PRODUCT TYPE ……..

Name, class or type of financial product concerned[124]

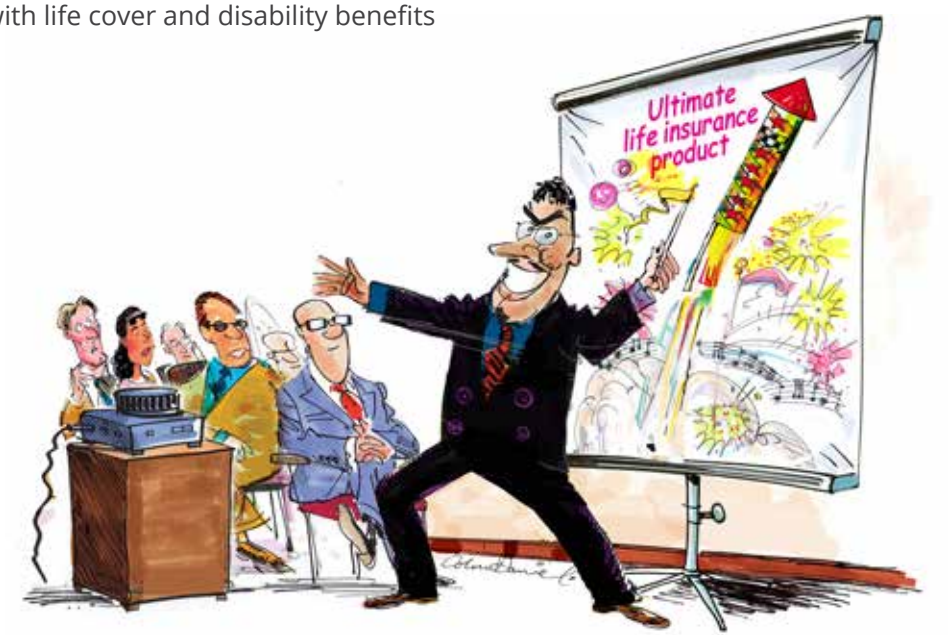
For example: Life & endowment policy, retirement annuity with life cover and disability benefits, Underwritten life / living annuity, etc.

119 - See par 69.1
120 - See par 69.2
121 - See par 69.3 | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraph 42
122 - See the matter between L. Landman and J.C Mostert: TPM FAIS 00493/13-14/KZN 1, page 19, par 69.5
123 - Section 7 of the FAIS General Code of Conduct
124 - Section 7(1)(c)

PRODUCT OBJECTIVE

Examples:

- Investing for capital growth, ideal for investors who require consistent investment returns that outperform inflation over the medium to long term, with life cover and disability benefits
- Offering life insurance benefits to individuals and their dependents who require capital at death or disability



PRODUCT BENEFITS

Examples:

- Nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;[125]
- Whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider;[126]
- Any guaranteed minimum benefits or other guarantees;[127]
- Material tax considerations; (tax deductible premiums for example)[128]

125 - Section 7(1)(c)(ii)
126 - Section 7(1)(b)
127 - Section 7(1)(c)(viii)
128 - Section 7(1)(c)(xi)

KEY FEATURES

For example:
Where the financial product is marketed or positioned as an investment or as having an investment component-

- concise details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments;[129]
- On request, information concerning the past investment performance of the product over periods and at intervals which are reasonable with regard to the type of product involved ...[130]
- To what extent the product is readily realisable or the funds concerned are accessible;[131]

TERMS, CONDITIONS AND EXCLUSIONS

- Concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided;[132]
- On request, information concerning the past investment performance of the product over periods and at intervals that are reasonable with regard to the type of product involved including a warning that past performances are not necessarily indicative of future performances;[133]
- Any restrictions on or penalties for early termination of or withdrawal from the product, or other effects, if any, of such termination or withdrawal;[134]
- Material tax considerations;[135]
- Whether cooling off rights are offered and, if so, procedures for the exercise of such rights;[136]
- Any material investment or other risks associated with the product, including any risk of loss of any capital amount(s) invested due to market fluctuations;[137]
- In the case of an insurance product in respect of which provision is made for increase of premiums, the amount of the increased premium for the first five years and thereafter on a five-year basis but not exceeding twenty years;[138]

Fully inform a client in regard to the completion or submission of any transaction requirement[139]-
(i) that all material facts must be accurately and properly disclosed, and that the accuracy and completeness of all answers, statements or other information provided by or on behalf of the client, are the client's own responsibility;
(ii) that if the provider completes or submits any transaction requirement

129 - Section 7(1)(c)(iii)(aa)
130 - Section 7(1)(c)(iii)(cc)
131 - Section 7(1)(c)(ix)
132 - Section 7(1)(c)(vii)
133 - Section 7(1)(c)(iii)(cc)
134 - Section 7(1)(c)(x)
135 - Section 7(1)(c)(xi), referring to taxation of capital growth and taxation of benefits paid out at maturity or claim, for example.
136 - Section 7(1)(c)(xii)
137 - Section 7(1)(c)(xiii)
138 - Section 7(1)(c)(xiv)
139 - Section 7(1)(d)

on behalf of the client, the client should be satisfied as to the accuracy and completeness of the details;
(iii) of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information; and
(iv) that the client must on request be supplied with a copy or written or printed record of any transaction requirement within a reasonable time.

PRODUCT COSTS

- The nature and extent of monetary obligations assumed by the client, directly or indirectly, in favour of the product supplier, including the manner of payment or discharge thereof, the frequency thereof, the consequences of non-compliance and, subject to subparagraph (xiv), any anticipated or contractual escalations, increases or additions;[140]
- Separate disclosure (and not mere disclosure of an all-inclusive fee or charge) of any charges and fees to be levied against the product, including[141]

(A) the amount and frequency thereof

(B) the identity of the recipient

(C) the services or other purpose for which each fee or charge is levied

(D) where any charges or fees are to be levied in respect of investment performance, details of the frequency, performance measurement period (including any part of the period prior to the client's particular investment) and performance benchmarks or other criteria applicable to such charges or fees

(E) where the specific structure of the product entails other underlying financial products, disclosure must be made in such a manner as to enable the client to determine the net investment amount ultimately invested for the benefit of the client

- Any rebate arrangements and thereafter on a regular basis (but not less frequently than annually): Provided that where the rebate arrangement is initially disclosed in percentage terms, an example using actual monetary amounts must be given and disclosure in specific monetary terms must be made at the earliest reasonable opportunity thereafter: Provided further that for the purposes of this subparagraph, "rebate means a discount on the administration, management or any other fee that is passed through to the client, whether by reduced fees, the purchase of additional investments or direct payment, and that the term "rebate" must be used in the disclosure concerned, to describe any arrangement complying with this definition, and the disclosure must include an explanation of the arrangement in line with this definition;[142]
- Any platform fee arrangements, which may be disclosed by informing the client that a platform fee of up to a stated percentage may be paid by the product supplier to the administrative financial services provider concerned,

140 - Section 7(1)(c)(iv)
141 - Section 7(1)(c)(iii)(bb)
142 - Section 7(1)(c)(iii)(dd)

rather than disclosing the actual monetary amount: Provided that for the purposes of this sub-paragraph, "platform fee" means a payment by a product supplier to an administrative financial services provider for the administration and/ or distribution and/or marketing cost savings represented by the distribution opportunity presented by the administrative platform, and ma be structured as a stipulated monetary amount or a volume based percentage of assets held on the platform, and that the term "platform fee" must be used in the disclosure concerned, to describe any arrangement complying with this definition, and the disclosure must include an explanation of the arrangement in line with this definition;[143]

ADVISOR / INTERMEDIARY FEES / COMMISSIONS

- The nature and extent of monetary obligations assumed by the client, directly or indirectly, in favour of the provider, including the manner of payment or discharge thereof, the frequency thereof, and the consequences of non-compliance
- The nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerages ("valuable consideration"), which will or may become payable to the provider, directly or indirectly, by any product supplier or any person other than the client, or for which the provider may become eligible, as a result of rendering of the financial service, as well as the identity of the product supplier or other person providing or offering the valuable consideration:

Provided that where the maximum amount or rate of such valuable consideration is prescribed by any law, the provider may (subject to clause 3(1)(a)(vii)) elect to disclose either the actual amount applicable or such prescribed maximum amount or rate.[144]

The most frequent cases of non-compliance with product disclosure requirements are non-disclosures pertaining to:

- Concise details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments;[145]
- Concise details of any special terms or conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions, or circumstances in whichbenefits will not be provided;[146]
- Any material investment or other risks associated with the product, including any risk of loss of any capital amount(s) invested due to market fluctuations;[147]

140 - Section 7(1)(c)(iv)
141 - Section 7(1)(c)(iii)(bb)
142 - Section 7(1)(c)(iii)(dd)
144 - Section 7(1)(a)(vi)
145 - Section 7(1)(c)(iii)(aa)
146 - Section 7(1)(c)(vii)
147 - Section 7(1)(c)(xiii)

- ☞ Any restrictions on or penalties for early termination of or withdrawal from the product, or other effects, if any, of such termination or withdrawal;[148]
- ☞ Full and frank disclosures of costs, fees, and commissions[149]

Examples:

"...there does not appear to have been any explanation given on the nature of the risk associated with the Edwafin investment.[150] *The financial product itself was not explained to complainant nor was she informed of any risks associated with this product."*[151] *As a result of their failure to disclose the true nature of the risk involved, complainant accepted respondents' advice and made the investments.*[152] *On the basis of the reasoning set out in this recommendation, the risks in the investments were not disclosed, in violation of Section 7 (1).*[153]

Section 3(1) (vii) requires disclosure of any fees, remuneration or monetary obligations, yet no mention at all is made in the agreement of what the costs attendant to the investment would be.[154] *Section 7 (1) (a) requires that an FSP provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision. There is no evidence that the complainant was informed of the risks involved in participating in the respondent's venture.* [155]

OBSERVATIONS:

One of the things I found to be very strange is that disclosure requirements for financial services providers in terms of section 7 of the General Code of Conduct are more onerous than the requirements that pertain to product suppliers in terms of the Policy Holder Protection Rules, for example. I always thought that, when product suppliers take their product to market to be promoted by intermediaries, they will consider what intermediaries must disclose to their clients and then ensure that product suppliers' disclosures are consistent with the advisor's requirements when they engage with clients.

