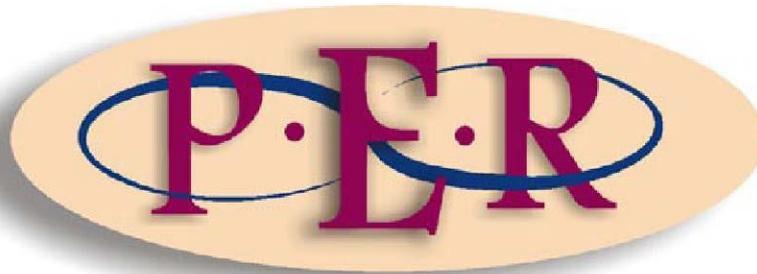


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A HISTORICAL OVERVIEW OF THE REGULATION OF MARKET ABUSE IN SOUTH AFRICA

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1 Introduction

The consequences of market abuse have been felt in a number of jurisdictions globally,¹ including in South Africa.² Its reputation for high levels of market abuse practices associated with the South African financial markets in the mid 1990s is a case in point.³ In an early attempt to combat market abuse practices in the South African financial markets, legislation such as the *Companies Act*,⁴ the *Financial Markets Control Act*⁵ and the *Stock Exchanges Control Act*⁶ were enacted. However, these Acts failed to effectively curb market abuse activities that were allegedly rife in the financial markets.⁷ Consequently, in 1995 the Ministry of Finance appointed "The King Task Group into the Insider Trading Legislation",⁸ which recommended further reforms of insider trading and other related laws.⁹ The *Insider Trading Act*¹⁰ was enacted and came into effect on 17 January 1999.

While the introduction of the *Insider Trading Act* brought some confidence in the financial markets, market abuse activities were still not extinguished. Its provisions

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¹ Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 8; generally see related comments by Bhattacharya and Daouk Date Unknown http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2004/BD_The_world.pdf; Van Deventer 2008 <http://www.fsb.co.za/public/marketafuse/FSBReport.pdf> 1-5.

² Van Deventer 2008 <http://www.fsb.co.za/public/marketafuse/FSBReport.pdf> 1-4; Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 8-13.

³ Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 11.

⁴ *Companies Act* 61 of 1973, hereinafter referred to as the *Companies Act*; see ss 162, 229-233.

⁵ *Financial Markets Control Act* 55 of 1989, hereinafter referred to as the *Financial Markets Control Act*; see ss 20-23.

⁶ *Stock Exchanges Control Act* 1 of 1985, hereinafter referred to as the *Stock Exchanges Control Act*; see s 40.

⁷ Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 11.

⁸ Hereinafter referred to as the "King Task Group" and its report as the "*King Report*".

⁹ The King Task Group published its first draft report on 15 May 1997 and the final report on 21 October 1997.

¹⁰ *Insider Trading Act* 135 of 1998; hereinafter referred to as the *Insider Trading Act*.

were rather inadequate and ineffectively implemented.¹¹ A number of factors contributed to the enactment of the flawed provisions, and the ineffective enforcement.¹² They included inadequate resources, inadequate sanctions and the inherently difficult nature of investigating and prosecuting cases of market abuse.¹³ The *Securities Services Act*¹⁴ was therefore enacted to repeal and replace all the flawed provisions of the *Insider Trading Act* and improve the regulation and enforcement of the ban on market abuse. Three major forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements relating to listed companies (disclosure-based market manipulation) were prohibited.¹⁵

Although the enactment of the *Insider Trading Act* and the *Securities Services Act* could be seen as valuable attempts on the part of the South African legislature to improve the general regulation of market abuse, more may still need to be done to increase the number of convictions and settlements in cases involving market abuse in South Africa. It is against this background that a historical overview analysis of the regulation of market abuse is carried out in this article to expose the flaws that were previously embedded in the South African market abuse laws prior to 2004. This is done to raise awareness of the situation among the relevant stakeholders as they consider whether such flaws were adequately resolved or subsequently re-introduced under the *Securities Services Act* and the *Financial Markets Act*. To this end the article firstly discusses the historical development and regulation of market

¹¹ Osode 2000 *J Afr L* 239.

¹² Jooste 2006 *SALJ* 441-460; Jooste 2000 *SALJ* 284-305; Osode 2000 *J Afr L* 239; Van Deventer 1999 *FSB Bulletin* 3; the King Task Group *Minority Report* para 3.4 as summarised in Beuthin and Luiz *Basic Company Law* 235-238; also see generally Chitimira *Regulation of Insider Trading* 41-72.

¹³ Jooste 2006 *SALJ* 441-460; Beuthin and Luiz *Basic Company Law* 235-238; Osode 2000 *J Afr L* 239.

¹⁴ *Securities Services Act* 36 of 2004, hereinafter referred to as the *Securities Services Act*, which came into effect on 1 February 2005.

¹⁵ Ss 73; 75; 76 and 77 of the *Securities Services Act*; also see clauses 82; 84; 85; 86 and 87 of the *Draft Financial Markets Bill*, 2011, hereinafter referred to as the *Draft Financial Markets Bill*; clauses 80; 82; 83 and 84 of the *Financial Markets Bill* [B12-2012], hereinafter referred to as the *Financial Markets Bill*, 2012 (I have employed the term "clause" to refer to the provisions of both the *Draft Financial Markets Bill* and the *Financial Markets Bill*, 2012) and ss 78; 80; 81 and 82 of the *Financial Markets Act* 19 of 2012, hereinafter referred to as the *Financial Markets Act*, which came into effect on 03 June 2013.

manipulation prior to 2004. Secondly, the regulation and enforcement of insider trading legislation prior to 2004 is examined. Moreover, where possible, certain flaws of the previous market abuse laws that were re-incorporated into the current South African market abuse legislation are isolated and recommendations are made in this regard.¹⁶

2 The regulation of market manipulation prior to 2004

In order to establish the historical background of the enforcement of the market manipulation ban in South Africa, a closer look at previous legislation that dealt with market abuse is necessary.¹⁷ This is done by briefly examining the regulation of market manipulation under the *Stock Exchanges Control Act* and the *Financial Markets Control Act*.

2.1 The regulation of market manipulation in terms of the Stock Exchanges Control Act 1 of 1985

Two forms of market abuse, namely trade-based market manipulation and disclosure-based market manipulation relating to listed securities were prohibited in terms of the *Stock Exchanges Control Act*.¹⁸ The responsibility for enforcement was placed upon the Johannesburg Stock Exchange itself, and on the courts.¹⁹ The delayed publication of price-sensitive information relating to listed securities was arguably the most common form of disclosure-based market manipulation in South Africa.²⁰ The publication of ambiguous information, tip-offs (tipping) and rumours also created another challenge for the enforcement authorities.²¹

¹⁶ In spite of the paucity of convictions and settlements in civil and criminal cases involving market abuse, the legislature has managed to raise the standards of practice in South African financial markets up to a level that would make them comparable with the highest standards of similar markets in the developed world and international best practice, by enacting some definitions as well as civil and administrative sanctions against market abuse.

¹⁷ It should be borne in mind that prior to 2004 insider trading was regulated separately under the *Companies Act* and later under the *Insider Trading Act*, while market manipulation was outlawed in the *Stock Exchanges Control Act* and the *Financial Markets Control Act*.

¹⁸ S 40 of the *Stock Exchanges Control Act*.

¹⁹ Henning and Du Toit 2000 *JJS* 159.

²⁰ Henning and Du Toit 2000 *JJS* 159.

²¹ A few prosecutions especially in market manipulation cases involving option and term contracts share transactions were successfully concluded under the *Stock Exchanges Control Act*.

2.2 *The regulation of market manipulation in terms of the Financial Markets Control Act 55 of 1989*

The enactment of the *Financial Markets Control Act* was aimed, among other things, at curbing market manipulative practices that were allegedly common in option and term contracts transactions.²² Two forms of market abuse, namely trade-based market manipulation and disclosure-based market manipulation relating to listed securities were prohibited under the *Financial Markets Control Act*.²³ Furthermore, the *Financial Markets Control Act* prohibited the dissemination or making of statements which a person knew or ought reasonably to have known were likely to induce other persons to deal in financial instruments or have the effect of altering the price for dealing in financial instruments.²⁴ The *Financial Markets Control Act* prohibited the publication or non-publication of information which had the effect of inducing another person to deal in a financial instrument on a financial market.²⁵ This was further complemented by the *Companies Act*, which prohibited the dissemination of false information in a prospectus.²⁶

Where the contravention of the relevant provisions of the *Financial Markets Control Act* caused another person to be prejudiced, a statutory action for damages was provided for under the same Act.²⁷ For example, damages were calculated by looking at the difference between the price at which the dealing took place and the price at which it would be likely to have taken place if the contravention had not occurred.²⁸ Claimants were not required to prove that the price had been altered by the offender's misrepresentation or market manipulation.²⁹ The *Financial Markets Control Act* further stipulated that prejudiced persons might claim twice the profit gained or likely to be gained or the loss avoided from the contravention of its market abuse

²² Ss 20-23 of the *Financial Markets Control Act*.

