

A comparative analysis of the regulation of market manipulation in Zimbabwe

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DECLARATION BY CANDIDATE

I, Princess Thembelihle Ncube do hereby declare that this dissertation, entitled *A Comparative Analysis of the Regulation of Market Manipulation in Zimbabwe* submitted in fulfilment of the requirements for the degree *Master of Laws* in Mercantile Law to the School of Post-Graduate Studies in the Faculty of Law at North-West University, Mafikeng Campus, is the product of my own and original work in all respects. I further declare that this research has not been previously submitted at this or any other institution and that all sources used herein have been indicated as such and duly acknowledged.

Signed aton this day.....of.....

Princess Thembelihle Ncube

CERTIFICATE OF ACCEPTANCE FOR EXAMINATION

I, Prof HT Chitimira, hereby declare that this dissertation by Princess Thembelihle Ncube entitled *A Comparative Analysis of the Regulation of Market Manipulation in Zimbabwe* for the degree *Master of Laws* in Mercantile Law be accepted for examination.

Signed aton this day.....of.....

Prof HT Chitimira

DEDICATION

I dedicate this dissertation with immense love to my late parents Thomas and Constance Ncube.

ACKNOWLEDGEMENTS

First and foremost, I would like to express my gratitude to the almighty God for his blessings. Through his love and grace everything is possible.

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To my young brother Cyprian Thabani Ncube who looks up to me thank you for your endless love, support and patience.

To my friends and family thank you.

Abstract

Market manipulation is defined as a practice that interferes or attempts to interfere with the free and fair operation of financial markets by creating an artificial, false or misleading appearance with respect to market prices, securities, commodities or financial instruments. Market manipulation practices also include the misuse of material information; dissemination of false or misleading information; a practice which abnormally or artificially affects, or is likely to affect the formation of prices or volumes of financial instruments or securities; dark pools and wash trades. Zimbabwe was regarded as one of the most vibrant and developed financial markets in Southern Africa in the 1980s. However, its anti-market manipulation laws have not been consistently enforced to date. Financial markets are crucial to the economic growth of many countries, including Zimbabwe. Market manipulation is one of the practices that affects and interferes with the operation of financial markets. Accordingly, this research provides that Zimbabwe should design and institutionalize an optimal regulatory system that promotes investor protection and enhances financial market development. This approach could enable the Securities and Exchange Commission of Zimbabwe (SECZ) to effectively combat market manipulation in the Zimbabwean securities and financial markets. In this regard, the research usefully outlines the importance of enacting adequate anti-market manipulation laws in Zimbabwe. Accordingly, the research states that such laws must incorporate other relevant anti-market manipulation enforcement approaches that could be adopted from the South African anti-market abuse laws.

Keywords: market manipulation; Zimbabwe, Securities Exchange Commission of Zimbabwe, financial markets.

LIST OF ABBREVIATIONS

ATS	Automated Trading System
AEFR	Asian Economic and Financial Review
AJBM	African Journal of Business Management
AJLS	African Journal of Legal Studies
CSD	Central Securities Depository
DEWPS	Department of Economics Working Paper Series
De Jure	De Jure Law Journal
EOJNSS	European Online Journal of Natural and Social Sciences
EU	European Union
GCGF	Global Corporate Governance Forum
IOSR-JBM	IOSR Journal of Business and Management
JCCLP	Journal of Corporate and Commercial Law and Practice
JSE	Johannesburg Stock Exchange Limited
KAS	Kosovo Agency of Statistics
MLSS	Mediterranean Journal of Social Sciences
NAUJILJ	Nnamdi Azikiwe University Journal of International Law and Jurisprudence
OBITER LJ	OBITER Law Journal
Per LJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SECZ	Securities and Exchange Commission of Zimbabwe

SSHJ	Social Science and Humanities Journal
ZEPARU	Zimbabwe Economic Policy Analysis Research Unit
ZSE	Zimbabwe Stock Exchange

TABLE OF CONTENTS

DECLARATION BY CANDIDATE.....	i
CERTIFICATE OF ACCEPTANCE FOR EXAMINATION.....	iii
DEDICATION	iv
ACKNOWLEDGEMENTS	v
Abstract.....	vi
CHAPTER ONE.....	1
RESEARCH OUTLINE.....	1
1.1 Introduction	1
1.2 Background of the Research	4
1.3 Statement of the Problem	6
1.4 Aims and Objectives	8
1.4.1 Aims.....	8
1.4.2 Objectives.....	8
1.5 Rationale of the Study	8
1.6 Limitations of the Study	9
1.7 Justification for Comparative Study	9
1.8 Research Methodology	10
1.9 Structure of the dissertation	10
CHAPTER TWO.....	12
HISTORICAL BACKGROUND OF THE REGULATION OF MARKET MANIPULATION IN ZIMBABWE.....	12
2.1 Introduction	12
2.2 Historical and foundational aspects of market manipulation regulation in Zimbabwe	13
2.2.1 <i>The regulation of market manipulation under the Companies Act of 1862 as amended</i>	14
2.2.2 <i>The regulation of market manipulation by the Gladstone's Act of 1844 ...</i>	15

2.2.3	<i>The regulation of market manipulation under Southern Rhodesian Act 53 of 1965</i>	15
2.2.4	<i>The regulation of market manipulation under the Income Tax Act 136 of 1967 (Chapter 23:09)</i>	16
2.2.5	<i>The regulation of the market manipulation under Zimbabwean Stock Exchange Act 1973</i>	17
2.3	<i>Overview historical aspects of the enforcement of anti-market manipulation laws in Zimbabwe</i>	18
2.3.1	<i>The enforcement of anti-market manipulation laws by the Duke Bridgewater’s Canal Company</i>	18
2.3.2	<i>The enforcement of anti-market manipulation laws under the Zimbabwe Stock Exchange</i>	19
2.4	<i>Zimbabwe’s current market manipulation regime</i>	19
2.5	<i>Conclusion</i>	21
CHAPTER THREE		22
THE ROLE OF THE SECURITIES EXCHANGE COMMISSION OF ZIMBAB .		22
3.1	<i>Introduction</i>	22
3.2	<i>The establishment of the SECZ</i>	Error! Bookmark not defined.
3.3	<i>The regulatory structure and objectives of the SECZ</i>	25
3.3.1	<i>The objectives of the SECZ</i>	29
3.4	<i>Selected regulatory duties of the SECZ</i>	32
3.5	<i>Selected key market participants that are administered by the SECZ..</i>	33
3.5.1	<i>Investors</i>	33
3.5.2	<i>The Central Securities Depository</i>	36
3.5.3	<i>The ZSE</i>	37
3.5.4	<i>Stock brokers</i>	38
3.6	<i>Conclusion</i>	39

CHAPTER FOUR	41
THE ADEQUACY OF THE STATUTORY PROHIBITION ON MARKET MANIPULATION IN ZIMBABWE	41
4.1 Introduction	41
4.2 The definition of market manipulation	42
4.2.1 <i>Examples of trade-based market manipulation</i>	42
4.2.2 <i>Examples of disclosure-based market manipulation</i>	44
4.3 Prohibition of false trading and market manipulation (trade-based market manipulation)	44
4.4 Fraudulently inducing person to trade or deal in security (disclosure- based market manipulation)	49
4.5 Available criminal penalties	52
4.6 Available civil penalties	53
4.7 Selected flaws of anti-market manipulation prohibition under the Securities Act 2004	54
4.8 Conclusion	56
CHAPTER FIVE	58
THE REGULATION OF MARKET MANIPULATION IN SOUTH AFRICA.....	58
5.1 Introduction	58
5.2 Historical overview of the regulation of market manipulation in South Africa prior to 2004	60
5.2.1 <i>The regulation of market manipulation under the Stock Exchanges Control Act 1985</i>	60
5.2.2 <i>The regulation of market manipulation under the Financial Markets Control Act 1989</i>	61
5.2.3 <i>The regulation of market manipulation under the Securities Service Act 2004</i>	64
5.3 The common law prohibition of market manipulation in South Africa	67

5.4	<i>The regulation of market manipulation under the Financial Markets Act 2012</i>	68
5.4.1	<i>Prohibition of trade-based market manipulation under the Financial Markets Act 2012</i>	68
5.4.2	<i>Prohibition on disclosure-based market manipulation under the Financial Markets Act 2012</i>	70
5.5	<i>The enforcement of the prohibition of market manipulation in South Africa</i>	71
5.6	<i>Available penalties for market manipulation in South Africa</i>	74
5.6.1	<i>Criminal penalties</i>	75
5.6.2	<i>Civil penalties</i>	75
5.6.3	<i>Administrative penalties</i>	76
5.7	<i>Remedies for market manipulation in South Africa</i>	76
5.7.1	<i>Available remedies for market manipulation under the Financial Markets Act 2012</i>	77
5.8	<i>Conclusion</i>	78
	CHAPTER SIX	80
	OVERVIEW ANALYSIS OF THE REGULATION OF MARKET MANIPULATION IN ZIMBABWE AND SOUTH AFRICA	80
6.1	<i>Introduction</i>	80
6.2	<i>Overview regulatory framework for market manipulation</i>	80
6.2.1	<i>Scope and meaning of market manipulation</i>	80
6.2.2	<i>The prohibition of market manipulation</i>	82
6.2.2.1	<i>Trade-based market manipulation</i>	83
6.2.2.2	<i>Disclosure-based market manipulation</i>	89
6.3	<i>The adequacy of the available remedies of market manipulation</i>	91
6.4	<i>Available penalties</i>	95
6.4.1	<i>criminal penalties</i>	95

6.4.2 <i>Administrative penalties</i>	96
6.4.3 <i>Civil penalties</i>	96
6.5 <i>The adequacy of the anti-market manipulation enforcement frameworks</i>	97
6.6 <i>Conclusion</i>	101
CHAPTER SEVEN	102
CONCLUSION AND RECOMMENDATIONS	102
7.1 <i>Introduction</i>	102
7.2 <i>Recommendations</i>	102
7.3 <i>Conclusion</i>	110
BIBLIOGRAPHY	111

CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

Market manipulation could be defined as a practice that interferes or attempts to interfere with the free and fair operation of the financial markets by creating an artificial, false or misleading appearance with respect to the price of securities, commodities or financial instruments in the regulated financial markets.¹ Market manipulation practices include the misuse of material information; dissemination of false or misleading information; a practice which abnormally or artificially affects, or is likely to affect, the formation of prices or volumes of financial instruments or securities; dark pools and wash trades.²

Although there is no definition of market manipulation that is universally accepted, the United States Securities Exchange Commission defines manipulation as the intentional behaviour of creating a false or misleading appearance of active trading on the financial markets in order to control or artificially influence the trading of securities on such markets by the offenders.³ This shows that market manipulation is prohibited in the United States of America.⁴ Prices of securities should be fairly determined by the markets without any interference⁵ from any dealer, broker, security based trade dealer, major security based trade participant, or any other person selling or offering to sale or purchasing or offering to purchase the security.⁶

¹ There is no section that expressly provides for the definition of market manipulation under the *Security Act 17 of 2004* (Chapter 24:25) as amended (*Securities Act 2004*); see related discussion by Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *JCCLP* 24, 36-37.

² Examples of market manipulation include trade-based market manipulation and disclosure based market manipulation; see section 96 and 97 of the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 36-37; Veil R *European Capital Markets Law* (Bloomsburg New York 2017) 144.

³ Moazeni B and Asadollahi F "Manipulation of Stock Price and its Consequences" 2013 *EOJNSS* 430, 431.

⁴ Section 9(a)(2) of the *Securities Exchange Act of 1934*.

⁵ Moazeni and Asadollahi *EOJNSS* 431-432.

⁶ For the purposes of this research market participants include securities Exchanges; Securities Dealers; Securities Authorised Dealers; Securities Client Liaison officers; Transfer Secretaries; Securities Trustees; Securities Custodians; Securities Investment Advisors; Central Securities Depository.

Any interference with the operation and price determination of securities or market prices for goods or services on the financial markets amounts to market manipulation.⁷ When market manipulation occurs, investors are usually misled by unscrupulous market players or offenders into purchasing worthless shares or sell their investments on a price below their true market value.⁸ Prices for securities in the financial markets should reflect the true value of such securities or stock in any financial markets at any given time.⁹ The misleading financial markets and securities or financial instruments occur when investors are forced to believe false stock prices and/or to trade to their detriment on the basis of such misleading prices.¹⁰

Financial markets play a crucial role in the economy of any country.¹¹ Financial markets also play an important role in the development of the economy of any country. Consequently, it is imperative that all the financial markets must be regulated to combat market abuse practices such as market manipulation.¹² The regulation of financial markets is aimed at encouraging all market participants to have confidence in the integrity of such markets. A well-regulated financial market encourages domestic and international investors to participate and contribute to the development of the relevant country's economy.¹³ Efficient and transparent financial markets have more integrity in any jurisdiction. The smooth functioning of the financial markets is crucially important for economic growth in Zimbabwe and any other country. Market manipulation harms the integrity of the financial markets.

⁷ Šabrī NR *Financial Markets and Institutions in the Arab Economy* (Nova Publishers New York 2008) 139.

⁸ Author unknown date unknown *Market Manipulation in South Africa* <http://www.vdma.co.za/market-manipulation-south-africa/> accessed 18 March 2017 1; see related discussion by Schlichting S *Internationalising China's Financial Markets* (Springer New York 2008) 14.

⁹ Moazeni and Asadollahi *EOJNSS* 432.

¹⁰ Moazeni and Asadollahi *EOJNSS* 432.

¹¹ Author unknown date unknown <http://www.vdma.co.za/market-manipulation-south-africa/> accessed 18 March 2017 1; see related discussion by Colombo E and Driffil J *the Role of Financial Markets in the Transition Process* (Springer German 2003) 9.

¹² Chinamo T date unknown *Regulatory Role of the Security and Exchange Commission in the Capital Market* www.seczim.co.zw/investor-information/concept-papers%3Fdownload%3D38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets+%amp;cd=4&hl=en&ct=clnk&gl=za accessed 19 march 2017 2; see related discussion by Saunders A and White LJ *Technology and the Regulation of Financial Markets Securities, Futures and Banking* (Beard Books Washington DC 2003) 8.

¹³ Chinamo date unknown www.seczim.co.zw/investor-information/concept-papers%3Fdownload%3D38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets+%amp;cd=4&hl=en&ct=clnk&gl=za accessed 19 march 2017 2.

Market manipulation also reduces public confidence in the affected financial markets.¹⁴ This research investigates whether the Zimbabwean *Security Act 2004*¹⁵ which governs market manipulation is adequate and robust enough to combat market manipulation practices in the Zimbabwean financial markets.¹⁶

It is against this background that this research discusses the regulation of market manipulation in Zimbabwe. In this regard, a historical background of the regulation of market manipulation in Zimbabwe is provided. Consequences of market manipulation in the financial markets include lack of public investor confidence in the integrity of such markets. Poor liquidity of stock markets and the reduction of foreign direct investments are also associated rampant with market manipulation in the financial markets.¹⁷ Subsequently, the consequences of market manipulation in the Zimbabwean financial markets is discussed. Furthermore, this research discusses the role of the Securities and Exchange Commission of Zimbabwe.¹⁸

This research also investigates the adequacy of the statutory regulation on market manipulation in Zimbabwe. In this regard, a comparative analysis of the regulation of market manipulation in Zimbabwe and South Africa is provided. South Africa was chosen as a comparative jurisdiction because it has the best anti-market manipulation laws in Southern African Development Community (SADC). Moreover, between 2016 and 2017, the Johannesburg Stock Exchange Limited (JSE) was rated as one of the best regulated exchanges in the world by the World Economic Forum.¹⁹ Therefore, it is necessary to examine how market manipulation is regulated in South Africa. This research examines whether the regulatory framework

¹⁴ Avery M, Zhu M and Cai J *China's Emerging Financial Markets: Challenges and Global Impact* (John Wiley and Sons Singapore 2011) 20; see related discussion by Author unknown 2014 *Regulation of the European Parliament and the Council on the Market Abuse and Repealing Directive* <http://eur-lex.europa.eu/eli/reg/2014/596/oj> accessed 20 March 2017 5.

¹⁵ Sections 96 and 97 of the *Security Act 2004*.

¹⁶ Packies H *The Market Abuse Control Legislative Regime of South Africa, Nigeria and United Kingdom* (LLM-dissertation University of Western Cape 2015) 3.

¹⁷ Davidson P *Financial Markets, Money, and the Real World* (Edward Elgar Publishing United Kingdom 2003) 8.

¹⁸ The Securities Exchange Commission of Zimbabwe (SECZ) regulates the securities industry in Zimbabwe see related discussion by Masclandaro D and Balakina O *Banking Secrecy and Global Finance: Economic and Political Issues* (Palgrave Macmillan United Kingdom 2015) 172.

¹⁹ Mayekiso P and Thabane M 2016 *JSE Remains Among the World's Top Regulated Exchanges* <https://www.jse.co.za/articles/jse-among-top-regulated-exchanges> accessed 11 October 2017 page unknown.

established in terms of the *Securities Act 2004* is robust enough to combat market manipulation in Zimbabwe.²⁰ In this regard, it is hoped that the Zimbabwean policy makers will consider some relevant anti-market manipulation measures that are employed in South Africa.

1.2 Background of the Research

Market manipulation has continued to be problematic in several jurisdictions.²¹ The effects of market manipulation have been felt in many jurisdictions, including Zimbabwe. As a result, most countries have enacted anti-market manipulation laws to combat the effects of market manipulation in their financial markets, including Zimbabwe.²² Zimbabwe's current anti market manipulation laws were inherited from the Rhodesian government in 1980. The Rhodesian Stock Exchange was set up in Bulawayo in 1946 and it was regulated by the *Rhodesian Act 1965*.²³ However, the *Rhodesian Act 1965* did not regulate market manipulation in the financial markets. Rhodesia relied on the London Stock Exchange and the Johannesburg Stock Exchange for large investments of money in order to enhance their financial markets.²⁴

Since Zimbabwe attained its independence, the anti-market manipulation laws have considerably improved with the introduction of the *Securities Act 2004*. The Reserve Bank of Zimbabwe, the Commissioner of Insurance and Pension Fund and the Zimbabwe Stock Exchange enforce capital markets in Zimbabwe.²⁵ In the year 2000, the *Banking Act 2001*²⁶ was amended making it possible for banking institutions to transform and add functions to their licenses in compliance with the regulation of

²⁰ Packies *The Market Abuse Control Legislative Regime of South Africa* 4.

²¹ Cassim R "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004" 2008 *SA Merc LJ* 33, 34.

²² See section 96 and 97 of the *Securities Act 2004*; see related discussion by Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER LJ* 937, 939.

²³ Section 2(2)(c) of the *Southern Rhodesia Act 53 of 1965 (Rhodesian Act 1965)*.

²⁴ Karekwaivenani G "History of the Rhodesian Stock Exchange: The Formative Years, 1946-1952" 2008 *SSHJ* 9, 10.

²⁵ Mhavira JDG, Mudzonga E and Mogocha E "Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options" 2013 *ZEPARU* 1, 3.

²⁶ Section 35 of the *Banking Act 22 of 2001* Chapter 24:20 (*Banking Act 2001*) see related discussion under O'Brien J *Private Equity Corporate Governance and the Dynamics of Capital Market Regulation* (Imperial College Press London 2007) 167.

financial markets.²⁷ The *Banking Act* 2001 did not adequately provide for the regulation of the Zimbabwean financial markets. For instance, the *Banking Act* 2001 did not expressly prohibit market manipulation in Zimbabwe.

The *Securities Act* 2004²⁸ came into effect in 2008. This Act was promulgated to regulate the securities services in Zimbabwe. The securities services include the securities exchanges and central securities depositories. The *Securities Act* 2004 regulates market manipulation in Zimbabwe.²⁹ The *Securities Act* 2004 was enacted in order to promote investor protection, reduce systematic risk and to promote market integrity.³⁰ The *Securities Amendment Act*³¹ of 2013 was enacted to, inter alia, enhance the effectiveness of the Securities Exchange Commission of Zimbabwe (SECZ) and extend its powers to provide protection for investors against market manipulation.³²

The SECZ regulates trading in securities, registers and supervises the stock exchanges and financial markets in Zimbabwe.³³ Furthermore, the SECZ licenses, supervises and regulates the licensed central securities depository, stockbrokers, investment advisors, custodians and transfer secretaries (market players).³⁴ The Zimbabwe Stock Exchange (ZSE) plays a crucial role in the detection and regulation of market manipulation practices in Zimbabwe. The ZSE ensures that market players do not negatively interfere with the determination of securities or financial instruments prices in order to avoid market manipulation. The ZSE is one of the oldest stock markets in Africa.³⁵ The ZSE was established as a statutory body in the

²⁷ See section 96 and 97 of the *Securities Act* 2004; see related discussion by Mhavira, Mudzonga and Mogocha 2013 *ZEPARU* 4.

²⁸ Sections 96 and 97 of the *Securities Act* 2004; see related discussion by Mhavira, Mudzonga and Mogocha 2013 *ZEPARU* 4.

²⁹ Section 3 of the *Securities Act* 2004; see related discussion by Mhavira, Mudzonga and Mogocha 2013 *ZEPARU* 10.

³⁰ Mhavira, Mudzonga and Mogocha 2013 *ZEPARU* 10 see related discussion by Fisher J et al *The Law of Investor Protection* (Thomson Sweet and Maxwell Scotland 2003) 278.

³¹ Section 22(n) of the *Securities Amendment Act* 2 of 2013.

³² Mhavira, Mudzonga and Mogocha 2013 *ZEPARU* 10.

³³ Sections 96 and 97 of the *Securities Act* 2004.

³⁴ Author unknown 2014 *Capital Markets in Zimbabwe* www.seczim.co.za/investor-information/zimbabwe-capital-markets accessed 20 March 2017 1.

³⁵ Magadi I, Muza C and Kandiero ZT "Exploring Demutualisation of Stock Markets: A Case Study of the Zimbabwe Stock Exchange" 2015 *IOSR-JBM* 88, 88.

financial markets in terms of the *Zimbabwe Stock Exchange Act*.³⁶ However, the *Zimbabwe Stock Exchange Act* 1980 was amended by the *Securities Act* 2004. An Investor Protection Fund was established in 2009 in order to provide an additional layer of protection to investors against prejudices resulting from illicit practices such as market manipulation.³⁷ The Investor Protection Fund protects investors against market manipulation by compensating those who are affected by market manipulation.³⁸ Furthermore, the investor protection fund protects investors against market manipulation by promoting investor education awareness on market manipulation practices.³⁹

1.3 Statement of the Problem

The *Securities Act* 2004 was enacted to, *inter alia*, combat market manipulation and other illicit trading practices in Zimbabwe.⁴⁰ This Act has somewhat improved the curbing of market manipulation practices in the Zimbabwean financial markets to date. The *Securities Act* 2004 regulates market manipulation in Zimbabwe.⁴¹ However, its provisions are relatively inadequate in regards to the combating of market manipulation in Zimbabwe.⁴² For instance, the *Securities Act* 2004 does not

³⁶ Section 3 of the *Zimbabwe Stock Exchange Act* 236 of 1980 (Chapter 24:18) (*Zimbabwe Stock Exchange Act* 1980).

³⁷ Philipsen N and Guangdong X *The Role of Law and Regulation in Sustaining Financial Markets* (Routledge London 2014) 328; see related discussion by Author unknown 2014 www.seczim.co.za/investor-information/zimbabwe-capital-markets accessed 20 March 2017 1.

³⁸ For instance, all those who are affected by market manipulation and who successfully prove to the SECZ that they suffered such prejudice will be compensated Philipsen and Guangdong *The Role of Law and Regulation in Sustaining Financial Markets* 328; see related discussion by Author unknown date unknown *Investor Compensation Fund* <http://www.emergingmarketsdialogue.org/dms/giz-emd/events/event2/Session-6-Speaker-2--R.Sundararaman-Investor-Protection> accessed 02 July 2017 10.

³⁹ Meyer RL and Nagarajan G *Rural Financial Markets in Asia: Policies, Paradigms, and Performance* (Oxford University Press United Kingdom 2000) 106; see related discussion by Author unknown date unknown <http://www.emergingmarketsdialogue.org/dms/gizemd/events/event2/Session-6-Speaker-2--R.Sundararaman-Investor-Protection> accessed 02 July 2017 10-11.

⁴⁰ Chitimira H "Overview of the Market Abuse Regulation under the Financial Markets Act 19 of 2012" 2014 *OBITER LJ* 254, 255.

⁴¹ Sections 96 and 97 of the *Securities Act* 2004.

⁴² Maferera N 2012 *The Overall Mandate of Securities and Exchange Commission in Zimbabwe and Globally* <http://www.seczim.co.zw/investor-information/concept-papers?download=42:the-overall-mandate-of-securities-exchange-commission-in-zimbabwe-and-globally> accessed 20 March 2017 3.

expressly define market manipulation.⁴³ In order for the financial markets to be credible and efficient, there must be adequate safeguards that enhance public investor confidence and the integrity of such markets in any country.⁴⁴ Zimbabwe has made progress in developing an anti-market abuse legal framework through the enactment of the *Securities Act 2004*. Nonetheless, its failure to provide sufficient offences, penalties and definition for market manipulation could have negatively impacted such progress. Moreover, the absence of specific measures and enforcement approaches that are employed to enhance the implementation of market manipulation in the *Securities Act 2004* has negatively affected the regulation of market manipulation in Zimbabwe. This research analyses the regulation of market abuse under the *Securities Act 2004* in order to investigate the adequacy of such regulation in combating market manipulation practices in Zimbabwe. This research seeks to ascertain whether the *Securities Act 2004*⁴⁵ is adequate enough to combat all forms of market manipulation in the Zimbabwean financial markets.

A closer look at the *Securities Act 2004* reveals that there are some regulatory inadequacies such as the absence of an adequate definition of market manipulation and specific enforcement approaches to enhance the implementation of the market manipulation provisions in Zimbabwe. In this regard, this research analyses the role and use of relevant enforcement approaches that combat market manipulation under the *Securities Act 2004*. This is done in order to increase awareness and enforcement of the market manipulation prohibition in Zimbabwe. This follows the fact that the inadequacies of the *Securities Act 2004* in relation to the prohibition of market manipulation have a potential to harm the integrity of the Zimbabwean financial markets.⁴⁶

It is submitted that Zimbabwe must enact adequate anti-market manipulation legislation in order to preserve the integrity of its financial markets. Furthermore, the SECZ must carefully and consistently utilise its wide powers to ensure that there is

⁴³ Sections 96 and 97 of the *Securities Act 2004*.

⁴⁴ Maferera <http://www.seczim.co.zw/investor-information/concept-papers?download=42:the-overall-mandate-of-securities-exchange-commission-in-zimbabwe-and-globally> accessed 20 March 2017 4.

⁴⁵ See sections 96 and 97 of the *Securities Act 2004*.

⁴⁶ Saungweme PW, Peters R and Brijal P "A Framework for Combating Insider Trading on Developing Stock Exchange: Evidence from the Zimbabwe Stock Exchange" 2012 *AJBM* 1630, 1632.

proper supervision and enforcement of market abuse prohibitions in Zimbabwe. This could enhance the integrity of the Zimbabwean financial markets.

1.4 Aims and Objectives

1.4.1 Aims

This research seeks to:

- (a) promote transparency in the Zimbabwean financial markets by encouraging Zimbabwe to employ better market manipulation laws;
- (b) recommend the enactment of an adequate anti-market manipulation legislation in Zimbabwe; and
- (c) expose the flaws imbedded in the Zimbabwean anti-market manipulation laws and recommend possible measures that could combat such flaws, where possible, from the South African experience.

1.4.2 Objectives

In order to achieve the aim of this research, the researcher:

- (a) investigates whether the current Zimbabwean anti-market manipulation laws are adequate enough to promote market integrity and investor confidence in the Zimbabwean financial markets;
- (b) investigates the adequacy of the Zimbabwean anti-market manipulation enforcement framework;
- (c) investigates the role of the SECZ; and
- (d) comparatively discusses the regulation of market manipulation in South Africa and Zimbabwe.

1.5 Rationale of the Study

This research discusses the regulation of market manipulation in Zimbabwe by analysing the legislative challenges that are associated with the Zimbabwean anti-market manipulation laws. This follows the fact that the current market manipulation provisions in the *Securities Act 2004* are relatively inadequate for deterrence purposes. In this regard, this research seeks to recommend the enactment of new

legislation to combat market manipulation in Zimbabwe. Accordingly, this research seeks to expose the need for effective regulation on market manipulation in Zimbabwe from a comparative perspective with South Africa. It is hoped that this research will provide strong, effective and practical measures that could be employed to combat market manipulation in Zimbabwe.

1.6 *Limitations of the Study*

Market abuse constitutes insider trading, engaging in prohibited trading practices and the making or publishing of false, misleading or deceptive statements.⁴⁷ However, this research focuses only on prohibited trading practices and the making or publishing of false misleading or deceptive statements which are also known as market manipulation. In other words, this research is only limited to the regulation of market manipulation in Zimbabwe. Moreover, this research mainly refers to the South African anti-market manipulation laws for comparative purposes. Furthermore, this research will not provide a specific heading for literature review and hypothesis because of space and time constraints. Nonetheless, various primary and secondary sources that are relevant to the topic are referred to in the entire dissertation.

1.7 *Justification for Comparative Study*

The regulation of market manipulation in Zimbabwe seems to be flawed and inadequate. For instance, the *Securities Act* 2004 does not expressly define market manipulation. Therefore, it is necessary to examine how market manipulation is regulated in South Africa. In this regard, a comparative discussion of the regulation of market manipulation in Zimbabwe and South Africa is provided. This is done to examine and isolate possible measures that could be employed in Zimbabwe from the South African market abuse regulatory framework. Accordingly, the anti-market manipulation laws in both Zimbabwe and South Africa are discussed. South Africa is chosen as a comparative jurisdiction because it has adequate anti-market manipulation laws in SADC. For instance, as earlier stated, between 2016 and 2017, the JSE was rated as one of the best regulated exchanges in the world by the World

⁴⁷ Cassim 2008 SA Merc LJ 40.

Economic Forum.⁴⁸ South Africa has also recently introduced the Twin Peaks model legislation, namely, the *Financial Sector Regulation Act 9 of 2017*. This Act now empowers the South African Reserve Bank to create the Prudential Authority (PA) while the Financial Sector Conduct Authority (FSCA) will replace the Financial Services Board (FSB) in a bid to strengthen consumer protection and combat illicit practices such as market manipulation in the South African financial markets and financial services industry. Moreover, South Africa and Zimbabwe share strong regional economic ties. Therefore, it is necessary to examine how market manipulation is regulated in South Africa in order to recommend possible measures that could be employed to enhance the combating of market manipulation in Zimbabwe.

1.8 Research Methodology

For the purpose of this research, a qualitative research method is used. Consequently, relevant primary and secondary sources are utilised in the entire dissertation. Primary sources are original sources while secondary sources are those sources that discuss, comments on, evaluate and interpret the primary sources. Consequently, the researcher will visit the library in order to access primary sources such as relevant legislation and secondary such as relevant books, case law, journal articles. The researcher also utilises the Internet to access other relevant information. In this regard, the dates available in the bibliography are those dates on which the researcher accessed the websites provided.

For the purposes of this research, the *Potchefstroom Electronic Law Journal* referencing style is used.

1.9 Structure of the dissertation

The research comprises of seven chapters including this chapter

Chapter One provides an overview of the research and what is discussed throughout the research. This chapter comprises of the introduction, the background of the research, the statement of the problem, the aims and objectives, the rationale of the

⁴⁸ See related comments in paragraph 1.1 of this research; Mayekiso and Thabane 2016 <https://www.jse.co.za/articles/jse-among-top-regulated-exchanges> accessed 11 October 2017 page unknown.

research, limitation of the study, the justification of the comparative study and the research methodology.

Chapter Two discusses the historical background and development of the prohibition of market manipulation in Zimbabwe. This chapter elaborates more on the history of market manipulation since 1980 when Zimbabwe attained its independence. Furthermore, various forms of market manipulation in Zimbabwe are discussed. This chapter further analyses the meaning and interpretation of market manipulation in Zimbabwe.