148 - Section 7(1)(c)(x)
149 - Section 7(1)(a)(vi)
150 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/ KZN/1 (page 11 par 40)
151 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 8 par 28.7)
152 - In the matter between RHISTA SINGH Complainant and MAK INVESTMENTS AND ASSURANCE t/a NU ERA INSURANCE BROKERS CC First Respondent ANESH MAHARAJ: Case Number: FAIS 07292/11-12/ KZN 1, page 8, par 13
153 - REMO EHLERS V ABE GOUWS MAKELAARS CC (first respondent) and ABRAHAM J GOUWS (second respondent). RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT (37 of 2002), par 43
154 - See the matter between TEDDY MADITSE Complainant and MAGAJANA TRADING AND PROJECTS CC and LINDIWE MTASA MAGAJANA: CASE NO: FAIS 04946/15-16/ GP 1, par 17.3
155 - See the matter between TEDDY MADITSE Complainant and MAGAJANA TRADING AND PROJECTS CC and LINDIWE MTASA MAGAJANA: CASE NO: FAIS 04946/15-16/ GP 1, par 17.2; Also see CASE NUMBER: FAIS 03315/14-15/ EC 2 in the case between: MAFA MKHOHLWA Complainant and WORKERS LIFE ASSURANCE COMPANY LIMITED Respondent, par 40

It will be extremely helpful if all product suppliers disclose exactly the same information in their minimum disclosure documents and quotations, as is required by advisors in terms of section 7 of the Code. When this happens, it will level the playing field between providers and product suppliers when they engage with clients and it will also lead to an enhanced client experience.

Unfortunately, there are still discrepancies between product disclosure requirements for providers and that of the very companies (product suppliers) that design and promote those products. In my opinion, it does not make sense that financial advisors need to disclose more information about the product than the product supplier that designed the product, and to add insult to injury, be obliged to conduct a full due diligence on the product as well.

I sincerely hope that the principles contained in Treating Customers Fairly and the proposed Conduct of Financial Institutions Act will level the playing field from a disclosure point of view, once and for all.

CAUTIONARY:

Regardless of the onerous nature of the disclosure requirements in terms of section 7 of the Code, and regardless of whether we agree with all the provisions and/or the application by the FAIS Ombud, advisors must understand that disclosure of relevant and material information will remain one of the key requirements that the Ombud will investigate through a magnifying glass every time a client complains. When in doubt, disclose. When there is no time, make time, and when there are no documents, confirm disclosures by email as soon as possible.

COMPLIANCE MADE EASY

INITIAL BUSINESS DISCLOSURES

GATHERING OF INFORMATION USING STANDARD OR CUSTOMISED FORMS

ASTUTE INTEGRATION

POLICY & INVESTMENT SCHEDULE

ASSETS & LIABILITY REGISTER

BUDGET

CLIENT SERVICE REQUEST

PREPARE PROPOSAL WITH EASY TO USE TOOLS

QUOTES & PRODUCT SELECTION

RECORD OF ADVICE WITH PRODUCT DISCLOSURES

AGREED SERVICE MODEL

DAILY VALUES & TRANSACTIONS FOR INVESTMENTS

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CHAPTER 13

RECORD-KEEPING

South Africa's first Ombud for Financial Services Providers, the late Mr. Charles Pillai, addressed a Compliance Workshop hosted by the Institute for International Research on 30 March 2006, where he stated:

"Cases are won or lost based on facts. If we have the right evidence, chances are slim for us to find against the financial services provider. Poor record-keeping is at the centre of our determinations."

In 2014, eight years after Pillai's address and almost ten years since the implementation of FAIS, poor quality record-keeping was still at the centre of the Ombud's determinations. Assistant Ombud at the time, David Davidson, gave financial services providers a 3 out of 10 score for record-keeping at the 2014 Insurance Conference at Sun City.

APPLICABLE LEGISLATION: .....

The first record-keeping requirement in the Code of Conduct is a very basic one.

TRANSACTIONS:.....

Transactions of a client must be accurately accounted for.[156]

When one buys a house, rents a house or purchases a car, the sale is confirmed by a comprehensive agreement. When there is a dispute, that agreement serves as an objective reminder of what was agreed. I would argue that all professionals, both from an accounting and risk management point of view, will keep accurate records of client transactions. As stated earlier, clients forget, and when it happens, accurate records can serve as a wonderful reminder of what was agreed to, which will go a long way in preventing clients from lodging complaints.

SYSTEMS AND PROCEDURES:.....

A provider must have appropriate procedures and systems in place[157] to-
(i) record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act
(ii) store and retrieve such records and any other material documentation relating to the client or financial service rendered to the client
(iii) keep such client records and documentation safe from destruction.
(b) All such records must be kept for a period of five years after termination, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned.
(c) Providers are not required to keep the records themselves but must ensure that they are available for inspection within seven days of the registrar's request.
(d) Records may be kept in an appropriate electronic or recorded format, which are accessible and readily reducible to written or printed form.

156 - See section 3(1)(d) of the General Code of Conduct
157 - See section 3(2)(a)

PROCEDURE:

Procedure is defined as a fixed, step-by-step sequence of activities or course of action (with definite start and end points) that must be followed in the same order to correctly perform a task. Repetitive procedures are called routines.[158]

Since joining the financial services industry as a legal advisor in July 1989, the client engagement process has never changed. When assisting advisors in their proposals to clients I observed a common process and I have tested this process with more than 10 000 advisors and intermediaries over the years, across all financial product lines. When taking thousands of advisors through their preparation towards writing the Regulatory examinations in 2011 and 2012, I started testing my observations, and to this date, no advisor has disagreed. The client engagement process is discussed later in the publication, as well as the key moments in the client interaction process. In addition, there are many other processes that, if implemented, will enhance business efficiencies and reduce risk at the same time.

SYSTEMS

According to the Business Dictionary, systems are defined as a set of detailed methods, procedures and routines created to carry out a specific activity, perform a duty, or solve a problem. It is an organised, purposeful structure that consists of interrelated and interdependent elements (components, entities, factors, members, parts etc.). These elements continually influence one another (directly or indirectly) to maintain their activity and the existence of the system, in order to achieve the goal of the system. All systems have:

(A) inputs

(B) outputs and feedback mechanisms,

(C) maintain an internal steady-state (called homeostasis) despite a changing external environment,

(D) display properties that are different than the whole (called emergent properties) but are not possessed by any of the individual elements, and

(E) have boundaries that are usually defined by the system observer.[159]

158 - http://www.businessdictionary.com/definition/procedure.html
159 - http://www.businessdictionary.com/definition/system.html

REGULATORY REQUIREMENTS:

A provider must at all times have and effectively employ the resources, procedures and appropriate technological systems that can reasonably be expected to eliminate as far as reasonably possible, the risk that clients, product suppliers and other providers or representatives will suffer financial loss through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.[160]

PROFESSIONAL BUSINESS MANAGEMENT

I would argue that these regulatory requirements are simply there to guide providers to manage their businesses professionally and effectively. Any modern business that wants to be competitive will employ the right resources, efficient procedures and appropriate technological systems.

RECORD OF ADVICE:

The record of advice is arguably the most misunderstood obligation referred to in the General Code of Conduct. Many providers interpret that this document must contain all the disclosures pertaining to the client needs and product, where it is clear from the provisions that what are needed are:

(a) a brief summary of the information and material on which the advice was based;

This refers to the needs of the client that were agreed to between advisor and client.

(b) the financial product (or products, because the singular also includes plural) which were considered;

In the event of a registered financial advisor this could refer to the different quotes from various product suppliers, for example.

(c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives

The FAIS Ombud often refers to providers not recording the reason why the recommended product was suitable in the circumstances.