²³ S 20 of the *Financial Markets Control Act*.

²⁴ See s 21 of the *Financial Markets Control Act*. Also see Henning and Du Toit 2000 *JJS* 158.

²⁵ S 22 of the *Financial Markets Control Act*.

²⁶ See s 162 of the *Companies Act*. Also see Henning and Du Toit 2000 *JJS* 159.

²⁷ Ss 20-23 of the *Financial Markets Control Act*.

²⁸ S 23(2) of the *Financial Markets Control Act*.

²⁹ S 23(2) and (3) of the *Financial Markets Control Act*. Also see generally Henning and Du Toit 2000 *JJS* 160.

provisions.³⁰ Prejudiced persons had two years to institute a claim against any person who violated the relevant provisions of the *Financial Markets Control Act*.³¹ In addition, the Registrar of Financial Institutions had the responsibility of instituting claims on behalf of all the prejudiced persons.³² In order to get compensation in such instances, the burden of proof was on the claimant to prove that the loss he had suffered was caused by the offender's market manipulative actions.³³

2.3 Evaluation of the enforcement of the market manipulation prohibition under the *Stock Exchanges Control Act* and the *Financial Markets Control Act*

Both the *Stock Exchanges Control Act* and the *Financial Markets Control Act* had little success in combating market manipulation in South Africa.³⁴ A minimum number of settlements and prosecutions were achieved in civil and criminal cases involving market manipulation and other market abuse activities in South Africa prior to 2004.³⁵ The paucity of successful settlements and prosecutions of market manipulation cases was allegedly caused by the failure on the part of the South African legislature to enact a more appropriate anti-market abuse enforcement framework.³⁶ Notably, the Johannesburg Stock Exchange's enforcement responsibility was not clearly defined, especially in the *Stock Exchanges Control Act*. The *Stock Exchanges Control Act* stated only that the Johannesburg Stock Exchange had the responsibility of policing market manipulation provisions without expressly and clearly defining its powers and functions.³⁷ Furthermore, it is unclear whether the Directorate of Public Prosecutions or the Johannesburg Stock Exchange was solely responsible for the prosecution of market manipulation cases in South Africa.³⁸ While it may be assumed that the Directorate of Public Prosecutions was responsible for

³⁰ S 23(3) of the *Financial Markets Control Act*.

³¹ S 23(4) of the *Financial Markets Control Act*.

³² See s 23(5) of the *Financial Markets Control Act*.

³³ Henning and Du Toit 2000 *JJS* 158-160, for further analysis and related comments.

³⁴ Henning and Du Toit 2000 *JJS* 158-160.

³⁵ Henning and Du Toit 2000 *JJS* 158-160.

³⁶ Henning and Du Toit 2000 *JJS* 158-160, for further analysis and related comments.

³⁷ Also see Henning and Du Toit 2000 *JJS* 159; Van Zyl 1992 *Transactions of the Center for Business Law* 231.

³⁸ Henning and Du Toit 2000 *JJS* 159.

the prosecution of market manipulation cases, it is unclear whether the Johannesburg Stock Exchange had similar prosecutorial powers, especially in criminal matters. This follows the fact that the Johannesburg Stock Exchange was merely given the general powers to oversee the regulation and detection of the occurrence of market abuse activity in the regulated financial markets in South Africa.³⁹ No express authority was statutorily conferred on the Johannesburg Stock Exchange itself to adjudicate and prosecute market manipulation cases in South Africa prior to 2004.⁴⁰ This flaw remained unresolved in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and eventually, in the *Financial Markets Act*.⁴¹

Although the penalties for committing market manipulation offences were not clearly stipulated in the *Stock Exchanges Control Act* and the *Financial Markets Control Act*, such offences could possibly have led to considerably severe civil or criminal sanctions against offenders. Both the *Stock Exchanges Control Act* and the *Financial Markets Control Act* overlooked the express provision of administrative or civil monetary penalties, an imprisonment term or any other appropriate penalties that could have been imposed on unscrupulous persons who engaged in market manipulation practices in the South African financial markets prior to 2004.⁴² This ambiguity could have further contributed to the inconsistent enforcement of market manipulation provisions under the *Stock Exchanges Control Act* and the *Financial Markets Control Act*.⁴³

The *Stock Exchanges Control Act* and the *Financial Markets Control Act* did not provide adequate measures and mechanisms for the effective detection, investigation, prosecution and prevention of market manipulation in the South African financial markets. The Johannesburg Stock Exchange was solely responsible for the detection of market manipulation activities in the South African financial

³⁹ Henning and Du Toit 2000 *JJS* 159, for related concerns and criticisms.

⁴⁰ Henning and Du Toit 2000 *JJS* 158-160, for further discussion.

⁴¹ Ss 73; 75; 76 and 77 of the *Securities Services Act*; also see clauses 82; 84; 85; 86 and 87 of the *Draft Financial Markets Bill*; clauses 80; 82; 83 and 84 of the *Financial Markets Bill*, 2012 and ss 78; 80; 81 and 82 of the *Financial Markets Act*.

⁴² Henning and Du Toit 2000 *JJS* 158-165, for related concerns and criticisms.

⁴³ Henning and Du Toit 2000 *JJS* 158-165, for similar comments.

markets.⁴⁴ Other enforcement authorities like the courts and the Directorate of Public Prosecutions were probably less co-operative or not involved in the primary investigation, detection and prevention of market manipulation practices in the South African financial markets prior to 2004.⁴⁵ Moreover, the *Stock Exchanges Control Act* and the *Financial Markets Control Act* did not expressly provide for the establishment of a surveillance system and other methods such as arbitration and alternative dispute resolution, whistle-blowing and bounty rewards to enhance the detection and investigation of market manipulation in the financial markets. Likewise, other anti-market abuse measures such as whistle-blowing and bounty rewards were also not expressly provided in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill, 2012* and the *Financial Markets Act*.⁴⁶

It appears as if the market manipulation prohibition under the *Stock Exchanges Control Act* and the *Financial Markets Control Act* did not have extra-territorial application.⁴⁷ Furthermore, it is unclear whether or not there were any co-operation agreements between the South African enforcement authorities and similar authorities at an international level to combat cross-border market abuse activities prior to 2004.

3 The regulation of insider trading prior to 2004

The anti-insider trading regulatory and enforcement frameworks established under the *Companies Act* (including all its amendments)⁴⁸ and the *Insider Trading Act* are examined below to explore how such frameworks were implemented. However, this section does not discuss all the provisions of these Acts in detail. The focus is on the provisions that dealt with the regulation and enforcement of the insider trading ban under the relevant statutes.

⁴⁴ Henning and Du Toit 2000 *JJS* 158-165.

⁴⁵ Henning and Du Toit 2000 *JJS* 158-165.

⁴⁶ Ss 73; 75; 76 and 77 of the *Securities Services Act*; also see clauses 82; 84; 85; 86 and 87 of the *Draft Financial Markets Bill*; clauses 80; 82; 83 and 84 of the *Financial Markets Bill, 2012* and ss 78; 80; 81 and 82 of the *Financial Markets Act*.

⁴⁷ See s 40 of the *Stock Exchanges Control Act*; ss 20 to 23 of the *Financial Markets Control Act*.

⁴⁸ The *Companies Act* was amended by the *Companies Amendment Act* 78 of 1989 and the *Second Companies Amendment Act* 69 of 1990.

3.1 The regulation of insider trading in terms of the Companies Act 61 of 1973 before its 1989 and 1990 amendments

It is generally agreed that the regulation of insider trading was only introduced by the relevant provisions of the *Companies Act*.⁴⁹ The enactment of these provisions was performed in accordance with the recommendations of the Van Wyk de Vries Commission of Inquiry into the *Companies Act* of 1973.⁵⁰ The relevant provisions of the *Companies Act* are briefly outlined, with an emphasis on those that directly and expressly outlawed the practice of insider trading.⁵¹ Some of the provisions of the *Companies Act* were enacted to enhance the enforcement of its insider trading prohibition by precluding directors, officers and other employees from dealing in a company's shares before the inside information relating to such shares had been made public.⁵² Directors and certain officers were prohibited from dealing in the share and debenture options of the company or any associated company.⁵³

A number of definitions were introduced for the purpose of enforcing the insider trading and other related provisions of the *Companies Act*.⁵⁴ The term "interest" was defined to include any right to subscribe for, or any right to any shares or debentures or any option in respect of shares or debentures, without derogating from the generality of the word. The term "officer" included any employee who would be in possession of any information consequent to his immediate relationship with the directors of the company immediately before the public announcement of that information under the general insider trading provision.⁵⁵ The use of the phrase

⁴⁹ S 224, ss 229-233 of the *Companies Act*. Also see further Jooste 1991 *BML* 248; the *Memorandum on the Objects of the Companies Second Amendment Bill*, 1990 [B119-90] (GA); Botha 1991 *SA Merc LJ* 4.