Chapter Three discusses the role of the SECZ. In this chapter, an analysis of the role of the SECZ is provided. The laws that are administered by the SECZ are briefly outlined.

Chapter Four discusses the adequacy of the statutory prohibition on market manipulation in Zimbabwe. This chapter discusses the adequacy of relevant Zimbabwean legislation. It appears that there is no adequate legislation that regulates and combats market manipulation in Zimbabwe. This chapter focuses on the adequacy of legislation such as the *Securities Act 2004*, *Companies Act 23 of 2009* Chapter 24:03, *Assets Management Act 15 of 2004* Chapter 24:26 and other legislation that regulate market manipulation in Zimbabwe.

Chapter Five discusses the regulation of market manipulation in South Africa. Accordingly, market manipulation in South Africa is prohibited by both common law and statutory law. The statutory law governing the prohibitions are contained in the *Financial Markets Act 19 of 2012*.

Chapter Six provides a comparative analysis of the regulation of market manipulation in Zimbabwe and South Africa. This is done to investigate whether Zimbabwe can adopt and/or take lessons from its South African counterpart.

Chapter Seven provides conclusions and recommendations on this research. The research recommends measures that could be used to enhance the regulation of market manipulation in Zimbabwe.

CHAPTER TWO

HISTORICAL BACKGROUND OF THE REGULATION OF MARKET MANIPULATION IN ZIMBABWE

2.1 Introduction

Zimbabwe had one of the most vibrant and developed financial markets in Southern Africa in the 1980s.⁴⁹ However, the anti-market manipulation laws have not been consistently developed and enforced in Zimbabwe since 1980s to date.⁵⁰ Consequently, market participants and financial markets have been poorly regulated in some instances.⁵¹ Financial markets are crucial to the economic growth of any country. Therefore, enacting adequate market abuse laws and regulations is crucially important in any country. Market manipulation is one of the illicit practices that affects and interferes with the operation of financial markets.⁵²

There has been much debate regarding the definition of market manipulation and its prohibition in many countries.⁵³ Market manipulation practices include issuing an order to trade by a person or persons acting in collaboration,⁵⁴ which gives or is likely

⁴⁹ In this regard, it is important to note that the period of relative economic stability was between 1980 and 2000. Danolf S and Laakso L *Twenty Years of Independence in Zimbabwe from Liberation to Authoritarianism* (Palgrave Macmillan London 2003) 34.

⁵⁰ Chambers D and Dimson E *Financial Market History: Reflections on the Past for Investors Today* (CFA Institute Research Foundation England 2016) 99; see related discussion by Author unknown 2010 "Proposed Financial Services Institute" Zimbabwe Securities Commission of Zimbabwe Proposed Institute: Discussion Draft 5 file:///C:/Users/24415642/Downloads/Institute_of_Financial_Markets_of_Zimbabwe%20(1).pdf accessed 15 April 2017 page unknown.

⁵¹ Chambers and Dimson *Financial Market History: Reflections on the Past for Investors Today* 99; see related discussion by Author unknown 2010 file:///C:/Users/24415642/Downloads/Institute_of_Financial_Markets_of_Zimbabwe%20(1).pdf accessed 15 April 2017 page unknown.

⁵² Giswold C and Korsvold E *Market Manipulation* http://www.acer.europa.eu/en/remmit/upcoming_activities/7th%20wms%20expert%20group%20meeting/document%20library/1/a13-wmseg-07-02_market%20manipulation.pptx accessed 17 April 2017 3; Besada H *Zimbabwe Picking Up The Pieces* (Palgrave Macmillan New York 2011) 233.

⁵³ Soderstrom R *Regulating Market Manipulation: An Approach to Designing Regulatory Principles* (LLD Thesis Uppsala University 2011) 4.

⁵⁴ See section 96 and 97 of the *Securities Act* 17 of 2004 (Chapter 24:25) as amended (*Securities Act* 2004); see related discussion by Chitimira H "Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa" 2015 *AJLS* 183, 202.

to give false or misleading signals to investors or other market participants. This chapter outlines the historical regulation of market manipulation in Zimbabwe. Furthermore, market manipulation includes a practice that interferes or attempts to interfere with the free and fair operation of the financial markets by creating an artificial, false or misleading appearance with respect to the price of markets, securities, commodity or financial instrument.⁵⁵

This chapter focuses on the regulation of market manipulation in Zimbabwe from 1806 till now. This chapter traces the origins of such regulation in Zimbabwe and provides an overview of the historical development of the market manipulation laws in Zimbabwe. This is done to ensure that the relevant financial and capital markets are effectively regulated to attract more investors to the Zimbabwean financial markets.⁵⁶

2.2 Historical and foundational aspects of market manipulation regulation in Zimbabwe

A financial market is a platform where stocks and shares are purchased or sold by market participants.⁵⁷ Markets for the trading of stocks and shares or securities have existed for centuries all over the world.⁵⁸ One of the earliest markets was established in Paris, France.⁵⁹ The Zimbabwean financial markets can be traced back to 1965.⁶⁰

⁵⁵ There is no section under the *Securities Act* 2004 that expressly provide for the definition of market manipulation; see related discussion by Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *JCCLP* 24, 36-37.

⁵⁶ Lewis G "Improving Market Enforcement, Preventing Fraud in South East Europe" 2008 *GCGF* 1, 1.

⁵⁷ Karekwaivenani G "History of the Rhodesian Stock Exchange: The Formative Years, 1946-1952" 2008 *SSHJ* 9, 9.

⁵⁸ Karekwaivenani 2008 *SSHL* 9.

⁵⁹ Author unknown 2009 *To Study the Effectiveness of Legal Corporate Governance Mechanisms that Exist to Protect Shareholders of Multinational Companies Operating in Zimbabwe* www.usb.ac.za/governance/Documents/pdfs/No.6_Zimbabwe_case%20study%2009.pdf accessed 10 July 2017 1.

⁶⁰ Chambers D and Dimson E *Financial Market History: Reflections on the Past for Investors Today* 99.

During the Unilateral Declaration of Independence,⁶¹ Zimbabwe was placed under United Nations sanctions which limited foreign currency inflow into the country.⁶²

2.2.1 *The regulation of market manipulation under the Companies Act of 1862 as amended*

The *Companies Act 1862*⁶³ regulated financial institutions in Zimbabwe.⁶⁴ Nonetheless, the *Companies Act 1862* did not regulate market manipulation in the Zimbabwean financial markets.⁶⁵ Instead, the *Companies Act 1862* dealt with amongst others, the incorporation of companies⁶⁶ and the management and administration of companies.⁶⁷ The *Companies Act 1862* was then amended in 1948 by the *Companies Act 1948*.⁶⁸ Zimbabwe has a predominantly English common law system with some Dutch civil law influence.⁶⁹ Zimbabwe is a former British colony and its company laws are derived from the United Kingdom *Companies Act* of 1948.⁷⁰ The *Companies Act 1948* did not expressly regulate market manipulation in Zimbabwe.⁷¹ In this regard, The *Companies Act* of 1996⁷² and the *Zimbabwe Stock Exchange Act 1996*⁷³ were influenced by the United Kingdom *Companies Act 1948*.⁷⁴ The *Companies Act 1996* regulates the pre-incorporation, incorporation,

⁶¹ Unilateral declaration of independence (UDI) which was established in 1965 through to 1980; see related discussion by Watts C *Rhodesia's Unilateral Declaration of Independence: An International History* (Palgrave New York 2012) 300.

⁶² Makochekanwa A "Zimbabwe's Black Market for Foreign Exchange" 2007 *DWPS* 9.

⁶³ See section 6 and 39 of the *Companies Act* of 1862 (*Companies Act 1862*).

⁶⁴ Christie RN *Business law in Zimbabwe* (Juta Cape Town 1998) 21.

⁶⁵ There are no sections that expressly deal with market manipulation under the *Companies Act 1862*.

⁶⁶ See section 6 of the *Companies Act 1862*; see related discussion by Christie RN *Business law in Zimbabwe* 21.

⁶⁷ See section 39 of the *Companies Act 1862*.

⁶⁸ *Companies Act* of 1948 (*Companies Act 1948*); see related discussion by Christie RN *Business law* 1998 21.

⁶⁹ Christie *Business Law* 137.

⁷⁰ There is no section that expressly provides for the prohibition of market manipulation under the *Companies Act 1948*; author Unknown 2009 www.usb.ac.za/governance/Documents/pdfs/No.6_Zimbabwe_case%20study%202009.pdf accessed 10 July 2017 2; Christie *Business law* 21.

⁷¹ There is no section under the *Companies Act 1948* that expressly dealt with the prohibition of market manipulation; Christie RN *Business law in Zimbabwe* 21.

⁷² *Companies Act* 219 of 1996 Chapter 24:03 (*Companies Act 1996*).

⁷³ See section 34 and 112 of the *Companies Act 1996*.

⁷⁴ Christie *Business law in Zimbabwe* 21; see related discussion by Author unknown 2009 www.usb.ac.za/governance/Documents/pdfs/No.6_Zimbabwe_case%20study%202009.pdf accessed 10 July 2017 2.

operations and duties of a company operating in Zimbabwe.⁷⁵ It also deals with the rights and obligations of directors and shareholders. All public and private companies are governed by the *Companies Act* 1996 and its regulations.⁷⁶ However, the *Companies Act* 1996 does not provide for strong and effective anti-market manipulation practise and laws in Zimbabwe. It is assumed that the *Companies Act* 1996 did not adequately regulate market manipulation in Zimbabwe.

2.2.2 *The regulation of market manipulation under the Gladstone's Act of 1844*

In 1844, the *Gladstone's Act* 1844⁷⁷ was enacted in order to regulate the registry of companies in Zimbabwe.⁷⁸ The *Gladstone's Act* 1844 stipulated that registered companies should allow the public to be given details of the company's management in order to discourage fraud.⁷⁹ The *Gladstone's Act* 1844 managed to ensure transparency in the financial institutions of Zimbabwe. However, the *Gladstone's Act* 1844 did not expressly regulate market manipulation.⁸⁰

2.2.3 *The regulation of market manipulation under Southern Rhodesian Act 53 of 1965*

The Rhodesian Stock Exchange relied on the London Stock Exchange and the Johannesburg Stock Exchange for the regulation of securities in 1898. The enactment of the *Southern Rhodesian Act* 1965⁸¹ aimed at providing security in the financial markets. In 1946, the financial markets were not effectively regulated.⁸² However, because of the poor economic policies and corruption, Zimbabwe had inflation challenges which impacted negatively on the investor's ability to invest in the

⁷⁵ See section 34 of the *Companies Act* 1996; Christie RN *Business law in Zimbabwe* 22.

⁷⁶ See section 34 of the *Companies Act* 1996.

⁷⁷ *Gladstone's Act* of 1844, notably, no provision of this Act expressly prohibited market manipulation; Christie *Business Law* 21.

⁷⁸ Christie *Business Law* 21; see related discussion by Coenen TJ *Essentials of Corporate Fraud* (John Willey and Sons Canada 2008) 43.

⁷⁹ Christie *Business Law* 21.

⁸⁰ There is no section under the *Gladstone's Act* of 1844 that expressly prohibit market manipulation; see related discussion by Christie *Business Law* 21.

⁸¹ See section 2(2)(c) of the *Southern Rhodesian Act* 53 of 1965 (*Rhodesian Act* 1965).

⁸² Karekwaivenani 2008 SSHJ 29.

financial markets.⁸³ By 1980, the Rhodesian Stock Exchange was the first stock exchange to be established in Zimbabwe.⁸⁴

The *Rhodesian Act* 1965 established a committee of the stock exchange, which helped to protect the public from any dishonesty on the part of broker's practices such as market manipulation.⁸⁵ The *Rhodesian Act* 1965 introduced strict supervision of the securities exchange's affairs.⁸⁶ The *Rhodesian Act* 1965 did not focus on regulating market manipulating.⁸⁷ Furthermore, the *Rhodesian Act* 1965's role was to expand the financial markets of Zimbabwe and ensure that they are free from market abuse practices in particular market manipulation.⁸⁸

2.2.4 *The regulation of market manipulation under the Income Tax Act 136 of 1967 (Chapter 23:09)*

The *Income Tax Act* 1967⁸⁹ was enacted in order to ensure that a company may not declare a dividend in order to attract the lowest rates of tax.⁹⁰ The *Income Tax Act* 1967 prohibited companies from manipulating reduced tax.⁹¹ However, the *Income Tax Act* 1967 did not deal with market manipulation in the financial markets. Consequently, anti-market abuse practices such as market manipulation were not expressly prohibited. The *Income Tax Act* 1967 strictly dealt with the legitimate tax evasion and legitimate tax avoidance.⁹²

⁸³ Karekwaivenani 2008 SSHJ 29; Rowe DM *Manipulating the Market: Understanding Economic Sanctions, Institutional Change, and the Political Unity of White Rhodesia* (University of Michigan United States of America 2004) 158.

⁸⁴ Karekwaivenani 2008 SSHJ 9.

⁸⁵ See section 2(2)(c) of the *Rhodesian Act* 1965.

⁸⁶ See section 2 of the *Rhodesian Act* 1965; Karekwaivenani 2008 SSHJ 14; see related discussion Rowe DM *Manipulating the Market*: 158.

⁸⁷ There is no section that under the *Rhodesian Act* 1965 that regulates market manipulation

⁸⁸ See section 2(2)(c) of the *Rhodesian Act* 1965.

⁸⁹ See section 98 of the *Income Tax Act* 136 of 1967 (Chapter 23:06) (*Income Tax Act* 1967).

⁹⁰ Christie *Business law* 133.

⁹¹ Reduced tax is a plan for reducing the amount of income tax owed by an individual or business by taking advantage of various tax credits, deductions and exemptions allowed see section 98 of the *Income Tax Act* 1967;

⁹² See section 98A of the *Income Tax Act* 1967; see related discussion by Christie *Business law* 133.

2.2.5 The regulation of the market manipulation under Zimbabwean Stock Exchange Act 1973

The *Zimbabwean Stock Exchange Act 1973*⁹³ prohibits any person from practicing as a stockbroker unless he is registered in terms of this Act.⁹⁴ A stockbroker is a specialised member of a stock exchange who deals with the shares and other securities of public companies. The stockbrokers play a role in ensuring the fair and effective distribution of shares and securities in Zimbabwe. In 1974, the *Zimbabwe Stock Exchange Act 1973*⁹⁵ was enacted in order to protect the rights and obligations of all market participants in the Zimbabwean financial markets.⁹⁶ However, the *Zimbabwe Stock Exchange Act 1973* did not expressly prohibit market manipulation in Zimbabwe.⁹⁷ The *Zimbabwean Stock Exchange Act 1973* did not entirely regulate market manipulation as it only dealt with the exposure and prevention of fraud in the Zimbabwean financial markets. Furthermore, the *Zimbabwean Stock Exchange Act 1973* did not regulate the prohibition of the transactions or orders to trade which give or are likely to give false or misleading signals of the volume of trading in the Zimbabwean financial markets.

Moreover, the *Zimbabwean Stock Exchange Act 1973* did not expressly prohibit the employment of factious devices or any other form of deception transactions or orders to trade. Also the *Zimbabwean Stock Exchange Act 1973* was not amended in order to expressly prohibit the dissemination of information through social media, including the Internet.⁹⁸

⁹³ *Zimbabwean Stock Exchange Act 27 of 1973* (Chapter 24:18) (*Zimbabwean Stock Exchange Act 1974*).

⁹⁴ See section 54 of the *Zimbabwean Stock Exchange Act 1973*

⁹⁵ See section 3 of the *Zimbabwe Stock Exchange Act 1973* which was then called the *Rhodesian Act 1965*.

⁹⁶ See section 3 of the *Zimbabwe Stock Exchange Act 1973* which discusses the establishment of Zimbabwe Stock Exchange; Edwards L date unknown *History of the Zimbabwe Stock Exchange* <https://lynton-eclwards.com/about-the-zimbabwe-stock-exchange/> 1.

⁹⁷ There are no sections under the *Zimbabwean Stock Exchange Act 1973* that expressly prohibit market manipulation.

⁹⁸ See section 96 and 97 of the *Securities Act 2004*; see related discussion under Chitimira H "Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa" 2015 *AJLS* 183, 202-203

2.2.6 The regulation of market manipulation under the Securities Act 2004

The *Securities Act 2004* regulates market manipulation in Zimbabwe. Consequently, the *Securities Act 2004* prohibits trade-based market manipulation and disclosure-based market manipulation.⁹⁹ However, the *Securities Act 2004* does not prohibit Internet-based and social media-based market manipulation. Paragraph 2.4 of this chapter further discusses the regulation of market manipulation under the *Securities Act 2004*.

2.3 Overview of historical aspects of the enforcement anti-market manipulation laws Zimbabwe

2.3.1 The enforcement of anti-market manipulation laws by the Duke Bridgewater's Canal Company

In 1959, the Duke Bridgewater's Canal Company was introduced in Zimbabwe and incorporated by the *Bubble Act 1720*.¹⁰⁰ The Duke Bridgewater's Canal Company was introduced in order to regulate the procedure for passing series of company the regulation of different types of companies.¹⁰¹ However, it did not enforce market manipulation laws in the Zimbabwean financial markets. There were no appropriate continental partnerships with regard to the regulation of companies in Zimbabwe. The *Bubble Act 1720*¹⁰² was then enacted and it prohibited financial institutions from transferring shares and securities.¹⁰³ In light of this, the *Bubble Act 1720* was enacted to prohibit corporate fraud.¹⁰⁴ Despite this, the *Bubble Act 1720* did not regulate market manipulation in Zimbabwe. In this regard, the *Bubble Act 1720* did not expressly prohibit market manipulation in the Zimbabwean financial markets.

⁹⁹ See section 96 and 97 of the *Securities Act 2004*; Nelemans M "Redefining Trade-Based Market Manipulation" 2008 *VULR* 1169, 1172.

¹⁰⁰ See section 112 of the *Bubble Act of 1720 (Bubble Act 1720)*.

¹⁰¹ Christie *Business Law* 20; see related discussion by Deloitte 2013 *Doing Business in Zimbabwe The jewel of Africa* <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> accessed 28 February 2018 14.

¹⁰² Gerding EF *Law, Bubbles, and Financial Regulation* (Routledge New York 2014) 538.

¹⁰³ Mokyr J *The Economics of the Industrial Revolution* (Rowman and Littlefield publishers United States of America 1989) 13.

¹⁰⁴ Mokyr J *The Economics of the Industrial Revolution* 13.

2.3.2 *The enforcement of anti-market manipulation laws by the Zimbabwe Stock Exchange*

The origins of the Zimbabwe Stock Exchange date back in 1896. The initial development to the Zimbabwean Stock Exchange (ZSE) commenced in Bulawayo in January 1946.¹⁰⁵ Thereafter, legislation was required in order to protect the rights and obligations of market participants.¹⁰⁶ Consequently, there was a need to protect investors in the financial markets against market manipulation and other related illicit practices in Zimbabwe.¹⁰⁷ The ZSE ensured the transfer of shares quoted by the stock exchange by means of securities transfer form and brokers.¹⁰⁸ The ZSE was responsible for the collection of money, shares and securities and transferred them to the investors.¹⁰⁹ In this regard, the ZSE did not effectively enforce market manipulation, this could possibly be the reason why there were no satisfactory number of settlements and prosecutions of market manipulation cases in Zimbabwe.

2.4 *Zimbabwe's current market manipulation regime*

Currently, market manipulation is regulated by the *Securities Act* 2004.¹¹⁰ The *Securities Act* 2004¹¹¹ ensures the regulation of markets is safe from market manipulation by enforcing new investor protection rules which include specific disclosure requirements, including the prohibition to disclosures by investment advisers, uniform key facts statements contract notes and statements in order to

¹⁰⁵ Edwards L Unknown *Date* <https://lynton-edwards.com/about-the-zimbabwe-stock-exchange/> accessed 5 April 2017 1.

¹⁰⁶ Edwards *Date* Unknown <https://lynton-edwards.com/about-the-zimbabwe-stock-exchange/> 1.

¹⁰⁷ In section 96 of the *Securities Act* 2004. Author unknown 2016 *The role of the Zimbabwe Stock Exchange* <https://www.mybulawayo.com/zimbabwe-stock-exchange/> accessed 11 July 2017 page unknown; Richard J, Hilman O and William M *Securities Investor Protection: Steps Needed to Better Disclose Sipc Policies to Investors* (United States General Accounting Washington DC 2001) 32.

¹⁰⁸ See section 22 under the *Zimbabwe Stock Exchange Act* 1973; Christie *Business law* 397; Author unknown 2016 *The Role of the Zimbabwe Stock Exchange* <https://www.mybulawayo.com/zimbabwe-stock-exchange/> accessed 11 July 2017 page unknown.

¹⁰⁹ Karekwaivenani 2008 *SSHJ* 12; Moazeni B and Asadollahi F "Manipulation of Stock Price and its Consequences" 2013 *EOJNSS* 431.

¹¹⁰ See section 96 and 97 of the *Securities Act* 2004.

¹¹¹ See section 96 of the *Securities Act* 2004 see related discussion by Mayer C *Regulating Financial Services and Markets in the 21st Century* (Oxford and Portland Oregon Canada 2001) 25.

protect investors from market manipulation practices.¹¹² The *Securities Act* 2004 prohibits the intentional creation of false or misleading appearance of the volume of trading in registered securities.¹¹³ The *Securities Act* 2004 prohibits trade-based market manipulation. However; the *Securities Act* 2004 does not effectively regulate trade-based market manipulation laws in that it excludes the non-registered securities. This could imply that the *Securities Act* 2004 does not regulate market manipulation in non-registered securities.¹¹⁴ Furthermore, the *Securities Act* 2004 prohibits disclosure-based market manipulation. However, the *Securities Act* 2004 does not effectively curb market manipulation in that the *Securities Act* 2004 does not expressly provide for internet-based and social-media market manipulation.¹¹⁵

Currently, the SECZ also investigates market manipulation practices in Zimbabwe.¹¹⁶ The SECZ is responsible for the investigation into suspected cases of market manipulation.¹¹⁷ The *Securities Act* 2004, which regulates the Zimbabwe's capital markets, outlaws trade-based market manipulation and disclosure-based market manipulation in the Zimbabwean financial markets. It is hoped that the Zimbabwean policy makers will establish other enforcement bodies like the Central Securities Depository to improve transparency and integrity in the financial markets.¹¹⁸

¹¹² Hosking G Trust: A History (OUP Oxford London 2014) 197; see related discussion by Unknown author 2015 *Zimbabwe Diagnostic Review of Consumer Protection and Financial Literacy Responsible Finance* Worldbank.org/~media/GIAWB/FL/Documents/Diagnostic-Reviews/Zimbabwe-CPFL-DiagReview-Volume-I-FINAL-20150713.pdf accessed 10 July 2017 4.

¹¹³ See section 96(1)(a) of the *Securities Act* 2004.

¹¹⁴ See section 96(3) of the *Securities Act* 2004; see related discussion by Radio.net date unknown *Criminal Charges v Croatian regulator charges MOL with Market Manipulation* <https://www.tportal.hr/vijesti/clanak/croatian-regulator-charges-mol-with-market-manipulation-2011052> accessed 06 April 2016 1.

¹¹⁵ See section 97 of the *Securities Act* 2004, there is no section that expressly provide for internet-based market manipulation under the *Securities Act* 2004; see related discussion under unknown author 2015 *Zimbabwe diagnostic review of consumer protection and financial literacy responsible finance* Worldbank.org/~media/GIAWB/FL/Documents/Diagnostic-Reviews/Zimbabwe-CPFL-DiagReview-Volume-I-FINAL-20150713.pdf accessed 10 July 2017 4.

¹¹⁶ Mandizha T 2014 *Listed Companies Cleared of Share Price Manipulation* <https://dev.newsday.co.zw/2014/04/listed-companies-cleared-share-price-manipulation/> accessed 06 April 2016 page unknown.

¹¹⁷ Mpofu B date unknown *Financial Counters, Mine Fingered in Price Manipulation* <http://www.financialgazette.co.zw/listed-companies-under-probe/> accessed 19 April 2017 1.

¹¹⁸ See section 3 of the *Securities Act* 2004; Mpofu <http://www.financialgazette.co.zw/listed-companies-under-probe/> accessed 19 April 2017 1.

2.5 Conclusion

Back in 1980s, the regulation of market manipulation in Zimbabwe was inadequate for deterrence purposes¹¹⁹ due to the fact that there was no legislation that expressly prohibited market manipulation in the Zimbabwean financial markets. The financial markets of Zimbabwe were improperly regulated and investors were very unsure about their investments. The inadequate regulation of market manipulation could be the reason for the loss of public investor confidence in the Zimbabwean financial markets.¹²⁰ Since then, Zimbabwe's economy as reflected by the performance of the local bourse, has been unsteady with market watchers calling for more structural reforms of financial market regulations. This could have been caused by the inadequate regulation market manipulation in Zimbabwe.¹²¹

The financial markets currently do not have sellers as investors are holding on to every share they have.¹²² Currently, the ZSE is undergoing the registration of the new entity as a stock exchange and the transfer of assets and liabilities from the existing entity to the new entity.¹²³ It is hoped that the new entity will be equipped with better surveillance systems to detect market manipulation and the *Securities Act* 2004 will give the new entity more powers to investigate market manipulation cases.

The *Gladstone's Act* 1844, *Rhodesian Act* 1965, *Zimbabwe Stock Exchange Act* 1973, and the *Companies Act* 1996 did not regulate market manipulation in the Zimbabwean financial markets. However, the *Securities Act* 2004 currently regulates market manipulation in Zimbabwe.

¹¹⁹ See section 96 and 97 of the *Securities Act* 2004; Mpofu 2016 *Highlights of the ZSE in 2015* <https://www.theindependent.co.zw/2016/01/08/highlights-of-the-zse-in-2015/> accessed 20 April 2017 1.

¹²⁰ Mpofu <https://www.theindependent.co.zw/2016/01/08/highlights-of-the-zse-in-2015/> accessed 20 April 2017 1.

¹²¹ See section 96 of the *Securities Act* 2004; see related discussion by Mayer *Regulating Financial Services* 25.

¹²² Muronzi C 2017 *Zimbabwe: Strong Demand Bound to Spark ZSE Rally Zimbabwe Independent (Harare)* <http://allafrica.com/stories/201704140101.html> accessed 20 April 2017 1; see related discussion by Mokyr *The Economics of the Industrial Revolution* 13.

¹²³ Mpofu 2016 <https://www.theindependent.co.zw/2016/01/08/highlights-of-the-zse-in-2015/> accessed 20 April 2017 2.

CHAPTER THREE

THE ROLE OF THE SECURITIES EXCHANGE COMMISSION OF ZIMBABWE

3.1 Introduction

The Securities and Exchange Commission of Zimbabwe (SECZ) is an independent body that oversees the regulation of the securities and financial markets in Zimbabwe.¹²⁴ The SECZ regulates the trading of securities in the financial markets of Zimbabwe.¹²⁵ Put differently, the SECZ is a financial market regulatory body that regulates the trading, marketing and investments in securities in Zimbabwe.¹²⁶ The main role of the SECZ, amongst others, is to enforce the market manipulation laws and related regulations that protect investors from illicit practices such as market manipulation.¹²⁷ In addition, the SECZ plays a pivotal role in providing stronger investor protection against misleading, manipulative and fraudulent practices by illicit market participants in Zimbabwe. The SECZ achieves this by regulating financial markets and ensuring prevention against market manipulation.¹²⁸

The *Securities Act 2004*¹²⁹ provides for the establishment of the SECZ. This chapter discusses the role of the SECZ in the regulation of market manipulation in Zimbabwe. Furthermore, the role of the SECZ in relation to the combating of market manipulation in Zimbabwe¹³⁰ is discussed. Moreover, this chapter discusses the

¹²⁴ Tambowoneyi A 2015 *Objectives and Functions of the Securities Commission in Zimbabwe* <http://ashleytambowoneyi.blogspot.co.za/> accessed 03 May 2017 page unknown.

¹²⁵ Franklin JE *Securities and Exchange Commission Decision* (DIANE Publishing Washington DC 2007) 13; see related discussion by Author unknown 2017 *The Role of Zimbabwe Stock Exchange as an Investment Platform* <http://myzimhustle.co.zw/wp-content/uploads/2017/10/1-The-role-of-Zimbabwe-Stock-Exchange-as-an-investment-platform-28-June.pdf> 7 August 2017 1.

¹²⁶ Madende LT *An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe* (LLM- Dissertation Graduate School Management University of Zimbabwe 2014) 2.

¹²⁷ Madende *An Assessment of the Regulatory Philosophy 2*; see related discussion by Narunnabi M *The Role of the State and Accounting Transparency: IFRS Implementation in Developing Countries* (Routledge London 2016) 98.

¹²⁸ Nwachukwu OC "The Role of Securities and Exchange Commission (SEC) in Public Issue of Securities and the Structure of the Nigerian Capital Market" 2013 *NAUJILJ* 91.

¹²⁹ See section 3 of the *Securities Act 17 of 2004* [Chapter 24:25] as amended (*Securities Act 2004*).

¹³⁰ Tambowoneyi 2015 <http://ashleytambowoneyi.blogspot.co.za/> accessed 03 May 2017 page unknown; see related discussion by Miller R and Jentz G *Cengage Advantage Books Business Law Today: The Essentials* (Thomson West United States of America 2008) 642.

relevant measures that were adopted by the SECZ to, *inter alia*, discourage market manipulation in Zimbabwe.

3.2 The establishment of the SECZ

The SECZ was established by the *Securities Act 2004*¹³¹ after it was realised by the relevant authorities that there was no adequate regulatory body to govern the financial and securities markets in Zimbabwe.¹³² The objectives of the SECZ are specifically provided for under the *Securities Act 2004*.¹³³ For instance, it is stipulated that the SECZ shall, amongst others, provide high levels of investor protection,¹³⁴ promote market integrity and investor confidence,¹³⁵ prevent market manipulation, fraud and financial crime,¹³⁶ ensure transparency in the financial and securities market,¹³⁷ and promote investor education.¹³⁸ The SECZ faced challenges such as the absence of specific rules that regulates market participants. The SECZ also regulates financial markets, asset managers, and other market participants.¹³⁹

¹³¹ See section 3 of the *Securities Act 2004*; see related discussion by Miller and Jentz *Cengage Advantage Books Business Law Today* 642.

¹³² See section 3 of the *Securities Act 2004*; Chinamo T date unknown *The Regulatory Role of The Securities Commission in the Capital Markets* <http://www.seczim.co.zw/investor-information/concept-papers?download=38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets> accessed 27 May 2017 4; see related discussion by Kawai M and Prasad E *Financial Market Regulation and Reforms in Emerging Markets* (Brookings Institution Press, Washington DC 2011) 179.

¹³³ See section 4(1) of the *Securities Act 2004*; see related discussion by Miller and Jentz *Business Law Today: The Essentials* 642.

¹³⁴ See section 4(1)(a) of the *Securities Act 2004*; see related discussion by Kawai and Prasad *Financial Market Regulation and Reforms in Emerging Markets* (Brookings Institution Press, Washington DC 2011) 179.

¹³⁵ See section 4(1)(c) of the *Securities Act 2004*; see related discussion by Anand A *Systemic Risk, Institutional Design, and the Regulation of Financial Markets* (Oxford University Press United Kingdom 2016) 21.

¹³⁶ See section 4(1)(d) of the *Securities Act 2004*; see related discussion see related discussion by Anand A *Systemic Risk, Institutional Design, and the Regulation of Financial Markets* 21.

¹³⁷ See section 4(1)(e) of the *Securities Act 2004*; see related discussion Yun-hwan K *Local Government Finance and Bond Markets* (Asian Development Bank Manilla 2003) 170.

¹³⁸ See section 4(1)(f) of the *Securities Act 2004*; Author Unknown "Accounting and Auditing on the Securities Market" *The Herald Zimbabwe* (13 March 2017) 4.

¹³⁹ There are no provisions that deals with market participants under the *Securities Act 2004*, see related discussion by Mugwati MZ Nkala D and Mukanganiki C "The Composition and Regulation of the Financial Services Sector in Zimbabwe" 2013 *AEFR* 483.