Provided that such record of advice is only required to be maintained where, to the knowledge of the provider, a transaction or contract in respect of a financial product is concluded by or on behalf of the client as a result of the advice furnished to the client in accordance with section 8.

CAUTIONARY:

Please remember that, even though you may not have concluded a transaction, you may still be held liable for the advice. Therefore, it is recommended that communication is sent to a client who does not accept your advice, in which you state that cannot be held liable for any transaction that is implemented through a third party.

160 - See section 11 of the General Code of Conduct

Failing to maintain records of advice has been the downfall of many financial advisors and intermediaries.

In many determinations against advisors, the Ombud has pointed out the following: *Respondents failed to keep any record of advice as provided in Section 9 the Code*.[161] *Likewise and despite the requirements of section 9 of the Code, no record of advice was furnished to the complainant.*[162]

No record of advice was maintained to explain why the selected product was likely to satisfy the client's identified needs and *objectives.*[163]

In the majority of FAIS Ombud cases the outcome ultimately depends on whether the facts and evidence support whether the advisor provided appropriate (suitable) advice.

161 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 10 par 33.6) | GODFREY FREDERIK BOTHA 1ST Complainant, ELIZABETH HELEN BOTHA 2nd Complainant and R & S WALSH INVESTMENT CONSULTANTS CC, CASE NUMBER: FAIS 06019/08- 09/EC1 / 06507/08-09/EC1, paragraph 47

162 - See the matter between TEDDY MADITSEFAIS and MAGAJANA TRADING AND PROJECTS CC LINDIWE MTASA MAGAJANA, FAIS 04946/15-16/ GP 1, par 17.5

163 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 9 par 11); Also see CASE NUMBER: FAIS 03315/14-15/

EVIDENCE:

To illustrate the significance of being able to provide the correct evidence when a client complains, I deem it best to quote the FAIS Ombud:

At the outset, I should perhaps mention that, for purposes of this determination, I have only considered issues as set out in the papers that have been placed before me by the parties. I am satisfied that the papers and documentation furnished to this office, particularly by the respondents, are adequate in painting a complete picture of what happened during the rendering of advice by the second respondent. In that regard, I have relied on information furnished to this office by the respondent in answer to the complaint.[164]

The test here is whether or not the respondent provided the complainant with adequate and appropriate advice, wherein the considerable risks in the syndication products were explained to her. There is no independent record of advice which shows that the respondent made a full disclosure to the complainant, so that she could make an informed decision[165]

NO EVIDENCE:

Noted that there was no evidence before this Office that respondents complied with the provisions of the FAIS Act at the time of rendering of the financial service.[166] *This Office is left with no choice but to determine this matter on the complainant's version. The respondents elected not to dispute the complainant's version and on the probabilities this Office accepts the complainant's version as true.*[167]

ELECTING NOT TO RESPOND TO THE OMBUD:

As for the respondents, notwithstanding the efforts of this Office, they chose not to file a response. They were certainly aware of the complaint as well as the allegations that they failed to act in the best interests of their client and further failed to comply with the provisions of the FAIS Act and Code of Conduct.[168]

PROOF OF COMPLIANCE:

Respondents, as licensed FSPs, were aware of their obligations in terms of the FAIS Act and Code. They are obliged to comply and retain proof of compliance. Respondents, despite repeated requests over a lengthy period of time, refused to provide any proof of compliance.

EC 2 in the case between: MAFA MKHOHLWA Complainant and WORKERS LIFE ASSURANCE COMPANY LIMITED Respondent, par 35 and 36

164 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/ KZN/1 (page 3 par 9)

165 - See the matter between BRENDA BARRABLE Complainant and NEVILLE GERHARD, FAIS 08280/11-12/ GP 1, par 25

166 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 7 par 23.6)

167 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 9 par 31)

168 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 9 par 30)

The only reasonable conclusion to be drawn is that they neglected or failed to comply in providing the financial services to the complainant.[169]

Notwithstanding a request from this Office, the respondent failed to provide proof that commission earned was disclosed to the complainants. She also failed to provide proof of that and an analysis had been carried out for the purposes of furnishing advice. Given the lack of information in the respondent's records, it appears that Charlene merely paid lip service to the provisions of the Act and the Code to create an illusion of compliance.[170]

In one of the letters to an advisor dated 29 July 2018, which was presented to me, the Ombud's Office reconfirmed the following:

Due to your failure to adhere to our request in providing us with a record of advice, we are unable to find that complainant was advised of the fact that he was underinsured or to be aware of underinsurance, what that meant and how an insurer deals with underinsurance at claim stage.

In many cases, advisors may feel that they received a raw deal from the Ombud when the determination was given in favour of the client, but most of these advisors will have to admit that the result was very much self-inflicted, simply because they did not give the Ombud sufficient evidence to support their case. In the letter to the advisor dated 29 July 2018, the Ombud's Office stated that-

We have taken note of your argument that a financial services provider's failure to keep a record of advice does not mean that they are liable for the loss. We submit that each matter is determined based on its own sets of facts and merits. This therefore means that where necessary, the provider will be held liable for the loss should they fail to keep a record of advice. It is crucial for you to understand that a record of advice serves as documentary evidence of the discussion which took place between the financial adviser and the client.

In the instance where a record of advice is silent regarding an issue which should have been discussed with the client or if there is no record of advice which was kept, the financial advisor is not only in contravention of section 9 of the Code, but there is also no evidence to corroborate the financial advisor's version of event. The law is very clear on the principle "he who alleges must prove". Since you are alleging that complainant was fully advised, you are required to prove that by submitting documentary evidence (a record of advice is accepted in the financial services industry) to support your version. In the absence of this record, which we must stipulate is a statutory record, you would be providing this Office with a post facto account of the financial service, which is not acceptable.

169 - (Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 10 par 32)
170 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 10 par 13)

Our view is that the onus is on the financial advisor to disprove the allegations that have been set forth by the client. Please take note that in the event that you are unable to provide evidence that you exercised due care, skill and diligence as envisaged in section 2 of the Code by ensuring that your client is adequately covered and will not be under insured should a claim arise, that you are required to treat your client fairly by finding an amicable solution to the complaint. Since there is no proof that your client was adequately advised, we cannot find that he was placed in a position to make an informed decision. Our considered view is that the current loss is a direct consequence of your negligence.

As part of his response to this office, the respondent submitted record of advice in terms of section 9 of the General Code which requires all FSPs to maintain and keep proper records of advice rendered to clients. In this connection, the respondent submitted these records in compliance with the Code and as requested by this Office. It is perhaps appropriate to deal with the important parts of the record of advice as submitted by the respondent.[171]

A striking feature of the respondent's record of advice and his response to this office is that there does not appear to have been any explanation given on the nature of the risk associated with the Edwafin investment.[172]

RECORD OF ADVICE

The Record of advice, as generally referred to by the FAIS Ombud, does not mean one single document. According to the Business Dictionary a record means: Document that … provides objective evidence of activities performed, … or statements made. Records are created/ received by an organization in routine transaction of its business or in pursuance of its legal obligations. A record may consist of two or more documents. All documented information, regardless of its characteristics, media, physical form, and the manner it is recorded or stored. Records include accounts, agreements, drawings, letters, memos, micrographics, etc.[173]

The Record of advice as recorded in Section 9 of the FAIS Code of Conduct is incorrectly used as a generic term that also refers to all the records that collectively represent the evidence of advice. This is further explained in chapter 16 of the book. In my opinion, the Record of advice referred to in section 9 of the Code should have been referred to simply as the "Executive summary of advice".

A SPECIFIC FOCUS ON THE PROVISIONS OF SECTION 9 OF THE CODE

On analyses of the ROA, it is evident that although the complainants expressed a specific need to be addressed, the ROA does not reflect the products allegedly considered

171 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/ KZN/1 (page 10 par 33)
172 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/ KZN/1 (page 11 par 40)
173 - Read more: http://www.businessdictionary.com/definition/record.html

by the respondent to address the need. There is also no explanation as to why the recommended products were likely to satisfy complainants' needs and objectives. In fact, there is no reference whatsoever to the Investment Plans that were ultimately chosen, nor is there a time frame.[174]

According to section 9(2) of the Code, a provider, other than a direct marketer, must provide a client with a copy of the record contemplated in 9(1) in writing.

When clients conclude other financial transactions, such as an agreement between a bank, a car dealer, or an estate agent, the client is always presented with a copy of the agreement as documentary proof of the transaction. It is simply the way professionals do business. Therefore, providing a copy of the Record of advice to a client is a basic act of professionalism.