⁵⁰ Hereinafter referred to as the "Van Wyk de Vries Commission" and its main report as the "*Van Wyk de Vries Report*". See the *Van Wyk de Vries Report* paras 44.49, 44.57.

⁵¹ Ss 224, 229-232 will be briefly discussed while more emphasis will be focused on s 233 which generally provided for the regulation of insider trading in South Africa under the *Companies Act*. The analysis of all the provisions of the *Companies Act* is, however, beyond the scope of this article.

⁵² Ss 224, ss 229-232 of the *Companies Act* which were enacted in a bid to improve the enforcement of the insider trading prohibition that was contained in s 233 of the *Companies Act*. Also see Botha 1991 *SA Merc LJ* 5.

⁵³ See s 224 of the *Companies Act*.

⁵⁴ See further s 229 of the *Companies Act* which contained several definitions for the purposes of enforcing ss 230-233.

⁵⁵ S 233 of the *Companies Act*.

"includes" suggests that these definitions were not exhaustive.⁵⁶ The definitions of "person" and "past director" respectively had the effect of extending the general insider trading provisions⁵⁷ to persons according to whose instructions directors would normally act, and to past directors for a period of six months after they had ceased to be directors. "Shares and debentures of the company" included shares and debentures of companies in the same group.

Every public company was required to keep a special register of the interests of directors and others in the shares and debentures of the company.⁵⁸ Failure to comply with any of these provisions was a criminal offence.⁵⁹ Directors, past directors, officers and certain persons were obliged to lodge with the company within a specified period a written notice regarding changes in any material interest in their shareholding in the company concerned.⁶⁰ In other words, directors were required, as soon as they acquired knowledge of the non-public inside information, to determine forthwith by resolution the names of the officers taken to be in possession of that information.⁶¹

Every director, past director, officer or any person who had knowledge of inside information concerning a transaction or proposed transaction or the affairs of the company, which, if it would become publicly known, could be expected to materially affect the price of the shares or debentures, would be guilty of an offence if he dealt in any way to his advantage, directly or indirectly, in such shares or debentures before the public announcement of such information on a stock exchange or in a newspaper or through medium of the radio or television.⁶² The *Companies Act*

⁵⁶ The term "interest" may for instance also cover the interest of beneficiaries under a trust to receive dividends or which a trustee, executor or guardian might have had in those capacities, in a company's shares. Likewise, the term "officer" was wider than the definition in s 1 of the *Companies Act* in the sense that it could include other employees who did not occupy executive positions. Also see Milne *et al Henochsberg* 404-405.

⁵⁷ Ss 230-233 of the *Companies Act*.

⁵⁸ S 230(1), (2) and (3) of the *Companies Act*.

⁵⁹ S 231(2) of the *Companies Act*; see further ss 230(4) and 232(3) of the same Act.

⁶⁰ S 232(1)(b) and (c) read with s 230(2) of the *Companies Act*. See also subsection (1)(a), that provided for particulars relating to non-public inside information at the time this Act came into operation.

⁶¹ S 232(1)(d) and (2) of the *Companies Act*.

⁶² See s 233 of the *Companies Act*.

specifically prohibited insider trading in relation to listed shares.⁶³ Insider trading was simply treated as a criminal offence which could be committed by a director, officer or employee of the company or a person in accordance with whose instructions any director was accustomed to act.

3.1.1 Evaluation of the enforcement of the insider trading prohibition under the Companies Act 61 of 1973 before its 1989 and 1990 amendments

The enforcement of the insider trading prohibition was probably a co-operative responsibility of the Johannesburg Stock Exchange, the Registrar of Companies under the jurisdiction of the Department of Trade and Industry, and the Department of Justice (the Attorney-General's Office).⁶⁴ The Johannesburg Stock Exchange was primarily responsible for monitoring and detecting the occurrence of insider trading. It was further mandated to monitor all trading and request dealing returns from brokers when suspected insider trading activities were detected. In addition, it was required to submit such dealing returns to the Registrar of Companies when suspected insider trading activities were confirmed by the preliminary investigation.⁶⁵ The Registrar of Companies was responsible for further analysis of the relevant data and for referring such data to the Attorney-General's Office.

In addition, the Attorney-General's Office was responsible for the prosecution of insider trading cases.⁶⁶ However, no successful prosecutions of insider trading cases were brought under the *Companies Act*.⁶⁷ This could have been caused in part by serious flaws that were embedded in its initial insider trading provisions.⁶⁸ For example, key terms like "insider", "tippee" and "tipping" were not statutorily and expressly defined under the *Companies Act*. Moreover, proving that the accused was a person falling under one of the categories of insiders as was proscribed in the

⁶³ The term "insider trading" was used only in relation to securities listed on a regulated market and it applied only to directors or officers of a company. Moreover, the concept of "insider trading" was not defined under the *Companies Act*. See s 233.

⁶⁴ See generally ss 224; 230-233, 440-441 of the *Companies Act*. Also see Botha 1991 *SA Merc LJ* 5-7.

⁶⁵ See further ss 224; 230-233, 440-441 of the *Companies Act*.

⁶⁶ See further ss 230-233, 440-441 of the *Companies Act*. Also see Botha 1991 *SA Merc LJ* 5.

⁶⁷ The provisions of s 233 came into operation on 1 January 1974. Also see Botha 1991 *SA Merc LJ* 5-6.

⁶⁸ See ss 233, 441 of the *Companies Act*.

Companies Act was difficult, and the onus was on the prosecution to prove beyond reasonable doubt that the person accused was aware of the fact that the information he possessed was non-public confidential information. This may have been extremely difficult to prove and could have impeded the successful prosecution of insider trading cases. Besides, the criminal penalties for insider trading⁶⁹ were not sufficient to deter potential offenders, considering the enormous profits that an insider could make from such transactions.⁷⁰ In the light of this, a provision for civil liability could have been an additional deterrent to potential offenders and a meaningful remedy to the victims of insider trading. Nonetheless, no provision was made for directors or other insiders to pay civil monetary fines or compensate shareholders if, for example, such shareholders had sold their shares to the directors, ignorant of the fact that they might suffer prejudice due to insider trading.⁷¹

Professors Bhana and Botha submit that these shortcomings hindered the general enforcement, detection, investigation and prosecution of insider trading cases in South Africa, especially under the *Companies Act*.⁷² As a result, some unscrupulous directors and employees of companies could have enjoyed an unfair advantage over other persons who were denied the opportunity to compete fairly in the buying and selling of shares.⁷³

3.2 The regulation of insider trading in terms of the Companies Act 61 of 1973 subsequent to the 1989 amendments

The original insider trading provision had several flaws.⁷⁴ As a result it was repealed and replaced by a new provision in terms of the *Companies Amendment Act*.⁷⁵ A

⁶⁹ There were no civil penalties for insider trading. See s 441(1)(b) of the *Companies Act*.

⁷⁰ Botha 1991 *SA Merc LJ* 5.

⁷¹ See the related views and comments in *Percival v Wright* 1902 2 Ch 421, where it was argued *inter alia* that directors do not owe any common law fiduciary duties to individual shareholders; hence, such shareholders could not sue them for insider trading; *Pretorius v Natal South Sea Investment Trust* 1965 3 SA 410 (W) 417 for further discussion on the enforcement of the insider trading ban in South Africa prior to 2004.

⁷² Bhana 1987 *SAJBM* 201; Botha 1991 *SA Merc LJ* 6.

⁷³ Osode 1999 *AJICL* 694-695.