The establishment of SECZ was generally motivated by the increased market manipulation activities in the Zimbabwean financial markets.¹⁴⁰ The SECZ enforces market manipulation laws in order to protect investors and the integrity of the Zimbabwean financial markets.¹⁴¹ The SECZ was established to enforce securities laws, promote stability in the Zimbabwean financial markets and to protect all investors.¹⁴² The SECZ provides investor education programme in order to maintain efficient and transparent financial markets that are free from market manipulation and other related illicit practices.¹⁴³

In the 1980s, the financial markets of Zimbabwe used to be regulated by the Zimbabwe Stock Exchange (ZSE) before the establishment of the SECZ in 2008.¹⁴⁴ The SECZ has been operating since 2008 as an independent body, and has since then regulated the financial markets of Zimbabwe.¹⁴⁵ The SECZ comprises of different structures and it is headed by a non-executive board of five Commissioners that are appointed by the Minister of Finance.¹⁴⁶ Consequently, the SECZ has a supervision and surveillance department that is responsible for the surveillance systems and measures that are aimed at discouraging market manipulation in Zimbabwe. It appears that the supervision and surveillance department is not

¹⁴⁰ See section 3 of the *Securities Act* 2004; Madende *An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe* 2.

¹⁴¹ See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Moloney N *How to Protect Investors: Lessons from the EC and the UK* (Cambridge University Press United Kingdom 2010) 209.

¹⁴² See section 4(1)(a) and (c) of the *Securities Act* 2004; Author Unknown 2015 *Enforcement Regulation Education Filings News About The Sec Commissioner* gov.<https://www.sec.gov/Article/whatwedo.html> accessed 5 May 2016 9.

¹⁴³ See section 4(2)(b) of the *Securities Act* 2004; Author unknown 2017 <http://www.seczim.co.zw/about-secz/management#Supervision> accessed 10 September 2012; see related discussion by Teall JL *Financial Trading and Investing* (Elsevier Amsterdam 2013) 440.

¹⁴⁴ Moloney N *How to Protect Investors: Lessons from the EC and the UK* 209.

¹⁴⁵ See section 8(1) of the *Securities Act* 2004; Madende *An Assessment of the Regulatory Philosophy* 2; see related discussion by Wei Y *Securities Markets and Corporate Governance: A Chinese Experience* (Routledge London 2016) 101-102.

¹⁴⁶ See section 5 of the *Securities Act* 2004; Author unknown 2013 *Structure of SECZ* <http://www.seczim.co.zw/about-secz/structure-of-secz> accessed 01 August 2017 page unknown; see related discussion by Bartos JM *United States Securities Law: A Practical Guide* 3rd ed (Kluwer Law International Netherlands 2006) 253.

effective in that there are not many successful settlements and prosecutions of market manipulation cases in Zimbabwe.¹⁴⁷

In a nutshell, the SECZ promotes, develops and regulates the Zimbabwean financial markets through the formulation and implementation of appropriate rules and regulations to guide financial markets operations and combat market manipulation in Zimbabwe.¹⁴⁸

3.3 The regulatory structure and objectives of the SECZ

The SECZ is headed by a board of commissioners,¹⁴⁹ who ensures the SECZ's security towards directing the SECZ undertakings and meeting the interests of its stakeholders. Furthermore, the board of commissioners administers the challenges relating to corporate governance, corporate social responsibility, ethics and market manipulation in the financial markets.¹⁵⁰ In this regard, under the *Securities Act 2004* the Minister of finance appoints the Chief Executive Officer (CEO) who serves as a chairperson of the SECZ.¹⁵¹ Furthermore, the CEO ensures that there is constant awareness of market manipulations practices, external and internal market developments.¹⁵² The legal and company secretarial department interprets all the relevant statutes: researches, recommends, reviews and drafts new legislation and rules.¹⁵³ The Corporate Finance and Market Development have powers to research

¹⁴⁷ There are no provisions that expressly deals with supervision and surveillance of market manipulation practices under the *Securities Act 2004*; see related discussion by author unknown 2017 *Supervision and Surveillance* <http://www.seczim.co.zw/about-secz/management#Supervision> accessed 05 August 2017 page unknown.

¹⁴⁸ See section 4 of the *Securities Act 2004*, Mugwati, Nkala and Mukanganiki "The Composition and Regulation of the Financial Services Sector in Zimbabwe" 2013 *AEFR* 483; 483; Bartos *United States Securities Law* 253.

¹⁴⁹ See section 6 of the *Securities Act 2004*; see related discussion by Robert A, Schwartz J and Byrn A *Rethinking Regulatory Structure* (Springer London 2013)33.

¹⁵⁰ See section 3 of the *Securities Act 2004*; see related discussion by author unknown 2017 *Commissioners* <http://www.seczim.co.zw/about-secz/board> accessed 30 October 2017 page unknown; see related discussion by Bartos *United States Securities Law* 253.

¹⁵¹ See section 5 of the *Securities Act 2004*; see related discussion by Mugwati, Nkala and Mukanganiki 2013 *AEFR* 484

¹⁵² See section 8 of the *Securities Act 2004*; see related discussion by Author unknown 2017 *Chief Executive Officer* <http://www.seczim.co.zw/about-secz/management#CEO> accessed 31 October 2017 page unknown; see related discussion by Bartos *United States Securities Law* 253-254.

¹⁵³ Franklin JE *Securities and Exchange Commission Decision* 13; see related discussion by Unknown author date unknown *Legal and Company Secretarial*

corporate finance, investor awareness and corporate communication. It ensures that the securities and financial markets are equipped with better awareness and investor education initiatives to curb any market abuse activities.¹⁵⁴ Consequently, the SECZ's information technology department provides necessary equipment to the employees of the SECZ. The information technology equipment views, analyses, and act upon the enormous volume of financial data and other information relevant to oversee the securities markets and any illicit market manipulation practices.¹⁵⁵

It appears the SECZ does not adequately provide an optimal regulatory system that promotes investor protection and enhances market integrity in Zimbabwe.¹⁵⁶ Nonetheless, the SECZ regulates and registers securities exchanges, the central securities depository, stockbrokers, investment advisors, custodians and transfer secretaries in order to curb market manipulation.¹⁵⁷ The SECZ also administers the *Asset Management Act*¹⁵⁸ and the *Collective Investment Schemes Act*.¹⁵⁹ The SECZ has the power to take all the measures necessary to execute its statutory obligations.

<http://www.seczim.co.zw/about-secz/management#Legal> accessed 31 October 2017 page unknown.

¹⁵⁴ Hochber SL *Securities and Exchange Commission Litigation Complaint* (DIANE Publishing Washington DC 2005) 2; see related discussion by Author unknown date unknown *Corporate Finance and Market Development* <http://www.seczim.co.zw/about-secz/management#Finance> 01 November 2017 page unknown.

¹⁵⁵ Hochber *Securities and Exchange Commission Litigation Complaint 2*; see related discussion by Author unknown date unknown *ICT* <http://www.seczim.co.zw/about-secz/management#ICT> accessed 01 November 2017 page unknown.

¹⁵⁶ See sections 4(1)(a) and (c) of the *Securities Act* 2004, see related discussion by Madende *An Assessment of the Regulatory Philosophy* 1.

¹⁵⁷ There is no section that deals with market participants under the *Securities Act* 2004; see related discussion by Larsen DR et al *Secondary Market Tax-exempt Asset Securitization for Sponsors, Investors, other Market Participants, and their Counsel* (American Bar Association Chicago 2005) 4.

¹⁵⁸ See section 22 of the *Asset Management Act* 15 of 2004 [Chapter 24:26]; see related discussion by Mathew J, Lin M and Tan A *Engineering Asset Management and Infrastructure Sustainability: Proceedings of the 5th World Congress on Engineering Asset Management (WCEAM 2010)* (Springer London 2012) 57.

¹⁵⁹ See section 5 of the *Collective Investment Schemes Act* 14 of 2004 [Chapter 24:19]; see related discussion by Kremer C and Lebbe I *Collective Investment Schemes in Luxembourg: Law and Practice* (Oxford University Press United Kingdom 2014) 510.

The SECZ enforces the market manipulation prohibition, it promotes transparency and efficiency of the Zimbabwean financial markets.¹⁶⁰ The SECZ provides the financial markets with various anti-market manipulation enforcement approaches that protect investors and promote the integrity of the Zimbabwean financial markets.¹⁶¹ The SECZ enforces the anti-market manipulation provisions under the *Securities Act* 2004 in order to combat illicit market abuse practices in the Zimbabwean financial markets.¹⁶² Investors require information which is accurate, correct, complete and not misleading in order for them to invest profitably.¹⁶³ Thus, the SECZ plays a crucial role in the regulation of the Zimbabwean financial markets to ensure that the relevant institutions in the industry are properly monitored in order to detect and combat market manipulation.¹⁶⁴ The SECZ also ensures that all market participants are fit and proper persons to operate in the financial markets.¹⁶⁵ The SECZ also ensures that all market participants are guided by adequate statutory regulations in order to discourage them from engaging in illicit market abuse practices such as market manipulation.¹⁶⁶ Furthermore, the SECZ provides rules and regulations that ensures fairness, efficiency, transparency and confidence in the Zimbabwean financial markets in order to regulate market manipulation.¹⁶⁷

Prior to the establishment of the SECZ in 2008, the Zimbabwean financial markets were largely unregulated.¹⁶⁸ The introduction of the SECZ improved the investigation of market manipulation cases in order to prevent market manipulation in the

¹⁶⁰ See section 4(1)(e) of the *Securities Act* 2004; see related discussion by Mathieson DJ and Schimasi GJ *International Capital Markets: Developments, Prospects, and Key Policy Issues (September 2000)* (International Monetary Funds Washington DC) 128.

¹⁶¹ See section 4(1)(a) and (c) of the *Securities Act* 2004.

¹⁶² See sections 96 and 97 of the *Securities Act* 2004; see related discussion by Madende *An Assessment of the Regulatory Philosophy* 3.

¹⁶³ See section 4 of the *Securities Act* 2004; see related discussion by Nwachukwu 2013 *NAUJILJ* 93.

¹⁶⁴ See section 4 of the *Securities Act* 2004; see related discussion by Author unknown 2017 <http://www.seczim.co.zw/about-secz/management#Supervision> accessed 05 August 2017 page unknown.

¹⁶⁵ There are no sections that expressly provide for market participants under the *Securities Act* 2004; see related discussion by Nwachukwu 2013 *NAUJILJ* 93

¹⁶⁶ See section 4(1)(d) of the *Securities Act* 2004; Nwachukwu 2013 *NAUJILJ* 93.

¹⁶⁷ See section 4(1)(a) and (e) of the *Securities Act* 2004, Nwachukwu 2013 *NAUJILJ* 94.

¹⁶⁸ Chinamo date unknown <http://www.seczim.co.zw/investor-information/concept-papers?download=38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets> accessed 27 May 2017 4; see related discussion by Avgouleas E *Governance of Global Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press United Kingdom 2012) 202.

Zimbabwean financial markets.¹⁶⁹ The SECZ licenses, regulates and encourages the development of free, fair and orderly financial and securities markets in Zimbabwe.¹⁷⁰ It is foreseen that the SECZ will join the International Organization of Securities Commission (IOSCO).¹⁷¹ The IOSCO is an association of several regulators in the world. It is hoped that once the SECZ becomes an IOSCO member, it will bring Zimbabwe in line with the IOSCO guidelines on the regulation of market manipulation.¹⁷² The SECZ's IOSCO membership will enable it to rely on other member regulatory bodies to detect and combat across-borders market manipulations.¹⁷³

¹⁶⁹ See section 4(1)(d) of the *Securities Act* 2004; An interview by Richard Mangi and Chinamo T 2017 *Unpacking Investment Banking* file:///C:/Users/NWUUser/Downloads/SECZ%20CEO%20T%20Chinamo%20Interview%2031%20March%202017.pdf accessed 23 May 2017 1.

¹⁷⁰ See section (4)(2)(c) of the *Securities Act* 2004; see related discussion by Mangi and Chinamo 2017 file:///C:/Users/NWUUser/Downloads/SECZ%20CEO%20T%20Chinamo%20Interview%2031%20March%202017.pdf accessed 23 May 2017 2; see related discussion by Beason R and James J *The Political Economy of Japanese Financial Markets: Myths versus Realities* (Springer London 1999) 40.

¹⁷¹ Mangi and Chinamo 2017 file:///C:/Users/NWUUser/Downloads/SECZ%20CEO%20T%20Chinamo%20Interview%2031%20March%202017.pdf accessed 23 May 2017 3; see related discussion by Beason and James *The Political Economy of Japanese Financial Markets: Myths versus Realities* 40.

¹⁷² Mangi and Chinamo 2017 file:///C:/Users/NWUUser/Downloads/SECZ%20CEO%20T%20Chinamo%20Interview%2031%20March%202017.pdf accessed 23 May 2017 page 3; see related discussion by Aspen Publishers *Securities Regulation: Keyed to Courses Using Cox, Hillman, and Langevoort's Securities Regulation: Cases and Materials* 6th ed (Walters Kluwer and Business Law New York 2009), 111.

¹⁷³ Mangi and Chinamo 2017 file:///C:/Users/NWUUser/Downloads/SECZ%20CEO%20T%20Chinamo%20Interview%2031%20March%202017.pdf accessed 23 May 2017 3; see related discussion by Hugh T, Yung P and Park C *The Financial Development of Japan, Korea, and Taiwan: Growth, Repression, and Liberalization* (Oxford University Press United Kingdom 1994)146.

3.3.1 The objectives of the SECZ

The SECZ has various objectives. For instance, the SECZ seeks to:

- (a) promote and maintain investor protection

Investors in the financial markets are sometimes vulnerable to market manipulation. Therefore, investor protection is crucially important in any viable financial markets.¹⁷⁴ The SECZ seeks to protect investors against misleading, manipulative or fraudulent practices in the Zimbabwean financial markets.¹⁷⁵ The investors in the financial markets are entitled to full disclosure of information which is material for them to make informed decisions.¹⁷⁶ The SECZ should continue to strive to ensure that the Zimbabwean financial markets match the high standards of market conduct and investor protection that effectively discourage market manipulation.¹⁷⁷

Moreover, the SECZ provides an independent Investor Protection Fund which is there to meet the claims of investors against offenders of market manipulation.¹⁷⁸ The SECZ ensures that there is adequate, equitable and timely disclosure of accurate information to investors for them to make informed decisions.¹⁷⁹ The SECZ also ensures that only duly licensed and authorized persons should be permitted to act as market participants and market players.¹⁸⁰ The SECZ regulates onsite and

¹⁷⁴ See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Author unknown 2011 *Reviewing the Regulation of Financial Markets in South Africa* <http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf> accessed 07 June 2017 10; see related discussion by see related discussion by Hugh, Yung and Park *The Financial Development of Japan, Korea, and Taiwan* 146.

¹⁷⁵ See section 4(2)(d) of the *Securities Act* 2004; see related discussion by Papanastasiou TN *The Legal Protection of Foreign Investments Against Political Risk: Japanese Business in the Asian Energy Sector* (Quid Pro Books United States of America 2015) 60.

¹⁷⁶ See section 4(1)(f) of the *Securities Act* 2004; see related discussion by Papanastasiou *The Legal Protection of Foreign Investments Against Political Risk* 60.

¹⁷⁷ See section (4)(1)(a) and section (4)(2)(d) of the *Securities Act* 2004; Author unknown 2011 <http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf> accessed 07 June 2017 9.

¹⁷⁸ Chinamo date unknown <http://www.seczim.co.zw/investor-information/concept-papers?download=38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets> accessed 27 May 2017 8; see related discussion by Shan W *The Legal Protection of Foreign Investment: A Comparative Study (with a Foreword by Meg Kinnear, Secretary-General of the ICSID)* (Bloomsbury Publishing United Kingdom 2014) 681.

¹⁷⁹ See section 4(1)(f) of the *Securities Act* 2004; see related discussion by Shan *The Legal Protection of Foreign Investment* 681.

¹⁸⁰ Lichtman K and Duke LN *Stock Detective Investor: Finding Market Gems Online* (John Wiley and Sons New York 2012) 49; see related disussion by Author Unknown date unknown

offsite supervision of market participants.¹⁸¹ This is done to detect and discourage all market participants from committing market abuse practices such as market manipulation.

(b) prevent unethical risk in the financial markets

The SECZ seeks to reduce the unethical and systematic risk in the Zimbabwean financial markets.¹⁸² To avoid failure of institutions, the SECZ has capital and internal control requirements that financial markets players and all market participants should adhere to in order to avoid disruptions in the financial markets.¹⁸³ This helps the SECZ to promote better domestic and cooperation that increases information sharing between like-minded regulatory bodies.¹⁸⁴ The SECZ also ensures that capital and other prudential requirements are sufficient to address appropriate trading risks.¹⁸⁵ It is submitted that the SECZ should provide alternative anti-market manipulation enforcement authorities that reduces the systematic risk associated with market abuse practices in the financial markets. The SECZ should continue to promote

	<i>Capital</i>	<i>Market</i>	<i>Highlights</i>
	http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20-%20Week%202.pdf accessed 21 May 2017 2.		
181	There is no section that expressly provide for the supervision of market participants under the <i>Securities Act</i> 2004, author unknown 2017 http://www.seczim.co.zw/about-secz/management#Supervision accessed 05 august 2017 page unknown; see related discussion by Lichtman and Duke <i>Stock Detective Investor: Finding Market Gems Online</i> 49.		
182	See section 4(1)(b) of the <i>Securities Act</i> 2004; see related discussion by Latimer P and Maume P <i>Promoting Information in the Marketplace for Financial Services: Financial Market Regulation and International Standards</i> (Springer Switzerland 2012) 86.		
183	Latimer and Maume <i>Promoting Information in the Marketplace for Financial Services</i> 86; see related discussion by Author unknown date unknown http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20-%20Week%202.pdf accessed 21 May 2017 3.		
184	There are no sections that expressly provide for cooperation of with the other bodies under the <i>Securities Act</i> 2004; in relation to this see section 3 of the <i>Securities Act</i> 2004; Author unknown date unknown http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20-%20Week%202.pdf accessed 21 May 2017 3; see related discussion by Maggetti M <i>Regulation in Practice: The de facto Independence of Regulatory Agencies</i> (ECPR Press United Kingdom 2012) 67.		
185	See section 4(1)(a) of the <i>Securities Act</i> 2004; Author unknown date unknown http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20-%20Week%202.pdf accessed 21 May 2017 3; see related discussion by Maggetti <i>Regulation in Practice: The de facto Independence of Regulatory Agencies</i> 67.		

comprehensive risk management in the Zimbabwean financial markets to combat market manipulation.¹⁸⁶

(c) promote investor confidence and market integrity

Confidence in capital and financial markets is a pre-requisite for the sustenance and growth of such markets in any country.¹⁸⁷ The SECZ enforces anti-market manipulation regulations, which prevent market manipulation while ensuring fairness and transparency in financial markets.¹⁸⁸ This, *inter alia* increases public investor confidence in the Zimbabwean financial markets. The SECZ should, however, strive to effectively enforce trade-based and disclosure-based market manipulation laws to ensure fairness and prevent illicit activities that damage investor confidence in the Zimbabwean financial markets.¹⁸⁹

(d) promote investor education on market abuse practices

The SECZ seeks to build a financially literate community and investors that can make informed choices, act responsibly, confidently and competently when trading in the regulated financial markets.¹⁹⁰ The SECZ promotes awareness programs and initiatives towards the regulation of market manipulation and related preventative measures through investor workshops, and participation at trade fairs and exhibitions.¹⁹¹ This is mainly aimed at discouraging persons from engaging in market manipulation and other market abuse practices.

¹⁸⁶ See section 4(1)(b) of the *Securities Act* 2004; Author unknown 2011 <http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf> accessed 07 June 2017 Page 11.

¹⁸⁷ See section 4 of the *Securities Act* 2004; see related discussion by Chinamo date unknown <http://www.seczim.co.zw/investor-information/concept-papers?download=38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets> accessed 27 May 2017 10.

¹⁸⁸ See section 4(1)(b) of the *Securities Act* 2004; Author unknown date unknown <http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20-%20Week%202.pdf> accessed 21 May 2017 3.

¹⁸⁹ See section 4(1)(d) of the *Securities Act* 2004; Chinamo date unknown <http://www.seczim.co.zw/investor-information/concept-papers?download=38:regulatory-role-of-the-securities-and-exchange-commission-in-the-capital-markets> accessed 27 May 2017 10.

¹⁹⁰ See section 4(1)(f) of the *Securities Act* 2004; see related discussion by Author unknown 2013 *What is the Role of the Securities and Exchange Commission Of Zimbabwe (SECZ)?* <http://www.seczim.co.zw/faq/109-role> accessed 29 August 2017 page unknown.

¹⁹¹ See section 4(1)(f) of the *Securities Act* 2004; Author unknown date unknown <http://www.seczim.co.zw/downloads/column/SECZ%20Newspaper%20Column%20->

3.4 Selected regulatory duties of the SECZ

One of the duties of the SECZ is to ensure that all stock brokers are registered with the SECZ.¹⁹² Furthermore, the SECZs provides information to investors for the transparency of the financial markets and prevent market manipulation.¹⁹³ The SECZ promotes the free, fair and orderly trading of securities in the financial markets in Zimbabwe.¹⁹⁴

The SECZ further supervises and regulates licensed persons to discourage market manipulation in the Zimbabwean financial markets.¹⁹⁵ The SECZ also registers, supervises and regulates the securities exchanges in Zimbabwe.¹⁹⁶ The SECZ enforces the anti-market abuse laws in Zimbabwe. Furthermore, the SECZ creates rules and ensures that market participants comply with such rules. The SECZ ensures that publicly traded companies disclose their non-public price sensitive financial information to the general public in order to protect investors against market manipulation.¹⁹⁷ This is done to protect market participants and ensure that the

%20Week%202.pdf accessed 21 May 2017 5; see related discussion by Suzanne LW and Magistrale J *Understanding Fiduciary Duties in Business Entities: 2017 Update* (CEB United States of America 2017) 210.

¹⁹² See section 4 of the *Securities Act* 2004; Author unknown date unknown *Securities and Exchange Commission: Roles and Responsibilities* <http://www.financialized.com/Investing/securities-and-exchange-commission-roles-responsibilitie> accessed 5 June 2017 1; see related discussion by Suzanne and Magistrale *Understanding Fiduciary Duties in Business Entities: 2017 Update* 210.

¹⁹³ See section 4 of the *Securities Act* 2004; see related discussion by Author unknown date unknown <http://www.financialized.com/Investing/securities-and-exchange-commission-roles-responsibilitie> accessed 5 June 2017 2; see related discussion by Fillerup J *et al Understanding Fiduciary Duties in Business Entities: 2017 Update* (Continuing Education of the Bar California 2017) 54.

¹⁹⁴ See section 4 of the *Securities Act* 2004; Author unknown 2016 *Securities Laws & Legislation* <http://www.seczim.co.zw/enforcement/securities-act> accessed 05 June 2017 page unknown.

¹⁹⁵ See section 4(2)(b) of the *Securities Act* 2004; Author unknown 2016 <http://www.seczim.co.zw/enforcement/securities-act> accessed 05 June 2017 page unknown.

¹⁹⁶ See sections 29 and 30 of the *Securities Act* 2004; see related discussion by Frank J and Roberson C *Introduction to Corporate and White-Collar Crime* (CRC Press London 2013) 103.

¹⁹⁷ See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Frank and Roberson *Introduction to Corporate and White-Collar Crime* 103.

financial markets operate accurately in order to combat market manipulation in the Zimbabwean financial markets.¹⁹⁸

The SECZ also oversees the trading and dealing in securities by market participants in the Zimbabwean financial markets.¹⁹⁹ This is done to maintain efficient, transparent, and effective financial markets.²⁰⁰ The SECZ monitors securities companies, self-regulatory organizations and other market participants in the Zimbabwean financial markets.²⁰¹ Nevertheless, the SECZ should develop better accounting and adequate anti-market abuse regulatory standards that will efficiently regulate the Zimbabwean financial markets so as to combat market manipulation.

3.5 Selected key market participants that are administered by the SECZ

3.5.1 Investors

An investor may be an individual or an institution that buys financial instruments or securities with the aim of making financial profit from its investment.²⁰² Investors play an important role in the financial markets. Accordingly, investors should be protected against market manipulation.²⁰³ In Zimbabwe, the SECZ has a duty to protect investors against market manipulation practices in the Zimbabwean financial markets.²⁰⁴ Investors are vulnerable compared to other market participants and likely to suffer more of market manipulation in Zimbabwe. The prohibition on market

¹⁹⁸ See section 4 of the *Securities Act 2004*; Tarantino *A Governance, Risk, and Compliance Handbook: Technology, Finance, Environmental, and International Guidance and Best Practices* (John Wiley and Sons New Jersey 2008) 62.

¹⁹⁹ Author unknown 2016 <http://www.seczim.co.zw/enforcement/securities-act> accessed 05 June 2017; see related discussion by Tarantino *Governance, Risk, and Compliance Handbook* 62.

²⁰⁰ See section 4(1)(a) and 4(2)(d) of the *Securities Act 2004*; see related discussion by Tarantino *Governance, Risk, and Compliance Handbook* 62.

²⁰¹ There is no section that deals with market participants under the *Securities Act 2004*; Author unknown 2016 <http://www.seczim.co.zw/enforcement/securities-act> accessed 05 June 2017 page number unknown; see related discussion by Fillerup et al *Understanding Fiduciary Duties in Business Entities: 2017 Update* 54.

²⁰² Jalloh M "The Role of Financial Markets in Economic Growth" 2009 *ACCRA* 1, 9-10.

²⁰³ See section 4(1)(a) of the *Securities Act 2004*; see related discussion by Masciandaro *D Handbook of Central Banking and Financial Authorities in Europe: New Architectures in the Supervision of Financial Markets* (Edward Elgar Publishing United Kingdom 2005) 172.

²⁰⁴ See section 4(1)(a) of the *Securities Act 2004*; see related discussion by Masciandaro *Handbook of Central Banking and Financial Authorities in Europe* 172.

manipulation is not effectively enforced by the SECZ.²⁰⁵ Investors may buy securities through a licensed stock broker and this process must be effectively monitored by the SECZ to combat market manipulation in the Zimbabwean financial markets.²⁰⁶ Consequently, the SECZ requires all companies and financial institutions to fully disclose their state affairs in order for investors to make informed investment decisions and avoid the negative effects of market manipulation.²⁰⁷

The SECZ must continue to provide investor protection and education programme in order to discourage other persons from violating investors' rights through market manipulation.²⁰⁸ Failure to provide investor protection could lead to the loss of confidence in the Zimbabwean financial markets.²⁰⁹ Accordingly, the SECZ has established an investor education programme to protect investors against market abuse practices such as market manipulation.²¹⁰ This investor education programme is aimed at improving investor awareness and protection against market manipulation in the Zimbabwean financial markets.²¹¹ This is done by empowering the investors with the relevant information on the investment processes and services to combat market manipulation.²¹² The SECZ's investor education programme is also aimed at developing financially literate investors, where investors can have

²⁰⁵ See section 4(1)(d) of the *Securities Act* 2004; see related discussion by see related discussion by Masciandaro *Handbook of Central Banking and Financial Authorities in Europe* 172.

²⁰⁶ See section 4(1)(d) of the *Securities Act* 2004; see related discussion by Jalloh 2009 ACCRA 10.

²⁰⁷ See section 4(1)(f) of the *Securities Act* 2004; Chinamo T 2014 *Key Strategic Focus Areas for the Securities And Exchange Commission of Zimbabwe Imara Conference Presentation Compatibly* <http://www.imara.com/media/9897/secz-2014-imara-conference-presentation-compatibility-mode-.pdf> accessed 8 June 2017 7.

²⁰⁸ See sections 4(1)(a) and (4)(1)(d) of the *Securities Act* 2004; Chinamo 2014 <http://www.imara.com/media/9897/secz-2014-imara-conference-presentation-compatibility-mode-.pdf> accessed 8 June 2017 6.

²⁰⁹ See section 4 of the *Securities Act* 2004; see related discussion by Chinamo 2014 <http://www.imara.com/media/9897/secz-2014-imara-conference-presentation-compatibility-mode-.pdf> accessed 8 June 2017 6.

²¹⁰ See section 4 of the *Securities Act* 2004; see related discussion by Author unknown 2013 <http://www.seczim.co.zw/faq/109-role> accessed 5 June 2017 page unknown.

²¹¹ See section 4(1)(f) of the *Securities Act* 2004; see related discussion by Fillerup et al *Understanding Fiduciary Duties in Business Entities: 2017 Update* 54.

²¹² See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Author unknown 2014 *SECZ Investor Education Initiatives* <http://www.seczim.co.zw/investorinformation/publications/category/24column?download=136:secz-newspaper-column-3-november-2014-secz-investor-education-initiatives> accessed 30 May 2017 1.

confidence and get effective investments; returns that are not negatively affected by market manipulation.²¹³ The investor education programme further helps an investor to avoid market manipulation when they trade and participate in the financial markets.²¹⁴ The SECZ's investor education initiatives are designed to suit all groups of people regardless of age, income or education.²¹⁵

The SECZ has put some investor protection mechanisms in place to inter alia, curb market manipulation.²¹⁶ These mechanisms include the regulation of financial markets and activities through the licensing of market participants.²¹⁷ The SECZ monitors market participants and exposes the market manipulation offenders in the Zimbabwean financial markets.²¹⁸ Furthermore, other investor protection mechanisms includes the independent investor protection fund, the professional indemnity cover and guarantee fund.²¹⁹

²¹³ See section 4 of the *Securities Act* 2004; see related discussion by Author unknown 2014 <http://www.seczim.co.zw/investorinformation/publications/category/24column?download=136:secz-newspaper-column-3-november-2014-secz-investor-education-initiatives> accessed 30 May 2017 1; Chisholm AM *An Introduction to Capital Markets: Products, Strategies, Participants* (John Wiley and Sons United Kingdom 2003) 300.

²¹⁴ See sections 4(1)(d) and (f) of the *Securities Act* 2004; see related discussion by Chisholm *An Introduction to Capital Markets* 300.

²¹⁵ Author unknown 2014 <http://www.seczim.co.zw/investor-information/publications/category/24-column?download=136:secz-newspaper-column-3-november-2014-secz-investor-education-initiatives> accessed 30 May 2017 1; see related discussion by Baker K and Nofsinger JR *Behavioural Finance: Investors, Corporations, and Markets* (John Wiley and Sons United Kingdom 2010) 72.

²¹⁶ See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Author unknown 2013 *What are the Investor Protection Mechanisms that are Available in the Capital Markets?* <http://www.seczim.co.zw/faq/108-investor-protection-mechanisms> accessed 06 June 2017 1.

²¹⁷ See section 4(1)(b) of the *Securities Act* 2004, see related discussion by Author unknown 2013 <http://www.seczim.co.zw/faq/108-investor-protection-mechanisms> accessed 06 June 2017 1.

²¹⁸ See section 4(1)(a) of the *Securities Act* 2004; see related discussion by Author unknown 2013 <http://www.seczim.co.zw/faq/108-investor-protection-mechanisms> accessed 06 June 2017 1.

²¹⁹ See sections 4 of the *Securities Act* 2004; see related discussion by Author unknown 2013 <http://www.seczim.co.zw/faq/108-investor-protection-mechanisms> accessed 06 June 2017 1; the Investor Protection Fund is an entity that was established by the SECZ for the purposes of providing compensation to investors for losses suffered as a direct result of a financial collapse of a market player licensed by SECZ being unable to meet its liabilities through insolvency, malpractice or other causes; the professional indemnity insurance is designed to provide protection for professionals in respect of third parties whom have suffered an economic loss as a result of these services.

3.5.2 The Central Securities Depository

The Central Securities Depository (CSD) is a very important institution in the Zimbabwean securities and financial markets.²²⁰ In terms of the *Securities Act* 2004,²²¹ the CSD is responsible for the selling of securities and the transfer of ownership for such securities.²²² The CSD records shareholders' traded securities in order to avoid illicit market abuse practices such as market manipulation.²²³ The CSD also deposits shares through registered custodians before trading in those shares.²²⁴ A CSD is a facility that provides for the storage and administering of securities and enables securities to be transferred from one system to the other electronically.²²⁵ If utilised effectively, the CSD may help the SECZ to combat market manipulation.²²⁶ However, the introduction of the electronic trading (online trading) has brought new challenges to the CSD in relation to the curbing of market manipulation in the Zimbabwean financial markets.²²⁷ Chengetedzai Central Securities Depository acts as a custodian of securities in order to prevent illicit activities that have the potential causing market manipulation in the financial markets.²²⁸

²²⁰ See section 2(1)(a) of the *Securities Act* 2004; see related discussion by Bratton M and Mattes R *Public Opinion, Democracy, and Market Reform in Africa* (Cambridge University Press United Kingdom 2005) 266.