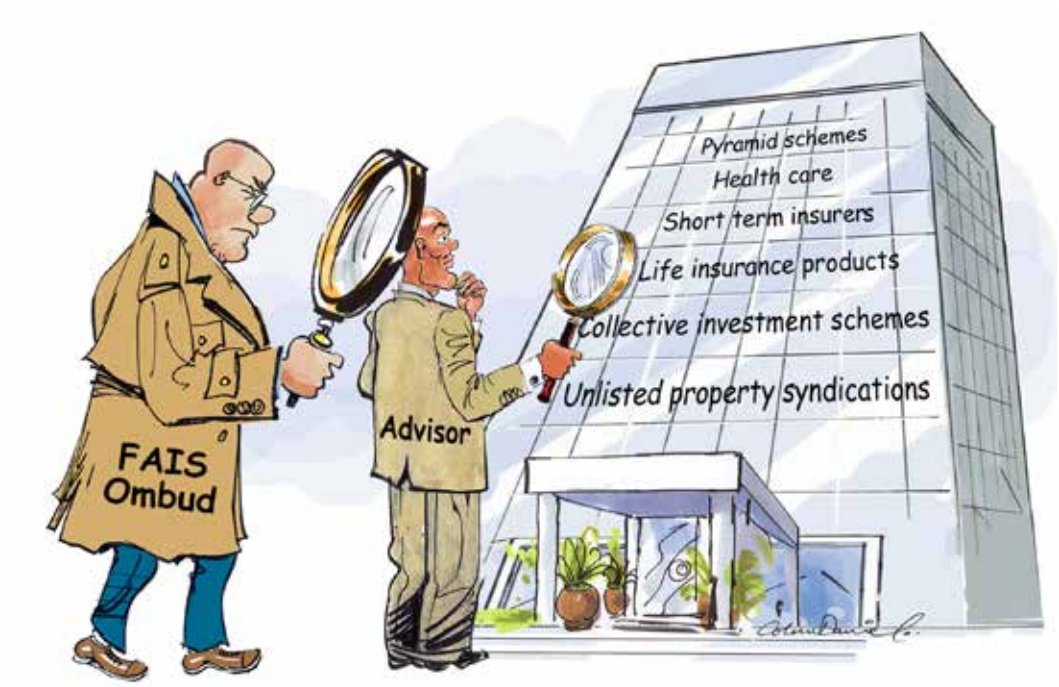
174 - Gert Corneulis Johannes Van Vuuren (and another) v Kampstone Financial Services CC FAIS 02156-09/10 GP(1) (page 9 par 11)

The best time money can buy.

ALLAN GRAY
LONG-TERM INVESTING

CHAPTER 14

DUE DILIGENCE



The FAIS Ombud pays serious attention to whether advisors performed a proper due diligence on product suppliers and financial products they recommend to clients. Financial services providers will do well to consider the Ombud's current position on the subject. Providers, like rugby players, who may not like the referee's interpretation and decisions on the field, will not do themselves any favours by ignoring the ref's interpretation and rulings. Examples of the Ombud's references to due diligence include:

I find that respondents failed to comply with their general duties as FSPs as contemplated in Section 2 of the Code; which provides as follows:

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.[175]

Respondent failed to act with due skill, care and diligence in the interest of his client and the integrity of the financial services industry.[176]

175 - Elizabeth Maria Catharina Van Schalkwyk v Investiplan (PTY) Ltd (and another) FAIS 04143/12-13/GP 1 (page 11 par 34)
176 - Elise Barnes v D Risk Insurance Consultants CC (and another) 6793/10-11/GP 1 (page 33 par 41)

The FAIS Act and the Code place a duty on the financial services provider to act with due skill, care and diligence. This duty ensures the FSPs act with responsibility and that the consumers are adequately protected from financial products which may be to their detriment. It is only those financial products which stand to benefit the consumer which should be sold to members of the public. In failing to conduct proper due diligence of the company and its product, the second respondent failed in his duty to act with care and skill required of an FSP.[177]

Inextricably linked with the quality of advice furnished by the respondent, is the question as to whether the respondent conducted the necessary due diligence on the product he invested the complainant's father's money.[178]

ACCORDING TO THE OMBUD: ……..

Due diligence simply means that the financial services provider examines the company and the product it sells beyond the company produced marketing material. Thus among other basic things required when conducting due diligence, the financial services provider checks on the legitimacy of the company to see whether it is properly registered and licensed by the authorities, establishes its history, examines the structure of that company to see whether it adequately affords protection to investors, *looks into its directors, and examines the viability of the product sold and sees if it is compatible with the needs of the investor.*[179]

I respectfully submit that the meaning of due diligence is far more complex, because as the Ombud highlights below *"There are several other factors that must be taken into account…* I further submit that they are not all set out in the FAIS Act.

It goes without saying that there is a duty on the financial services provider to carefully examine the extravagant claims made on the probable success of the product. In that regard, the financial services provider ought to examine extravagant claims which promise huge returns and determine if these are attainable, judging from the underlying economic activity. There are several other factors that must be taken into account, and it is not necessary to list them all here as they are set out in the FAIS Act.[180]

As far as returns go, advisors should know that the Ombud will always frown upon extravagant returns promised to investors. As the saying goes: If something sounds too good to be true, it probably is.

177 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/KZN/1 (page 17 par 58)
178 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/KZN/1 (page 16 par 53)
179 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 2202/09-10/KZN/1 (page 12 par 42)
180 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 2202/09-10/KZN/1 (page 12 par 42)

For example:

... the Edwafin investment promised a return of 20% interest which was out of kilter with the single digit interest promised by established financial institutions. No information was furnished as to how this extravagant interest would be raised. Instead the second respondent simply accepted this claim...[181]

Although I fully agree with the need for compliance with the provisions contained in section 2 of the Code, I believe that it can be argued that the Ombud has taken the advisor's responsibility of due diligence too far. The FAIS Ombud has consistently criticised FSPs in their determinations for not conducting a proper due diligence, but fails to provide or elaborate on what would be considered an acceptable and/or sufficient due diligence in the circumstances. There always seems to be another investigation that had to be covered.

IT BEGS THE FOLLOWING QUESTIONS:....

- ☞ What is the industry standard of what a due diligence would entail?
- ☞ Are there any published criteria/ guidelines to be followed?
- ☞ Where does the advisor's responsibility stop?

INDUSTRY STANDARD?.....

Firstly, it is important to note that "due diligence" is not defined in the Financial Advisory and Intermediary Services Act (The FAIS Act) or its subordinate legislation. In fact, it is a topic that was only really highlighted after the demise of companies such as Blue Zone and Sharemax. For example, I include the following article by Bruce Cameron on financial planning dated 26 September 2015 titled,

"Your financial adviser must check that products are safe"

Your financial adviser must, by law, take reasonable steps to ensure you are not sold a lemon or invest in a scam, and he or she cannot pass this requirement on to the company that provides the financial product. This was emphasised by Charene Nortier, the Financial Services Board's manager of financial advisory and intermediary services (FAIS) supervision, at the recent launch of the South African Independent Financial Advisers' Association (Saifaa). TCF requires financial advisers to perform a due diligence on both the product provider and the product before recommending the product to you (see "TCF aimed at ensuring you can invest with confidence", below). Your adviser cannot simply read the product information issued by the provider; instead, your adviser must apply his or her mind when assessing whether or not the product and the company are sound.

The due diligence process should reveal anything that may prevent the product from delivering on the undertakings made by the provider. Nortier says if advisers do not understand a product, including its risks, they need to ask themselves whether they should recommend that you use the product.

181 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 02202/09-10/ KZN/1 (page 13 par 43)

Many complaints to the Ombud for Financial Services Providers are the result of advisers accepting the information in providers' marketing brochures at face value and not thoroughly checking the providers and their products.

Derek Smorenburg, the chairman of Saifaa, says that if financial advisers had performed reasonable due diligence tests, many people would have been prevented from investing in inappropriate products, such as property syndication schemes that subsequently imploded, or so-called investments that were actually scams.

Many advisers' failure to perform due diligence tests resulted in investors, including financially vulnerable pensioners, losing billions of rands, he says. Many advisers do not accept that they are responsible for undertaking a due diligence on behalf of their clients, Smorenburg says.

Nortier says the General Code of Conduct under the FAIS Act requires your adviser at all times "to render financial services honestly, fairly, with due skill and diligence, and in the interests of clients".

A due diligence can be defined as an investigation into a business or person before a contract is signed, or the application of a certain degree of care.

Advisers are required to provide you with factually correct information that will enable you to make an informed decision, Nortier says. Therefore, your adviser must have the correct information before he or she can help you to make an informed decision. That an institution or an individual has been in an industry for a long time does not automatically mean he or she is ethical, Nortier says. A prime example is United States hedge fund manager Bernie Madoff, who swindled thousands of people out of their savings.[182]

In my experience the definition of a reasonable advisor, what reasonable steps are and what a reasonable due diligence test is, are all much more complicated than it seems. My research further shows that the industry's understanding of due diligence prior to the demise of unlisted property investment schemes in 2009 was extremely limited. Granted, there was a broad understanding of due diligence at time, but there were no specific guidelines. In broad terms the industry's understanding of due diligence was very much in line with any of the following descriptions:

Due diligence is an investigation of a business or person prior to signing a contract, or an act with a certain standard of care[183] [184]. Again, how does one quantify a certain standard of care?

182 - http://www.iol.co.za/personal-finance/financial-planning/your-financial-adviser-must-check-that-products-are-safe-1921296
183 - My emphasis
184 - This certain standard of care is not specifically defined, but it is assumed that it has to be a reasonable standard of care.