⁷⁴ See s 233 of the *Companies Act*.

chapter that dealt with the regulation of securities was added to the *Companies Act*.⁷⁶ Section 440F formed part of this chapter and contained a prohibition of insider trading in very wide terms. A director, past director or any other person connected with a company who had knowledge of any information which, when published, was likely to affect the price of such securities, would be guilty of an offence if he would deal in such securities within 24 hours after the public announcement of that information on a stock exchange, or in a newspaper or television, or by other means.⁷⁷ Thus, tippees would incur the same liability if they were to deal on the basis of the information received from any of the persons referred to in subsection (2)(a) at any time when the tipper was not allowed to deal.⁷⁸

Nevertheless, the insider trading provisions of the *Companies Amendment Act*⁷⁹ in their original form repeated some of the flaws that have been discussed in relation to the initial insider trading prohibition contained in the *Companies Act*.⁸⁰ It came under fire for having largely adopted American principles on insider trading without proper regard to the South African circumstances.⁸¹

3.2.1 The purported enforcement framework for the insider trading prohibition under the Companies Act 61 of 1973 subsequent to the 1989 amendments

The *Companies Amendment Act* introduced the Securities Regulation Panel as a regulatory body that was required to monitor and enforce the insider trading prohibition.⁸² The Securities Regulation Panel had the powers to police insider trading by supervising dealings in securities.⁸³ It also had the powers to subpoena and interrogate any persons accused of insider trading.⁸⁴ In addition, certain persons were required to disclose to is any information regarding their beneficial holding of

⁷⁵ *Companies Amendment Act* 78 of 1989, hereinafter referred to as the *Companies Amendment Act*. See s 6.

⁷⁶ Chapter XVA "Regulation of Securities".

⁷⁷ Also see s 440F(2)(a) of the *Companies Amendment Act*.

⁷⁸ See s 440F(2)(b) of the *Companies Amendment Act*.

⁷⁹ See the original s 440F of the *Companies Amendment Act*.

⁸⁰ See s 233 of the *Companies Act*.

⁸¹ Botha 1991 *SA Merc LJ* 7-11; also see generally Bhana 1987 *SAJBM* 201-202; Osode 1999 *AJICL* 690-695.

⁸² See s 440B of the *Companies Amendment Act*.

⁸³ See s 440C(1)(b) of the *Companies Amendment Act*.

⁸⁴ See s 440D of the *Companies Amendment Act*; also see further s 440C(6)(c) of the same Act.

securities.⁸⁵ Put differently, the Securities Regulation Panel was *inter alia* entrusted with the main responsibility of monitoring and investigating insider trading activities in South Africa prior to 1998.⁸⁶ This was clearly stated in the *Memorandum on the Objects of the Companies Second Amendment Bill* of 1989.⁸⁷

Moreover, the maximum sentence was considerably increased. Persons convicted of insider trading were liable to pay the relevant enforcement authorities a fine of R500 000, or to be imprisoned for a period not exceeding ten years, or both. Notwithstanding the efforts on the part of the legislature to outlaw insider trading, the provisions of the *Companies Amendment Act* were still seriously flawed. As a result, the insider trading prohibition under the *Companies Amendment Act* never came into operation and will therefore not be discussed in detail. It was replaced by a new insider trading prohibition that was introduced in terms of the *Second Companies Amendment Act*.⁸⁸

3.3 The regulation of insider trading in terms of the Companies Act 61 of 1973 subsequent to the 1990 amendments

Due to fears that the insider trading ban under the *Companies Amendment Act* was not good enough, the *Second Companies Amendment Act* extensively revised the provisions that dealt with insider trading and introduced a number of innovations.⁸⁹ The prohibition on insider trading was expressly made applicable to all dealings in securities. The term "securities" was defined to include company shares as well as stock debentures convertible into shares and any rights or interests in a company or rights or interests in respect of any such shares, stock or debentures including any financial instruments as defined in the *Financial Markets Control Act*.⁹⁰ This definition was still limited to securities in a company or financial instruments as stated.⁹¹

⁸⁵ See s 440G of the *Companies Amendment Act*.

⁸⁶ Botha 1991 *SA Merc LJ* 7; also see further Osode 1999 *AJICL* 690-695.

⁸⁷ *Memorandum on the Objects of the Companies Second Amendment Bill*, 1989 [B99-89] (GA).

⁸⁸ *Second Companies Amendment Act* 69 of 1990, hereinafter referred to as the *Second Companies Amendment Act*; see the revised s 440F.

⁸⁹ See the revised s 440F.

⁹⁰ See the definition of "security" in s 440A(1) of the *Second Companies Amendment Act*.

⁹¹ The term "company" in this context entailed entities registered or recognised in terms of the *Companies Act*. See ss 1-3 of the *Companies Act*.

Insider trading in relation to interests in other entities, including government and semi-government stock, was therefore not expressly prohibited.⁹² However, the Minister could on the advice of the Securities Regulation Panel and by notice in the Government Gazette exempt certain classes of persons from the insider trading provisions.⁹³

The provisions of the *Second Companies Amendment Act* were targeted *inter alia* at correcting the shortcomings of the *Companies Amendment Act*. This was enumerated in the Memorandum on the Objects of the *Companies Second Amendment Bill* of 1990.⁹⁴ Therefore, any person who knowingly dealt directly or indirectly in a security on the basis of unpublished price-sensitive information⁹⁵ in respect of that security would be guilty of an offence if he knew that such information had been obtained:

- (a) by virtue of a relationship of trust or any contractual relationship, irrespective of whether or not the person concerned was a party to that relationship; or
- (b) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof.⁹⁶

This clearly suggested that insiders and their tippees were prohibited from dealing in securities on the basis of unpublished price-sensitive information.⁹⁷ This can be regarded as a positive development.

Moreover, unpublished price-sensitive information was defined as information which:

⁹² Luiz 1990 *SA Merc LJ* 328.

⁹³ See s 440F(5) and (6) of the *Second Companies Amendment Act*.

⁹⁴ *Memorandum on the Objects of the Companies Second Amendment Bill*, 1990 [B119-90] (GA). See further Botha 1991 *SA Merc LJ* 11.

⁹⁵ Information other than financial data that could also lead to insider trading was not considered. Examples might include the incompetence and resignation of a company's directors. Such information might arguably not be treated as inside information in terms of the *Companies Act* but it might still have a material effect on the price of securities or financial instruments if investors withdrew their investments in the company concerned. Generally see Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 8; also see Van Deventer 2008 <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf> 1-5, for further related analysis.

⁹⁶ S 440F(1) of the *Second Companies Amendment Act*.

⁹⁷ Botha 1991 *SA Merc LJ* 12.

related to matters of the internal affairs of a company, or to its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction; or

- (c) was not generally available to the reasonable investor; or
- (d) would reasonably be expected to materially affect the price of such securities if it were generally available.⁹⁸

Seemingly, the term "generally available"⁹⁹ meant available in the sense that such steps had been taken, and such time had elapsed, that it could reasonably be expected that the information in question should have been known to the reasonable investor in the relevant markets.¹⁰⁰

3.3.1 The enforcement of the insider trading prohibition in terms of the Companies Act 61 of 1973 subsequent to the 1990 amendments

The enforcement of the insider trading ban was now a joint responsibility of the Securities Regulation Panel, the Registrar of Companies, and the Department of Justice. As indicated earlier,¹⁰¹ the Securities Regulation Panel was responsible for investigating and policing insider trading provisions. Its functions included the supervision of dealings in securities and exercising control over insider trading. In another attempt to improve the enforcement, the Securities Regulation Panel was again given powers to subpoena and to further interrogate witnesses and impose an obligation on certain persons to disclose to it information relating to their beneficial dealing in securities. This was done by requesting companies to disclose all the details of the amount of equity securities of which a person was a beneficial owner.¹⁰² It was also responsible for ensuring that persons who suffered harm due to insider trading had a fair platform to lodge their complaints so that they had proper

⁹⁸ S 440F(2) of the *Second Companies Amendment Act*.

⁹⁹ See s 140A(3) of the *Companies Act* as introduced in terms of the *Companies Amendment Act 37 of 1999*; also see explanatory remarks on disclosure requirements in Gen N 724 in GG 18868 of 8 May 1998.

¹⁰⁰ S 440F(2)(b) of the *Second Companies Amendment Act*.

¹⁰¹ See para 3.2.1 above.

¹⁰² S 440B of the *Second Companies Amendment Act*; also see s 140A(3) introduced in terms of the *Companies Amendment Act 37 of 1999*.

access to a civil remedy. Nonetheless, there was no provision for victims to claim compensation directly from persons who were convicted of insider trading (private rights of action).

Two presumptions were introduced to assist the enforcement and prosecuting authorities in obtaining convictions in matters involving insider trading.¹⁰³ Firstly, if it was proved that the accused, at the time of the alleged dealing, was in possession of unpublished price-sensitive information in respect of the relevant securities, it would be deemed, unless the contrary was proved, that the accused had knowingly dealt in those securities on the basis of such information. Secondly, if it was proved that the unpublished price-sensitive information was obtained in a manner as stated earlier in the relevant provisions of the *Second Companies Amendment Act*, the accused was deemed to have known that the information had been so obtained, unless the accused could prove the contrary.¹⁰⁴

The maximum sentence for insider trading was a fine of R500 000, or imprisonment for a period of ten years, or both. In spite of these significant changes, the enforcement of insider trading remained problematic in that no person was convicted for insider trading under the *Second Companies Amendment Act*. Moreover, the Securities Regulation Panel did not have its own surveillance preventative measures to assist in the detection of suspected insider trading activities and it further lacked authority to impose additional civil penalties that could have increased settlements in civil cases of insider trading.¹⁰⁵ Perhaps there was insufficient co-operation between the Securities Regulation Panel, the Registrar of Companies and the Department of Justice in relation to the enforcement of the insider trading prohibition.