²²¹ See section 2 of the *Securities Act* 2004; see related discussion by Bratton and Mattes *Public Opinion, Democracy, and Market Reform in Africa* 266.

²²² See section 2(1)(b) of the *Securities Act* 2004; Madende *An Assessment of the Regulatory Philosophy* 4.

²²³ See section 2(1)(b) of the *Securities Act* 2004; see related discussion by Bratton and Mattes *Public Opinion, Democracy, and Market Reform in Africa* 266.

²²⁴ See section 2(1)(c)(i)-(iii) of the *Securities Act* 2004.

²²⁵ See section 2(1)(b) of the *Securities Act* 2004

²²⁶ There are no provisions that expressly deals with the CSD under the *Securities Act* 2004; Rutsito TT 2014 *Zimbabwe's Central Security Depository in a Landmark Move* <http://www.technomag.co.zw/2014/09/09/zimbabwes-central-security-depository-in-a-landmark/#sthash.sI0CQunx.dpuf> accessed 22 May 2017 page unknown.

²²⁷ There is no section that expressly deals with electronic trading under the *Securities Act* 2004; Rutsito TT 2014 *Zimbabwe's Central Security Depository in a Landmark Move* <http://www.technomag.co.zw/2014/09/09/zimbabwes-central-security-depository-in-a-landmark/#sthash.sI0CQunx.dpuf> accessed 22 May 2017 page unknown.

²²⁸ See section 2(1)(c)(ii) of the *Securities Act* 2004; Author unknown 2015 *Insider Trading and other Market Abuses including the Effective Management of Price Sensitive Information* <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Bo oklet.pdf> accessed 29 May 2017 21; see related discussion by Author unknown 2014 "Setting up of Central Securities Depository approved" *BH24* (20 May 2014) page unknown.

The CSD also enhances public investor confidence, fairness and integrity of the Zimbabwean financial markets. Market manipulation harms the integrity and undermines public confidence of the securities and financial markets.²²⁹ Consequently, the CSD plays a pivotal role in the securities trading to detect and prevent market manipulation in Zimbabwe.²³⁰

The CSD also helps to reduce systematic risks in financial markets, and enhance public investor confidence in the Zimbabwean financial markets.²³¹ In light of this, the CSD oversees the distribution of securities. This process ensures the Zimbabwean financial markets are free from market manipulation and other illicit practices.²³² The CSD, together with the Automated Trading System (ATS) which was introduced by the ZSE, assists the SECZ to monitor securities transactions in the financial markets and to detect market abuse activities such market manipulation the benefit of investors.²³³

3.5.3 The ZSE

The ZSE was established in 1946. Before the enactment of the *Securities Act* 2004, the Zimbabwean financial markets were regulated in terms of the *Zimbabwe Stock Exchange Act*.²³⁴ Consequently, the establishment of the SECZ brought new

²²⁹ See section 4(1)(a) of the *Securities Act* 2004; Author unknown 2015 <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf> accessed 29 May 2017 20.

²³⁰ See section 4(1)(d) of the *Securities Act* 2004; Author unknown 2015 <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf> accessed 29 May 2017 20.

²³¹ Clark RA *Africa's Emerging Securities Markets: Developments in Financial Infrastructure* (Greenwood Publishing Group United States of America 1998) 206; see related discussion by Author unknown 2015 *Newsletter release* 2015 <http://www.chengetedzai.co.zw/wp-content/uploads/2015/11/CSD-Launch-Newsletter.pdf> accessed 01 June 2017 page unknown.

²³² See section 4(1)(d) of the *Securities Act* 2004; see related discussion by Author unknown 2015 <http://www.chengetedzai.co.zw/wp-content/uploads/2015/11/CSD-Launch-Newsletter.pdf>. accessed 01 June 2017 page unknown.

²³³ Clark *Africa's Emerging Securities Markets: Developments in Financial Infrastructure* 206; see related discussion by Unknown author 2015 <http://www.chengetedzai.co.zw/wp-content/uploads/2015/11/CSD-Launch-Newsletter.pdf>. accessed 01 June 2017 page unknown.

²³⁴ See section 119 of the *Securities Act* 2004 repealed the *Zimbabwe Stock Exchange Act* 236 of 1980 (chapter 24:18) (*Zimbabwe Stock Exchange Act* 1980).

changes in the ZSE's status be a controlled substance, this brought up administrative clashes between the ZSE and the SECZ.²³⁵

The *Securities Act* 2004 defines securities exchange as a person or entity that constitutes, maintains or provides a market place, including online trading, where buyers and sellers of securities can be brought together to exchange securities.²³⁶

The ZSE is a current stock exchange of Zimbabwe that also helps in the combating and detection of market manipulation.²³⁷ The ZSE serves as a centre of acquiring funds for listed companies and investors. The financial markets free from market manipulation helps the economy to grow by providing quantity and quality investments.

3.5.4 Stock brokers

A stock broker is a licensed agent who buys and sells financial securities on behalf of investors.²³⁸ A stockbroker executes trades on the instruction of investors.²³⁹

Previously, in 1993, stock brokers were licensed by the ZSE and now they are licensed by the SECZ in terms of the *Securities Act* 2004.²⁴⁰ In *Bartholomew Mswaka v the Securities Exchange Commission of Zimbabwe*, the SECZ argued that the issuing of licences to stockbrokers was only applicable to stockbrokers who were already in securities business in order to avoid illicit practices such as market manipulation.²⁴¹

Financial markets integrity is very important to any country. Investors need to be assured that they are investing in a transparent market where securities' prices

²³⁵ The ZSE has drawn SECZ to court under the case *Zimbabwe Stock Exchange v Security Exchange Commission of Zimbabwe* H.C 8347/10, challenging its regulatory authority.

²³⁶ See section 2 of the *Securities Act* 2004.

²³⁷ See section 121(2) of the *Securities Act* 2004.

²³⁸ Madende *An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe* 6.

²³⁹ There are no sections that expressly deal with the duties of a stockbroker under the *Securities Act* 2004.

²⁴⁰ Section 30 of the *Securities Act* 2004.

²⁴¹ The SECZ was taken to court on several cases with regard of the licencing of the stockbrokers see related cases of *Mswaka v SECZ* H.C. 8067 2010; *SECZ vs Gwatidzo NO and others* SC 459 2013; *Remo Investment Brokers (Pvt) Ltd & others v SECZ* Misc 6 2012, *Rufaro Zengeni v SECZ* Misc 7 2012 and *Interfin Securities (Pvt) Limited v SECZ* Misc 8 2012; however these cases did not deal with market manipulation.

reflect their true value.²⁴² The Zimbabwean financial markets must be well regulated to curb market abuse practices such as market manipulation.²⁴³ Where financial markets lack fairness, investors may lose their investments due to unethical trading practices such as market manipulation.²⁴⁴

Market manipulation can be caused by stock brokers. Therefore, it is very important to uphold the integrity of financial markets in Zimbabwe, by ensuring that the SECZ regulates the conduct of stock brokers to avoid market manipulation.²⁴⁵

Investment advisers are required to specify the volume of managed assets and the services offered in order to detect and discourage illicit market abuse practices such as market manipulation.²⁴⁶ Investment advisers are required by the SECZ to disclose their payment schedule, including fund expenses and custody in order to avoid market manipulation.²⁴⁷

3.6 Conclusion

Zimbabwe, like other jurisdictions, has the *Securities Act* 2004 to combat market manipulation. However, a lot may still need to be done in order to eliminate flaws that are contained in the *Securities Act* 2004 in Zimbabwe.²⁴⁸ As indicated above, significant progress has been made with regards to the enforcement of market manipulation laws by the SECZ.²⁴⁹ It is noteworthy that the SECZ plays a crucial role

²⁴² See section 4(1)(a) of the *Securities Act* 2004.

²⁴³ Makwata R "PPC Fungibility: are there Grounds for Market Rigging Suspicion?" *Zimbabwe Independent* (25 February 2010) page unknown.

²⁴⁴ See section 4(1)(b) and (d) of the *Securities Act* 2004.

²⁴⁵ There are no provisions that deals with market participants under the *Securities Act* 2004; SECZ regulate and license persons who trade or deal in or manage securities; and these include Securities dealers & dealing firms (commonly referred to as stockbrokers); Securities Transfer Secretaries; Securities Custodians; Securities Investment Advisers; Securities Investment Managers' Securities Trustees; Central Securities Depositories; Depository Participants and Securities Exchanges (also known as Stock Exchanges).

²⁴⁶ See sections 96 and 97 of the *Securities Act* 2004. However, there are no sections that expressly deals with the detection of market manipulation under the *Securities Act* 2004.

²⁴⁷ Makwata *Zimbabwe Independent* page unknown.

²⁴⁸ See sections 96 and 97 of the *Securities Act* 2004; see related discussion by Chitimira H "Overview of Problems Associated with Effective Enforcement of Market Abuse Provisions in South Africa" 2012 *MJSS* 47, 56.

²⁴⁹ See sections 3 and 4 of the *Securities Act* 2004; see related discussion by Peiris SJ *Foreign Participation in Emerging Markets' Local Currency Bond Markets* (International Monetary Fund United States of America 2010) 7.

in the enforcement of market manipulation laws in the Zimbabwe.²⁵⁰ Accordingly, it is recommended that policy makers in Zimbabwe should consider introducing provisions in the *Securities Act 2004* that obliges and empowers the SECZ's surveillance divisions to effectively detect and combat market manipulation activities in Zimbabwe by providing better surveillance systems.²⁵¹

Given this background, it is hoped that challenges such as the adoption of market manipulation preventative measures and the provision of distinct penalties for market manipulation offenders will enable the SECZ to successfully enforce the market manipulation prohibition in Zimbabwe.²⁵² It is also hoped that the SECZ will consistently execute its functions to enhance the integrity of the Zimbabwean financial markets.²⁵³ The SECZ should also consider establishing its own surveillance systems in order to improve and increase the detection of market manipulation activities in the Zimbabwean financial markets.²⁵⁴

²⁵⁰ See sections 3, 96 and 97 of the *Securities Act 2004*; see related discussion by Chitimira 2012 *MJSS* 56.

²⁵¹ Chitimira H "An Analysis of the Establishment and Enforcement of Anti-Market Abuse Preventative Measures in the United Kingdom" 2014 *MJSS* 529, 537.

²⁵² See sections 98-99 of the *Securities Act 2004*; Chitimira 2014 *MJSS* 537.

²⁵³ See section 4 of the *Securities Act 2004*; Soderstrom R *Regulating Market Manipulation: An Approach to Designing Regulatory Principles* (LLD-Thesis Uppsala University) 4.

²⁵⁴ There is no section that expressly deals with the surveillance and detection of market manipulation under the *Securities Act 2004*; Chitimira 2014 *MJSS* 538.

CHAPTER FOUR

THE ADEQUACY OF THE STATUTORY PROHIBITION ON MARKET MANIPULATION IN ZIMBABWE

4.1 Introduction

To achieve efficiency and competitiveness in the financial markets, it is important that such markets reflect the genuine supply and demand of securities or prices of the relevant securities in order to destroy imperfections in the financial markets, such as fraud and non-disclosure of the relevant price-sensitive information.²⁵⁵ The *Securities Act*²⁵⁶ prohibits market manipulation in order to maintain the integrity of the financial markets in Zimbabwe.²⁵⁷ Both trade-based market manipulation and disclosure-based market manipulation practices are prohibited in Zimbabwe.²⁵⁸ Market manipulation practices harm the integrity of the financial markets. Therefore, the adequate regulation of market manipulation is crucially important in any country. Accordingly, this chapter discusses some selected key elements of market manipulation under the *Securities Act* 2004.²⁵⁹ This is done in order to examine the adequacy of the *Securities Act* 2004 in relation to the combating of market manipulation in Zimbabwe.²⁶⁰

Furthermore, this chapter discusses some flaws in the current market manipulation regulatory framework under the *Securities Act* 2004. In this regard, possible measures that could be utilised to enhance the combating of market manipulation in Zimbabwe are provided.

²⁵⁵ Latimer P "False Trading and Market Rigging on the Stock Exchange" 1999 *APLR* 247, 247-248.

²⁵⁶ See *Securities Act* 17 of 2004 (Chapter 24: 25) as amended (*Securities Act* 2004); see related discussion by Davis J *Professional Investor Rules: Top Investors Reveal the Secrets of Their Success* (Harriman House Limited United Kingdom 2013) 210.

²⁵⁷ Latimer 1999 *APLR* 247-248.

²⁵⁸ See sections 96 and 97 of the *Securities Act* 2004; see related discussion by Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *JCCLP* 24, 24-25.

²⁵⁹ See section 96 and 97 of the *Securities Act* 2004 Chapter 24:25 (*Securities Act* 2004); see related discussion by Davis *Professional Investor Rules: Top Investors Reveal the Secrets of Their Success* 210.

²⁶⁰ See sections 96-99 of the *Securities Act* 2004; see related discussion by Davis J *Professional Investor Rules: Top Investors Reveal the Secrets of Their Success* 210.

4.2 The definition of market manipulation

It should be noted that market manipulation is not expressly defined under the *Securities Act 2004*.²⁶¹ However, market manipulation practices such as trade-based market manipulation and disclosure-based market manipulation are statutorily prohibited under the *Securities Act 2004*.²⁶² However, market manipulation can be defined as a practice that interferes or attempts to interfere with the free and fair operation of the financial markets by creating an artificial, false or misleading appearance with respect to the price of, or market for, a security, commodity or financial instrument.²⁶³ It is submitted that this definition of market manipulation is adequate in that it includes all the elements of market manipulation.

Notably, market manipulation has different forms which, *inter alia*, include the trade-based market manipulation²⁶⁴ and the disclosure-based market manipulation.²⁶⁵ Market manipulation is categorised in two main forms which are trade-based manipulation and disclosure-based market manipulation.²⁶⁶

4.2.1 Examples of trade-based market manipulation

Trade-based market manipulation includes transactions or orders to trade which give or are likely to give false or misleading signals as to the supply of demand for or price of financial instruments.²⁶⁷ Furthermore, trade-based market manipulation

²⁶¹ There are no sections that expressly provides for the definition of market manipulation under the *Securities Act 2004*; in relation to this, See sections 2; 96 and 97 of the; see related discussion by Bhala KT, Yeh W and Bhala R *International Investment Management Theory, Ethics and Practice* (Routledge New York 2016) 329.

²⁶² See sections 96 and 97 of the *Securities Act 2004*; see related discussion by Harrison K and Ryder H *The Law Relating to Financial Crime in the United Kingdom 2nd ed* (Routledge London 2016) 143.

²⁶³ There are no sections that expressly provides for the definition of market manipulation under the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 24, 37.

²⁶⁴ See section 96 of the *Securities Act 2004*; see related discussion by Harrison and Ryder *The Law Relating to Financial Crime in the United Kingdom* 143.

²⁶⁵ See section 97 of the *Securities Act 2004*; see related discussion by Harrison and Ryder *The Law Relating to Financial Crime in the United Kingdom* 143.

²⁶⁶ See sections 96 and 97 of the *Securities Act 2004*; see related discussion by Bhala, Yeh and Bhala *International Investments Management* 329; Mantysaari P *The Law of Corporate Finance: General Principles and EU Law* (Springer New York 2010) 212.

²⁶⁷ There are no sections that expressly provides for the definition of trade-based market manipulation under the *Securities Act 2004*; see related discussion by Chitimira H "Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa" 2015 *AJLS* 183, 202.

includes the transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.²⁶⁸

Trade-based market manipulation involves transactions in which there is no genuine change in actual ownership of the financial instruments (wash sales).²⁶⁹ Furthermore, trade-based market manipulation involves transactions where both orders for buying and selling securities are entered at the same time, for the same price and quantity by different but colluding persons.²⁷⁰ Moreover, trade-based market manipulation includes engaging in a series of transactions that are reported on a public display facility to give impression of activity or price movement in a financial instrument.²⁷¹ Engaging in an activity designed by persons acting in collaboration to push the price of a financial instrument to an artificially high level and then sell to their own financial instrument is another example of trade-based market manipulation.²⁷² It should be noted that the prohibition of market manipulation under the *Securities Act 2004* does not provide for examples of trade based market manipulation as indicated above.²⁷³ Part of this omission could possibly be part of the reasons for the inadequate regulation of market manipulation in Zimbabwe.

²⁶⁸ See section 96(2) of the *Securities Act 2004*; see related discussion by Chitimira 2015 *AJLS* 202-203.

²⁶⁹ There are no sections that expressly provides for the wash sales under the *Securities Act 2004*; see related discussion under Mantysaari *Law of Corporate Finance* 212.

²⁷⁰ There are no sections that expressly provides for transactions where both orders for buying and selling securities are entered at the same time, for the same price and quantity by different but colluding persons under the *Securities Act 2004*; see related discussion by Mantysaari *Law of Corporate Finance* 212.

²⁷¹ There are no sections that expressly provides for engaging in a series of transactions that are reported on a public display facility to give impression of activity or price movement in a financial instrument under the *Securities Act 2004*; see related discussion by Vives X *Information and Learning in Markets: The Impact of Market Microstructure* (Greenwood Publishing Group New Jersey 2010) 347.

²⁷² There are no sections that expressly provides for persons acting in collaboration to push the price if financial instrument under the *Securities Act 2004*; see related discussion by Mantysaari *Law of Corporate Finance* 213; Vives *Information and Learning in Markets: The Impact of Market Microstructure* 347.

²⁷³ There are no sections that expressly provides for the examples of trade-based market manipulation under the *Securities Act 2004*; see related discussion by Feria R and Vogenauer S *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing Canada 2011) 189.

4.2.2 Examples of disclosure-based market manipulation

Disclosure-based market manipulation includes the dissemination of information through the media, including the Internet, or by any other means which gives or is likely to give false or misleading signals as to financial instruments in the financial markets.²⁷⁴ Furthermore, disclosure-based market manipulation includes the dissemination of false or misleading information. The person who made the dissemination ought to have known that the information was false or misleading.²⁷⁵ Disclosure-based market manipulation is prohibited under the *Securities Act* 2004.²⁷⁶

This is done in order to sell the securities or financial instruments for a profit after such recommendation.²⁷⁷ Disclosure-based market manipulation includes the spreading of false rumours to induce buying and selling by others, the making of untrue statements of material facts and the nondisclosure of material facts or material interests.²⁷⁸ The disclosure of false statements and nondisclosure of material facts is prohibited under the *Securities Act* 2004.²⁷⁹

4.3 Prohibition of false trading and market manipulation (trade-based market manipulation)

The false trading and market manipulation practices also known as trade-based market manipulation are expressly prohibited in the *Securities Act* 2004.²⁸⁰ Different activities and conducts may give rise to trade-based market manipulation. For instance, such activities include executing a transaction with no beneficial change of

²⁷⁴ There are no sections that expressly provides for Internet-based market manipulation under the *Securities Act* 2004; see related discussion by Chitimira 2015 AJLS 183, 203.; see related discussion by Friedman HM *Securities Regulation in Cyberspace* (Aspen Publishers New York 2010) 11-13

²⁷⁵ See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Chitimira 2015 AJLS 183, 203; see related discussion by Friedman *Securities Regulation in Cyberspace* 13.

²⁷⁶ See section 97 of the *Securities Act* 2004; see related discussion by Willemaers GS *The EU Issuer-disclosure Regime: Objectives and Proposals for Reform* (Kluwer International Law Netherlands 2011) 5-6.

²⁷⁷ Mantysaari *Law of Corporate Finance* 214.

²⁷⁸ See section 97(1)(b) of the *Securities Act* 2004; see related discussion by Mantysaari *Law of Corporate Finance* 214.

²⁷⁹ See section 97(1)(b) of the *Securities Act* 2004; see related discussion by Doyran MA *Financial Crisis Management and the Pursuit of Power: American Pre-eminence and the Credit Crunch* (Ashgate Publishing United States of America) 101.

²⁸⁰ See section 96 of the *Securities Act* 2004; see related discussion by Doyran *Financial Crisis Management and the Pursuit of Power: American Pre-eminence and the Credit Crunch* 101.

ownership of the securities and entering orders into the market near the close of the market or during the auctioning process for the purpose of creating a deceptive appearance in that market.²⁸¹ Notably, the execution of transactions with no beneficial change of ownership of the securities is not expressly prohibited under the *Securities Act 2004*.²⁸² Although the *Securities Act 2004* prohibits trade-based market manipulation,²⁸³ it does not expressly prohibit the beneficial change of ownership.²⁸⁴ The fact that the *Securities Act 2004* does not expressly prohibit the beneficial change of ownership could be the reason for minimal cases of market manipulation that have been successfully settled or prosecuted by the SECZ and courts in Zimbabwe respectively.²⁸⁵

The *Securities Act 2004* stipulates that no person shall do anything with the intention of creating a false misleading appearance.²⁸⁶ Thus, the offender is required to know that he was taking part in a prohibited trading practice on a regulated market and the effect or possible effect of such practice before he could incur any liability or any liability can be imputed to him/her.²⁸⁷ Furthermore, a person creates a false or misleading appearance when he or she enters into transactions to buy or sell orders

²⁸¹ There are no sections that expressly provides for the beneficial change of ownership under the *Securities Act 2004*; see related discussion by Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012" 2014 *MJSS* 124, 127.

²⁸² There are no sections that expressly provides for the beneficial change of ownership under the *Securities Act 2004*; related discussion by Yu G *Comparative Corporate Governance in China: Political Economy and Legal Infrastructure* (Routledge London 2012) 88.

²⁸³ See section 96 of the *Securities Act 2004*; see related discussion by Yu *Comparative Corporate Governance in China: Political Economy and Legal Infrastructure* 88; Armson E 2009 *False Trading and Market Rigging in Australia* <http://www.cita.edu.au/professional/papers/conference2009/ArmsonCLTA09.pdf> accessed 17 July 2017 2-3; Cahn A and Donald DC *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge University Press United Kingdom 2010) 251.

²⁸⁴ There are no section that expressly provides for the beneficial change of ownership under the *Securities Act 2004*; see related discussion by Yu *Comparative Corporate Governance in China: Political Economy and Legal Infrastructure* 88.

²⁸⁵ There are no sections that expressly provides for the beneficial change of ownership under the *Securities Act 2004*; see related cases of market manipulation that were not resolved by the SECZ *Mswaka v SECZ H.C.* 8067 2010; *SECZ v Gwatidzo NO and others* SC 459 2013; *Remo Investment Brokers (Pvt) Ltd & others v SECZ* Misc 6 2012; *Rufaro Zengeni v SECZ* Misc 7 2012 and *Interfin Securities (Pvt) Limited v SECZ* Misc 8 2012.

²⁸⁶ See section 96(1)(b) of the *Securities Act 2004*; see related discussion by

²⁸⁷ See section 97(1)(a) of the *Securities Act 2004*; Chitimira "Overview of the Market Abuse Regulation under the *Financial Markets Act 19 of 2012*" 2014 *OBITER LJ* 254, 262-263.

at or nearly at the same time, with the same price and quantity with colluding parties (wash sales and matched orders).²⁸⁸ Notably, the creation of a false or misleading appearance of active trading where a transaction does not involve any change in beneficial ownership is also known as a wash sale. On the other hand, the entering into transactions to buy or sell orders at or nearly at the same time with the same price and quantity with colluding parties is known as a matched order.²⁸⁹ The *Securities Act* 2004 does not expressly prohibit wash sales and matched orders.²⁹⁰ This narrow approach could have contributed to the paucity of the successful settlements and prosecutions of trade-based that have been obtained by the SECZ to date.

Any conduct that creates or might create a false or deceptive appearance of the trading activity in connection with an artificial price for securities amounts to trade-based market manipulation.²⁹¹ However, the *Securities Act* 2004 does not expressly define trade-based market manipulation.²⁹² The *Securities Act* 2004 stipulates that no person shall do anything with the intention of creating a false or misleading appearance of the volume of trading in any securities on a registered securities exchange.²⁹³ It is submitted that this provision does attempts to prohibit trade-based market manipulation. Furthermore, the *Securities Act* 2004 stipulates that no person shall do anything with the intention of creating a false or misleading appearance of

²⁸⁸ Section 96 of the *Securities Act* 2004 does not expressly prohibit this conduct; Author unknown 2005 *Market Abuse Directive* https://www.esma.europa.eu/sites/default/files/library/2015/11/04_505.pdf accessed 26 July 2017 12; see related discussion by Frunza MC *Introduction to the Theories and Varieties of Modern Crime in Financial Markets* (Academic Press United States of America 2015) 111.

²⁸⁹ There is no section under the *Securities Act* 2004 that expressly provides for such prohibitions; see related discussion under Armson 2009 <http://www.cita.edu.au/professional/papers/conference2009/ArmsonCLTA09.pdf> accessed 17 July 2017 3; Frunza *Introduction to the Theories and Varieties of Modern Crime in Financial Markets* 111.

²⁹⁰ See section 96 of the *Securities Act* 2004; see related discussion under Frunza *Introduction to the Theories and Varieties of Modern Crime in Financial Markets* 111.

²⁹¹ See section 96(2) of the securities act 2004; see related discussion by Chitimira 2016 *JCCLP* 37-38; see related discussion by Beder S *Free Market Missionaries: The Corporate Manipulation of Community Values* (Routledge London 2006) 106.

²⁹² There are no sections that expressly provides for the definition of trade-based market manipulation under the *Securities Act* 2004; see related discussion by Beder *Free Market Missionaries: The Corporate Manipulation of Community Values* 106.

²⁹³ See section 96(1)(a) of the *Securities Act* 2004; see related discussion by Beder *Free Market Missionaries: The Corporate Manipulation of Community Values* 106.

the market for, or the price, of any security on a registered securities exchange.²⁹⁴ Nonetheless, the *Securities Act 2004* only prohibits trade-based market manipulation in respect of securities listed on a registered securities exchange. This could imply that other market manipulation offences that are perpetrated on unregistered securities exchanges are not covered by the *Securities Act 2004*. Furthermore, the *Securities Act 2004* does not expressly provide whether the term “person” applies to both individual and juristic persons in respect to affected listed securities.²⁹⁵

The *Securities Act 2004* further stipulates that no person shall by means of any false fictitious or artificial transaction or device, maintain inflate or depress, cause fluctuations in the price of any securities on a registered securities exchange.²⁹⁶ Nonetheless, the *Securities Act 2004* does not expressly provide whether the term “persons” as employed in this prohibition applies to both individuals and juristic persons. This obscurity could have enabled employees of companies and other juristic persons to commit market manipulation offences in the name of their companies and evade personal liability in respect thereof.²⁹⁷

Trade-based market manipulation can also be perpetrated by, *inter alia*, accepting or entering in a regulated market, and an order to buy or sell a security listed on that market at successfully higher or lower prices in order to negatively affect the market price of that security.²⁹⁸ However, the *Securities Act 2004* does not expressly prohibit the entering on registered markets in order to sell or buy listed securities at a higher or lower price. This flaw is currently unresolved under the *Securities Act 2004*. Thus, one could conclude that the *Securities Act 2004* does not adequately prohibit trade-based market manipulation in the Zimbabwean financial markets. Furthermore, trade-based market manipulation that occurs through maintaining an artificial price

²⁹⁴ See section 96(1)(b) of the *Securities Act 2004*; see related discussion by Barucci E *Financial Markets Theory: Equilibrium, Efficiency and Information* (Springer Science & Business Media New York 2012) 389.

²⁹⁵ See section 96 read with section 2(1) of the *Securities Act 2004*; also see Barucci *Financial Markets Theory* 389.

²⁹⁶ See section 96 of the *Securities Act 2004*; see related discussion by Barucci *Financial Markets Theory* 389.

²⁹⁷ See section 96(2) of the *Securities Act 2004*; see related discussion by Barucci *Financial Markets Theory* 389.

²⁹⁸ There are no sections that expressly provides for the examples of trade-based market manipulation under the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 38; Piacentini MG *Multicultural Perspectives in Customer Behaviour* (Routledge London 2013) 169.

for dealing in securities listed on a regulated market and affecting a market corner are not adequately prohibited under the *Securities Act 2004*.²⁹⁹ Moreover, the execution of a transaction with no beneficial change of ownership of the securities is not expressly prohibited in the *Securities Act 2004*.³⁰⁰ This suggests that the *Securities Act 2004* does not effectively prohibit offenders from committing market manipulation in respect of executing transactions with no beneficial change of ownership in Zimbabwe. Likewise, the entering in to orders to buy or sell securities listed on a regulated market at a successfully higher or lower price for the purpose of improperly influencing the market price for such securities is not expressly prohibited under the *Securities Act 2004*.³⁰¹ Additionally, the maintaining of an artificial price for dealing in securities listed on a regulated market is not expressly prohibited in the *Securities Act 2004*.³⁰² This status *quo* shows that various gaps are still contained in the *Securities Act 2004*.

Moreover, the entering onto a regulated market in order to buy or sell a security listed on that market during any auctioning process or pre-opening session and cancelling such order immediately prior to the opening of the market to create a deceptive or false appearance of demand for or supply for securities is not expressly prohibited under the *Securities Act 2004*.³⁰³ This implies that the *Securities Act 2004* does not adequately prohibit trade-based market manipulation in Zimbabwe. This gap in the *Securities Act 2004* has to date negatively affected the combating of these different types of trade-based market manipulation in Zimbabwe.³⁰⁴

²⁹⁹ See section 96(2) of the *Securities Act 2004*; see related discussion by Piacentini *Multicultural Perspectives in Customer Behaviour* 169.

³⁰⁰ See section 96 of the *Securities Act 2004*. Notably, there are no sections that expressly provides for the beneficial change of ownership under the *Securities Act 2004*; see related discussion under Chitimira 2016 *JCCLP* 38.

³⁰¹ See section 96 of the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 38; Serge A and Dubrocard A *Internet Econometrics* (Palgrave Macmillan New York 2012) 1.

³⁰² See section 96. There are no sections that expressly provides for the examples of trade based market manipulation under the *Securities Act 2004*; see related discussion by Serge and Dubrocard *Internet Econometrics* 1.

³⁰³ See section 96 of the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 38; Beder *Free Market Missionaries: The Corporate Manipulation of Community Values* 106.

³⁰⁴ See section 96 of the *Securities Act 2004*. There are no sections that expressly provides for the examples of trade based market manipulation under the *Securities Act 2004*; see related discussion by Mahoney PG *Wasting a Crisis: Why Securities Regulation Fails* (University of Chicago Press Chicago 2015) 101.

The perpetrators of trade-based market manipulation ought to be aware, or at least have the necessary knowledge, of their actions or practices before they incur liability.³⁰⁵ Moreover, the *Securities Act* 2004's prohibition on trade-based market manipulation is limited to transactions relating to securities listed on regulated financial markets.³⁰⁶ This prohibition is inadequate as it excludes trade-based market manipulation in respect of securities that are not listed on registered securities exchange in Zimbabwe.

4.4 Fraudulently inducing person to trade or deal in security (disclosure-based market manipulation)

The *Securities Act* 2004 prohibits the fraudulent inducing of any person to deal in securities.³⁰⁷ Thus, it is an offence to induce or to attempt to induce another person to deal in securities by making or publishing any statement, promises or forecast that the person knows to be misleading, false or deceptive.³⁰⁸ The *Securities Act* 2004 stipulates that no person shall induce another person to trade or deal in securities on a registered securities exchange by making or publishing any statement, promise or forecast which he or she knows to be false or misleading.³⁰⁹ Thus, the publication of false or deceptive statements, promises and forecasts is expressly prohibited under the *Securities Act* 2004.³¹⁰ This further shows that disclosure-based market

³⁰⁵ See section 96 of the *Securities Act* 2004. There is no section that expressly provides for the requirement of knowledge in incurring liability under the *Securities Act* 2004; see related discussion by Chitimira 2016 *JCCLP* 37; see related discussion by Mahoney PG *Wasting a Crisis: Why Securities Regulation Fails* 101.