DEFINITION OF DUE DILIGENCE:……..

1law: the care that a *reasonable person* exercises[185] to avoid harm to other persons or their property failed to exercise due diligence in trying to prevent the accident.[186]

Due diligence later developed a legal meaning, namely, "the care that a *reasonable person*[187] takes to avoid harm to other persons or their property"; in this sense, it is synonymous with another legal term, *ordinary care*[188].[189]

Due diligence refers to the care a *reasonable person*[190] should take before entering into an *agreement or a financial transaction*[191] with another party.[192]

It is important to note that, performing a due diligence on a company or a financial product is not a specific requirement in terms of the (FAIS). At best, it is implied in the provisions in section 2 of the FAIS General Code of Conduct, herein after referred to as the General Code, which states that:

A provider must at all times render financial services honestly, fairly, with *due skill, care and diligence*,[193] and in the interests of clients and the integrity of the financial services industry.

Again, the term "due diligence" is neither defined in the FAIS Act or in any of its subordinate legislation, nor does it form part of any study material of any Academic Institution providing courses in financial planning or Education bodies providing advisor and intermediary training in respect of the Regulatory Examinations introduced by the Financial Services Board in 2009/2010. Everyone still has his/her own subjective framework of what a due diligence should entail.

Truth be told, prior to the demise of unlisted property investments in 2009, if you had asked 10 top advisers what they understand a due diligence means, you would get 10 different answers. Now, with the benefit of hindsight, advisors such as myself are far more alert when it comes down to perform a due diligence simply because of all the publicity on the subject since the determination in the matter between Black v John Alexander Moore and Johnsure Investments was published.

185 - My emphasis
186 - https://www.merriam-webster.com/dictionary/due%20diligence
187 - My emphasis
188 - My emphasis
189 - https://www.merriam-webster.com/dictionary/due%20diligence
190 - My emphasis
191 - My emphasis
192 - http://www.investopedia.com/terms/d/duediligence.asp
193 - My emphasis

GUIDELINES

Prior to 2013 there were no guidelines regarding due diligence for financial planners in South Africa. This was also confirmed by various financial planners,[194] Senior representatives of the Financial Planning Institute of Southern Africa (FPI),[195] the Financial Intermediaries Association of South Africa (FIA),[196] Moonstone Compliance,[197] Masthead Compliance[198] and Compliserve,[199] a registered Compliance Practice, Senior lecturers at the University of the Free State[200] and The University of Johannesburg,[201] Akademia, co-author of The Financial Planning Handbook[202] and former employees of the FAIS Ombud.[203]

According to the FSB presentation on Due diligence at the time, the Ombud indicated that it is time for the Courts to determine what lengths FSPs must go to, to satisfy the due diligence requirements outlined in the FAIS Act.[204] To this day there is no industry standard. There were no guidelines published before 2013, when the FSB presented their industry guidelines. As you will see, these guidelines are generic, not specific. Even the Ombud conceded that "Even institutions with massive resources such as FSB take months to thoroughly investigate product suppliers".[205]

WHERE DOES THE ADVISOR'S LIABILITY STOP?

I am afraid that during my analysis of performing a due diligence, it was impossible for me to determine where the advisor's responsibility and accountability stops under FAIS, and where the product supplier's responsibility starts. The Ombud's determinations are based on their own interpretation of how deep a due diligence should go, which is problematic for advisors. From the determinations pertaining to unlisted property syndications it appears that it is expected of an advisor to go beyond the expertise of attorneys, auditors and property valuators whereas in law the test is that of the reasonable advisor.

The reasonable advisor is not a specialist, nor a forensic auditor, but from the determinations it appears that advisors are being held liable at a level that goes beyond that of a reasonable advisor when products fail.

Sadly, until the Courts determine to what lengths FSPs must go to satisfy the due diligence requirements outlined in the FAIS Act, financial advisors are totally exposed if products fail, especially in the case of investment products. It appears that, as things currently stand, advisors

194 - Including Gerrit Viljoen Financial Planner of the year 2013 and Wouter Fourie, Financial Planner of the year 2015/2016
195 - David Kopp and Lelane Bezuidenhout
196 - Joe Kotze, FIA Legal & Compliance
197 - Paul Kruger
198 - Ian Middleton
199 - Richard Rattue
200 - Shirly Heyland (Current Head of the Centre for Financial Planning) and Wessel Oosthuizen (Former Head)
201 - Carl Anchitz
202 - Lee Rossini
203 - The individual(s) asked to remain anonymous
204 - See FSB slides dated 2013
205 - See FSB slides on Due diligence (2013)

face a potential open-ended liability if investment products, which they have recommended to clients, fail.

The risks to advisors will increase substantially if they recommend financial products that have not been approved by the Regulator. Hopefully our Courts will provide more clarity soon.

One often comes across the description of the duty of an FSP to perform a risk analysis as that he or she must perform a "due diligence". In one of the matters that served before the Office of the FAIS Ombud, the Ombud stated-

> ***However, there is, no indication that the First Respondent conducted proper due diligence to satisfy himself of the suitability and the viability of Blue Zone's Spitskop Village Investment scheme***.[206]

In my view this description is inappropriate. "Due diligence" has acquired a special meaning in the world of mergers and business takeovers where an entity interested in taking over another entity is entitled to antagonistic scrutiny. Due diligences of this nature require either the consent of the party investigated or some official warrant to obtain information and to breach privacy.

Generally, the persons who execute such an exercise have received special training to equip them to do so.

An FSP in private practice does not have the power or the training to conduct such a due diligence. He or she is wholly dependent on information in the public domain and, in my view, cannot be required to act as an amateur detective to establish the "real truth" behind the public statements of what appear to be responsible professionals and promotors of investment schemes.

Of significant importance is that the term "due diligence" is neither defined in the FAIS Act or in any of its subordinate legislation, nor does it form part of any study material of any academic institution providing courses in financial planning or education bodies providing advisor and intermediary training in respect of the Regulatory Examination introduced by the Financial Services Board in 2009/2010.

Neither Key individuals nor Representatives have ever been trained on the fundamentals of "due diligence" content or process in complying with the necessary "Fit & proper" provisions as required in terms of the FAIS Act. I investigated this aspect further and determined the following.

- I have personally scrutinized most of the available publications relating to financial planning. At the time of the Blue Zone and Sharemax investments I could not find any reference to due diligence guidelines.
- INSETA is an organization that provides the financial services industry with study material in preparation for the Regulatory Examinations.

206 - See Gerald Edward Black and John Alexander Moore and Johnsure Investments CC, FAIS 01110/10-11/WC1, page 37-38, par 108

I have personally perused the study guides provided by INSETA and can confirm that there is no mention in this material of any due diligence guidelines for financial advisors.

- The University of the Free State was instrumental in publishing the financial planning handbook for students who enrolled for the Post-Graduate Diploma in Financial Planning, a qualification required for any financial provider who aspires to obtain the designation of Certified Financial Planner. The Financial Planning handbook did not and still does not contain any guidelines on due diligence on companies and/or financial products.
- Furthermore, I also confirmed with the University of Johannesburg that due diligence framework does not form part of their curriculum.
- The first attempt to provide a framework relating to due diligence was introduced by the Financial Services Board in 2013.
- In 2014, the Financial Planning Institute of Southern Africa, for the first time, published a due diligence framework.

A reasonable FSP would have to rely on his or her own investigations and analyses to determine the institutional risk of a potential investment. Such an FSP would not be legally trained or be an auditor, an economist or particularly knowledgeable about corporate structures. A reasonable financial services provider would rely on the statements and advice of professionals like lawyers, auditors, economists, valuators and regulators about matters that lay within their fields of expertise.

There is no requirement that an FSP should go beyond the boundaries of reasonableness to determine, once and for all, what the truth behind an investment opportunity may be. Apart from the fact that the term "due diligence" is not defined in any act/regulation, an FSP in private practice does not have the authority to conduct due diligences as aforesaid because, inter alia, an FSP is wholly dependent on the information in the public domain. A reasonable FSP cannot be required to act as an amateur detective to establish the real truth behind public statements by responsible professionals and representatives of investment schemes.

Due diligence simply means that the financial services provider examines the company and the product it sells beyond the company produced marketing material.[207]

To what extent must the FSP examine the company and product beyond its marketing material? That is the question. What is clear from this determination is that the Ombud will go beyond a due diligence of the product supplier and investigate whether the provider has scrutinised the financial product as well.