¹⁰³ S 440F(3) of the *Second Companies Amendment Act*.

¹⁰⁴ S 440F(1)(a) or (b) of the *Second Companies Amendment Act*.

¹⁰⁵ Botha 1991 *SA Merc LJ* 18.

3.4 *The regulation of insider trading in terms of the Insider Trading Act 135 of 1998*

A novel regime aimed at resolving the tenacious insider trading problem in South Africa was introduced by the *Insider Trading Act*.¹⁰⁶ The *Insider Trading Act* repealed and replaced the relevant provisions of the *Companies Act* in an effort to broaden the scope of the prohibition of insider trading. In addition to treating insider trading as a criminal offence, an attempt was made to provide more appropriate civil remedies to those who would suffer prejudice as a result of insider trading activities. Furthermore, more severe criminal sanctions were introduced and the insider trading ban was extended to a wide spectrum of financial instruments other than securities of companies.¹⁰⁷ The provisions of the *Insider Trading Act*, relating to enforcement and the role of the enforcement authorities are analysed below. This analysis is divided into four parts. Firstly, the provisions that relate to the key concepts of the insider trading prohibition are briefly discussed. Secondly, the provisions that deal with the enforcement of the insider trading sanctions and penalties are examined. Thirdly, a closer look is taken at the roles of the enforcement authorities. Lastly, the enforcement methods adopted under the *Insider Trading Act* are discussed.

3.4.1 *The definition of selected key terms and concepts under the Insider Trading Act 135 of 1998*

The term "insider" was defined as an individual who has inside information through being a director, employee or shareholder of an issuer of securities or financial instruments to which the inside information relates or who has access to such information by virtue of his employment, office or profession, or who knew that the direct or indirect source of the inside information was a director, employee or shareholder as contemplated in the *Insider Trading Act*.¹⁰⁸ Two categories of insiders were therefore contemplated under the *Insider Trading Act*. Firstly, there were primary insiders such as the directors, employees or shareholders of an issuer of securities or financial instruments to which the inside information related, and which

¹⁰⁶ Benade *et al Entrepreneurial Law* 130.

¹⁰⁷ Osode 2000 *J Afr L* 239-248.

¹⁰⁸ S 1 of the *Insider Trading Act*.

might include fortuitous insiders or individuals who had access to the inside information by virtue of their employment, office or profession but who were not officers or employees of the company itself.¹⁰⁹ Secondly, there were secondary insiders or tippees, being individuals who know that the direct or indirect source of their inside information was a primary insider.

The focus in the definition on individuals as insiders clearly implied the exclusion of juristic persons. In this context the scope of the definition was too limited.¹¹⁰ Individuals could easily involve themselves in insider trading activities through juristic persons under their control without their entities or companies incurring any liability. The exclusion of companies and other juristic persons from the definition of an "insider" can therefore be regarded as a serious flaw that was contained in the *Insider Trading Act* and a major compromise on the part of the legislature.

Inside information was defined as specific or precise information which had not been made public and which was obtained or learned by an individual as an insider and which, if it were made public, would be likely to have a material effect on the price or value of any securities or financial instruments.¹¹¹

Only accurate and factual non-public inside information would fall in the ambit of the definition.¹¹² Information therefore had to meet four requirements to qualify as inside information in terms of the *Insider Trading Act*. Firstly, the information was required to be factually specific or precise. Inaccurate and any unconfirmed information, speculation about whether information might be true, rumours or promises were excluded. Trading on the basis of rumours or speculation about the value of securities or financial instruments could, however, still occur and harm ignorant outsiders. The terms "specific" or "precise" were not defined and it was left to the courts to determine what would constitute specific or precise information. Although it can be assumed that all persons should have a broad understanding of the general

¹⁰⁹ In this regard, the pool of individuals who could become insiders was now large and included not only directors, employees and advisors but also many others, like advertising and production professionals engaged to compile and publish inside information for printing.

¹¹⁰ Osode 2000 *J Afr L* 239-248; generally see Jooste 2006 *SALJ* 438-441.

¹¹¹ S 1 of the *Insider Trading Act*.

¹¹² Osode 2000 *J Afr L* 248.

meaning of these terms, everybody might not appreciate the degree of specificity or precision required for information to qualify. This obscurity could have offered other persons an opportunity to engage in insider trading practices without incurring liability. This flaw remained unresolved in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and finally, in the *Financial Markets Act*.¹¹³

Secondly, the inside information must have been information which was obtained only from an insider. Instances where the information originated from sources other than the insiders were, therefore, not expressly included in the definition. This exclusion might also have left room for abuse. Whatever the situation, the fact remains that price-sensitive information that was leaked unintentionally by insiders was not covered by the definition and could still be used by other persons to indulge in insider trading activities. This position was unfortunately retained in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹¹⁴

Thirdly, the information must not have been made public, as superficially stipulated in the *Insider Trading Act*.¹¹⁵ The term "publication" was not statutorily defined, but a number of ways in which the non-public inside information was deemed to have been published were enumerated.¹¹⁶ Lastly, the non-public inside information was required to be likely to have a material effect on the price or value of the securities¹¹⁷ or financial instruments¹¹⁸ after having been made public. The term "material effect" was not defined. Moreover, although some of the elements of the insider trading offence were described, the concept of "insider trading" was not statutorily and expressly defined under the *Insider Trading Act*. It could be argued that the failure

¹¹³ See ss 72 and 73 of the *Securities Services Act*; also see clauses 81 and 82 of the *Draft Financial Markets Bill*; clauses 79 and 80 of the *Financial Markets Bill*, 2012 and ss 77 and 78 of the *Financial Markets Act*.

¹¹⁴ See ss 72 and 73 of the *Securities Services Act*; also see clauses 81 and 82 of the *Draft Financial Markets Bill*; clauses 79 and 80 of the *Financial Markets Bill*, 2012 and ss 77 and 78 of the *Financial Markets Act*.

¹¹⁵ S 3 of the *Insider Trading Act*.

¹¹⁶ S 3 of the *Insider Trading Act*.

¹¹⁷ See the definition in s 1 of the *Insider Trading Act*.

¹¹⁸ See the definition in s 1 of the *Insider Trading Act*.

of the Act to provide adequate definitions of these and other terms contributed to the inconsistent enforcement of its provisions. Conspicuously, this flaw has subsequently remained unresolved in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹¹⁹

3.4.2 *The selected key elements of the insider trading offence under the Insider Trading Act 135 of 1998*

Actual dealing in securities or financial instruments for making a profit or avoiding a loss for oneself as well as for any other person was prohibited.¹²⁰ Individuals were liable only if they knew that they had inside information. Therefore, knowledge was a prerequisite for criminal liability under the *Insider Trading Act*.¹²¹ Consequently, it was very difficult for the prosecuting authorities to prove beyond reasonable doubt that the accused was aware that he was in possession of inside information.¹²² Seemingly, circumstantial evidence would not suffice for the purposes of the insider trading offence under the *Insider Trading Act*.¹²³ This might explain why very little or no success was achieved in the enforcement of the criminal sanctions under the *Insider Trading Act*.¹²⁴

Encouraging or discouraging (tipping) another person to deal in or from dealing in securities or financial instruments was prohibited.¹²⁵ Nonetheless, what constituted illegal conduct or tipping on the part of the insider was not distinctly and expressly stated.¹²⁶ Apparently, it was immaterial for the purpose of incurring liability whether

¹¹⁹ See ss 72 and 73 of the *Securities Services Act*; also see clauses 81 and 82 of the *Draft Financial Markets Bill*; clauses 79 and 80 of the *Financial Markets Bill*, 2012 and ss 77 and 78 of the *Financial Markets Act*.

¹²⁰ S 2(1)(a) of the *Insider Trading Act*.

¹²¹ S 2(1)(a) of the *Insider Trading Act*.

¹²² Chanetsa *Business Report* (page number unknown).

¹²³ Osode 2000 *J Afr L* 248 for a generally related discussion.

¹²⁴ During the period between January 1999 and January 2002, 28 cases of insider trading were investigated. Only 22 cases were successfully settled for civil penalties and no convictions were obtained in the other six criminal cases. This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse or the DMA) on 5 May 2009.