³⁰⁶ See section 96 of the *Securities Act* 2004; see related discussion by Chitimira 2014 *OBITER LJ* 262-263; also see discussion by Loh T and Sze C 2011 *False Trading: Are Wash Trades and Matched Orders Now Illegal?* <https://www.timothyloh.com/en/13-publications/96-false-trading-are-wash-trades-and-matched-orders-now-illegal> accessed 06 July 2017 page unknown.

³⁰⁷ See section 97 of the *Securities Act* 2004; see related discussion by Ratliff J and Grasso R *Insider Trading and Market Manipulation in the European Wholesale Energy Markets* (Claeys & Casteels Publishing Belgium 2017) 206.

³⁰⁸ See section 97 (1)(a) of the *Securities Act* 2004; see related discussion by Ratliff and Grasso *Insider Trading and Market Manipulation in the European Wholesale Energy Markets* 206.

³⁰⁹ See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Ali PU and Gregoriou GN *Insider Trading: Global Developments and Analysis* (CRC Press United States of America 2008) 100.

³¹⁰ See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Khademian AM *The SEC and Capital Market Regulation: The Politics of Expertise* (University of Pittsburgh Press London 1992)83.

manipulation in relation to securities is prohibited in Zimbabwe.³¹¹ Nonetheless, this prohibition is merely limited to listed securities. Moreover, the offenders may only incur liability if they knowingly participated in such disclosure-based market manipulation practices under the *Securities Act* 2004.³¹²

Additionally, the *Securities Act* 2004 prohibits any dishonest concealment or omission of a material fact, which gives rise to or which may give rise to the making or publication of a statement, promise or forecast that is deceptive, false or misleading.³¹³ The term “material fact” could suggest that fault is required to determine whether the fact that was concealed could reasonably give rise to disclosure-based market manipulation.³¹⁴ The *Securities Act* 2004 does not clearly state what amounts to, and when facts, or an omitted fact can be regarded as a material fact.³¹⁵ Furthermore the *Securities Act* 2004 prohibits the reckless making of or publication of dishonest or promises or forecasts that is false or misleading.³¹⁶ In this regard, the *Securities Act* 2004 is adequate in combating disclosure market manipulation. However, the *Securities Act* 2004 does not prohibit the recording or storing in, or by means of any mechanical, electronic or other device information that the maker knows to be false or misleading information.³¹⁷ This is a flaw in that market manipulation perpetrators may record or store false or misleading information

³¹¹ See section 97 of the *Securities Act* 2004; see related discussion by Ali and Gregoriou *Insider Trading: Global Developments and Analysis* 100.

³¹² See section 97(1)(a) of the *Securities Act* 2004; see related discussion by O'Brien J and Gilligan G *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Bloomsbury Publishing New York 2014) 94.

³¹³ See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Khademian *The SEC and Capital Market Regulation: The Politics of Expertise* 84.

³¹⁴ See section 97(1)(b) of the *Securities Act* 2004; see related discussion by Chitimira H “The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective” 2015 *PER LJ* 112, 121; Khademian *The SEC and Capital Market Regulation: The Politics of Expertise* 84.

³¹⁵ There are no sections that expressly provides for the requirements and when facts or an omitted fact can be regarded as a material fact under the *Securities Act* 2004; in relation to this see section 97(1)(b) of the *Securities Act* 2004; see related discussion by Chitimira 2016 *JCCLP* 40; O'Malley C *Bonds without Borders: A History of the Eurobond Market* (John Wiley and Sons United Kingdom 2015) 197.

³¹⁶ See section 97(1)(c) of the *Securities Act* 2004; see related discussion by O'Malley *Bonds without Borders: A History of the Eurobond Market* 197.

³¹⁷ There are no sections that expressly provides such prohibitions under the *Securities Act* 2004; see related discussion by Meymer S 2014 *Fraudulently Inducing Persons to Deal in Securities* <https://prezi.com/ec-woter4b1x/fraudulently-inducing-persons-to-deal-in-securities/> accessed 25 July 2017 page unknown.

in any mechanical, electronic or other device information and get away with market manipulation offence without any prosecutions or charges.

The misleading or deceptive statements, promises or forecasts in respect of the listed securities that relate to the past or future performance of a public company amount to disclosure-based market manipulation is not expressly prohibited under *Securities Act 2004*.³¹⁸ This is another flaw in the *Securities Act 2004*. Some individuals could be committing market manipulation practices through their juristic persons without incurring liability under the *Securities Act 2004*.

The direct or indirect making or publication in respect of listed securities, or in respect of the past or future performance of a company whose securities are listed on a regulated market, of any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading is not expressly prohibited under the *Securities Act 2004*.³¹⁹ Moreover, the making or publication of false statements regarding matters that are not directly associated with the company's past or current performance, but which may nevertheless artificially inflate the share prices is not expressly prohibited under the *Securities Act 2004*.³²⁰ This non-prohibition of the direct and indirect making or publication in respect of listed companies implies that companies and their agents and other offenders could be getting away with disclosure-based market manipulation in Zimbabwe. Perhaps, these practices should be expressly prohibited in the *Securities Act 2004* to enhance the combating of disclosure-based market manipulation in respect of past or future performance of companies in Zimbabwe.

³¹⁸ Section 97 of the *Securities Act 2004*; see related discussion by Meymer 2014 <https://prezi.com/ec-woter4b1x/fraudulently-inducing-persons-to-deal-in-securities/> accessed 25 July 2017 page unknown; O'Malley *Bonds without Borders: A History of the Eurobond Market* 198.

³¹⁹ See section 97 of *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 38-39; Gerster C *European Banking and Financial Services Law* (Kluwer Law International Netherlands 2004) 69.

³²⁰ See section 97 of the *Securities Act 2004*; see related discussion by Amadou NR *The Systemic Regulation of Credit Rating Agencies and Rated Markets* (International Monetary Fund United States of America 2009) 15.

Moreover, disclosure-based market manipulation on the Internet is not expressly prohibited under the *Securities Act 2004*.³²¹ The Internet could be providing unscrupulous persons with additional opportunities to participate in disclosure-based market manipulation activities in the Zimbabwean financial markets.³²²

4.5 Available criminal penalties

Market manipulation is treated as a criminal offence under the *Securities Act 2004*.³²³ Criminal penalties such as fines and imprisonment of the offenders are imposed on the offenders of market manipulation.³²⁴ For instance, the criminal penalties that may be imposed on trade-based market manipulation offenders include a fine not exceeding level ten³²⁵ or imprisonment not exceeding five years or both such fine and imprisonment.³²⁶ Offenders who are found guilty of disclosure-based market manipulation are also subject to a fine not exceeding level seven or imprisonment not exceeding two years or both such fine and imprisonment.³²⁷ It is submitted that the criminal penalties expressly provided for under the *Securities Act 2004* are not deterrent for the purposes of combating market manipulation. For instance, the *Securities Act 2004* does not provide actual amount of fines that could be imposed on the market manipulation offenders under its level 7 and 10 fines.³²⁸

³²¹ There is no section that expressly provide for the prohibition of Internet-based market manipulation under the *Securities Act 2004*; Amadou *The Systemic Regulation of Credit Rating Agencies and Rated Markets* 15.

³²² There is no section that expressly provide for the prohibition of Internet-based market manipulation under the *Securities Act 2004* in relation to this see section 97 of the *Securities Act 2004*.

³²³ See sections 96 and 97 of the *Securities Act 2004*; see related discussion by Lancker JV *Listed in Belgium 2004: A Legal Guide for Euronext Companies* (Intersentia Belgium 2004) 202.

³²⁴ See section 97(2) of the *Securities Act 2004*; see related discussion by Chitimira H and Lawark VA "An Analysis of the General Enforcement Approaches to Combat Market Abuse" 2012 *OBITER LJ* 548, 549; see related discussion by Lancker *Listed in Belgium 2004: A Legal Guide for Euronext Companies* 202.

³²⁵ However, the meaning of fine not exceeding level 10 is not clear under the *Securities Act 2004*.

³²⁶ See section 96(3) of the *Securities Act 2004*; see related discussion by Harrison K and Ryder N *The Law Relating to Financial Crime in the United Kingdom 2nd ed* (Routledge London 2016)142.

³²⁷ See section 97(2) of the *Securities Act 2004*; see related discussion by Harrison and Ryder *The Law Relating to Financial Crime in the United Kingdom* 142.

³²⁸ See sections 96(3) and 97(2) of the *Securities Act 2004*; see related discussion by William H, Byrnes R and Munro J *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide* (LexisNexis New York 2017) 60.

Furthermore, the imprisonment term of two or five years may not be deterrent enough to discourage some persons from continuing with market manipulation practices.

4.6 Available civil penalties

Civil penalties are employed to combat and discourage market manipulation practices in Zimbabwe.³²⁹ Civil penalties may be imposed on the offenders of market manipulation under the *Securities Act 2004*.³³⁰ The *Securities Act 2004* provides for civil penalties such as the recovery of the amount or loss incurred by the victim of market manipulation.³³¹ Moreover, civil penalties provided for under the *Securities Act 2004* include the recovery of the difference between the price at which the victim purchased or sold any securities and the price which the victim would have probably have purchased or sold it as the case maybe had the contravention not taken place.³³² Furthermore, the victims of market manipulation may recover any profit that they would have made on the sale of any securities which the victim was induced by the contravention not to sell.³³³ In this regard, the *Securities Act 2004* provides for civil penalties,³³⁴ such as class actions,³³⁵ and pecuniary penalties³³⁶ against market manipulation offenders. However, the *Securities Act 2004* does not expressly provide separate and distinct civil penalties for juristic and natural persons that commit market manipulation. Civil measures such as class actions may be imposed

³²⁹ See section 98 of the *Securities Act 2004*; see related discussion by William Byrnes and Munro *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide* 60.

³³⁰ See section 98 of the *Securities Act 2004*; see relate discussion by Hawk BE *International Antitrust Law and Policy: Fordham Competition Law* (Juris Publishing Inc New York 2014) 213.

³³¹ See section 98(1) of the *Securities Act 2004*; see relate discussion by Hawk *International Antitrust Law and Policy: Fordham Competition Law* 213.

³³² See section 98(3)(a) of the *Securities Act 2004*; see related discussion by Pearson G *Financial Services Law and Compliance in Australia* (Cambridge University Press United Kingdom) 504.

³³³ See section 98(3)(b) of the *Securities Act 2004*; see related discussion by Pearson *Financial Services Law and Compliance in Australia* 504.

³³⁴ See section 98 of the *Securities Act 2004*; see related discussion by El-Dean AB *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* (BRILL Netherlands 2002)168.

³³⁵ See section 99 of the *Securities Act 2004*; see related discussion by El-Dean *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* 168.

³³⁶ See section 98(1) of the *Securities Act 2004*; see related discussion by El-Dean *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* 168.

against the market manipulation offenders under the *Securities Act* 2004.³³⁷ However, the *Securities Act* 2004 does not expressly provide for factors that could be considered by the courts when imposing civil penalties for market manipulation against the offenders.³³⁸ In this regard, it is submitted that a number of factors should be considered by the courts when determining the appropriate civil penalties to be imposed on the market manipulation offenders in Zimbabwe.³³⁹ Notably, these factors should include the adverse effect of the behaviour on the market in question; whether the person on whom the penalty is to be imposed is an individual or a juristic person; the amount of profits accrued or loss avoided; the degree to which the conduct in question was deliberate or reckless and the conduct following the behaviour of the alleged offender in question.³⁴⁰

4.7 Selected flaws of anti-market manipulation prohibition under the Securities Act 2004

One of the major problems associated with financial markets laws is getting the market participants to comply with such laws.³⁴¹ The *Securities Act* 2004 was enacted to inter alia, improve the regulation of market manipulation in Zimbabwe.³⁴² However, one of the major flaws with the *Securities Act* 2004 is its failure to define market manipulation.³⁴³ The absence of a legal definition of market manipulation in

³³⁷ See section 99 read with section 98 of the *Securities Act* 2004.

³³⁸ See sections 96 and 97 of the *Securities Act* 2004; see related discussion by Johnson PM *Derivatives Regulation: Successor Edition to Commodities Regulation* 3rd ed (Aspen Publishers London 2004) 1291.

³³⁹ See sections 96 and 97 of the *Securities Act* 2004. There is no section that expressly provide for factors that could be considered when imposing civil penalties for market manipulation under the *Securities Act* 2004; see related discussion by Chitimira 2014 *MJSS* 57; see related discussion Johnson PM *Derivatives Regulation: Successor Edition to Commodities Regulation* 1291.

³⁴⁰ Chitimira 2014 *MJSS* 57; see related discussion by French D *Blackstone's Statutes on Company Law 2017-2018* (Oxford University Press United Kingdom 2017) 219.

³⁴¹ Barger T *Lessons of Experience Financial Institutions* (International Finance Corporation Washington DC 1998) 38.

³⁴² See sections 96 and 97 of the *Securities Act* 2004 see related discussion by Barger *Lessons of Experience Financial Institutions* 38; French *Blackstone's Statutes on Company Law 2017-2018* 219.

³⁴³ See sections 2, 96 and 97 of the *Securities Act* 2004; see related discussion by Chitimira 2014 *MJSS* 52; Johnson PM *Derivatives Regulation: Successor Edition to Commodities Regulation* 1291.

the *Securities Act 2004* could possibly have led to the practices such as the disclosure-based market manipulation by illicit market participants, in Zimbabwe.

The intentional or negligent publication or making of incorrect statements, promises or forecasts is not expressly provided for under the *Securities Act 2004*.³⁴⁴ The intentional or negligent publication or making of incorrect statements, promises or forecasts could be an offence of market manipulation.³⁴⁵ However; the intentional or negligent publication or making of incorrect statements, promises or forecasts is not expressly prohibited under the *Securities Act 2004*.

The dissemination of false or misleading information through media, including the internet, (Internet-based market manipulation), is not expressly prohibited in the *Securities Act 2004*.³⁴⁶ The omission of the prohibition of Internet-based market manipulation could possibly imply that the *Securities Act 2004* is inadequate to regulate market manipulation in Zimbabwe.

The *Securities Act 2004* provides for different penalties of market manipulation.³⁴⁷ Criminal penalties that may be imposed on trade-based market manipulation offenders include a fine not exceeding level ten or imprisonment not exceeding five years or both such fine and imprisonment.³⁴⁸ Furthermore, the *Securities Act 2004* provides that civil measures like civil liabilities,³⁴⁹ class actions,³⁵⁰ and pecuniary

³⁴⁴ There is no section that expressly provide such prohibition under the *Securities Act 2004*; see related discussion by Baliira K, Sardar M and Islam N *Corporate Governance, Capital Markets, and Capital Budgeting: An Integrated Approach* (Springer London 2013) 122.

³⁴⁵ There is no section that expressly provide such prohibition under the *Securities Act 2004*; see related discussion by Chitimira 2016 *JCCLP* 40; Baliira, Sardar and Islam *Corporate Governance, Capital Markets, and Capital Budgeting: An Integrated Approach* 122.

³⁴⁶ There is no section that expressly provide for the prohibition of Internet-based market manipulation under the *Securities Act 2004*; see related discussion by Unknown author 2005 https://www.esma.europa.eu/sites/default/files/library/2015/11/04_505.pdf accessed 26 July 2017 12; Baliira, Sardar and Islam *Corporate Governance, Capital Markets, and Capital Budgeting: An Integrated Approach* 122.

³⁴⁷ See section 98 and 99 of the *Securities Act 2004*; see related discussion by Harald O and Wasenden B *EU Market Abuse Regulation in Energy Markets* (Cappelen New York 2008) 98.

³⁴⁸ See section 96(3) of the *Securities Act 2004* see related discussion by Harald and Wasenden *EU Market Abuse Regulation in Energy Markets* 98.

³⁴⁹ See section 96(3) of the *Securities Act 2004* see related discussion by Harald and Wasenden *EU Market Abuse Regulation in Energy Markets* 98.

³⁵⁰ See section 98 of the *Securities Act 2004*; see related discussion by Harald and Wasenden *EU Market Abuse Regulation in Energy Markets* 98.

penalties³⁵¹ are enforced against the market manipulation offenders by the Securities Act 2004. Notably, the *Securities Act* 2004 does not provide for administrative sanctions in order to deter market manipulation offenders.³⁵² Nonetheless, the *Securities Act* 2004 does not expressly provide for administrative penalties. Administrative penalties such as civil monetary penalties, an order for remedial action, costs orders, a fine for punitive purposes and other appropriate disciplinary sanctions could be imposed on market manipulation offenders in order to enhance the combating of market manipulation in the Zimbabwean financial markets.

Trade-based market manipulative practices are difficult to detect, investigate and prosecute³⁵³ and Zimbabwe does not have in place adequate surveillance systems to detect market manipulation.³⁵⁴ In Zimbabwe, the Securities Exchange Commission of Zimbabwe (SECZ) investigates and adjudicates upon matters relating to securities and market abuse violations in Zimbabwe.³⁵⁵ However, the SECZ has not managed to formulate high level methods and preventative measures especially in relation to the enforcement of market manipulation in order to obtain more prosecution and settlements of market manipulation cases in Zimbabwe.³⁵⁶

³⁵¹ See section 99 of the *Securities Act* 2004; see related discussion by Baliira Sardar and Islam *Corporate Governance, Capital Markets, and Capital Budgeting: An Integrated Approach* 122.

³⁵² There is no section that expressly provide for administrative sanction under the *Securities Act* 2004; in relation to this see sections 98 and 99 of the *Securities Act* 2004.

³⁵³ Chitimira 2014 *OBITER LJ* 262-263; see related discussion by Salinger LM *Encyclopedia of White-Collar and Corporate Crime* (SAGE Publications United States of America 2013)30.

³⁵⁴ There is no section under the *Securities Act* 2004 that provides for surveillance system to detect market manipulation Author unknown 2005 https://www.esma.europa.eu/sites/default/files/library/2015/11/04_505.pdf accessed 26 July 2017 page 12; Salinger *Encyclopedia of White-Collar and Corporate Crime* 30.

³⁵⁵ See section 3 of the *Securities Act* 2004; see related discussion by Maferefa N 2012 *The overall mandate of Securities & Exchange Commissions in Zimbabwe and Globally* www.seczim.co.zw/investor-information/concept-papers%3Fdownload%3D42:the-overall-mandate-of-securities-exchange-commission-in-zimbabwe-and-globally+%3d3&hl=en&ct=clnk&gl=za accessed 06 July 2017 12.

³⁵⁶ See section 3 of the *Securities Act* 2004; Chitimira H "An Analysis of the Establishment and Enforcement of Anti-Market Abuse Preventative Measures in the United Kingdom" 2014 *MJSS* 529, 537; see related discussion by Salinger LM *Encyclopedia of White-Collar and Corporate Crime* 30.

4.8 Conclusion

The *Securities Act* 2004 prohibits market abuse practices such as market manipulation.³⁵⁷ For instance, the *Securities Act* 2004 expressly prohibits false trading and market manipulation³⁵⁸ and the fraudulent inducing of a person to trade or deal in security.³⁵⁹ However, the *Securities Act* 2004 does not define market manipulation. The *Securities Act* 2004 also does not expressly provide other enforcement approaches such as whistle-blower immunity provisions, higher criminal penalties and public censure.³⁶⁰ Likewise, Internet-based and social media-related market manipulation is still not expressly prohibited under the *Securities Act* 2004 in Zimbabwe.³⁶¹ This could indicate that the *Securities Act* 2004 is still flawed in relation to the combating of market manipulation in the Zimbabwean financial markets. The available penalties of market manipulation are also still minimal for deterrence purposes.³⁶² Given this background, it is hoped that an adequate anti-market abuse regulatory framework will be adopted and effectively enforced in Zimbabwe to discourage illicit practices such as market manipulation.

In this regard, it is submitted that the *Securities Act* 2004 should be amended to provide an adequate statutory definition of the concept of market manipulation involving all the elements of market manipulation, the conduct amounting to market manipulation as well as the various types of market manipulation practices to enhance the combating of such practice in Zimbabwe.

³⁵⁷ See sections 96 and 97 of the *Securities Act* 2004; Chen J and Shi H *The Evolution of the Stock Market in China's Transitional Economy* (Edward Elgar Publishing London 2002) 69.

³⁵⁸ See section 96 of the *Securities Act* 2004; Chen and Shi *The Evolution of the Stock Market in China's Transitional Economy* 69.

³⁵⁹ See section 97 of the *Securities Act* 2004; see related discussion Chen and Shi *The Evolution of the Stock Market in China's Transitional Economy* 69.

³⁶⁰ There is no section that expressly prohibit this under the *Securities Act* 2004; see related discussion by Chen and Shi *The Evolution of the Stock Market in China's Transitional Economy* 69.

³⁶¹ There is no section that expressly provide for the prohibition of internet-based market manipulation under the *Securities Act* 2004; see related discussion by Chitimira 2016 *JCCLP* 40; Rodney TS, Hans J, and Possamai M *Fraud Prevention and Detection: Warning Signs and the Red Flag System* (CRC Press New York 2014) 130.

³⁶² See sections 98 and 99 of the *Securities Act* 2004; see related discussion by Rodney, Hans, and Possamai *Fraud Prevention and Detection: Warning Signs and the Red Flag System* 130.

CHAPTER FIVE

THE REGULATION OF MARKET MANIPULATION IN SOUTH AFRICA

5.1 Introduction

The effects of market manipulation have been felt in different financial markets globally, including South Africa.³⁶³ A reputation of high levels of market abuse practices was reportedly associated with the South African financial markets in the early 1970s and late 1990s.³⁶⁴ Consequently, there was a great need for combating such practices to enhance public investors' confidence in the South African financial markets.³⁶⁵ Put differently, the relevant authorities correctly decided that the proper regulation of market manipulation enhances public investor confidence in the South African financial markets.³⁶⁶ Given the background and in order to evaluate the adequacy of the South African anti-market manipulation laws, a closer look at all legislation that regulated market manipulation is crucially important.³⁶⁷ Accordingly, a brief discussion of the regulation of market manipulation under the *Financial Markets Control Act*,³⁶⁸ *Securities Service Act 2004*,³⁶⁹ the *Stock Exchanges Control Act*³⁷⁰ and the *Financial Markets Act 2012*³⁷¹ is provided.

³⁶³ Chitimira H "The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective" 2015 *PER LJ* 112, 120; see related discussion under Markham JW *Law Enforcement and the History of Financial Market Manipulation* (Rutledge New York 2014) 3.

³⁶⁴ Packies H *The Market Abuse Control Legislative Regime of South Africa, Nigeria and the United Kingdom – An Approach to Regulation and Monitoring in Relation to certain Aspects of the Financial Markets of South Africa* (LLM-dissertation University of Western Cape 2015) 11.

³⁶⁵ Packies *The Market Abuse Control Legislative Regime of South Africa, Nigeria and the United Kingdom* 11; see related discussion under Markham *Law Enforcement and the History Of Financial Market Manipulation* 347.

³⁶⁶ Packies *The Market Abuse Control Legislative Regime of South Africa, Nigeria and United Kingdom* 11.

³⁶⁷ Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER* 937, 939; see related discussion by Markets Department *South Africa: Financial System Stability Assessment* (International Monetary Fund. Monetary and Capital South Africa 2014) 11.

³⁶⁸ See sections 20 and 22 of the *Financial Markets Control Act 55 of 1989* (*Financial Markets Control Act 1989*); see related discussion by Davies H *Can Financial Markets be Controlled?* (John Wiley and Sons Britain 2015) 77.

³⁶⁹ See sections 75 and 76 of the *Securities Service Act 36 of 2004* (*Securities Service Act 2004*); Davies *Can Financial Markets be Controlled* 77.

³⁷⁰ See s 40 of the *Stock Exchanges Control Act 1 of 1985* (*Stock Exchanges Control Act 1985*).

³⁷¹ See sections 80 and 81 of the *Financial Markets Act 19 of 2012* (*Financial Markets Act 2012*).

Historically, market manipulation was mainly prohibited in South Africa by the common law.³⁷² However, common law still has influence in regulating market manipulation in South Africa.

In an attempt to effectively combat market manipulation in the South African financial markets, the *Financial Markets Act* 2012 was enacted. This Act currently regulates market manipulation in South Africa.³⁷³ The *Financial Markets Act* 2012 prohibits trade-based and disclosure-based market manipulation.³⁷⁴ Various practices that amount to trade-based market manipulation are outlined in the *Financial Markets Act* 2012.³⁷⁵ Furthermore, the *Financial Markets Act* 2012 prohibits the publication of false, misleading or deceptive statements, promises or forecasts in respect of the listed securities that relate to the past or future performance of a public company.³⁷⁶ Notably, disclosure-based market manipulation includes the dissemination of information through the media, including the Internet, or by any other means which gives or is likely to give false or misleading signals as to the price or trading activity of listed securities and/or financial instruments.³⁷⁷ Nonetheless, the *Financial Markets Act* 2012 does not expressly prohibit social media-related and other Internet-related market manipulation practices.³⁷⁸

This chapter discusses the regulation of market manipulation in South Africa. For instance, this chapter investigates the adequacy of the current offences, available remedies and penalties for market manipulation in South Africa.

³⁷² Cassim FHI et al *Contemporary Company Law* 2nd ed (Juta Cape Town 2012) 981; Cassim R "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Mec LJ* 177 178-199.; see related discussion by Stein C and Everingham G *New Companies Act Unlocked* (Siber Ink 2011 Cape Town) 193.

³⁷³ See sections 80 and 81 of the *Financial Markets Act* 2012; see related discussion by Nussbaum AJ *Mergers & Acquisitions: Jurisdictional Comparisons* (Sweet and Maxwell London 2012) 319.

³⁷⁴ See sections 80 and 81 of the *Financial Markets Act* 2012; see related discussion by Nussbaum *Mergers & Acquisitions* 319.

³⁷⁵ See section 80 of the *Financial Markets Act* 2012.

³⁷⁶ See section 81(1) and (2) of the *Financial Markets Act* 2012; also see Chitimira 2015 *PER LJ* 120; Willemaers EU *Issuer-disclosure Regime* 5.

³⁷⁷ Notably, disclosure-based market manipulation is not expressly defined under the *Financial Markets Act* 2012, see section 81; see related discussion by Chitimira 2015 *AJLS* 183 and 203; Willemaers GS EU *Issuer-disclosure Regime: Objectives and Proposals for Reform* (Kluwer International Law Netherlands 2011) 5.

³⁷⁸ See sections 80 and 81 of the *Financial Markets Act* 2012.

5.2 Historical overview of the regulation of market manipulation in South Africa prior to 2004

5.2.1 The regulation of market manipulation under the Stock Exchanges Control Act 1985

Trade-based market manipulation and disclosure-based market manipulation relating to listed securities were prohibited under the now repealed *Stock Exchanges Control Act 1985*.³⁷⁹ For instance, the *Stock Exchanges Control Act 1985* prohibited the publication of any statement, promise or forecast by any person which he knows to be misleading or induce any other person to buy or sell listed securities.³⁸⁰ Furthermore, the *Stock Exchanges Control Act 1985* prohibited the publication of any statement, promise or forecast within or outside a stock exchange, by means of the creation of fictitious transactions to stimulate activities or influence the prices of securities on a licensed stock exchange.³⁸¹

The responsibility for the enforcement of market manipulation provisions was placed upon the Johannesburg Stock Exchange (JSE) and on the courts.³⁸² However, the *Stock Exchange Control Act 1985* had several flaws that negatively affected its effective combating of market manipulation in South Africa.³⁸³ For instance, the *Stock Exchange Control Act 1985* did not clearly define the enforcement responsibility of the JSE.³⁸⁴ Thus, the regulatory responsibility for policing market manipulation provisions was not clearly provided by the *Stock Exchanges Control Act 1985*. Moreover, this Act did not expressly define the powers and functions of any specific regulatory body to oversee and enforce its market manipulation

³⁷⁹ See section 40 of the *Stock Exchanges Control Act 1985*; see related discussion by Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER LJ* 937, 939; Magliolo J *Become Your Own Stockbroker: A Practical Guide to Trading in South Africa* (Zebra Press Cape Town 2005) 187.

³⁸⁰ See section 40 *Stock Exchanges Control Act 1985*; see related discussion by Smit PC *et al Economics: A Southern African Perspective* (Juta Cape Town 2007) 610.

³⁸¹ See section 40 of the *Stock Exchanges Control Act 1985*; Chitimira H "Overview Of The Market Abuse Regulation Under The Financial Markets Act 19 Of 2012" 2014 *OBITER LJ* 254, 261.

³⁸² Chitimira 2014 *PER LJ* 939; see related discussion by Seredynska I *Insider Dealing and Criminal Law: Dangerous Liaisons* (Springer London 2012) 5.

³⁸³ See section 40 *Stock Exchanges Control Act 1985*; see related discussion by Smit *et al Economics: A Southern African Perspective* 610.

³⁸⁴ See section 40 of the *Stock Exchanges Control Act 1985*; see further related discussion by Smit *et al Economics: A Southern African Perspective* 610.

provisions.³⁸⁵ The *Stock Exchanges Control Act* 1985 was also unclear on whether the Directorate of Public Prosecutions or the JSE was solely responsible for the prosecution of market manipulation cases in South Africa.³⁸⁶

Furthermore, the *Stock Exchanges Control Act* 1985 did not clearly provide adequate penalties for market manipulation offences in South Africa.³⁸⁷ The *Stock Exchanges Control Act* 1985 provided penalties of market manipulation.³⁸⁸ Offenders who were found guilty of market manipulation were guilty of an offence and liable on conviction to a fine not exceeding R4 000 or to imprisonment for a period not exceeding four years, or both such fine and imprisonment.³⁸⁹ In this regard, the researcher submits that the *Stock Exchanges Control Act* 1985. For instance, the *Stock Exchanges Control Act* 1985 did not adequately prohibit market manipulation in South Africa since these penalties were not deterrent enough to discourage offenders from continuing with their illicit trading practices. As a result, the *Stock Exchanges Control Act* 1985 was repealed in another bid to enhance the combating of market practices in the South African securities and financial markets.

5.2.2 *The regulation of market manipulation under the Financial Markets Control Act 1989*

Various manipulative practices were allegedly common in option and term contracts transactions in South Africa before the *Financial Markets Control Act* 1989 was enacted.³⁹⁰ The *Financial Markets Control Act* 1989 was enacted in order to regulate

³⁸⁵ See section 40 of the *Stock Exchanges Control Act* 1985; Chitimira 2014 *PER LJ* 941; see related discussion by Smit *et al Economics: A Southern African Perspective* 610.

³⁸⁶ See section 40 of the *Stock Exchanges Control Act* 1985; also see Chitimira 2014 *PER LJ* 941; see related discussion by Hyde-Clarke N *Communication and Media Ethics in South Africa* (Juta Cape Town 2011) 204.

³⁸⁷ See section 40 of the *Stock Exchanges Control Act* 1985; also see Chitimira 2014 *PER LJ* 942; see related discussion by Benston GJ *Regulating Financial Markets: A Critique and Some Proposals* (American Enterprise Institute Washington DC 1999) 12.

³⁸⁸ See section 48 of the *Stock Exchanges Control Act* 1985; see related discussion by Smit *et al Economics: A Southern African Perspective* 610.

³⁸⁹ See section 48(h)(i) of the *Stock Exchanges Control Act* 1985.

³⁹⁰ See sections 20-23 of the *Financial Markets Control Act* 1989; also see Henning JJ & Du Toit S "The Regulation of False Trading, Market Manipulation and Insider Trading" 2000 *Journal for Juridical Science* 155, 155-159.

such market manipulative practices.³⁹¹ The *Financial Markets Control Act* 1989 prohibited trade-based market manipulation and disclosure-based market manipulation in relation to listed securities.³⁹² For instance, the *Financial Markets Control Act* 1989 prohibited the dissemination or making of statements that 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.³⁹³ Additionally the *Financial Markets Control Act* 1989 prohibited the publication or non-publication of information which had the effect of inducing another person to illicitly deal in a financial instrument on a financial market or to engage in any market manipulation practices in the South African financial markets.³⁹⁴

Market manipulation offenders were liable to a statutory action for damages from the prejudiced persons.³⁹⁵ Under the *Financial Markets Control Act* 1989, 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.³⁹⁶ Where market manipulation occurred, prejudiced persons did not have to prove that the prices have been actually altered by the offender's market manipulation conduct.³⁹⁷ Thus, the inducement or attempt to induce another person to commit market manipulation would suffice. The *Financial Markets Control Act* 1989 stipulated that prejudiced persons could claim twice the

³⁹¹ See sections 20-23 of the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 940; Balling M, Hennessy E and O'Brien R *Corporate Governance, Financial Markets and Global Convergence* (Springer London 2013) 254.