207 - Ethel Ellouise Blessie (and others) v Shevgem Investments CC t/a Randsure Brokers (and other) 2202/09-10/KZN/1 (page 12 par 42)

Legal Support Worker. Aerospace Engineer. Author. Dental Hygienist. Biological Scientist. Surveying Technician. Geographer. Law Clerk. Office Clerk. Designer. Decorator. Punching Machine Setter. Dentist. Design Draughtsman. Financial Analyst. Brazier. Waste Treatment Plant Operator. Fire Inspector. Epidemiologist. Transportation Worker. Urban Planner. Boiler Operator. Biologist. Weapons Specialist. Court Clerk. Film Laboratory Technician. Air Crew Manager. Boat Builder and Shipwright. Crew Captain. Motorboat Mechanic. Landscaper. Heating Equipment Operator. Administrative Services Manager. Aviation Inspector. Healthcare Practitioner. Heating and Air Conditioning Mechanic. Surveying and Mapping Technician. Equal Opportunity Representative. Environmental Scientist. Fast Food Cook. Nutritionist. Maintenance Supervisor. Fashion Model. Graphic Designer. Funeral Attendant. Butcher. Maintenance Equipment Operator. Mail Machine Operator. Automotive Specialty Technician. Avionics Technician. Surveyor. Valve Repairer. Moulder. Radiologic Technologist. Dancer. Event Planner. Account Manager. Healthcare Support Worker. Credit Analyst. Moulding and Casting Worker. Health Technologist. Domestic Worker. Environmental Science Technician. Piano Tuner. Wildlife Biologist. Auxiliary Equipment Operator. Entertainment Attendant. Adjustment Clerk. Public Relations Manager. Radar Technician. Regulator Repairer. Crushing Grinding Machine Operator. Brake Machine Setter. Survey Researcher. Pump Operator. Courier. Fabric Mender. Engineering Manager. Database Manager. Watch Repairer. Detective. Metal Pourer and Caster. Tree Trimmer. Psychiatric Technician. Xhosa Translator. Civil Drafter. Bicycle Repairer. Dental Assistant. Auditor. Internist. Choreographer. Environmental Engineer. Petrol Attendant. Market Research Analyst. Radio and Television Announcer. Advertising Sales Agent. Mystery Shopper. Botanist. Health Educator. Financial Examiner. Motion Picture Projectionist. Payroll Administrator. Motorboat Operator. Marine Cargo Inspector. Metal-Refining Furnace Operator. Court Reporter. Government Service Executive. Gaming Supervisor. Underground Mining Welder. Engineering Technician. Fraud Investigator. Manufacturing Sales Representative. Farm Equipment Mechanic. Primary School Teacher. Executive Secretary. First-Line Supervisor. Landscaping Manager. Lawn Service Supervisor. Groundskeeper. Financial Specialist. Public Relations Specialist. Purchasing Agent. Bartender. Woodworking Machine Operator. Accountant. Audiologist. Purchasing Manager. Meter Mechanic. Bookkeeper. Jewellery Model. Mould Maker. Afrikaans Copywriter. Marine Architect. Business Director. Gaming Service Worker. Fish Game Warden. Financial Services Sales Agent. Supervisor of Police. Office Machine and Cash Register Servicer. Hand Presser. Landscape Architect. Military Officer. Photographer. Exhibit Designer. Benefits Specialist. Extraction Worker. Gauger. Bench Jeweller. Nursing Instructor. Surgical Technologist. Makeup Artist. Radiation Therapist. Cleaning Supervisor. Jeweller. Dog Walker. Taxi Driver. Art Director. Extruding Machine Operator. Vending Machine Servicer. Custom Tailor. Firefighter. Transportation Equipment Painter. Baker. Funeral Director. Interviewer. Keyboard Instrument Repairer and Tuner. Travel Guide. Fibre Product Cutting Machine Operator. Laboratory Animal Caretaker. Veterinary Assistant. South African Olympian. Veterinary Technician. Obstetrician. Glass Blower. Maintenance and Repair Worker. Environmental Compliance Inspector. Fence Erector. Landscape Artist. Cricket Player. Fabric Presser. Crane and Tower Operator. Brick Mason. Explosives Expert. Typesetting Machine Operator. Geological Sample Test Technician. Hairdresser. Cosmetologist. Head Nurse. Actuary. Craft Artist. Boilermaker. Claims Examiner. Psychiatrist. Biochemist. Radio Operator. Phlebotomist. Usher. Farm Labour Contractor. Able Seaman. Health Services Manager. Automotive Technician. Rugby Player. Database Administrator. User Experience Researcher. Claims Adjuster. Meteorologist. Gaming Dealer. Marine Engineer. Production Manager. Geological Engineer. Public Health Social Worker. Etcher and Engraver. Credit Authoriser. Gaming Manager. Civil Engineer. Geologist. Public Transportation Inspector. Administrative Support Supervisor. Brazing Machine Operator. Gas Appliance Repairer. Video Editor. Automotive Body Repairer. Automotive Mechanic. Lathe Operator. Freight and Material Mover. Veterinarian. Advertising Manager. Promotions Manager. Graduate Teaching Assistant. Biomedical Engineer. Strategist. Swimmer. Layout Worker. Bindery Machine Operator. Bookbinder. Customer Service Supervisor. Deburring Machine Operator. Grounds Maintenance Worker. Machine Tool Operator. Automatic Teller Machine Servicer. Psychologist. Oil Service Unit Operator. Offset Lithographic Press Operator. Fibreglass Laminator and Fabricator. Microbiologist. Mixing and Blending Machine Operator. Butler. Librarian. Mining Machine Operator. Mail Clerk. Lawyer. Corporate Social Investment Specialist. Independent Manufactured Building Installer. Motorcycle Mechanic. Biological Technician. Umpire. Garment Cutter. Civil Engineering Technician. Referee. Laundry Worker. General Practitioner. Millwright. Fire Investigator. Administrative Law Judge. Entertainer and Performer. Financial Adviser. Travel Agent. Irradiated Fuel Handler. Radio Mechanic. Typesetter. Motor Vehicle Operator. English Language Teacher. Gas Distribution Plant Operator. Furniture Finisher. Audio and Video Equipment Manager. Account Collector. Blogger. Technician. Webmaster. Office Machine Operator. City Planning Assistant. Gaming Surveillance Officer. Freight Inspector. Consultant. Polisher. Rail Car Repairer. Gas Compressor Operator. Receptionist. Barber. Glazier. Audiovisual Collections Specialist. Biophysicist. Marine Oiler. Machine Feeder. Curator. Truck Driver. Hand Sewer. Woodworking Machine Setter. Atmospheric and Space Scientist. Data Entry Operator. Occupational Therapist. User Experience Manager. Maintenance Worker. General Manager. Travel Clerk. Mine Cutting Machine Operator. Food Preparation Manager. Management Analyst. Data Technician. Fashion Designer. Farmworker. Dental Laboratory Technician. Legal Secretary. Lawn Service Manager. Government Property Inspector. Diagnostic Medical Sonographer. Actor. Interpreter. Motor Vehicle Inspector. Utility Meter Reader. Machinist. Geological Visual Designer. Freight Agent. Office and Administrative Support Worker. Geoscientist. Environmental Engineering Technician. Data Processing Equipment Repairer. Automotive Master Mechanic. Scholar Patrol Officer. Washing Equipment Operator. Milling Machine Operator. Automotive Glass Installer. Metal Worker. Upholsterer. Criminal Investigator. Heat Treating Equipment Operator. Gluing Machine Operator. Nursery School Teacher. Data Web Developer. Logistics Manager. Doctor. Extruding and Drawing Machine Operator. Desktop Publisher. Health Practitioner. Online Marketing Analyst. Banker. Transport Security Administrator. Surgeon.

CHAPTER 15

KEY MOMENTS
IN THE CLIENT INTERACTION PROCESS

INTRODUCTION

To be totally honest, I have been a little frustrated by the Six-step financial planning process over the years, because I have experienced the natural client interaction process somewhat differently. As a result, to follow the Six-step process, one must almost force an activity, which does not come naturally in the client engagement process. The current practice standards also do not recognise the fact that the law of contract actually plays a significant role in more than one phase in the process. Global legislation, such as Money laundering and Protection of Personal Information, has also subsequently been introduced, which requires a holistic review of the practice standards in my view. Therefore, I propose that the following practical steps be considered as Practice Standards in the future:

1. Setting up an appointment

1.1 Contact the client per telephone or electronic medium to set up an appointment

2. A professional introduction

2.1 Provide an introduction letter to the client that contains financial planner and business details

2.2 Inform the client about the financial planning and planner competencies

2.3 Inform the client about legislation applicable to the financial planner

2.4 Inform the client about financial planning fees and/or applicable remuneration for the rendering of financial services

3. Obtain client information

3.1 Establish the client's current financial position

3.2 Identify the client's personal and financial objectives, needs and priorities

3.3 Collect quantitative client information

3.4 Collect qualitative client information and documentation

3.5 Establish the client's risk profile

4. Establish and define the relationship with the client

4.1 Agree on the client's needs, objectives, risk profile and priorities

4.2 Agree whether the planner can assist the client and whether the client should engage with another professional or not

4.3 Agree on the service(s) that are required and define the scope of engagement

4.4 Confirm the service required and scope of engagement in writing

4.5 Provide a copy of such written agreement in writing to the client

5. Conduct an analysis, assess the client's financial status, and develop financial planning and financial product recommendations