¹²⁵ This prohibition was aimed at discouraging persons who were privy to non-public price-sensitive information to incite others to deal in or to refrain from dealing in securities or financial instruments to the detriment of innocent (outside) investors who were at an informational disadvantage. See further s 2(1)(b) of the *Insider Trading Act*.

¹²⁶ S 2(1)(b) of the *Insider Trading Act*.

the tippee had actually acted on the tip or whether the insider involved had made a profit or avoided a loss.

The improper disclosure of non-public price-sensitive information was further outlawed.¹²⁷ The use of the term "individual"¹²⁸ once again implied the exclusion of juristic persons and a natural person could be guilty of the offence only if he was fully aware that he was in possession of inside information and failed to prove any of the defences that were provided.¹²⁹ Ostensibly, mere disclosure of information by a person who knew that it was inside information was sufficient to constitute an offence in terms of the *Insider Trading Act*, irrespective of whether it was acted upon or not. However, the prohibition did not extend to innocent disclosure by an individual who was ignorant of the fact that the information had not yet been made public. For example, an uneducated individual who was simply employed to clean up the company's offices (a cleaner in a company), who overheard the directors celebrating the company's good financial results while performing his duties and later innocently and ignorantly disclosed that information to his friend who then purchased shares on the basis thereof, could not be convicted under the *Insider Trading Act*.¹³⁰

Civil liability could be incurred by any person who unlawfully dealt in securities or financial instruments for his own account.¹³¹ Such a person could be ordered to pay to the Financial Services Board an amount as provided for in the civil provisions of the *Insider Trading Act*.¹³² This enabled the Financial Services Board to assist prejudiced persons to be compensated by individuals who practised insider trading for their own benefit. Nevertheless, the onus of proof was on the Financial Services Board to prove on a balance of probabilities that the defendant knowingly dealt

¹²⁷ S 2(2) of the *Insider Trading Act*.

¹²⁸ S 2(2) of the *Insider Trading Act*.

¹²⁹ S 4(2) of the *Insider Trading Act*.

¹³⁰ S 5 of the *Insider Trading Act*.

¹³¹ S 6(1)(a) of the *Insider Trading Act*.

¹³² S 6(4) of the *Insider Trading Act*.

directly or indirectly in the affected securities or financial instruments for his own account.¹³³

Any individual who knew that he had inside information and dealt in the affected securities or financial instruments to gain a profit or avoid a loss through such dealing¹³⁴ could be ordered to pay to the Financial Services Board an amount as provided for in the relevant provisions of the *Insider Trading Act*.¹³⁵ In addition, civil penalties for the improper disclosure of price-sensitive information could be imposed on an individual who knowingly disclosed that information to other persons¹³⁶ and failed to prove on a balance of probabilities any one of the stipulated defences or any other defence available to him.¹³⁷ Civil liability for encouraging or causing another person to deal in securities or financial instruments was further provided under the *Insider Trading Act*.¹³⁸ Furthermore, civil liability could be incurred by any person who dealt in securities or financial instruments for another person's account.¹³⁹ Accordingly, any person who entered into any unlawful dealing on behalf of any other person could, therefore, incur civil liability jointly and severally with that person, irrespective of their relationship.¹⁴⁰

3.4.3 The enforcement of the insider trading prohibition under the Insider Trading Act 135 of 1998

The contravention of the provisions of the *Insider Trading Act* attracted criminal and civil sanctions.¹⁴¹ Likewise, the Financial Services Board, courts, the Insider Trading Directorate and the Directorate of Public Prosecutions were entrusted with responsibility to jointly enforce these provisions.¹⁴² The Financial Services Board was

¹³³ S 6(1)(a) of the *Insider Trading Act*.

¹³⁴ S 6(1)(b) of the *Insider Trading Act*.

¹³⁵ S 6(4)(a) of the *Insider Trading Act*. Also see Van Deventer 1999 *FSB Bulletin* 3 for further discussion on the role of the Financial Services Board.

¹³⁶ S 6(2)(a) of the *Insider Trading Act*.

¹³⁷ S 6(4)(a) of the *Insider Trading Act*.

¹³⁸ S 6(2)(b) of the *Insider Trading Act*.

¹³⁹ S 6(2)(c) of the *Insider Trading Act*.

¹⁴⁰ S 6(2)(c) of the *Insider Trading Act*.

¹⁴¹ Ss 2 and 6 of the *Insider Trading Act*.

¹⁴² Generally see Osode 2000 *J Afr L* 239-248.

given wide powers to monitor and enforce the insider trading prohibition.¹⁴³ In addition, the Insider Trading Directorate was, as a committee of the Financial Services Board, responsible for exercising all the powers of the Financial Services Board.¹⁴⁴ It also had powers to decide whether to take civil action or to refer criminal matters to the Directorate of Public Prosecutions or the courts. The Insider Trading Directorate could also institute a prosecution when the Directorate of Public Prosecutions or the Attorney-General neglected to prosecute any alleged insider trading case.¹⁴⁵ The Insider Trading Directorate was further entitled to withdraw, abandon or compromise any civil proceedings in terms of the *Insider Trading Act*.¹⁴⁶ The capacity of the Insider Trading Directorate was nevertheless limited, and it relied heavily on the Johannesburg Stock Exchange Limited's¹⁴⁷ Surveillance Department for the tracking and detection of insider trading activities. Notably, a similar flaw was retained in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹⁴⁸

Individuals convicted of any insider trading offence could be sentenced to pay the Financial Services Board a fine not exceeding R2 million, or to imprisonment for a period not exceeding ten years, or both such a fine and such imprisonment.¹⁴⁹ Be that as it may, the enforcement of the provisions of the *Insider Trading Act* was still difficult in that only a few civil settlements and criminal convictions were successfully obtained.¹⁵⁰ The R2 million fine and the ten years term of imprisonment were yet again not sufficient to deter persons from getting involved in insider trading activities.¹⁵¹ Furthermore, the Directorate of Public Prosecutions did not have the

¹⁴³ Ss 11(1) and (2)(a) to (i) and subsections (3)-(11) of the *Insider Trading Act*.

¹⁴⁴ S 12 of the *Insider Trading Act*.

¹⁴⁵ S 11(10) of the *Insider Trading Act*. Also see Luiz 1999 *SA Merc LJ* 145.

¹⁴⁶ Ss 6, 12(13) and (14) of the *Insider Trading Act*.

¹⁴⁷ Hereinafter referred to as the JSE.

¹⁴⁸ S 83 of the *Securities Services Act*; also see clause 92 of the *Draft Financial Markets Bill*; clause 87 of the *Financial Markets Bill*, 2012 and s 85 of the *Financial Markets Act*.

¹⁴⁹ S 5 read with ss 2 and 6 of the *Insider Trading Act*.

¹⁵⁰ In relation to this, generally see Osode 2000 *J Afr L* 239-248; Luiz 1999 *SA Merc LJ* 139-145; Loubser 2006 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> 18-20, 24-27; Blincoe 2001 http://www.theregister.co.uk/2001/05/23/datatec_directors_pay_up/, where two Datatec directors, Jens Montanana and Robin Rindel were reportedly fined about R1 million each for insider trading by the Financial Services Board. Also see Jooste 2000 *SALJ* 284-305 for further related analysis.

¹⁵¹ Van der Lingen 1997 *FSB Bulletin* 10.

capacity to conduct effective and timeous prosecutions. Although the Financial Services Board was empowered in terms of the *Insider Trading Act* to regulate insider trading, the prosecuting function was mainly vested in the Directorate of Public Prosecutions. The same position was unfortunately retained in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹⁵² Besides, the everlasting backlog in our criminal courts might also have delayed criminal prosecutions for insider trading and in spite of the fact that South Africa was among the first countries to introduce civil remedies,¹⁵³ the flaws in the civil provisions could have undermined the successful enforcement of the civil sanctions.¹⁵⁴

3.5 Evaluation of the enforcement of the insider trading prohibition prior to 2004

The pioneering provisions in the *Companies Act* (including all its amendments) were not only inconsistent for the purposes of combating insider trading, but were also not properly enforced.¹⁵⁵ Notably, the enforcement approaches adopted under the *Companies Act* as amended were few and restricted to criminal sanctions.¹⁵⁶ By enacting criminal penalties, it appears the legislature relied mainly on the policy goal of deterrence, which failed to discourage some persons from practising insider trading.¹⁵⁷ Other enforcement approaches such as civil sanctions, bounty rewards and whistle-blowing were not considered.

¹⁵² S 82(9) read with s 79 of the *Securities Services Act*; also see clause 91(9) read with clause 81 of the *Draft Financial Markets Bill*; clause 86(10) read with clause 79 of the *Financial Markets Bill*, 2012 and s 84(10) read with s 77 of the *Financial Markets Act*.