³⁹² See sections 20-23 of the *Financial Markets Control Act* 1989; see related discussion by Cassim F *et al Contemporary Company Law* (Juta Cape Town 2011) 886.

³⁹³ See section 21 of the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 940; Balling, Hennessy and O'Brien *Corporate Governance, Financial Markets and Global Convergence* 254.

³⁹⁴ See sections 21 and 22 of the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 940; Cassim F *et al Contemporary Company Law* 886.

³⁹⁵ See section 23 read with section 20 of the *Financial Markets Control Act* 1989; Chitimira 2014 *PER LJ* 940; see related discussion by Kelly MV *Financial Institutions in South Africa: Financial, Investment and Risk Management* (Juta Cape Town 1993) 247.

³⁹⁶ Section 23(2) of the *Financial Markets Control Act* 1989; see further Chitimira 2014 *PER LJ* 940; see related discussion by Dunaway S *et al Private Market Financing for Developing Countries* (International Monetary Fund Washington DC 1995) 31.

³⁹⁷ See section 23(2) of the *Financial Markets Control Act* 1989; see further Chitimira 2014 *PER LJ* 937, 940.

profit gained or likely to have been gained or the loss avoided by the market manipulation offenders.³⁹⁸

The *Financial Markets Control Act* 1989 had a little success in combating market manipulation.³⁹⁹ For instance, the *Financial Markets Control Act* 1989 proved to be inadequate since it did not clearly stipulate the fines that were imposed on the market manipulation offenders.⁴⁰⁰ This Act stipulated that any person who is found guilty of an offence was subject to a fine or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.⁴⁰¹ This clearly shows that market manipulation offences could also give rise to both civil and criminal sanctions against the offenders under the *Financial Markets Control Act* 1989.⁴⁰²

In addition, the *Financial Markets Control Act* 1989 did not adequately provide other measures and mechanisms for the effective detection, investigation, prosecution and prevention of market manipulation in the South African financial markets.⁴⁰³ Moreover, surveillance systems and other methods such as arbitration and alternative dispute resolution were not expressly provided to combat market manipulation under the *Financial Markets Control Act* 1989.⁴⁰⁴ Furthermore, anti-market manipulation enforcement methods like whistle-blowing and bounty rewards were not expressly provided to enhance the detection and investigation of market

³⁹⁸ See section 23(3) of the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 940; Balling, Hennessy and O'Brien *Corporate Governance, Financial Markets and Global Convergence* 254.

³⁹⁹ See section 20 of the *Financial Markets Control Act* see related discussion by Chitimira 2014 *PER LJ* 941; Dunaway *et al Private Market Financing for Developing Countries* 31.

⁴⁰⁰ See section 36 of the *Financial Markets Control Act* 1989; see related discussion by Pirrong SC *The Economics, Law, and Public Policy of Market Power Manipulation* (Springer New York 1996) 257.

⁴⁰¹ See section 36(1)(e)(i) of the *Financial Control Act* 1989.

⁴⁰² See sections 36 of the *Financial Markets Control Act* 1989; also see Chitimira 2014 *PER LJ* 942; Kelly MV *Financial Institutions in South Africa* 247.

⁴⁰³ See sections 20-23 of the *Financial Markets Control Act* 1989. Notably, there is no section that expressly provides mechanisms for the detection and prosecution of market manipulation under the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 942;

⁴⁰⁴ See sections 20-23 of the *Financial Markets Control Act* 1989; see related discussion by Chitimira 2014 *PER LJ* 942.

manipulation under the *Financial Markets Control Act 1989*.⁴⁰⁵ Consequently, the *Financial Markets Control Act 1989* was later repealed.

5.2.3 *The regulation of market manipulation under the Securities Services Act 2004*

The *Securities Services Act 2004* came into effect in 2005. The *Securities Services Act 2004* consolidated all the market manipulation provisions that were contained in the *Stock Exchanges Control Act 1985* and the *Financial Markets Control Act 1989*.⁴⁰⁶ The *Securities Services Act 2004*'s⁴⁰⁷ market manipulation prohibition was aimed at enhancing the curbing of market manipulation in the South African financial markets.⁴⁰⁸ However, the term "market manipulation" was not expressly defined in the *Securities Services Act 2004*.⁴⁰⁹ The *Securities Services Act 2004* was also probably aimed at repealing all the previously flawed market abuse laws in order to improve the enforcement of the market abuse prohibition in South Africa.⁴¹⁰ Consequently, the *Securities Services Act 2004* prohibited trade-based market manipulation⁴¹¹ and disclosure-based market manipulation relating to listed securities.⁴¹² For example, the *Securities Services Act 2004* prohibited trade-based market manipulation practices such as executing a transaction with no beneficial change of ownership of the securities⁴¹³ and entering orders into the market near the close of the market⁴¹⁴ or during the auctioning process for the purpose of creating a

⁴⁰⁵ See sections 20-23 of the *Financial Markets Control Act 1989*; see related discussion by Chitimira 2014 *PER LJ 943*; Pirrong *The Economics, Law, and Public Policy of Market Power Manipulation* 257.

⁴⁰⁶ See related discussion by Chitimira 2014 *PER LJ 943*.

⁴⁰⁷ See sections 75 and 76 of the *Securities Services Act 2004*; see further Smit *et al Economics: A Southern African Perspective* 610.

⁴⁰⁸ See section 75 and 76 of the *Securities Services Act 2004*; see further Chitimira H "A Historical Overview of the Regulation of Market Abuse under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 311; Salami I *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets* (Routledge London 2016) 210.

⁴⁰⁹ See sections 76 and 77 of the *Securities Services Act 2004*.

⁴¹⁰ Chitimira 2014 *De Jure* 311; Benston GJ *Regulating Financial Markets: A Critique and Some Proposals* (American Enterprise Institute Washington DC 1999) 43.

⁴¹¹ See section 75 of the *Securities Services Act 2004*.

⁴¹² See section 76 of the *Securities Services Act 2004*; see related discussion by Chitimira 2014 *De Jure* 312.

⁴¹³ See section 75(4) of the *Securities Services Act 2004*; see related discussion by Harris L *Trading and Exchanges: Market Microstructure for Practitioners* 259.

⁴¹⁴ See section 75(3)(d) of the *Securities Services Act 2004*; see related discussion by Gendreau Y *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Edward Elgar United Kingdom 2008) 12.

deceptive appearance in that market.⁴¹⁵ This could have enabled the enforcement authorities to discourage all persons from engaging themselves in auctioning process illicit trading activities in the South African regulated financial markets.

The *Securities Services Act* 2004 also prohibited any person who directly or indirectly used or knowingly participated in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, either for such person's own account or on behalf of another person, where such practice creates or might create a false or deceptive appearance of the trading activity in connection with or an artificial price for that security could be guilty of an offence.⁴¹⁶ Furthermore, any person who placed an order to buy or sell listed securities which, to his knowledge could, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with or an artificial price for such securities was guilty of an offence.⁴¹⁷ This shows that trade-based market manipulation, which involves techniques designed to distort the market and conduct that interferes with the normal market mechanisms of supply and demand for a securities was expressly prohibited by the *Securities Services Act* 2004.⁴¹⁸

Additionally, the *Securities Services Act* 2004 expressly prohibited disclosure-based market manipulation.⁴¹⁹ For instance, the making or publication of false, misleading or deceptive statements, promises and forecasts was prohibited.⁴²⁰ Such practices

⁴¹⁵ See section 75(3)(e) of the *Securities Services Act* 2004; see related discussion by Chitimira 2014 *De Jure* 312; see related discussion by Harris L *Trading and Exchanges: Market Microstructure for Practitioners* (Oxford University Press United Kingdom 2003) 259.

⁴¹⁶ Section 75(1)(a)(i) and (ii) of the *Securities Services Act* 2004; see related discussion by Harris L *Trading and Exchanges: Market Microstructure for Practitioners* 259.

⁴¹⁷ Section 75(1) of the *Securities Services Act* 2004; see related discussion by Cassim R "An Analysis of Market Manipulation under the *Securities Services Act* 36 of 2004" 2008 *SA Merc LJ* 33, 35.

⁴¹⁸ See section 75(1) of the *Security Services Act* 2004; see related discussion by Cassim 2008 *SA Merc LJ* 34.

⁴¹⁹ Section 76 of the *Securities Services Act* 2004; see related discussion by Gendreau *An Emerging Intellectual Property Paradigm* 12.

⁴²⁰ Section 76 of the *Securities Services Act* 2004; see related discussion by Vasudev PM and Watson S *Global Capital Markets: A Survey of Legal and Regulatory Trends* (Edward Elgar United Kingdom 2017) 212.

distort the market price of securities, giving rise to direct or indirect prejudice to innocent investors.⁴²¹

The *Securities Services Act* 2004 also prohibited the publishing of false statements with respect to listed securities of the past or future performance of a public company.⁴²² Thus, the *Securities Services Act* 2004 broadly prohibited the publication of false or deceptive statements, promises and forecasts.⁴²³ For instance, any person who made or published, in respect of the past or future performance of a public company, any statement, promise or forecast which are false or misleading or deceptive in respect of any material fact and which the person knew that such information was false, misleading or deceptive was guilty of an offence.⁴²⁴ The *Securities Services Act* 2004 also prohibited the making or publication of false statements regarding matters that are not directly associated with the company's current performance, but which may nevertheless artificially inflate the share prices.⁴²⁵ Nonetheless, this prohibition is only restricted to false statements regarding a company's current or past future dealings in securities that are listed on a regulated market. Thus, other company dealings that could be perpetrated in unregulated trading platforms were not covered by the *Securities Services Act* 2004.

Moreover, the market manipulation offender was required to know that he or she was taking part in a prohibited trading practice on a regulated market and the effect or possible effect of such practice before he or she could incur any liability.⁴²⁶ Trade-based market manipulation offenders could evade liability if they proved that they were not aware they were committing an offence and that they traded in the affected securities.⁴²⁷ Both trade-based and disclosure-based market manipulation was

⁴²¹ Section 76 of the *Securities Services Act* 2004; see related discussion by Chitimira 2014 *De Jure* 313; see Vasudev PM and Watson S *Global Capital Markets* 212.

⁴²² See section 76 of *Securities Services Act* 2004; see related discussion by Schmidt K and Katja SW *Practical Handbook for the Marketing of Foreign Investment Funds in Germany: A Legal Overview* (Diplomica Verlag GmbH Germany 2012) 190.

⁴²³ Section 76 of the *Securities Services Act* 2004; see related discussion by Packies: *The Market Abuse Control Legislative Regime of South Africa, Nigeria and United Kingdom* 17.

⁴²⁴ Section 76(1)(a) of the *Securities Services Act* 2004; see related discussion by Schmidt and Katja *Practical Handbook for the Marketing of Foreign Investment Funds in Germany* 190.

⁴²⁵ Section 76 of the *Securities Services Act* 2004; also Chitimira 2014 *De Jure* 342.

⁴²⁶ See section 76 of the *Securities Services Act* 2004; see related discussion by Chitimira 2014 *De Jure* 319; Cassim 2008 *SA Merc LJ* 177.

⁴²⁷ See section 76 of *Securities Services Act* 2004; see related discussion by Chitimira 2014 *De Jure* 319; Cassim 2008 *SA Merc LJ* 189.

generally limited to transactions relating to securities listed on a regulated market.⁴²⁸ Moreover, civil remedies for both trade-based and disclosure-based market manipulation was not expressly provided for in the *Securities Services Act 2004*.⁴²⁹ However, such penalties could still be imposed on the offenders under the *Financial Institutions Protection of Funds Act*.⁴³⁰ The *Securities Services Act 2004* also failed to define market manipulation and this could have negatively affected its combating of market manipulation practices in South Africa. Eventually, the *Securities Services Act 2004* was repealed by the *Financial Markets Act 2012* in order to, *inter alia*, address the flaws indicated above.⁴³¹

5.3 The common law prohibition of market manipulation in South Africa

South Africa also relied on common law to prohibit market manipulation.⁴³² Put differently, common law was and is still utilised to prohibit market manipulation and other market abuse practices in South Africa.⁴³³ Notably, market manipulation was prohibited as a crime of rigging under common law.⁴³⁴ For instance, *Rubery v Grant*⁴³⁵ held that rigging the market is a dishonest practice, which also amounted to abominable fraud and amounted to market manipulation practice. Rigging the market was very difficult to detect.⁴³⁶ Market manipulation practices were outlawed under common law as early as the 1980s in South Africa.⁴³⁷ Moreover, common law

⁴²⁸ See section 75 of the *Securities Services Act 2004*; also see Chitimira 2014 *De Jure* 318; Green EF et al *US Reg International Securities and Derivative Market* (Kluwer international Law Netherlands 2015) 113.

⁴²⁹ See section 75 of the *Securities Services Act 2004*; also Chitimira 2014 *De Jure* 319.

⁴³⁰ Section 6D read with section 6A(2) of the *Financial Institutions Protection of Funds Act 28 of 2001* as amended (*Protection of Funds Act 2001*).

⁴³¹ Section 76 of the *Securities Services Act 2004*; see related discussion by Chitimira H "Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa" 2015 *AJLS* 184, 190.

⁴³² Cassim 2008 *SA Merc LJ* 177.

⁴³³ Chitimira 2015 *PER LJ* 119.

⁴³⁴ Cassim *SA Merc LJ* 2008 40.

⁴³⁵ *Rubery v Grant* 1872 13 LR Eq 443 447-448.

⁴³⁶ *Rubery v Grant* 1872 13 LR Eq 443 447-448, see related discussion by Cassim 2008 *SA Merc LJ* 2008 40; also see the earliest reported South African decision on rigging the market, *S v Mark* 1965 (3) SA 834 (W) 846; *R v McLachlan & Bernstein* 1929 WLD 149 155, where the court established the essential elements required to constitute the crime of rigging the market.

⁴³⁷ Chitimira 2015 *PER LJ* 119.

remedies are still utilised by those who fall victim to market manipulation practices in South Africa.⁴³⁸

5.4 The regulation of market manipulation under the Financial Markets Act 2012

The *Financial Markets Act 2012* currently prohibit market manipulation practices in South Africa.⁴³⁹ Trade-based market manipulation and disclosure-based market manipulation are expressly prohibited under the *Financial Markets Act 2012*.⁴⁴⁰ The *Financial Market Act 2012* brought new objectives such as the protection of investors, ensuring that financial markets are fair, efficient and transparent, and the reduction of systemic risk.⁴⁴¹

5.4.1 Prohibition of trade-based market manipulation under the Financial Markets Act 2012

Trade-based manipulative practices are prohibited under the *Financial Markets Act 2012*.⁴⁴² For example, any person who knowingly participates in the use of any manipulative, improper, false or deceptive practice of trading in listed securities, where such practice creates false or deceptive appearance of the trading activity in connection with or an artificial price for those securities will be guilty of trade-based market manipulation offence.⁴⁴³ This indicates that fictitious trade-based market manipulation activities are expressly outlawed under the *Financial Markets Act 2012*. Therefore, any person who places an order to buy or sell listed securities which, to his knowledge could, if executed, have the effect of creating a false or deceptive

⁴³⁸ See section 87 of the *Financial Markets Act 2012*.

⁴³⁹ See sections 80-81 of the *Financial Markets Act 2012*.

⁴⁴⁰ See sections 80-81 of the *Financial Market Act 2012*; see related discussion by Chitimira 2015 *AJLS* 190; see related discussion by Olifant CJ *Liability of Companies for Market Abuse* (LLM University of Johannesburg 2015) 14.

⁴⁴¹ Luiz and Van der Linde 2013 *SA Merc LJ* 459; Mngomezulu S *The Journey from Insider Trading to Market Abuse Have we Succeeded in Curbing the Scourge?* <https://www.chartsec.co.za/documents/2011SpeakerPresentations/TheRegulationOfInsiderTrading.pdf> accessed 28 October 2017 15-16; Luiz S and Van der Linde K "The Financial Markets Act 19 of 2012: Some Comments on the Regulation of Market Abuse" 2013 *SA Merc LJ* 458; see related discussion by Olifant *Liability of Companies for Market Abuse* 14-15.

⁴⁴² Section 80 of the *Financial Markets Act 2012*.

⁴⁴³ Section 80(1)(a)(i) and (ii) of the *Financial Markets Act 2012*; see related discussion by Chitimira H "Overview of The Market Abuse Regulation Under the *Financial Markets Act 19 Of 2012*" 2014 *OBITER LJ* 254, 261.

appearance of the trading activity in connection with or an artificial price for such securities will be guilty of trade-based market manipulation.⁴⁴⁴ Nonetheless, the offenders may only incur liability if the courts and/or the Financial Services Board (FSB) proves that they had knowledge of their illicit trading practices when they committed the aforesaid trade-based market manipulation offences.⁴⁴⁵ Put differently, persons who engage in trade-based market manipulation are required to know that they were taking part in a prohibited trading practice on a regulated market. Such parties must also know the effect or possible effects of such practice before they could incur any liability.⁴⁴⁶ However, offenders of trade-based market manipulative practices could evade liability if they prove that they ignorantly dealt in the listed securities in the registered financial markets.⁴⁴⁷ Thus, some unscrupulous persons could still contravene the requirement of knowledge under the *Financial Markets Act 2012*. Moreover, trade-based market manipulation offences are generally limited to transactions that relates to securities listed on a regulated market.⁴⁴⁸ Thus, market manipulation that could occur in non-regulated market as defined in the *Financial Markets Act 2012* is not expressly prohibited.

The *Financial Markets Act 2012* provides for different inexhaustible examples of trade-based market manipulation.⁴⁴⁹ However, The *Financial Markets Act 2012* does not, expressly prohibit Internet-based market manipulation and social media-related market manipulation.⁴⁵⁰

⁴⁴⁴ See section 80(1) read with section 80(3) of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 *OBITER LJ* 261; Tan CH *Financial Markets and Institutions in Singapore* (Singapore University Press Singapore 2005) 201.

⁴⁴⁵ Sakurai K *Trade and the Labor Market: Effect on Wage Inequality in Japan* (Springer London 2016) 2.

⁴⁴⁶ See section 80 of the *Financial Markets Act 2012*; Chitimira 2014 *OBITER LJ* 262; see related discussion by Soderstrom R *Regulating Market Manipulation: An Approach to Designing Regulatory Principles* (LLD Thesis Uppsala University 2011) 18.

⁴⁴⁷ Sections 80 and 81 of the *Financial Markets Act 2012*; also see further Chitimira 2014 *OBITER LJ* 262; Lin T 2017 *The New Market Manipulation* <https://corpgov.law.harvard.edu/2017/08/03/the-new-market-manipulation/> accessed 30 October 2017 page unknown.

⁴⁴⁸ See section 80 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 *OBITER LJ* 262.

⁴⁴⁹ See section 80(3) of the *Financial Markets Act 2012*; see related discussion by Cassim FHI *et al Contemporary Company Law* 981.

⁴⁵⁰ See sections 80 of the *Financial Markets Act 2012*; see related discussion by Chitimira H "The Inherent Challenges in the South African Anti-Market Abuse Enforcement Framework in Relation to Selected Market Abuse Practices that Occurred During the Global Financial

5.4.2 Prohibition on disclosure-based market manipulation under the *Financial Markets Act 2012*

Any person who directly or indirectly made or published false, misleading or deceptive statements in respect of any material fact and which the person knew, or ought reasonably to have known was false, misleading or deceptive in respect of listed securities will be guilty of an offence.⁴⁵¹ In addition, any person who directly or indirectly, make or publish any statement, promise or forecast of the past or future performance of a company in respect of listed securities, which is by reason of omission of material facts, rendered false, misleading and deceptive statements by such omission will be liable for disclosure-based market manipulation offence.⁴⁵² Thus, the publication of false or deceptive statements, promises and forecasts is prohibited under the *Financial Markets Act 2012*.⁴⁵³ Therefore, disclosure-based market manipulation that applies to matters relating to the non-publication of price-sensitive information or the omission of material facts is prohibited under the *Financial Markets Act 2012*.⁴⁵⁴ This is commendable since the issuing of false, deceptive or misleading statements could reduce public investor confidence and the financial markets.⁴⁵⁵ However, the *Financial Markets Act 2012* does not expressly provide any factors that should be considered by the FSB and/or courts to the materiality of the omitted facts. Furthermore, the *Financial Markets Act 2012* does not prohibit the making or publication of false statements regarding matters that are not directly associated with the company's current performance, but which may nevertheless artificially inflate the share prices.⁴⁵⁶

It appears that liability for disclosure-based market manipulation may be imposed on persons who either intentionally or negligently published or made incorrect

Crisis" 2014 *MJSS* 60, 65; Davidson P *Financial Markets, Money, and the Real World* (Edward Elgar Publishing Netherlands 2003) 104.

⁴⁵¹ See section 81(1)(a) of the *Financial Markets Act 2012*, see related discussion by Cassim 2008 *SA Merc LJ* 43; Chitimira 2014 *OBITER LJ* 267.

⁴⁵² See section 81(1)(b) of the *Financial Markets Act 2012*; see related discussion by Cassim 2008 *SA Merc LJ* 43.

⁴⁵³ Section 81 of the *Financial Markets Act 2012*.

⁴⁵⁴ See section 81(1)(b) of the *Financial Markets Act 2012*; see related discussion by Bainbridge *SM Research Handbook on Insider Trading* (Edward Elgar United Kingdom 2013) 440.

⁴⁵⁵ See section 81 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 *OBITER LJ* 267.

⁴⁵⁶ See sections 81 of the *Financial Markets Act 2012*; see related discussion by Chitimira *OBITER LJ* 267.

statements under the *Financial Markets Act 2012*.⁴⁵⁷ Additionally, the *Financial Markets Act 2012* does not expressly provide civil penalties for any disclosure-based market manipulation offences.⁴⁵⁸ However, offenders still incur civil penalties under the JSE Listing Requirements that prohibits false or misleading statements by the JSE member companies.⁴⁵⁹ Additionally, the *Financial Markets Act 2012* does not expressly prohibit Internet-based market manipulation practices.⁴⁶⁰ The Internet could be providing unscrupulous persons with additional platforms to participate in disclosure-based market manipulation activities in the South African financial markets.⁴⁶¹

5.5 The enforcement of the market manipulation prohibition in South Africa

The enforcement of the prohibition on market manipulation mainly lies with the FSB. The FSB uses different enforcement measures that are aimed at discouraging market abuse practices in South Africa.⁴⁶² For instance, the FSB was established in terms of the *Financial Services Board Act*⁴⁶³ as an independent board and a national regulator that, *inter alia*, enforces market manipulation laws.⁴⁶⁴ The FSB investigates cases of suspected market manipulation practices in the South African financial markets.⁴⁶⁵ Furthermore, the FSB is empowered to interrogate any persons

⁴⁵⁷ See section 81 of the *Financial Markets Act 2012*; Cassim 2008 *SA Merc LJ* 43; see related discussion by Chitimira 2014 *OBITER LJ* 268.

⁴⁵⁸ There is no section that expressly provides for civil liability under the *Financial Markets Act 2012*; see related discussion Chitimira 2014 *OBITER LJ* 268.

⁴⁵⁹ Generally see sections 80 and 81 of the *Financial Market Act 2012*, which do not provide civil penalties for disclosure-based market manipulation; see related discussion by Chitimira 2014 *OBITER LJ* 268.

⁴⁶⁰ There is no section that expressly deal with Internet-based market manipulation under the *Financial Markets Act 2012*.

⁴⁶¹ See related discussion Chitimira 2014 *OBITER LJ* 268.

⁴⁶² See section 84 of the *Financial Markets Act 2012*; see related discussion by Chitimira H "Analysis of the Establishment and Enforcement of Anti-Market Abuse Preventative Measures in the United Kingdom" 2014 *MJSS* 529.

⁴⁶³ See section 2 of the *Financial Services Board Act 97* of 1990 read with section 84 of the *Financial Markets Act 2012*; also see Chitimira H "Overview of Problems Associated with Ineffective Enforcement of Market Abuse Provisions in South Africa" 2014 *MJSS* 47, 48; see related discussion by Misra-Dexter and February *Testing Democracy* 274.

⁴⁶⁴ The powers of the FSB are enumerated in the *Financial Markets Act 2012*, see section 84(1) of the *Financial Markets Act 2012*; Chitimira 2014 *MJSS* 48; Cassim et al *Contemporary Company Law* 906.

⁴⁶⁵ See section 84(2)(a) and (e) of the *Financial Markets Act 2012*; Chitimira 2014 *MJSS* 48; see related discussion by Alexander RCH *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routledge London 2016) 245.

suspected of violating market manipulation provisions in South Africa.⁴⁶⁶ The FSB is now statutorily empowered to assist foreign regulators with investigations in relation to market manipulation cases.⁴⁶⁷ However, the FSB is not expressly empowered to institute civil action against market manipulation offenders under the *Financial Markets Act 2012*.⁴⁶⁸ Thus, market manipulation is only a criminal offence under the *Financial Markets Act 2012*. The FSB works in association with the JSE, the Enforcement Committee (EC), and the Directorate of Market Abuse (DMA). The DMA primarily investigates market abuse cases on behalf of the FSB. The JSE offers surveillance measures to market abuse activities and the EC jurisdiction over administrative sanctions for market abuse in South Africa.

For example, the JSE prevents all the forms of market manipulation by mandating its members to consider the circumstances of orders placed by clients before entering such orders in the JSE equities-trading system and to be responsible for the integrity of such orders.⁴⁶⁹ The JSE's Surveillance Division may conduct an investigation into any suspected market manipulation practices and the outcomes are handed over to the DMA.⁴⁷⁰ The JSE has surveillance systems in place to detect and combat market manipulation practices.⁴⁷¹ The JSE requires its members to comply with disclosure requirements to prevent market manipulation.⁴⁷² It is submitted that the surveillance

⁴⁶⁶ See section 84(3)(b) of the *Financial Markets Act 2012*; see related discussion by Alexander *Insider Dealing and Money Laundering in the EU* 245.

⁴⁶⁷ See section 84(2)(b) of the *Financial Markets Act 2012*; see related discussion by Chitimira H "An Overview Analysis of Selected Challenges in the Enforcement of the Prohibition of Insider Trading and Market Manipulation in the European Union and South African" 2015 *LDD* 94,105.

⁴⁶⁸ Sections 80-81 of the *Financial Markets Act 2012*; see related discussion Pilbeam K *Finance and Financial Markets* (Palgrave Macmillan London 2010) 20.

⁴⁶⁹ See sections 84 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 *OBITER LJ* 263; author unknown date unknown *Introducing JSE Equity Market Enhancement* <https://www.jse.co.za/trade/equity-market> accessed 30 October 2017 page unknown.

⁴⁷⁰ See sections 84 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 *OBITER LJ* 263; see related discussion by Misra-Dexter N and February J *Testing Democracy: Which Way is South Africa Going?* (Idasa Cape Town 2010) 274.

⁴⁷¹ Chitimira 2014 *OBITER LJ* 263; see related discussion by Alexander *Insider Dealing and Money Laundering in the EU* 245; Markham J *Law Enforcement and the History of Financial Market Manipulation* (Routledge London 2014)162.

⁴⁷² Chitimira 2014 *OBITER LJ* 263; Cassim et al *Contemporary Company Law* 906; see related discussion by Ligeti K and Franssen V *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Bloomsbury Publishing United States of America 2017) 270.

systems of the JSE identifies unusual price and trading volumes and when the surveillance systems detect possible market manipulation an investigation is carried out and the results are handed over to the DMA for further investigation.⁴⁷³

The DMA was established in 2005. The powers of the DMA are stipulated in the *Financial Markets Act 2012*.⁴⁷⁴ The DMA investigates cases of insider trading and market manipulation in respect of securities listed on a regulated market.⁴⁷⁵ To date, the DMA have successfully investigated various market manipulation cases in South Africa.⁴⁷⁶

The DMA closes investigations once it becomes evident that no, or insufficient evidence has been obtained to warrant action.⁴⁷⁷ The Director of Public Prosecutions (DPP) has jurisdiction to institute criminal action against the offender.⁴⁷⁸ However, the DMA only institute criminal prosecutions when the DPP has neglected or failed to institute such action.⁴⁷⁹ The DMA may refer market manipulation cases to the EC or take civil legal action against an alleged offender.⁴⁸⁰ The relevant court or the EC may order the alleged offender to pay the profit made, or the losses avoided, as a result of the offending transactions.⁴⁸¹ The payments that are made in respect of

⁴⁷³ Chitimira 2014 *OBITER LJ* 263; see related discussion by Ligeti and Franssen *Challenges in the Field of Economic and Financial Crime in Europe and the US* 270.

⁴⁷⁴ Section 85(1)(c) of the *Financial Markets Act 2012*.

⁴⁷⁵ See section 85 read with sections 80 and 81 of the *Financial Markets Act 2012*; see related discussion by Author unknown 2008 *FSB Directorate of Market Abuse Deals with Cases for Legal Action* <http://www.insurancegateway.co.za/print//22.8.131.Irn=1737#.WPhaJWmGOUk> Accessed 20 April 2017 1.

⁴⁷⁶ See section 84 of the *Financial Markets Act 2012*; see related discussion by Chitimira H "An Analysis of the Market Abuse Prohibition Enforcement in the United States of America" 2014 *MJSS* 188, 192; *Pather and Another v Financial Services Board and Others* (57617/10) [2014] ZAGPPHC 303; *The Directorate of Market Abuse v Brown and Two Others*, 12/2008; *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C).

⁴⁷⁷ See section 84 of the *Financial Markets Act 2012*; see related discussion by Author unknown 2008 <http://www.insurancegateway.co.za/print//22.8.131.Irn=1737#.WPhaJWmGOUk> accessed 20 April 2017 1.

⁴⁷⁸ See section 84 of the *Financial Markets Act 2012*; *Pather and Another v Financial Services Board and Others* (57617/10) [2014] ZAGPPHC 303; see section 83(1)(c)(i) of the *Financial Markets Act 2012*.

⁴⁷⁹ See section 80 of the *Financial Markets Act 2012*; see relate discussion by Unknown author 2008 <http://www.insurancegateway.co.za/print//22.8.131.Irn=1737#.WPhaJWmGOUk> accessed 20 April 2017 1.

⁴⁸⁰ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001*.

⁴⁸¹ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001* read with sections 80, 81; 84 and 85 of the *Financial Markets Act 2012*; see related discussion by Ligeti and

market manipulation actions are given to the FSB. These funds are distributed, to persons who may have been prejudiced by the offending transactions.⁴⁸² The EC may impose a penalty and a cost order on the alleged market manipulation offenders.

As indicated above, one can conclude that there is some cooperation between the FSB and other related enforcement authorities in relation to the combating market manipulation in South Africa.

5.6 Available penalties for market manipulation in South Africa

Market manipulation is both a criminal and civil offence under *the Financial Markets Act 2012*.⁴⁸³ However, civil, criminal and administrative penalties are employed in order to discourage market manipulation in South Africa.⁴⁸⁴ Moreover, civil remedies for market manipulation are not expressly provided for under the *Financial Markets Act 2012*.⁴⁸⁵ However, relatively more settlements and prosecutions of market manipulation have been obtained by the relevant authorities in South Africa.⁴⁸⁶

Franssen *Challenges in the Field of Economic and Financial Crime in Europe and the US* 270.

⁴⁸² See section 84 of the *Financial Markets Act 2012*; see related discussion by Author unknown 2008 <http://www.insurancegateway.co.za/print/22.8.131.lrn=1737#.WPhaJWmGOUk> accessed 20 April 2017 1.