5.1 Record the client's current financial position, needs, objectives, risk profile, and priorities

5.2 Conduct an analysis

5.3 Develop the financial planning recommendations

5.4 Develop the financial product recommendations

5.5 Record the assessment and recommendations in writing

6. Present the recommendations to the client

6.1 Present the assessment and proposal(s) to the client

6.2 Disclose all relevant and material product information to the client in writing

6.3 Offer the client an opportunity to ask questions

6.4 Address the client's questions and / or concerns

6.5 Offer the client an opportunity to consider the proposal

7. Agree on the financial planning and product solutions

7.1 Reach an agreement on the financial planning solution(s) to be implemented

7.2 Reach an agreement on the financial product solution(s) to be implemented

7.3 Agree the ongoing monitoring services required

8. Implement the financial planning and product solutions agreed to

8.1 Record the client's acceptance of the product terms, conditions and exclusions

8.2 Agree the ongoing monitoring services required

8.3 Record the agreement(s) in writing

8.4 Complete all the necessary application forms where necessary

8.5 Provide a copy of the agreement to the client

8.6 Submit all the necessary application forms within a reasonable time

8.7 Confirm receipt of the applications from the product suppliers

8.8 Confirm the correct issuing of the applications

8.9 Provide confirmation of such correct implementation to the client

9. Review the client's situation

9.1 Review the client's financial position as agreed between the parties

9.2 Agree on the client's needs, objectives, risk profile and priorities

9.3 Conduct an analysis and develop a new strategy when necessary

9.4 Make new financial planning and/or financial products recommendations

9.5 Agree on the solutions to be implemented when necessary

9.6 Implement the solutions as agreed

9.7 Confirm the correct implementation as agreed

9.8 Agree on the ongoing services required

THE SIX-STEP-PROCESS REMAINS PART OF THE PROCESS

As you will see, the Six-step-process still forms part of the process, but not necessarily in the same order. It is not that I have abolished the process, I have simply added some steps and re-arranged our beloved six steps to make it more practical.

IN CLOSING

In my opinion, the framework as proposed above, represents the natural process of client engagement, which will enhance the efficiencies in the process. This process also applies to all advice processes and all product solutions. It offers a standardised process, but creates the opportunity for unique application to client circumstances and needs.

COMPLIANCE MADE EASY

INITIAL BUSINESS DISCLOSURES

GATHERING OF INFORMATION USING STANDARD OR CUSTOMISED FORMS

ASTUTE INTEGRATION

POLICY & INVESTMENT SCHEDULE

ASSETS & LIABILITY REGISTER

BUDGET

CLIENT SERVICE REQUEST

PREPARE PROPOSAL WITH EASY TO USE TOOLS

QUOTES & PRODUCT SELECTION

RECORD OF ADVICE WITH PRODUCT DISCLOSURES

AGREED SERVICE MODEL

DAILY VALUES & TRANSACTIONS FOR INVESTMENTS

STATE OF THE ART REGULAR REPORTING

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CHAPTER 16

KEY DOCUMENTS
REQUIRED IN EVERY CLIENT FILE

There is strong evidence that many advisors in our industry do all the paperwork with the client during the last meeting, when the financial transaction is concluded. I advise against this practice for the following reasons:

- ☞ It leads to a very negative client experience
- ☞ The evidence does not reflect the true chain of events, and is confusing to any third party who tries to analyse the facts in the case

To lighten the burden of paperwork, to enhance your professional standard of conducting business, and to improve the client experience during the client engagement process, I propose that the relevant compliance documentation, as alluded to in the summary below, be recorded during each engagement, and not all during the engagement with which the transaction is concluded.

I believe that professionalism should drive business and business conduct, and compliance should follow seamlessly as a result. If compliance drives business, the process is frustrating, but if professionalism and building trust is the focus, compliance follows seamlessly as a result. However, it does call for a professional mindset and discipline.

The purpose of this chapter is to highlight that there is a practical way to use compliance documentation to ensure that the key documentation is properly recorded as required in terms of the Act.

Whilst the entire compliance process is important, some documentation is more important than others.

All records are not created equal.

Financial services providers must be able to distinguish between records that are vital, important, and good to have when engaging with clients.

VITAL DOCUMENTS:

From a FAIS point of view, the vital documents are those that can be presented to prove that the *transaction is accurately accounted for*.[208] These documents are usually the ones that contain the contractual arrangements between the parties. The law of contract will always fundamentally underly every transaction that is concluded in terms of

208 - See section 3(1)(e) of the Code of Conduct

the Act.[209] The Appeal Board repeatedly confirmed that the liability of an FSP to a client is usually based on a breach of contract.[210]

IMPORTANT DOCUMENTS:

These records would include all business disclosures and supporting documents regarding the advice, such as the gathering of qualitative and quantitative information of the client.

GOOD TO HAVE DOCUMENTS:

Designing a colourful marketing document that can be sent to clients is an example of a "good to have" document.

THE CLIENT ENGAGEMENT PROCESS AND COMPLIANCE DOCUMENTATION

Step one: Setting up the appointment

Applicable legislation:

The FAIS Code of Conduct[211]

Required record(s):

- ☞ Letter of disclosure (optional)[212]
- ☞ Letter of authority (optional)[213]

Step two: Professional introduction

Applicable legislation:

The FAIS Code of Conduct

Required record(s):

- ☞ Letter of introduction/disclosure notice[214]

Step three: Gathering information

Applicable legislation:

The FAIS Code of Conduct

Required record(s):

- ☞ General client information[215]
- ☞ Needs analysis questionnaire[216]
- ☞ Risk profile analysis questionnaire[217]

209 - See Swanepoel, LLM Dissertation, University of the Free State, 2007
210 - See Appeal Board Decisions
211 - See section 6 of the Code of Conduct
212 - See sections 4 and 5 of the Code of Conduct
213 - See POPIA and section 3 (1)(d) of the Code of Conduct
214 - See sections 4 and 5 of the Code of Conduct
215 - See section 8(1)(a) of the Code of Conduct
216 - See section 8(1)(a) of the Code of Conduct (Also see proposed amendments)
217 - See section 8(1)(a) of the Code of Conduct (Also see proposed amendments)

rendered

Applicable legislation:
The FAIS Code of Conduct, POPIA and FICA

Required record(s):

- ☞ Service agreement[218]
- ☞ Letter of authority[219]
- ☞ POPIA Declaration (POPIA)
- ☞ Proof of ID document and proof of address (FICA)
- ☞ Personal risk rating (FICA)

Step five: Conduct an analysis and prepare the report / proposal

Applicable legislation:
The FAIS Code of Conduct

Required record(s):

- ☞ Written / recorded proposal[220]

Step six: Present the report / proposal

Applicable legislation:
The FAIS Code of Conduct

Required record(s):

- ☞ Written / recorded proposal[221]

Step seven: Agree on the advice solutions to be implemented

Applicable legislation:
The FAIS Code of Conduct

Required record(s):

- ☞ Advice agreement / Quotation[222]
- ☞ Risk profile agreement (Investments) [223]
- ☞ Record of advice[224]

Step eight: Implement the advice solutions as agreed

Applicable legislation: The FAIS Code of Conduct

Required record(s):

- ☞ Application form[225]
- ☞ Terms / Loading offer / Agreement (if applicable)[226]

Step nine: Performing ongoing advice and the rendering services

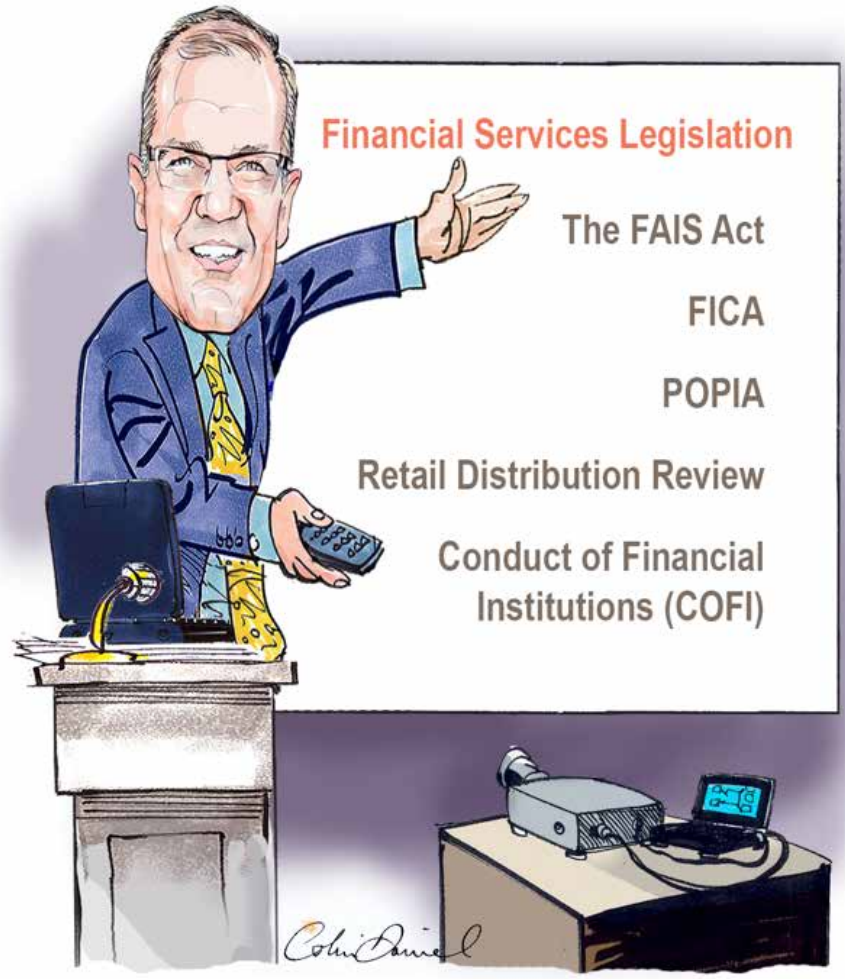
Applicable legislation: The FAIS Code of Conduct