¹⁵³ See further Osode 2000 *J Afr L* 239-248; Luiz 1999 *SA Merc LJ* 139-145; Botha 1991 *SA Merc LJ* 4-18.

¹⁵⁴ S 6 of the *Insider Trading Act*.

¹⁵⁵ See the discussions in paras 3.1.1; 3.2.1 and 3.3.1 above.

¹⁵⁶ Ss 229-233 of the *Companies Act*; also see s 440F of the *Companies Amendment Act*; see further Barron 2014 <http://www.timeslive.co.za/Feeds/2014/02/02/greg-draws-a-blank-in-belfort-parallel>, where Greg Blank was reportedly sentenced to eight years imprisonment for stock market-related fraud and front running in 1992.

¹⁵⁷ See the discussions in paras 3.1.1; 3.2.1 and 3.3.1 above. Also see Jooste 1990 *De Ratione* 21; Botha 1990 *SALJ* 504.

As indicated earlier,¹⁵⁸ the enforcement bodies established in terms of the *Companies Act* did not achieve much success in the enforcement of the insider trading prohibition. In the light of this, the *Second Companies Amendment Act* officially launched the Securities Regulation Panel as an independent body with powers to supervise, detect, investigate, and police insider trading in South Africa.¹⁵⁹ The *Second Companies Amendment Act* further introduced civil sanctions.¹⁶⁰ In spite of this, not much success was achieved in terms of the enforcement of criminal and civil sanctions of insider trading under the *Second Companies Amendment Act*. This might have been caused by the fact that other enforcement methods such as whistle-blowing, bounty rewards and administrative sanctions were still not considered.

The enactment of the *Insider Trading Act* was therefore welcomed as another attempt to enhance the enforcement of the insider trading ban in South Africa. This Act introduced considerably higher criminal penalties and more elaborate civil remedies. Notably, the *Insider Trading Act* empowered the Financial Services Board to be solely responsible for the policing of insider trading and established the Insider Trading Directorate as an investigatory arm of the Financial Services Board. Notwithstanding these developments, various gaps and flaws were still embedded in the provisions of the *Insider Trading Act* and these, in a way, impeded the proper enforcement of the insider trading ban in South Africa.¹⁶¹ Not giving less regard to some key factors like the challenges involving the availability of adequate financial resources in South Africa, the *Insider Trading Act*, like its predecessors, also failed to expressly provide for other alternative practical enforcement methods like administrative sanctions, whistle-blowing, private rights of action, the establishment of additional self-regulatory organs and specific insider trading courts or tribunals to complement the enforcement efforts of the Financial Services Board.

As summarised above, one can probably assert that the general enforcement of the insider trading prohibition prior to 2004 was not very successful. The *Companies Act*

¹⁵⁸ See the discussions in paras 3.1.1 and 3.2.1 above.

¹⁵⁹ See the discussions in para 3.3.1 above.

¹⁶⁰ S 440F *Second Companies Amendment Act*.

¹⁶¹ See para 3.4.3 above.

was recently repealed by the *Companies Act*,¹⁶² which *inter alia* broadly deals with the disclosure of relevant information relating to uncertified securities by issuers and Central Securities Depository participants in another attempt to combat illicit trading practices. For instance, the *Companies Act* 2008 provides that issuers, companies and/or Central Securities Depository participants must timeously record and maintain all the relevant details relating to uncertified securities in their securities registers.¹⁶³ This Act also states that issuers, companies and/or Central Securities Depository participants must have clear guidelines and requirements in place for the inspection of such registers¹⁶⁴ as well as their own internal audit committees.¹⁶⁵ Issuers, companies and/or registered shareholders are further required to disclose any of their beneficial interests held in respect of their securities.¹⁶⁶ Nonetheless, it remains to be seen whether or not the relevant provisions of the *Companies Act* 2008 are robust enough to prevent insider trading and market manipulation in South Africa.

4 Concluding remarks

It is clear that the various market abuse laws enacted in South Africa were aimed mainly at improving the regulation of market manipulation and insider trading in order *inter alia* to restore public investor confidence in our financial markets. Several amendments to the market abuse legislation were introduced from time to time in a bid to effectively combat market abuse practices in South Africa. Nonetheless, in relation to this, it has been shown that both the *Stock Exchanges Control Act* and the *Financial Markets Control Act* had little success in combating market manipulation in South Africa.¹⁶⁷ For instance, no express authority was statutorily conferred on the Johannesburg Stock Exchange itself to adjudicate and prosecute market manipulation cases in South Africa prior to 2004.¹⁶⁸ This flaw remained unresolved in the *Securities Services Act*, the *Draft Financial Markets Bill*, the

¹⁶² *Companies Act* 71 of 2008, hereinafter referred to as the *Companies Act*, 2008.

¹⁶³ Ss 50 and 52 of the *Companies Act*, 2008.

¹⁶⁴ Ss 50 and 52 of the *Companies Act*, 2008.

¹⁶⁵ S 94(7)(i) of the *Companies Act*, 2008.

¹⁶⁶ S 56 of the *Companies Act*, 2008.

¹⁶⁷ See para 2.3 above.

¹⁶⁸ See the related comments in para 2.3 above.

Financial Markets Bill, 2012 and the *Financial Markets Act*.¹⁶⁹ In the light of this, it is submitted that the policy makers should consider introducing a specific provision into the current market abuse legislation that obliges and empowers the JSE's Surveillance Division to prosecute or report incidents of market abuse to the Financial Services Board. Another option is to financially and statutorily empower the Financial Services Board to procure its own market abuse surveillance systems and transfer the entire financial markets anti-market abuse surveillance responsibility from the JSE to the Financial Services Board. It has been noted that the *Stock Exchanges Control Act* and the *Financial Markets Control Act* did not expressly provide for other anti-market abuse methods such as arbitration and alternative dispute resolution, whistle-blowing and bounty rewards.¹⁷⁰ It has also been stated that the pioneering provisions in the *Companies Act* (including all its amendments) were not only inconsistent for the purposes of combating insider trading, but were also not properly enforced.¹⁷¹ Notably, the anti-market abuse enforcement methods adopted under the *Companies Act* as amended were few and restricted to criminal sanctions only.¹⁷² Other anti-market abuse enforcement methods such as whistle-blowing and bounty rewards were not considered under the *Companies Act* (including all its amendments).¹⁷³ Amazingly, this flaw was retained in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill, 2012* and the *Financial Markets Act*.¹⁷⁴ In this regard, it is submitted that the policy makers should consider enacting additional provisions for anti-market abuse measures such as whistle-blowing and bounty rewards into the current market abuse legislation to enhance the combating of market abuse in South Africa.

Eventually the *Insider Trading Act* was enacted and welcomed as another attempt to enhance the enforcement of the insider trading ban in South Africa.¹⁷⁵ This Act introduced considerably higher criminal penalties and more elaborate civil remedies. However, while acknowledging some key factors like the challenges involving the

¹⁶⁹ See the related comments in para 2.3 above.

¹⁷⁰ See the related comments in para 2.3 above.

¹⁷¹ See the discussions in paras 3.1.1, 3.2.1, 3.3.1 and 3.5 above.

¹⁷² See para 3.5 above.

¹⁷³ See para 3.5 above.

¹⁷⁴ See the related comments in para 2.3 above.

¹⁷⁵ See the related comments in para 3.5 above.

availability of adequate financial resources in South Africa, it must be noted that the *Insider Trading Act*, like its predecessors, has failed to expressly provide for other alternative practical enforcement methods like administrative sanctions, whistle-blowing, private rights of action, the establishment of additional self-regulatory organs and specific insider trading courts or tribunals to complement the enforcement efforts of the Financial Services Board.¹⁷⁶ Moreover, the *Insider Trading Act's* failure to provide adequate definitions of some insider trading terms such as "material effect", "insider trading", "inside information", "specific" or "precise" and "publication" has contributed to the inconsistent enforcement of its provisions.¹⁷⁷ Conspicuously, this flaw was not resolved in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹⁷⁸ Consequently, policy makers should consider enacting adequate definitions of these and other related terms to consistently discourage market abuse practices in the South African financial markets. Furthermore, notwithstanding the fact that the Financial Services Board was empowered in terms of the *Insider Trading Act* to regulate insider trading, the prosecuting function was vested mainly in the Directorate of Public Prosecutions.¹⁷⁹ The same position was retained in the *Securities Services Act*, the *Draft Financial Markets Bill*, the *Financial Markets Bill*, 2012 and the *Financial Markets Act*.¹⁸⁰ It is hoped, given the constant backlog in our criminal courts, that additional specialised market abuse courts or tribunals and self-regulatory organs will be established in future to complement the enforcement efforts of the Financial Services Board and enhance the criminal prosecution of market abuse cases in South Africa.