⁴⁸³ See section 109(a) of the *Financial Markets Act 2012* Chitimira 2014 *MJSS* 53; see related discussion by Ligeti and Franssen *Challenges in the Field of Economic and Financial Crime in Europe and the US* 270

⁴⁸⁴ See section 82 of the *Financial Markets Act 2012*; also see Chitimira 2014 *MJSS* 55; Cassim et al *Contemporary Company Law* 906.

⁴⁸⁵ There is not section that expressly provides for civil remedies under the *Financial Markets Act 2012*. Chitimira 2014 *OBITER LJ* 263; see related discussion by unknown author 2015 *Insider Trading and other Market Abuses (Including The Effective Management of Price Sensitive Information)*

<https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf> accessed 28 October 2017 26.

⁴⁸⁶ Chitimira 2014 *OBITER LJ* 263; Cassim et al *Contemporary Company Law* 906; see related discussion by Ligeti and Franssen *Challenges in the Field of Economic and Financial Crime in Europe and the US* 270; *Pather and Another v Financial Services Board and Others* (57617/10) [2014] ZAGPPHC 303; *The Directorate of Market Abuse v Brown and Two Others*, 12/2008; *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C); see related discussion by Chitimira 2014 *PER LJ* 952.

5.6.1 Criminal penalties

The DPP has the discretion to institute criminal proceedings in respect of market manipulation offences.⁴⁸⁷ Criminal penalties may be imposed on all persons who knowingly engage in market abuse practices.⁴⁸⁸ Market manipulation is treated as a criminal offence under the *Financial Markets Act 2012*⁴⁸⁹ and a maximum fine of R50 million, or imprisonment for a period not exceeding ten years, or both such fine and imprisonment is imposed against the offenders.⁴⁹⁰

However, these criminal penalties for market manipulation are generally not deterrent as other offenders may easily pay the stipulated R50 million fine and continue with their illicit market manipulation practices.⁴⁹¹ It is submitted that the available criminal penalties for market manipulation are not robust enough to discourage perpetrators of market manipulation.⁴⁹² Despite this, it is submitted that higher criminal penalties could encourage all market participants to refrain from market manipulation practices in South Africa.

5.6.2 Civil penalties

Civil penalties are also employed to enhance the combating of market manipulation in South Africa.⁴⁹³ However, civil penalties are employed only to curb insider trading

⁴⁸⁷ Chitimira 2015 *PER LJ* 122; see related discussion by Gutierrez JBB and Harding C *EU Criminal Law and Policy: Values, Principles and Methods* (Routledge London 2017) 95.

⁴⁸⁸ See section 109(a) read with sections 80-82 of the *Financial Markets Act 2012*.

⁴⁸⁹ See section 109(a) read with sections 80-82 of the *Financial Markets Act 2012*; see further Caprio G *Handbook of Safeguarding Global Financial Stability: Political, Social, Cultural, and Economic Theories and Models* (Elsevier Boston 2013) 385; see related discussion by Chitimira 2014 *MJSS* 54;

⁴⁹⁰ See section 109(a) of the *Financial Markets Act 2012*; Chitimira 2014 *MJSS* 56; Cassim 2008 *SA Merc LJ* 33- 74.

⁴⁹¹ See section 109(a) read with section 82 of the *Financial Markets Act 2012*; also see Chitimira 2015 *PER LJ* 124; see related discussion by Gutierrez and Harding *EU Criminal Law and Policy* 240.

⁴⁹² See section 109(a) read with sections 80-82 of the *Financial Markets Act 2012*; also see Chitimira 2014 *De Jure* 326; see related discussion by Martin AN, Quackelbeen L and Simonato M *Food Regulation and Criminal Justice* (Malku Netherlands 2016) 173.

⁴⁹³ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001*. However, there is no section that expressly provides for civil liability of market manipulation under the *Financial Markets Act 2012*; see related discussion by Alexander RCH *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routledge London 2016) 206.

under the *Financial Markets Act 2012*.⁴⁹⁴ The *Financial Markets Act 2012* does not expressly provide civil penalties for market manipulation in South Africa.⁴⁹⁵ Nonetheless, such civil and administrative penalties are currently imposed against the market manipulation offenders in terms of the *Protection of Funds Act 2001*.⁴⁹⁶ Persons prejudiced of market manipulation have to rely on common law remedies.⁴⁹⁷ This approach could have somewhat negatively affected the consistent combating of market manipulation in South Africa.

5.6.3 Administrative penalties

The *Financial Markets Act 2012* does not expressly provide for administrative penalties for market manipulation.⁴⁹⁸ However, the *Protection of Funds Act 2001* provides for the administrative sanctions such as public censure, disqualification, warnings and disciplinary actions to curb market manipulation in South Africa.⁴⁹⁹ In this regard, it should be noted that administrative sanctions like the payment of R1 million, the interest incurred by the offender and cost of suits are used to deter both market manipulation and insider trading activities.⁵⁰⁰

5.7 Remedies for market manipulation in South Africa

Remedies include a right that is enforced by a court when a wrongful act is intentionally or unintentionally inflicted upon an individual by another person.⁵⁰¹ Remedies usually deal with the nature and extent of relief to which the affected

⁴⁹⁴ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001* read with section 82 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 MJSS 58.

⁴⁹⁵ Sections 80-81 of the *Financial Markets Act 2012*; see related discussion by Alexander Insider *Dealing and Money Laundering in the EU* 206.

⁴⁹⁶ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001*.

⁴⁹⁷ Chitimira 2015 PER LJ 127; see related discussion by Cassim 2008 SA Merc LJ 74.

⁴⁹⁸ There is no section that expressly provides for administrative penalties under the *Financial Markets Act 2012*; see related discussion by Chiu IHY *Regulatory Convergence in EU Securities Regulation* (Kluwer International law Netherlands 2008).

⁴⁹⁹ See section 6D read with section 6A(2) of the *Protection of Funds Act 2001*; see related discussion by Gullifer L and Payne J *Corporate Finance Law: Principles; and Policy* (Bloomsbury Publishing London 2011) 500.

⁵⁰⁰ Section 6D read with section 6A(2) of the *Protection of Funds Act 2001* read with sections 80-82 and 87 of the *Financial Markets Act 2012*; see related discussion by Payne J *Takeovers in English and German Law* (Bloomsbury Publishing London 2002) 68.

⁵⁰¹ Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the *Financial Markets Act 19 of 2012*" 2014 MJSS 124, 128; see related discussion by Alexander Insider *Dealing and Money Laundering in the EU* 206.

person is entitled to receive from the courts once there is proof that the victim was prejudiced by the actions, conduct or dealings of another person.⁵⁰² There are generally four main types of judicial remedies that a prejudiced person may claim against the offenders, namely damages; restitution; coercive remedies and declaratory remedies. However, the *Financial Markets Act 2012* does not expressly provide remedies for market manipulation victims.⁵⁰³

5.7.1 Available remedies for market manipulation under the *Financial Markets Act 2012*

The *Financial Markets Act 2012* only provides for civil and administrative remedies for insider trading.⁵⁰⁴ This suggests that no statutory civil or administrative remedies are expressly provided for market manipulation under the *Financial Markets Act 2012*.⁵⁰⁵ Consequently, victims of market manipulation may only rely on any common law remedies to recover such remedies from the offenders.⁵⁰⁶ Market manipulation victims who successfully obtained any amount of common law damages will have such amount deducted from the amount that they might have claimed under the *Protection Fund Act 2001*.⁵⁰⁷ It is, therefore, recommended that the *Financial Markets Act 2012* should be amended in order to expressly provide civil and administration penalties for market manipulation in addition to those that are stipulated in the *Protection Fund Act 2001*.⁵⁰⁸

⁵⁰² See section 82 of the *Financial Markets Act 2012*; also see Chitimira 2014 MJSS 128; Payne *Takeovers in English and German Law* 68.

⁵⁰³ There is no section that expressly provide for remedies of market manipulation under the *Financial Markets Act 2012*, see sections 80-82; see related discussion by Gullifer and Payne *Corporate Finance Law: Principles and Policy* 500.

⁵⁰⁴ See section 82 of the *Financial Markets Act 2012*; see further section 6D read with section 6A(2) of the *Protection of Funds Act 2001*; see related discussion by Chitimira 2014 MJSS 129; Lacalle D *Life in the Financial Markets: How They Really Work And Why They Matter To You* (John Wiley and Sons London 2010) 199.

⁵⁰⁵ See sections 80-82 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 MJSS 129; Lacalle *Life in the Financial Markets* 199.

⁵⁰⁶ See section 82(8) of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 MJSS 131; Schlichting S *Internationalising China's Financial Markets* (Springer London 2008) 218.

⁵⁰⁷ See section 6D(2)(b)(ii) *Protection of Funds Act 2001* read with section 87 of the *Financial Markets Act 2012*; see related discussion by Chitimira 2014 MJSS 131; Schlichting *Internationalising China's Financial Markets* 218.

⁵⁰⁸ See section 6D read with section 6A(2) of the *Protection of Funds Act 2001*.

5.8 Conclusion

The *Financial Markets Act* 2012 has commendably attempted to provide provisions that ensure that South African financial markets are fair, efficient and transparent since its inception to date.⁵⁰⁹ For instance, the *Financial Markets Act* 2012 prohibits various examples of market manipulation practices. Moreover, the *Protection of Funds Act* 2001 provides for administrative penalties to curb market manipulation in South Africa. This chapter has usefully traced the regulation of market manipulation in South Africa since the 1980s to date. Furthermore, the prohibition, enforcement, remedies and penalties of market manipulation were briefly discussed in order to enlighten the reader on how South Africa combats market manipulation from both the common law and statutory positions. From the analysis in this chapter, it is clear that several enactments and amendments of the anti-market manipulation laws were introduced to in a bid to effectively combat market manipulation in South Africa. Nonetheless, the *Financial Markets Act* 2012 and all its predecessors had minimal success in combating market manipulation.⁵¹⁰ For instance, South Africa has so far attempted to successfully and consistently enforce its market manipulation laws to date.⁵¹¹

This chapter also revealed that the *Financial Markets Act* 2012 does not expressly provide administrative penalties for market manipulation. In this regard, it is recommended that the *Financial Markets Act* 2012 should be amended in order to provide for the additional remedies for market manipulation in South Africa. The *Financial Markets Act* 2012 should also be amended in order to expressly provide for civil remedies for market manipulation in addition to those contained in the *Protection of Funds Act* 2001. The law makers should further consider enacting private rights of action, specific civil pecuniary penalties, punitive damages and class actions in the *Financial Markets Act* 2012 in order to effectively combat market manipulation. In conclusion, although South African market manipulation laws still has some gaps and flaws, South Africa currently has relatively adequate anti-market manipulation

⁵⁰⁹ Schlichting *Internationalising China's Financial Markets* 218.

⁵¹⁰ *Pather and Another v Financial Services Board and Others* (576/17/10) [2014] ZAGPPHC 303; *The Directorate of Market Abuse v Brown and Two Others*, 12/2008; *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C); see related discussion by Chitimira 2014 *PER LJ* 952.

⁵¹¹ Chitimira 2014 *MJSS* 537.

laws in Southern African Development Community (SADC).⁵¹² Consequently, it is hoped that the South African anti-market manipulation laws will provide some valuable lessons to the Zimbabwean policy makers in respect of regulating market manipulation laws.

⁵¹² Mayekiso P and Thabane M 2016 *JSE Remains Among the World's Top Regulated Exchanges* <https://www.jse.co.za/articles/jse-among-top-regulated-exchanges> accessed 11 October 2017 page unknown.

CHAPTER SIX

OVERVIEW ANALYSIS OF THE REGULATION OF MARKET MANIPULATION IN ZIMBABWE AND SOUTH AFRICA

6.1 Introduction

The South African prohibition on market manipulation is one of the most adequate regulatory systems in the Southern African Development Community (SADC).⁵¹³ Therefore, a comparative analysis of the market manipulation regulatory framework in South Africa and Zimbabwe is carried out in this chapter.

This is done to explore the similarities and differences between Zimbabwean and South African anti-market manipulation laws. Furthermore, this chapter seeks to isolate possible lessons that can be learnt by Zimbabwe from the South African anti-market manipulation regulatory framework. Therefore, relevant South African provisions and cases are examined and where necessary contrasted with similar cases and provisions in Zimbabwe.

6.2 Overview regulatory framework for market manipulation

6.2.1 Scope and meaning of market manipulation

Seemingly, some gaps and flaws are still embedded in both the South African and Zimbabwean anti-market manipulation laws.⁵¹⁴ For instance, the *Financial Markets Act 2012*⁵¹⁵ does not expressly define the concept of market manipulation in South Africa.⁵¹⁶ Similarly, the *Securities Act 2004* does not expressly define the concept of

⁵¹³ Mayekiso P and Thabane M 2016 *JSE Remains Among the World's Top Regulated Exchanges* <https://www.jse.co.za/articles/jse-among-top-regulated-exchanges> accessed 11 October 2017 page unknown; see related discussion by Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for An Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM Dissertation University of Fort Hare 2008) 119.

⁵¹⁴ No specific sections expressly define the concept of "market manipulation" under the *Securities Act 17 of 2004* [Chapter 24:25] (*Securities Act 2004*) as amended, see sections 96 and 97 and sections 80 and 81 of the *Financial Markets Act 2012*; see further related discussion by Chitimira H "Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa" 2015 *AJLS* 183,195.

⁵¹⁵ Sections 80 and 81 of the *Financial Markets Act 19 of 2012* (*Financial Markets Act 2012*); see related discussion by Gomez C *Financial Markets, Institutions, and Financial Services* (PHI Learning United States of America 2008) 218.

⁵¹⁶ Sections 80 and 81 of the *Financial Markets Act 2012*; see related discussion by Gomez C *Financial Markets, Institutions, and Financial Services* 218.

market manipulation.⁵¹⁷ Accordingly, the inconsistent application of the anti-market manipulation prohibition and the absence of an adequate definition of market manipulation in both jurisdictions could have given rise to the increased commission of various market manipulation practices in both the Zimbabwean and South African financial markets without incurring any liability.⁵¹⁸ In this regard, the definition of market manipulation should be introduced in both the *Financial Markets Act 2012* and the *Securities Act 2004* to enhance the regulation of this practice in South Africa and Zimbabwe.⁵¹⁹ This follows the fact that omission of the definition of market manipulation in both South Africa and Zimbabwe has somewhat negatively affected the effective enforcement of the market manipulation prohibition in these jurisdictions. In this regard, it is submitted that the *Financial Markets Act 2012* and the *Securities Act 2004* should be amended to provide an adequate statutory definition of the concept of market manipulation. This definition should cover all the relevant conduct and practices that constitutes or may result in market manipulation offences.⁵²⁰ For instance, it is submitted that the definition of market manipulation should broadly prohibit various conduct that could give rise to market manipulation offences such as the misuse of material information; dissemination of false or misleading information; a practice which abnormally or artificially affects, or is likely to affect the formation of prices or volumes of financial instruments or securities; dark pools and wash trades⁵²¹ and social media and Internet-based market manipulation practices.

⁵¹⁷ There is no section that expressly provide for the definition of market manipulation under the *Securities Act 2004*, see sections 2; 96 and 97.

⁵¹⁸ There is no section that expressly provides for the definition of market manipulation under both the *Securities Act 2004* and the *Financial Markets Act 2012*.

⁵¹⁹ See sections 80 and 81 of the *Financial Markets Act 2012*; sections 96 and 97 of the *Securities Act 2004*. See generally related analysis by De Brouwer G *Financial Markets and Policies in East Asia* (Routledge London 2003) 56.

⁵²⁰ Chitimira 2016 *JCCLP* 36; see related discussion by Soderstrom R *Regulating Market Manipulation: An Approach to Designing Regulatory Principles* (LLD-Thesis Uppsala University) 4.

⁵²¹ See sections 80 and 81 of the *Financial Markets Act 2012*; see related discussions by Chitimira 2016 *JCCLP* 37; Baumgarten M *Banks, Bailouts and Liberal Markets* (GRIN Verlag New York 2012) 100.

6.2.2 The prohibition of market manipulation

Market manipulation was initially prohibited under the *Stock Exchanges Control Act 1 of 1985 (Stock Exchanges Control Act)*.⁵²² This Act prohibited the publication of ambiguous information, tip-offs (tipping) and rumours. Moreover, 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 in South Africa.⁵²³

The similarities and differences of the market manipulation prohibition in South Africa and Zimbabwe are briefly examined under this sub-heading.⁵²⁴ Two forms of market manipulation, namely, trade-based market manipulation and disclosure-based market manipulation in relation to listed securities are prohibited under the *Financial Markets Act 2012* and the *Securities Act 2004*.⁵²⁵

The *Securities Act 2004* prohibits the intentional creation of false or misleading appearance of the volume of trading in any registered securities exchange by any person.⁵²⁶ Moreover, the *Securities Act 2004* further prohibits any person from engaging in any conduct that could result in the false or misleading appearance of the market for the price of any securities exchange in Zimbabwe.⁵²⁷ In addition, the *Securities Act 2004* prohibits any person from intentionally creating false, fictitious statements or artificial transactions or devices that maintain, inflate, depress or

⁵²² See section 40 of the *Stock Exchanges Control Act 1985*.

⁵²³ See section 20 of the *Financial Markets Control Act 55 of 1989 (Financial Markets Control Act 1989)*; see related discussion by Chitimira H "Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER LJ* 937, 940-941; Baumgarten *Banks, Bailouts and Liberal Markets* 100.

⁵²⁴ See sections 96 and 97 of the *Securities Act 2004*; see sections 80 and 81 of the *Financial Markets Act 2012*; see related discussion by Chitimira *The Regulation of Insider Trading in South Africa* 104; Spencer PD *The Structure and Regulation of Financial Markets* (Oxford University Press United Kingdom 2002) 159.

⁵²⁵ Sections 80 and 81 of the *Financial Markets Act 2012* and sections 96 and 97 of the *Securities Act 2004*; see related discussion by Spencer *The Structure and Regulation of Financial Markets* 159; Chitimira H "Overview of The Market Abuse Regulation under the Financial Markets Act 19 of 2012" 2014 *OBITER LJ* 254, 255.

⁵²⁶ See section 96(1)(a) of the *Securities Act 2004*; see related discussion by Jarrow RA, Maskimovic V and Ziember WT *Finance* (Elsevier Amsterdam 2006) 619.

⁵²⁷ See section 96(1)(b) of the *Securities Act 2004*; see related discussion by Jarrow, Maskimovic and Ziember *Finance* 619.

cause fluctuations in the price of any securities on a registered securities exchange.⁵²⁸ The *Securities Act* 2004 also prohibits any person from the inducing of others to trade or to deal in securities on a registered securities exchange by making or publishing any statement, promise or forecast which the person knew to be false or misleading.⁵²⁹ Furthermore, the *Securities Act* 2004 prohibits the dishonest concealment of material fact⁵³⁰ and the recklessly and dishonest making or publishing any statement, promise or forecast that is false or misleading by any person.⁵³¹ However, unlike the position in South Africa,⁵³² the *Securities Act* 2004 only prohibits a few practices and/or conduct that constitutes trade-based market manipulation. Thus, several other examples of conduct that amounts to trade-based market manipulation that are enumerated under section 80 of the *Financial Markets Act* are not expressly prohibited under sections 96 and 97 of the *Securities Act* 2004.⁵³³

Nonetheless, it should be noted that market manipulation is discouraged under common law in both Zimbabwe and South Africa.⁵³⁴ Thus, the common law still influences the regulation of market manipulation in South Africa and Zimbabwe.⁵³⁵

6.2.2.1 Trade-based market manipulation

A number of trade-related manipulative practices are prohibited under the *Financial Markets Act* 2012.⁵³⁶ Thus, the *Financial Markets Act* 2012 prohibits different types of trade-based market manipulation. For instance, the *Financial Markets Act* 2012

⁵²⁸ See section 96(2) of the *Securities Act* 2004.

⁵²⁹ See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Jarrow, Maskimovic and Ziember *Finance* 619.

⁵³⁰ See section 97(1)(b) of the *Securities Act* 2004.

⁵³¹ See section 97(1)(c) of the *Securities Act* 2004; see related discussion by Jarrow, Maskimovic and Ziember *Finance* 619.

⁵³² See paragraphs and sub-paragraphs under 5.4 to 5.7 in Chapter Five of this dissertation.

⁵³³ See section 80 of the *Financial Markets Act* 2012; see related discussion by Barucci E *Financial Markets Theory: Equilibrium, Efficiency and Information* (Springer London 2003) 389.

⁵³⁴ Cassim R "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Mec LJ* 177 177-179; 191-192; Chitimira H "The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective" 2015 *PER LJ* 112, 119.

⁵³⁵ See section 82(8) of the *Financial Markets Act* 2012; see related discussion by Chitimira 2015 *PER LJ* 119; Henning & Du Toit "The Regulation of False Trading, Market Manipulation and Insider Trading" 2000 *Journal for Juridical Science* 155 159.

⁵³⁶ See sections 80 and 81 of the *Financial Markets Act* 2012; see related discussion by Chitimira 2015 *PER LJ* 119; Barucci *Financial Markets Theory* 389.

provides that no person may knowingly, directly or indirectly use or participate in practices which creates or are likely to create⁵³⁷ a false or deceptive appearance of the demand for supply of or trading activity in connection with,⁵³⁸ or an artificial price of any listed securities for his or her own account or for the account of another person.⁵³⁹ Furthermore, the *Financial Market Act 2012* stipulates that the offender ought to have reasonably known that he or she is participating in trade-based market manipulation.⁵⁴⁰ This could imply that persons who engage in trade-based market manipulative practices in respect of any listed securities in South Africa could evade their liability if they prove that they ignorantly dealt in the affected securities.⁵⁴¹

On the contrary, the *Securities Act 2004* does not expressly state whether the offenders must have knowledge of their illicit trading practices before they could incur liability for trade-based market manipulation.⁵⁴² Moreover, the *Securities Act 2004* only prohibits the intentional creation of false or misleading appearance of the volume of trading in any registered securities.⁵⁴³ This shows that its market manipulation prohibition is only restricted to registered securities and offenders may only incur liability if their intention is proved by the relevant courts and/or the SECZ. Thus, like the *Financial Markets Act 2012*,⁵⁴⁴ the *Securities Act 2004*'s trade-based market manipulation may only be committed in respect of securities listed on a registered and/or regulated market. Furthermore, like the *Financial Markets Act 2012*,⁵⁴⁵ the *Securities Act 2004* prohibits any conduct that give rise to a false or misleading appearance of the financial markets or the price of any listed

⁵³⁷ See section 80(1)(a) of the *Financial Market Act 2012*; see related discussion by Dutilleul FC and Jean-Philippe B *Legal Dictionary of Food Security in the World* (Primento France 2013) 210.

⁵³⁸ See section 80(1)(a)(i) of the *Financial Markets Act 2012*; see related discussion by Dutilleul and Jean-Philippe *Legal Dictionary of Food Security in the World* 210.

⁵³⁹ See section 80(1)(a)(ii) of the *Financial Market Act 2012*; see related discussion by Papadopoulos T *EU Law and the Harmonization of Takeovers in the Internal Market* (Kluwer Law International Chicago 2010) 121.

⁵⁴⁰ See section 80(1)(b) of the *Financial Markets Act 2012*; see related discussion by Papadopoulos *EU Law and the Harmonization of Takeovers in the Internal Market* 121.

⁵⁴¹ Chitimira 2014 *OBITER LJ* 262.

⁵⁴² See section 96 of the *Securities Act 2004* which does not provide many examples of trade based market manipulation.

⁵⁴³ See section 96(1)(a) of the *Securities Act 2004*; see related discussion by Mwenida KK *Zambia's Stock Exchange and Privatisation Programme: Corporate Finance Law in Emerging Markets* (Edwin Mellen Press New York 2001) 163.

⁵⁴⁴ See section 80 of the *Financial Markets Act 2012*.

⁵⁴⁵ See section 80 of the *Financial Markets Act 2012*.

securities.⁵⁴⁶ Moreover, like the *Financial Markets Act 2012*,⁵⁴⁷ the *Securities Act 2004* prohibits any person from intentionally maintaining, inflating, depressing or causing fluctuation in the price of any securities on a registered securities exchange by means of any false, fictitious statement or artificial transactions or device.⁵⁴⁸

On the other hand, unlike the *Securities Act 2004*,⁵⁴⁹ the *Financial Markets Act 2012* prohibits the entering on a regulated market in order to buy or sell a security listed on that market which involves no change in the beneficial ownership of that security with the intention of creating⁵⁵⁰ false or deceptive appearance of the trading activity⁵⁵¹ or an artificial market price for that security.⁵⁵² In this regard, the *Securities Act 2004* should be amended in line with the *Financial Markets Act 2012*,⁵⁵³ to expressly prohibit executing a transaction with no beneficial change of ownership of the securities in the Zimbabwean financial markets.⁵⁵⁴ Accordingly, the *Securities Act 2004* should be amended to expressly prohibit many trade-based market manipulation activities in the Zimbabwean financial markets.⁵⁵⁵ This broadening of the *Securities Act 2004*'s trade-based market manipulation prohibition scope could enhance the combating market manipulation in Zimbabwe.⁵⁵⁶

⁵⁴⁶ See section 96(1)(b) of the *Securities Act 2004*; see related discussion by Mwenda *Zambia's Stock Exchange and Privatisation Programme* 163.

⁵⁴⁷ See section 80 of the *Financial Markets Act 2012*.

⁵⁴⁸ See section 96(2) of the *Securities Act 2004*; see related discussion by Hazen T *Principles of Securities Regulation, (Concise Hornbook Series)* 3rd ed (West Academic United States of America 2009) 146.

⁵⁴⁹ See section 96 of the *Securities Act 2004*.

⁵⁵⁰ See section 80(3)(a) of the *Financial Markets Act 2012*; see related discussion by Dutilleul and Jean-Philippe *Legal Dictionary of Food Security in the World* 210.

⁵⁵¹ See section 80(3)(a)(i) of the *Financial Markets Act 2012*; see related discussion by Bhasin A *Banking and financial markets in India 1947 to 2007* (Century Publications India 2007) 293.

⁵⁵² See section 80(3)(a)(ii) of the *Financial Markets Act 2012*; see related discussion by Hazen *Principles of Securities Regulation* 146.

⁵⁵³ See section 80(5) of the *Financial Markets Act 2012* see related discussion by Bhasin *Banking and financial markets in India* 293.

⁵⁵⁴ Currently, no section expressly prohibit transactions with no change of beneficial of ownership listed securities under the *Securities Act 2004*.

⁵⁵⁵ See section 96 of the *Securities Act 2004*; see related discussion by Nelson P *Capital Markets Law and Compliance: The Implications of MiFID* (Cambridge University Press United Kingdom 2008) 361.

⁵⁵⁶ See section 96(2) of the *Securities Act 2004*; see related discussion by Athukorala PC and Rajapatirana S *The Domestic Financial Market and the Trade Liberalization Outcome: The Evidence from Sri Lanka* (World Bank Publications Washington DC 1991) 4.

Furthermore, the *Financial Markets Act 2012* also prohibits the entering of an order to buy or sell a security on a regulated market by someone who knows that a similar opposite order has been entered, or will be entered with the intention of creating⁵⁵⁷ a deceptive appearance of active public trading in connection with,⁵⁵⁸ or an artificial market price for that security.⁵⁵⁹ This is effectively aimed at prohibiting any person from creating false or fictitious trading activity in the financial markets by colluding with others to enter opposite orders for securities at substantially similar prices to deceive other unwitting investors.⁵⁶⁰ On the other hand, the *Securities Act 2004* does not expressly prohibit anyone from entering an order to buy or sell a security on a regulated market by any person while he or she is aware that a similar opposite order has been entered, or will be entered at substantially same price with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that security.⁵⁶¹ This could have enabled other persons to engage in similar unlawful trading practices without incurring any liability for market manipulation under the *Securities Act 2004*.

Additionally, the *Financial Markets Act 2012* prohibits any person from entering orders to buy or sell a security listed on a regulated market at successfully higher or lower prices for the purpose of improperly influencing the market price for that security or creating, a false or deceptive appearance of the trading activity or an artificial market price of that security.⁵⁶² On the contrary, the *Securities Act 2012* does not expressly prohibit this trade-based market manipulation conduct in

⁵⁵⁷ See section 80(3)(b) of the *Financial Markets Act 2012*; see related discussion by Gkoutzinis PA *Law and Practice of Liability Management: Debt Tender Offers, Exchange Offers, Bond Buybacks and Consent Solicitations in International Capital Markets* (Cambridge University Press United Kingdom 2014) 137.

⁵⁵⁸ See section 80(3)(b)(i) of the *Financial Markets Act 2012*; see related discussion by Gkoutzinis PA *Law and Practice of Liability Management* 137.

⁵⁵⁹ See section 80(3)(b)(ii) of the *Financial Markets Act 2012*; see related discussion by Barnes P *Stock Market Efficiency, Insider Dealing and Market Abuse* (Routledge London 2016) 136.

⁵⁶⁰ Section 3(b) of the *Financial Markets Act 2012*.

⁵⁶¹ There is no section that expressly provides for the entering of orders on a regulated market while he or she is aware that a similar opposite order has been entered, or will be entered, with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that security see related discussion by Chitimira 2014 *OBITER LJ 262*.

⁵⁶² See section 80(3)(c) of the *Financial Market Act 2012*.

Zimbabwe.⁵⁶³ This flaw could be enabling some persons to negatively influence the market prices of securities by entering orders to buy or sell a security listed on a regulated market at a successful higher or lower price for the purpose of improperly influencing the market price for that security or creating, a false or deceptive appearance of the trading activity or an artificial market price of that security without incurring liability in Zimbabwe. In this regard, the *Securities Act* 2012 should be amended in line with the *Financial Markets Act* 2012 to expressly prohibit the entering orders to buy or sell a security listed on a regulated market at successfully higher or lower prices by unscrupulous persons to avoid the creation of false or deceptive trading activity and market prices for listed securities in the Zimbabwean financial markets.

The *Financial Markets Act* 2012 further prohibits the entering on a regulated market an order at or near the close of the market to change or maintain the closing price of a security listed on that market.⁵⁶⁴ On the contrary, the *Securities Act* 2004 does not expressly prohibit the same conduct.⁵⁶⁵ This shows that the *Securities Act* 2004 does not adequately prohibit other forms of trade-based market manipulation. Accordingly, this shortcoming could have negatively affected the enforcement of the trade-based market manipulation prohibition by the SECZ in Zimbabwe.⁵⁶⁶

Moreover, the *Financial Markets Act* 2012 prohibits anyone from entering an order to buy or sell a security listed on a regulated market during any auctioning process or pre-opening session and cancelling such order immediately prior to the opening of the market to create a deceptive or false appearance of demand for or supply for securities or an artificial price of such security.⁵⁶⁷ However, the *Securities Act* 2004

⁵⁶³ See section 96(2) of the *Securities Act* 2004; Chitimira 2014 *OBITER LJ* 262; see related discussion by Cassim *Contemporary Company Law* 896.

⁵⁶⁴ Section 80(3)(d) of the *Financial Markets Act* 2012; see related discussion by Lanoie P, Laplante B and Roy M *Can Capital Markets Create Incentives for Pollution Control?, Issue 1753* (World Bank Publications Washington DC 1997) 17.

⁵⁶⁵ Section 96 of the *Securities Act* 2004; see related discussion by Lanoie, Laplante and Roy *Can Capital Markets Create Incentives for Pollution Control? Issue 1753* 17.

⁵⁶⁶ See section 96 of the *Securities Act* 2004; see related discussion by Stallings B *Finance for Development: Latin America in Comparative Perspective* (Brookings Institution Press New York 2006) 115.

⁵⁶⁷ See section 80(3)(e) of the *Financial Markets Act* 2012; see related discussion Rose F by *Blackstone's Statutes on Commercial and Consumer Law 2017-2018* (Oxford University Press United Kingdom 2017) 571; Stallings B *Finance for Development: Latin America in Comparative Perspective* (Brookings Institution Press New York 2006) 115.

does not expressly prohibit such conduct.⁵⁶⁸ For instance, the *Securities Act 2004* only prohibits the actual trading and dealing in the affected securities by any person through the creation of false or misleading appearance of the volume of trading in any registered securities,⁵⁶⁹ or the false or misleading appearance of the market for the price of such securities on a registered exchange.⁵⁷⁰ This narrow approach has to date given rise to minimal settlements and prosecutions of trade-based market manipulation cases to be obtained by the SECZ and courts in Zimbabwe.