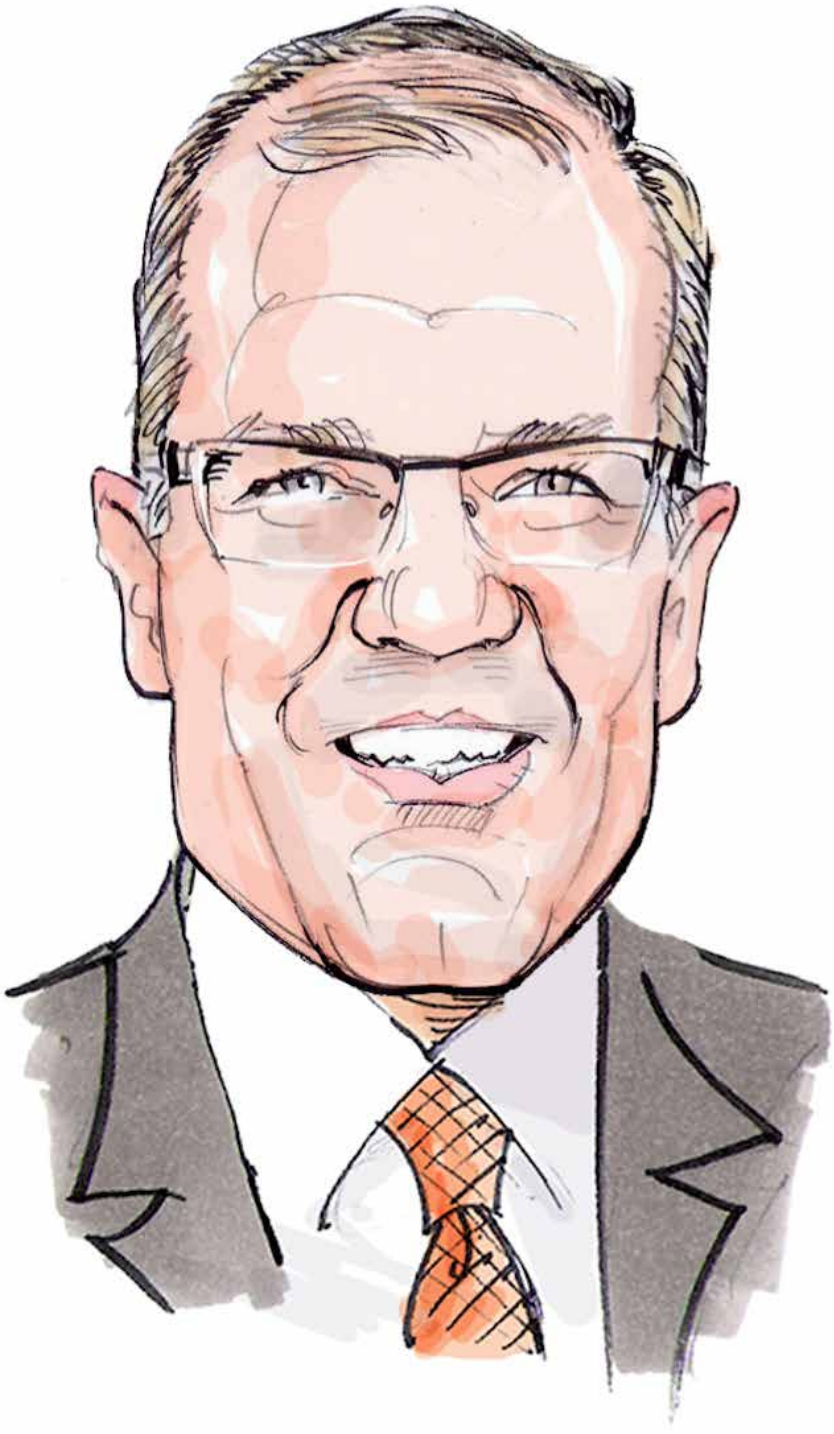
Required record(s):

- ☞ Minutes[227]
- ☞ Service request[228] (starting the process again)

Note:
The vital documents are marked.

218 - See section 3(1)(d) of the Code of Conduct
219 - See section 3 (1)(d) of the Code of Conduct
220 - See section 3(2)(a)(i) of the Code of Conduct
221 - See section 3(2)(a)(i) of the Code of Conduct
222 - See section 3(1)(d) of the Code of Conduct
223 - See section 3(1)(d) of the Code of Conduct
224 - See section 9(1) of the Code of Conduct
225 - See section 3(2)(a)(i) of the Code of Conduct
226 - Long-term insurance practice and section 3(1)(d) of the Code of Conduct
227 - See section 3(2)(a)(i) of the Code of Conduct
228 - See section 3(1)(d) of the Code of Conduct


Financial Services Legislation
The FAIS Act
FICA
POPIA
Retail Distribution Review
Conduct of Financial Institutions (COFI)



CHAPTER 17

CLOSING ARGUMENTS

It is common cause that the demise of companies such as Bluezone Investments and Sharemax have been instrumental in many FAIS Ombud determinations against advisors. I have been fortunate in the sense that I have never been involved in promoting investments in unlisted property to clients. However, I will be the first to acknowledge that, although it never formed part of my advice to clients, it was not because of my sheer brilliance, but rather as a result of my passion for training at the time. Since 2004 my career path shifted more towards FAIS related training and I was spared the troubles that some advisors face today. Since 2010, I have studied most of the determinations against advisors who recommended investments in unlisted property to their clients, and I came to the following conclusions:

- We cannot change the past, but we should learn from it
- The FAIS Ombud's Office will scrutinise every step of your interaction process and investigate every piece of evidence as they apply a strict interpretation of the law.
- Do not expect any mercy if your evidence does not prove that you complied with the provisions of the Act
- It is always easier to judge from a "replay" with 2020 hindsight vision
- We must not assume that the principles that were laid down by the Ombud in these cases only apply to investments
- Financial products that are not approved by the Financial Sector Conduct Authority will always be subject to a deeper scrutiny, and will always pose a higher risk to advisors who promote such unregistered products to their clients
- Financial products that offer higher than market related commissions and promises higher than market related interest rates, will always be frowned upon and subject to much deeper scrutiny by the Ombud, should these products fail
- It is better to stay clear of complex financial products of which the structures are difficult to understand and contain too many moving parts

ANTON SWANEPOEL

Anton Swanepoel is an industry expert with more than 29 years of experience in the financial services industry. He is a former FPI Financial Planner of the year finalist and he serves on a number of industry committees that aims to professionalise the financial planning industry. He is a former Chairperson of the Financial Intermediaries Association (FIA) Financial Planning Committee and a former Board member of the FIA. He also serves on the Expert Panel that guides National Treasury on the Conduct of Financial Institutions Bill.

Anton holds a Master's Degree in Mercantile Law and a Post Graduate Diploma in Financial Planning from the University of the Free State. He is the author and co-author of more than twenty books and industry manuals on leadership, ethics, trust, business management, financial planning, investment planning, and compliance. He is an accredited trainer on these topics and a regular speaker at financial planning seminars and conventions. His publications on Financial Planning, Leadership, Management, Ethics and Compliance include:

- The Trust Factor
- Invest like a pro
- Retire like a pro
- Comply like a pro
- Courageous Leadership
- The FIA Code of Conduct
- The Trust Factor in Schools
- The Trust Factor in Business
- FAIS 2010: The Paradigm Shift
- Manage your practice like a pro
- Essential habits of trusted advisors
- The Six-step-process and compliance
- The fundamentals of FAIS compliance
- Captains & Coaches with Nick Mallett
- The Business Manual for Key Individuals
- Play your business like a pro with Gary Player
- Business lessons from the 2015 Rugby World Cup
- Protect you business like a Pro with Gerrit Viljoen
- The Code of Ethics for CFP® Professionals with Wouter Fourie CFP®

In 2013 Anton received the Cover Excellence Award for contribution in service to the Short-term insurance industry, and in 2017 he received the Harry Brews' Chairman's Award from the Financial Planning Institute of Southern Africa for his life-long, significant contributions to the financial planning profession in the areas of service to society, academia, training, government, and the media.

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