This article has given a historical overview of the regulation of market abuse prior to 2004 and exposed certain flaws in the previous market abuse laws that have been recycled and re-incorporated into the *Financial Markets Act's* market abuse

¹⁷⁶ See the related comments in para 3.5 above.

¹⁷⁷ See the related comments in para 3.4.1 above.

¹⁷⁸ See the related comments in para 3.4.1 above.

¹⁷⁹ See the related comments in para 3.4.3 above.

¹⁸⁰ See the related comments in para 3.4.3 above; see further the JSE 2013 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx 1-26.

provisions. It is hoped that the recommendations made in this article will be utilised by the relevant stakeholders in future to combat market abuse.

BIBLIOGRAPHY**Literature**

Benade *et al Entrepreneurial Law*

Benade ML *et al Entrepreneurial Law* 3rd ed (LexisNexis Butterworths Durban 2003)

Beuthin and Luiz *Basic Company Law*

Beuthin RC and Luiz SM *Beuthin`s Basic Company Law* 3rd ed (Butterworths Durban 2000)

Bhana 1987 *SAJBM*

Bhana N "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *SAJBM* 198-208

Botha 1990 *SALJ*

Botha D "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *SALJ* 504-508

Botha 1991 *SA Merc LJ*

Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1-18

Chanetsa *Business Report*

Chanetsa B "Insider Trading is Notoriously Hard to Prosecute" *Business Report* (26 April 2004) Page number unknown

Chitimira *Regulation of Insider Trading*

Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-dissertation UFH 2008)

Chitimira Comparative Analysis

Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-thesis NMMU 2012)

Henning and Du Toit 2000 JJS

Henning JJ and Du Toit S "The Regulation of False Trading, Market Manipulation and Insider Trading" 2000 *JJS* 155-165

Jooste 1990 De Ratione

Jooste R "Insider Dealing in South Africa - The Criminal Aspects" 1990 *De Ratione* 21-28

Jooste 1991 BML

Jooste R "Insider Trading: A New Clamp-Down" 1991 *BML* 248-250

Jooste 2000 SALJ

Jooste R "The Regulation of Insider Trading in South Africa - Another Attempt" 2000 *SALJ* 284-305

Jooste 2006 SALJ

Jooste R "A critique of the insider trading provisions of the 2004 Securities Services Act" 2006 *SALJ* 437-460

King Task Group First Report

King Task Group into Insider Trading Legislation *First Report* (15 May 1997)

King Task Group Final Report

King Task Group into Insider Trading Legislation *Final Report* (21 October 1997)

King Task Group Minority Report

King Task Group into Insider Trading Legislation *Minority Report on Insider Trading* (1997)

Luiz 1990 *SA Merc LJ*

Luiz SM "Prohibition Against Trading on Inside Information - The Saga Continues" 1990 *SA Merc LJ* 328-332

Luiz 1999 *SA Merc LJ*

Luiz SM "Insider Trading Regulation - If at First You Don't Succeed..." 1999 *SA Merc LJ* 136-151

Milne *et al Henochsberg*

Milne A *et al Henochsberg on the Companies Act* 3rd ed (Butterworths Durban 1975)

Osode 1999 *AJICL*

Osode PC "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *AJICL* 688-708

Osode 2000 *J Afr L*

Osode PC "The new South African Insider Trading Act: Sound law reform or legislative overkill?" 2000 *J Afr L* 239-263

Van der Lingen 1997 *FSB Bulletin*

Van der Lingen B "Tougher Legislation to Combat Insider Trading" 1997 *FSB Bulletin* 10

Van Deventer 1999 *FSB Bulletin*

Van Deventer G "New watchdog for insider trading" 1999 *FSB Bulletin* 3

Van Wyk de Vries Commission *Report*

Van Wyk de Vries Commission of Inquiry into the Companies Act *Report* (1963)

Van Zyl 1992 *Transactions of the Center for Business Law*

Van Zyl FH "Aspekte van Beleggersbeskerming in die Suid-Afrikaanse Reg" 1992 *Transactions of the Center for Business Law* 231-357

Case law

Percival v Wright 1902 2 Ch 421

Pretorius v Natal South Sea Investment Trust 1965 3 SA 410 (W)

Legislation

Companies Act 61 of 1973

Companies Act 71 of 2008

Companies Amendment Act 78 of 1989

Companies Amendment Act 37 of 1999

Financial Markets Act 19 of 2012

Financial Markets Control Act 55 of 1989

Insider Trading Act 135 of 1998

Second Companies Amendment Act 69 of 1990

Securities Services Act 36 of 2004

Stock Exchanges Control Act 1 of 1985

Government publications

Draft Financial Markets Bill, 2011

Financial Markets Bill [B12-2012]

Gen N 724 in GG 18868 of 8 May 1998 (Explanatory Remarks on Disclosure Requirements)

Memorandum on the Objects of the Companies Second Amendment Bill, 1989 [B99-89] (GA)

Memorandum on the Objects of the Companies Second Amendment Bill, 1990
[B119-90] (GA)

Internet sources

Barron 2014 <http://www.timeslive.co.za/Feeds/2014/02/02/greg-draws-a-blank-in-belfort-parallel>

Barron C 2014 *Greg Draws a Blank in Belfort Parallel*
<http://www.timeslive.co.za/Feeds/2014/02/02/greg-draws-a-blank-in-belfort-parallel> accessed 3 March 2014

Bhattacharya and Daouk Date Unknown http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2004/BD_The world.pdf

Bhattacharya U and Daouk H Date Unknown *The World Price of Insider Trading*
http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2004/BD_The world.pdf accessed 19 June 2004

Blincoe 2001 http://www.theregister.co.uk/2001/05/23/datatec_directors_pay_up/
Blincoe R 2001 *Datatec Directors Pay Up on Insider Trading Charges*
http://www.theregister.co.uk/2001/05/23/datatec_directors_pay_up/
accessed 3 March 2014

JSE 2013

http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx
Johannesburg Stock Exchange 2013 *Insider Trading and Other Market Abuses (Including the Effective Management of Price-sensitive Information) in the Insider Trading Booklet*
http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx accessed 3 March 2014

Loubser 2006 <http://www.jse.co.za/public/insider/JSEbooklet.pdf>

Loubser R 2006 *Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information) in the Insider Trading Booklet final draft* <http://www.jse.co.za/public/insider/JSEbooklet.pdf> accessed 3 March 2014

Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf>

Myburgh A and Davis B 2004 *The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board* <http://www.genesis-analytics.com/public/FSBReport.pdf> accessed 9 February 2009

Van Deventer 2008 <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>

Van Deventer G 2008 *Anti-Market Abuse Legislation in South Africa* <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf> accessed 5 May 2009

LIST OF ABBREVIATIONS

AJICL	African Journal of International and Comparative Law
BML	Businessman's Law
J Afr L	Journal of African Law
JJS	Journal for Juridical Science
JSE	Johannesburg Stock Exchange
SAJBM	South African Journal of Business Management
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal

A HISTORICAL OVERVIEW OF THE REGULATION OF MARKET ABUSE IN SOUTH AFRICA

H Chitimira*

SUMMARY

In an early attempt to combat market abuse in the South African financial markets, legislation such as the *Companies Act*, the *Financial Markets Control Act* and the *Stock Exchanges Control Act* were enacted. However, these Acts failed to effectively curb market abuse activities that were allegedly rife in the financial markets. Consequently, the *Insider Trading Act* was enacted and came into effect on 17 January 1999. While the introduction of the *Insider Trading Act* brought some confidence in the financial markets, market abuse activities were still not extinguished. The provisions of the *Insider Trading Act* were to some extent inadequate and ineffectively implemented. Eventually, the *Securities Services Act* was enacted to repeal all the flawed provisions of the *Insider Trading Act*. Notwithstanding these efforts on the part of the legislature, more may still need to be done to increase the number of convictions and settlements in cases involving market abuse in South Africa. It is against this background that a historical overview analysis of the regulation of market abuse is carried out in this article to expose the flaws that were previously embedded in the South African market abuse laws prior to 2004. This is done to raise awareness of the situation on the part of the relevant stakeholders, as they consider whether such flaws were adequately resolved or subsequently re-introduced under the *Securities Services Act* and the *Financial Markets Act*. To this end, the article firstly discusses the historical development and regulation of market manipulation prior to 2004. Secondly, the regulation and enforcement of insider trading legislation prior to 2004 are examined. Moreover, where possible, certain flaws of the previous market abuse laws that were re-

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incorporated into the current South African market abuse legislation are isolated and recommendations are made in that regard.

KEYWORDS: insider trading; market abuse; regulation; financial markets; market manipulation