Like the *Financial Markets Act 2012*,⁵⁷¹ the *Securities Act 2004* prohibits any person from employing any device or artificial transactions aimed at creating a false or fictitious trading activity in relation to securities listed on a registered securities exchange.⁵⁷² Nonetheless, both the *Financial Markets Act 2012* and the *Securities Act 2004*'s trade-based market manipulation prohibition are only limited to securities listed on registered or regulated securities exchanges. Therefore, other trade-based market manipulation practices that are perpetrated through other trading platforms.⁵⁷³ Moreover, the *Financial Markets Act 2012* does not expressly prohibit the employment of any device, scheme or artifice to defraud other persons as a result of a transaction effected through the facilities of a regulated market.⁵⁷⁴ However, related conduct is satisfactorily prohibited under the *Securities Act 2004*.⁵⁷⁵

The *Securities Act 2004*'s trade-based market manipulation⁵⁷⁶ is somewhat inadequate since it does not prohibit a number of other trade-based market manipulation practices that are currently prohibited under the *Financial Markets Act*

⁵⁶⁸ See section 96 of the *Securities Act 2004*; see related discussion by Chitimira 2014 *OBITER LJ* 262.

⁵⁶⁹ See section 96(1)(a) of the *Securities Act 2004*; see related discussion by Dalla I *The Emerging Asian Bond Market* (The World Bank Washington DC 1995) 40.

⁵⁷⁰ See section 96(1)(b) of the *Securities Act 2004*; see related discussion by Leong HK *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulations* (Institute of Southeast Asian Studies Singapore 2005) 105.

⁵⁷¹ See section 80(1) and (3) of the *Financial Markets Act 2012*.

⁵⁷² See section 96(2) of the *Securities Act 2004*; see related discussion by Leong HK *Reforming Corporate Governance in Southeast Asia* 105.

⁵⁷³ See section 96(2) of the *Securities Act 2004*; see related discussion by Leong HK *Reforming Corporate Governance in Southeast Asia* 105.

⁵⁷⁴ See section 80 of the *Financial Markets Act 2012*; Chitimira 2014 *OBITER LJ* 267.

⁵⁷⁵ See section 96 of the *Securities Act 2004*; see related discussion by Leong HK *Reforming Corporate Governance in Southeast Asia* 105.

⁵⁷⁶ See section 96 of the *Securities Act 2004*.

2012.⁵⁷⁷ Accordingly, it is submitted that although the South African anti-market manipulation prohibition is sometimes not consistently enforced, it remains adequate than that of Zimbabwe. In this regard, the Zimbabwean policy makers should consider adopting the South African anti-market manipulation laws to enhance the combating of trade-based market manipulation in the Zimbabwean financial markets.

6.2.2.2 Disclosure-based market manipulation

The publication of false or deceptive statements, promises and forecasts is prohibited under the *Financial Markets Act* 2012.⁵⁷⁸ Similarly, the *Securities Act* 2004 also expressly prohibits disclosure-based market manipulation.⁵⁷⁹ However, the *Securities Act* 2004 does not expressly prohibit internet-based market and social-media manipulation. Notably, the *Financial Markets Act* 2012 prohibits any person from making or publishing in respect of listed securities or in respect of the past or future performance of a company whose securities are listed on a regulated market, any statement, promise or forecast which was, at the time and in the light of the circumstances in which it was made, false or misleading or deceptive in respect of any material fact and which the person knew, or ought reasonably to have known was false, misleading or deceptive will be guilty of an offence.⁵⁸⁰ This conduct is not expressly prohibited in the *Securities Act* 2004.⁵⁸¹ Nonetheless, the *Securities Act* 2004 prohibits any person from inducing another person to trade or deal in securities on a registered securities exchange by making or publishing any statement, promise or forecast which he or she knows to be false or misleading.⁵⁸² However, the *Securities Act* 2004 does not expressly state whether the market manipulation

⁵⁷⁷ See section 80 of the *Financial Markets Act* 2012; Chitimira 2014 *OBITER LJ* 267.

⁵⁷⁸ See section 81 of the *Financial Markets Act* 2012; see related discussion by Stallings *Finance for Development: Latin America in Comparative Perspective* 115.

⁵⁷⁹ See section 97 of the *Securities Act* 2004; see related discussion by Brown JR *Regulation of Corporate Disclosure* (Kluwer International Law Netherlands 2017) 12.

⁵⁸⁰ See section 81(1)(a) of the *Financial Markets Act* 2012; see related discussion by Brown *Regulation of Corporate Disclosure* 12; Barucci *Financial Markets Theory* 389.

⁵⁸¹ See section 97 of the *Securities Act* 2004; see related discussion by Brown JR *Regulation of Corporate Disclosure* (Kluwer International Law Netherlands 2017) 12.

⁵⁸² See section 97(1)(a) of the *Securities Act* 2004; see related discussion by Brown *Regulation of Corporate Disclosure* 12.

offenders should know or ought reasonably to have known that the statement in question was false, misleading or deceptive.⁵⁸³

It is evident that disclosure-based market manipulation practices are statutorily prohibited in both Zimbabwe and South Africa. Nonetheless, the regulation and prohibition of disclosure-based market manipulation is relatively different in its scope and enforcement in these jurisdictions. For instance, the making or publication of false statements regarding matters that are not directly associated with the company's current performance, but which may nevertheless artificially inflate the share prices is not expressly prohibited under the *Financial Markets Act 2012*.⁵⁸⁴ On the other hand, the *Securities Act 2004* does not have any prohibition that directly, or indirectly prohibits the publication of listed securities in respect of the past or future performance of a company.⁵⁸⁵ This shows that the *Financial Markets Act 2012* and the *Securities Act 2004* do not adequately prohibit disclosure-based market manipulation.

Moreover, the Internet could be providing market manipulation offenders in South Africa and Zimbabwe the opportunity to participate in disclosure-based market-manipulation activities easier since Internet-based market manipulation is not statutorily prohibited in both jurisdictions.⁵⁸⁶ This shows that both jurisdictions do not expressly have any measures to discourage Internet-based market manipulation as well as social media-related market manipulation in South Africa and Zimbabwe.

6.3 The adequacy of the available remedies for market manipulation

Administrative sanctions, civil penalties and civil remedies are mostly used to discourage market manipulation practices in South Africa.⁵⁸⁷ However, the civil

⁵⁸³ There is no section that expressly state whether the market manipulation offenders should know or ought reasonably to have known that the statement in question was false, misleading or deceptive under the *Securities Act 2004*; section 97 of the *Securities Act 2004*.

⁵⁸⁴ See section 97 of the *Securities Act 2004*; see related discussion by Moloney M Ferran E and Payne J *The Oxford Handbook of Financial Regulation* (Oxford University Press United Kingdom 2015) 647.

⁵⁸⁵ Chitimira 2014 *OBITER LJ* 267; see related discussion by Machiraju HR *International Financial Markets and India* (New Age International Mumbai 2007) 225.

⁵⁸⁶ Chitimira 2014 *OBITER LJ* 268; see related discussion by Machiraju *International Financial Markets and India* 225.

⁵⁸⁷ See sections 80, 81 and 109(a) of the *Financial Markets Act 2012*; see related discussion by Chitimira H and Lawack VA "An Analysis of the General Enforcement Approaches to Combat

penalties and remedies of market manipulation are only limited to insider trading under the *Financial Markets Act 2012*.⁵⁸⁸ This could suggest that very few civil penalties and remedies are available to the market manipulation victims in South Africa.⁵⁸⁹

In South Africa, market manipulation practices that are detected by the Johannesburg Stock Exchange Limited (JSE) are referred to the FSB. Thereafter, such practices are referred to the DMA for further investigations.⁵⁹⁰ The EC may impose on the offenders, administrative sanctions not exceeding the profit made or loss avoided by such offenders.⁵⁹¹ The EC may impose against the market abuse offender, an administrative sanction not exceeding the profit made or loss avoided by that offender.⁵⁹² However, the *Financial Markets Act 2012* provides administrative damages which may be awarded to the persons affected by market abuse offences, especially insider trading.⁵⁹³ It appears that the civil and administrative remedies under the *Financial Markets Act 2012* are limited to insider trading.⁵⁹⁴ Therefore, since the *Financial Markets Act 2012* does not expressly provide for civil and administrative remedies for market manipulation, such remedies are only afforded to the victims in terms of the *Protection of Funds Act*.⁵⁹⁵ However, unlike the *Protection of Funds Act*, the *Securities Act 2004* does not expressly provide administrative sanctions for market manipulation.⁵⁹⁶ In this regard, it is submitted that both the

Market Abuse (Part 1)" 2012 *OBITER LJ* 548 554; Machiraju *International Financial Markets and India* 225.

⁵⁸⁸ See section 82; discussion under chapter 5 of this dissertation.

⁵⁸⁹ See section 81 read with section 82 of the *Financial Markets Act 2012*; Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the *Financial Markets Act 19 of 2012*" 2014 *MJSS* 124,129.

⁵⁹⁰ See section 85; discussion under chapter 5 of this dissertation.

⁵⁹¹ Chitimira 2014 *MJSS* 129; see related discussion by Harris L *Trading and Exchanges: Market Microstructure for Practitioners* (Oxford University Press United Kingdom 2003) 259.

⁵⁹² See sections 6D read with 6A to 6C and 6E to 6H of the *Financial Institutions (Protection of Funds) Act 28 of 2001* as amended (*Protection of Funds Act*); also see section 82 of the *Financial Markets Act 2012* and related discussion by Harris *Trading and Exchanges* 259.

⁵⁹³ Section 82(1)(a) of the *Financial Markets Act 2012*; see related discussion by Cassim *Contemporary Company Law* 906.

⁵⁹⁴ See sections 82 of the *Financial Markets Act 2012*; see related discussion by Harris *Trading and Exchanges* 259.

⁵⁹⁵ See section 6D read with sections 6A(2); 6B to 6C and 6E to 6H of the *Protection of Funds Act*; see related discussion by Harris *Trading and Exchanges* 259.

⁵⁹⁶ Sections 96, 97, 98 and 99 of the *Securities Act 2004*; see related discussion by Thomas M, Möllers J and Heinemann A *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007) 501.

Securities Act 2004 and the *Financial Markets Act 2012* should be amended in order to enact provisions for market manipulation administrative sanctions in Zimbabwe and South Africa respectively. If adopted, this approach could enhance the combating of market manipulation in Zimbabwe and South Africa.

Compensatory damages includes any kind of relief that is intended to compensate the injured or affected party for the harm he or she might have suffered as a result of the actions, conduct or dealings of another person.⁵⁹⁷ Compensatory damages can be in monetary amount equivalent to value and/or profit made or loss avoided by the victim.⁵⁹⁸ However, the *Financial Markets Act 2012* only provides civil compensatory damages to all the affected victims of insider trading.⁵⁹⁹ No such damages are expressly provided to market manipulation victims under the *Financial Markets Act 2012*. Likewise, the *Securities Act 2004* does not expressly provide compensatory and/or administrative damages for market manipulation. This suggests that all the persons affected by market manipulation in Zimbabwe cannot recover compensatory and administrative damages from the offenders.⁶⁰⁰

The *Protection of Fund Act* further provides for actual calculable damages as remedies to insider trading victims.⁶⁰¹ Such damages are then given to any person prejudiced by market manipulation practices.⁶⁰² Likewise, the *Securities Act 2004* provides actual calculable damages for market manipulation in Zimbabwe.⁶⁰³ For instance, actual calculable pecuniary damages are determined as the difference between the price at which the securities were sold or bought and the probable price that such securities would have been sold or bought by the affected person if there

⁵⁹⁷ Chitimira 2014 *MJSS* 128; see related discussion by Thomas, Möllers and Heinemann *The Enforcement of Competition Law in Europe* 501.

⁵⁹⁸ Chitimira 2014 *MJSS* 128; see related discussion by Harding C and Joshua J *Regulating Cartels in Europe* (Oxford University Press United Kingdom 2010) 272.

⁵⁹⁹ Section 82(1)(b) of the *Financial Markets Act 2012*; see related discussion by Harding and Joshua *Regulating Cartels in Europe* 272.

⁶⁰⁰ Sections 96, 97, 98 and 99 of the *Securities Act 2004*.

⁶⁰¹ See section 6D of the *Protection of Fund Act*; see further section 82(6)(a) of the *Financial Markets Act 2012*. Also see related discussion by Harding and Joshua *Regulating Cartels in Europe* 272.

⁶⁰² See section 6H of the *Protection of Fund Act 2001*; section 82(6)(a) of the *Financial Markets Act 2012*; see related discussion by Johnson PM *Derivatives Regulation: Successor Edition to Commodities Regulation*, 3rd (Aspen United states of America 2004) 1233.

⁶⁰³ Section 98(3) of the *Securities Act 2004*; see related discussion by Johnson *Derivatives Regulation* 1233.

was no market manipulation.⁶⁰⁴ Thus, unlike the position under the *Securities Act* 2004,⁶⁰⁵ market manipulation remedies under the *Financial Markets Act* 2012 are limited to insider trading.⁶⁰⁶ In this regard, the *Securities Act* 2004⁶⁰⁷ provides a better approach towards the realisation of market manipulation remedies by the affected persons than the *Financial Markets Act* 2012.

Nevertheless, both the *Financial Markets Act* 2012 and the *Securities Act* 2004 do not have specific guidelines that may be utilised by claimants of market manipulation victims to timeously receive their damages from the FSB and the SECZ respectively. Accordingly, it is submitted that the *Securities Act* 2004 and the *Financial Markets Act* 2012 should be amended in order to expressly provide specific guidelines that may be utilised by victims of market manipulation practices.

The amount for actual calculable damages is determined by the EC having regard to the differences or changes in the price of the affected securities in terms of the *Protection of Fund Act*.⁶⁰⁸ The EC plays a key role in the enforcement of actual calculable damages remedies to the affected victims of market manipulation in South Africa. However, the role of the SECZ in relation to actual calculable damages is not expressly provided in the *Securities Act* 2004 in Zimbabwe.⁶⁰⁹

In South Africa, it appears that common law remedies are available to the victims of market manipulation practices. Victims of market manipulation may rely on any available and applicable common law remedies since civil and administrative remedies are not expressly as provided under the *Financial Markets Act* 2012.⁶¹⁰ This implies that the *Financial Markets Act* 2012 interprets market manipulation as a

⁶⁰⁴ See section 98(3)(a) of the *Securities Act* 2004; see related discussion by Markham J *Law Enforcement and the History of Financial Market Manipulation* (Routledge London 2014) 340.

⁶⁰⁵ See sections 91-92 and sections 98-99 of the *Securities Act* 2004; see related discussion by Markham *Law Enforcement and the History of Financial Market Manipulation* 340.

⁶⁰⁶ See section 82 of the *Financial Markets Act* 2012; Markham *Law Enforcement and the History of Financial Market Manipulation* 340.

⁶⁰⁷ See sections 98 and 99 of the *Securities Act* 2004; see related discussion by Markham *Law Enforcement and the History of Financial Market Manipulation* 340.

⁶⁰⁸ See section 6D of the *Protection of Fund Act*; see related discussion by Chitimira 2014 *MJSS* 130; Bond P *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* (Africa World Press New Jersey 1998) 73

⁶⁰⁹ See sections 96 to 99 of the *Securities Act* 2004; see related discussion by Markham J *Law Enforcement and the History of Financial Market Manipulation* 340.

⁶¹⁰ See section 87 of the *Financial Markets Act* 2012; see related discussion by Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 73

wrong doing against the financial markets rather than as a wrong doing against the actual affected persons.⁶¹¹

On the other hand, the *Securities Act* 2004 provides class actions for market manipulation practices in Zimbabwe.⁶¹² Class actions are used by the SECZ to claim damages from the market abuse offenders on behalf of the affected persons.⁶¹³ Class actions are utilised in Zimbabwe to recover pecuniary damages from the market manipulation offenders.⁶¹⁴ On the contrary, the *Financial Markets Act* 2012 does not provide for class actions for market manipulation. In this regard, the *Financial Markets Act* 2012 should be amended to introduce class actions as a remedy available to those affected by market manipulation in South Africa.

6.4 Available penalties

6.4.1 Criminal penalties

In South Africa, perpetrators of market manipulation offences will be liable for a R50 million fine or imprisonment for a period not exceeding ten years or both such fine and imprisonment.⁶¹⁵ However, these criminal charges are not deterrent enough to curb market manipulation in South Africa. For instance, persons who engage in market manipulation might make more profit from their illicit trading practices such that they could easily afford stipulated R50 million fine. Furthermore, market manipulation offenders may opt to plead guilty and get lighter sentences.⁶¹⁶ Notably, in Zimbabwe, perpetrators of trade-based market manipulation may also incur

⁶¹¹ Chitimira H "The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective" 2015 *PER LJ* 112, 132.

⁶¹² See section 99 of the *Securities Act* 2004; see related discussion by Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 73.

⁶¹³ See section 99 read with section 98 of the *Securities Act* 2004; see generally related comments by Chitimira and Lawack 2012 *OBITER LJ* 560; Nkusu M and Sayek S *Local Financial Development and the Aid-Growth Relationship* (International Monetary Fund London 2004) 17.

⁶¹⁴ See section 99 read with section 98 of the *Securities Act* 2004; Chitimira and Lawack 2012 *OBITER LJ* 560; Nkusu and Sayek *Local Financial Development and the Aid-Growth Relationship* 17.

⁶¹⁵ See section 109(a) read with sections 80 to 82 of the *Financial Markets Act* 2012; see related discussion by Chitimira H *Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Nelson Mandela Metropolitan University 2012) 66; Cassim 2008 *SA Merc LJ* 178.

⁶¹⁶ See section 6D of the *Protection of Fund Act* read with section 82 of the *Financial Markets Act* 2012, see related discussion by Chitimira *Comparative Analysis of the Enforcement of Market Abuse Provisions* 66-67.

criminal penalties such as fines not exceeding level 10 or imprisonment for five years or both such fine and imprisonment.⁶¹⁷ Moreover, perpetrators who are found guilty of disclosure-based market manipulation will be liable to a fine not exceeding level 7 or imprisonment for a period not exceeding 2 years or both such imprisonment and fine.⁶¹⁸ It should be noted that the criminal penalties imposed on market manipulation offenders is not deterrent enough. Nonetheless, unlike the *Financial Markets Act* 2012,⁶¹⁹ the *Securities Act* 2004 does not specify the actual amount of fines that could be imposed on the market manipulation offenders under both level 7 and 10.⁶²⁰ This flaw could have negatively embedded the anti-market manipulation enforcement efforts of the SECZ in Zimbabwe.⁶²¹

6.4.2 Administrative penalties

In South Africa, administrative penalties may be imposed on the market manipulation offenders.⁶²² Administrative penalties such as, cost orders, fine for punitive purposes and other disciplinary sanctions may be imposed on the perpetrators of market manipulation.⁶²³ The *Protection of Fund Act* offers relatively adequate administrative penalties against the market manipulation offenders.⁶²⁴ However, in Zimbabwe, the *Securities Act* 2004 only offers criminal penalties,⁶²⁵ civil penalties⁶²⁶ and class actions⁶²⁷ to curb market manipulation. This clearly shows that the *Securities Act* 2004 does not expressly provide administrative sanctions for market manipulation in

⁶¹⁷ See section 96(3) of the *Securities Act* 2004; see related discussion by Martin N, Quackelbeen L and Simonato M *Food Regulation and Criminal Justice* (Maklu Canada 2017) 173.

⁶¹⁸ See section 97(2) of the *Securities Act* 2004; see related discussion by Martin, Quackelbeen and Simonato *Food Regulation and Criminal Justice* 173.

⁶¹⁹ See section 109(a) read with sections 80 to 82 of the *Financial Markets Act* 2012.

⁶²⁰ See sections 96(3) and 97(2) of the *Securities Act* 2004; see related discussion by Martin, Quackelbeen and Simonato *Food Regulation and Criminal Justice* 173.

⁶²¹ See section 96(3) and 97(2) of the *Securities Act* 2004; see related discussion by Beata Banach-Gutierrez and Harding *EU Criminal Law and Policy: Values, Principles and Methods* 240.

⁶²² See section 6D of *The Protection of Funds Act*.

⁶²³ See section 6D of the *Protection of Funds Act* read with section 82 of the *Financial Markets Act* 2012; see related discussion by Chiu IHY *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International Netherlands 2008) 151.

⁶²⁴ There is no section that expressly provides for administrative penalties under the *Securities Act* 2004.

⁶²⁵ See sections 96(3) and 97(2) of the *Securities Act* 2004.

⁶²⁶ See section 98 of the *Securities Act* 2004; see related discussion by Chiu *Regulatory Convergence in EU Securities Regulation* 151.

⁶²⁷ See section 99 of the *Securities Act* 2004.

Zimbabwe.⁶²⁸ The absence of administrative penalties could have contributed to the minimal number of successful settlements obtained by the SECZ in respect of market manipulation in Zimbabwe to date.

6.4.3 Civil Penalties

Civil penalties are employed to discourage market manipulation practices in Zimbabwe and in South Africa.⁶²⁹ The *Securities Act* 2004 imposes civil penalties against the offenders for profit made or pecuniary loss incurred by the victim of market manipulation.⁶³⁰ In this regard, the difference between the price of the securities which would have been purchased or sold by the victim had the contravention not taken place will be the amount of pecuniary loss to be compensated to the affected persons by the offenders.⁶³¹ Moreover, civil measures such as class actions are employed against the offenders in respect of any pecuniary loss incurred by the market manipulation victims. However, the civil penalties under the *Securities Act* 2004 are not robust enough to combat market manipulation. For instance, the *Securities Act* 2004 does not expressly provide whether civil penalties for market manipulation may be imposed on both juristic persons and natural persons.

Similarly, as stated in chapter 5 of this research, the *Financial Markets Act* 2012 does not expressly provide civil penalties for market manipulation in the South Africa.⁶³² Nonetheless, such civil and administrative penalties for market manipulation are provided for under the *Protection of Funds Act*.⁶³³ Notably, civil measures like class actions for market manipulation are not provided in both the *Financial Markets Act* 2012 and the *Protection of Funds Act*.⁶³⁴ Consequently, it is

⁶²⁸ See sections 96 and 97 of the *Securities Act* 2004.

⁶²⁹ Barnes *Stock Market Efficiency, Insider Dealing and Market Abuse* 129.

⁶³⁰ See section 98 of the *Securities Act* 2004; see related discussion by Barnes *Stock Market Efficiency, Insider Dealing and Market Abuse* 129.

⁶³¹ See section 98(3)(a) of the *Securities Act* 2004; see related discussion by Mäntysaari P *Comparative Corporate Governance: Shareholders as a Rule-maker* (Springer Science and Business Media New York 2006) 165.

⁶³² Barnes *Stock Market Efficiency, Insider Dealing and Market Abuse* 129; Shapiro I *Cato Supreme Court Review, 2007-2008* (Cato Institute Washington DC 2008) 235; see related discussion by Cassim *et al Contemporary Company Law* 906.

⁶³³ See section 6D of *The Protection of Funds Act*.

⁶³⁴ Markham *Law Enforcement and the History of Financial Market Manipulation* 340.

submitted that the *Financial Markets Act 2012* and the *Protection of Funds Act* should be amended to provide class actions for market manipulation practices in order to enhance the combating of such practices in the South African financial markets.

6.5 The adequacy of the anti-market manipulation enforcement frameworks

The Directorate of Market Abuse (DMA) is a committee of the FSB that investigates and enforces market abuse laws in South Africa. The DMA is statutorily mandated to investigate market abuse cases in South Africa.⁶³⁵ The DMA may refer criminal or administrative sanctions for market manipulation to the Director of Public Prosecutions (DPP) and the EC respectively. Thus, the DMA plays a major role in the prevention and combating of market manipulation in South Africa. Nonetheless, in Zimbabwe, although the SECZ investigates market abuse violations, it is not expressly empowered to refer complex market abuse cases to the prosecuting authorities under the *Securities Act 2004*.⁶³⁶ It appears the SECZ does not have regulatory committee such as the DMA that undertakes market manipulation investigations on its behalf.

Moreover, the detection and surveillance of market abuse is undertaken by the JSE's Surveillance Division.⁶³⁷ The JSE has proprietary systems that have been specifically designed to detect unusual trading volumes and price movements, which could be indicative of market manipulation.⁶³⁸ The JSE has modern technological surveillance systems that detect market manipulation, which is currently not found in most SADC countries. The South African financial markets are equipped with strong surveillance and monitoring system for purposes of detecting illicit practices such as market manipulation.⁶³⁹ The JSE detects market abuse practices and send alert messages on possible market manipulation practices to the FSB for further investigations.⁶⁴⁰ In this regard, the JSE Surveillance Division undertakes an initial

⁶³⁵ See section 85 of the *Financial Markets Act*; see further related comments by Chimpango B *The Development of African Capital Markets: A Legal and Institutional Approach* (Routledge New York 2017) 90.

⁶³⁶ See section 4.

⁶³⁷ Chimpango *The Development of African Capital Markets* 90.

⁶³⁸ Chimpango *The Development of African Capital Markets* 91.

⁶³⁹ Chimpango *The Development of African Capital Markets* 91.

⁶⁴⁰ Chimpango *The Development of African Capital Markets* 91.

investigation and the results are brought to the attention of the DMA.⁶⁴¹ The Market Practices Department of the Surveillance Division is responsible for detecting any sign of market abuse using proprietary technology which refreshes the trading information every 30 minutes.⁶⁴² When unusual activity is detected and there appears to be no obvious cause of the market malpractice, the surveillance officers may contact the sponsors of the listed companies for further clarity.⁶⁴³

On the other hand, the SECZ relies on the disclosure reviews and examinations by securities dealers, investment advisers, self-regulatory organizations (SROs) and other market participants, to detect violations of the securities laws and rules and to foster strong compliance and risk management practices within the financial markets.⁶⁴⁴ This could suggest that the SECZ does not have its own surveillance systems to detect and combat market manipulation in Zimbabwe. In this regard, the SECZ should develop its own proprietary systems that detects unusual trading volumes which could be potential market manipulation activities. It appears that such surveillance and proprietary systems are housed in the Surveillance Department of the Zimbabwe Stock Exchange (ZSE).⁶⁴⁵ Nevertheless, unlike the JSE, it appears that the surveillance and proprietary systems are not being effectively utilised by the ZSE since very few successful settlements and prosecutions of market manipulation cases have been obtained by the SECZ to date.

The SECZ ensures that license inspections are well planned and systematically conducted to cover all perceived risks that may be encountered in the Zimbabwean

⁶⁴¹ Chimpango *The Development of African Capital Markets* 91.

⁶⁴² Chimpango *The Development of African Capital Markets* 90; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108 111-114.

⁶⁴³ Chimpango *The Development of African Capital Markets* 90; Chitimira 2014 *Speculum Juris* 111-114.

⁶⁴⁴ Bond P *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* (Africa World Press Zimbabwe 1998) 228; see related discussion by Author unknown 2014 *Risk Oversight Framework* <http://www.seczim.co.zw/component/content/article/13-secz/supervision/41-risk-oversight-framework> accessed 12 October 2017 page unknown.

⁶⁴⁵ Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 228; see related discussion by Author unknown 2015 *Zimbabwe: Zimbabwe Stock Exchange Launches Automated Trading System* <https://www.funds-axis.com/news-articles/zimbabwe-zimbabwe-stock-exchange-launches-automated-trading-system/> accessed 01 November 2017 page unknown.

financial markets.⁶⁴⁶ Disclosure reviews and examinations of securities dealers, investment advisers, SROs and other market participants helps the SECZ to detect market manipulation practices in the Zimbabwean financial markets.⁶⁴⁷ Like the FSB, the SECZ also investigates and brings enforcement actions against regulated persons and entities as well as other market participants accused of market manipulation.⁶⁴⁸

However, unlike the JSE,⁶⁴⁹ the SECZ (and not the ZSE) merely oversees the trading of securities in order to detect and prevent market manipulation practices in the Zimbabwean financial markets.⁶⁵⁰ The SECZ also regulates and registers securities exchanges, the central securities depository, stockbrokers, investment advisers, custodians and transfer secretaries in order to prevent market manipulation.⁶⁵¹ However, it appears that the SECZ does not have a committee such as the EC of the FSB which could receive referrals of market manipulation cases in relation to administrative sanctions.⁶⁵² Moreover, unlike the South African position,⁶⁵³ it is not clear whether the responsibility for prosecuting market manipulation cases lies solely with the Zimbabwean prosecuting authorities or the SECZ.⁶⁵⁴

It should be noted that the FSB, DMA, EC and other regulatory bodies work hand in hand to enforce market manipulation laws and this has satisfactorily enhanced the

⁶⁴⁶ Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 228; see related discussion by Author unknown 2017 <http://www.seczim.co.zw/about-secz/management> accessed 30 August 2017 page unknown.

⁶⁴⁷ Oyama T *Determinants of Stock Prices: The Case of Zimbabwe* (International Monetary Fund Netherlands 1997) 6; see related discussion by Author unknown 2017 <http://www.seczim.co.zw/about-secz/management> accessed 30 August 2017 page unknown.

⁶⁴⁸ Oyama *Determinants of Stock Prices: The Case of Zimbabwe* 6; see related discussion by Author Unknown 2017 <http://www.seczim.co.zw/about-secz/management> accessed 30 August 2017 page unknown.

⁶⁴⁹ See paragraphs 5.4 to 57 in Chapter 5 of this dissertation.

⁶⁵⁰ Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 228; see related discussion by Author unknown 2017 *The Capital Market* <http://www.seczim.co.zw/about-secz/management> accessed 30 August 2017 page unknown.

⁶⁵¹ There is no section that deals with market participants under the *Securities Act* 2004.

⁶⁵² See section 84 of the *Financial Markets Act* 2012; see related discussion by Barth JR, Tatom JA and Yago G *China's Emerging Financial Markets: Challenges and Opportunities* (Springer London 2009) 45.

⁶⁵³ See paragraphs 5.4 to 57 in Chapter 5 of this dissertation.

⁶⁵⁴ Bond *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* 228; see related discussion by Author unknown 2017 <http://www.seczim.co.zw/about-secz/management> accessed 30 August 2017 page unknown.

enforcement of the market manipulation prohibition in South Africa.⁶⁵⁵ This approach is not utilised in Zimbabwe. In light of this, it is submitted that the policy makers should consider amending the *Securities Act* 2004 to statutorily empower the SECZ to co-operate with other regulatory bodies in order to effectively curb market manipulation practices in Zimbabwe. Furthermore, the SECZ should consider adopting other anti-market manipulation enforcement measures such as private rights of action, alternative dispute resolution and whistleblowing.⁶⁵⁶ This could enable the SECZ to improve its enforcement of the market manipulation laws just like what the FSB is currently doing in South Africa.⁶⁵⁷ For instance, although it took South Africa a long time to detect the rigging of the Rand by banks, Amalgamated Banks of South Africa (ABSA), Investec and Standard Bank which engaged in activities designed to rig the market,⁶⁵⁸ it is hoped that the *Financial Sector Regulation Act* 2017⁶⁵⁹ will afford the Financials Sector Conduct Authority more powers to detect market manipulation practices in the South African companies and financial markets in the future. Thus, despite the rigging of the Rand, a number of market manipulation cases have been successfully investigated and settled by the FSB to date.⁶⁶⁰

⁶⁵⁵ *Pather v Financial Services Board* (866/2016) [2017] ZASCA 125.

⁶⁵⁶ Interview conducted by the researcher with regards to the combating of market manipulation and statistics of successful settlements and prosecutions of market manipulation cases, with Mr Pascoe Alexander (the investigation team leader at the FSB's directorate of market abuse) and Mr Keetse Solly (the Director of the Directorate of Market Abuse) on the 6th of October 2017.

⁶⁵⁷ *Pather v Financial Services Board* (866/2016) [2017] ZASCA 125, the DMA conducted an investigation in terms of section 83(1) of the Securities Services Act 2004 where Mr Pather and Mr Cedric caused the financial statement for the year 2005 to be published on the Stock Exchange News Service which they knew or ought to have known were false, misleading or deceptive.

⁶⁵⁸ Moyagabo M 2017 *The Rigging of the Rand — How They Did It* <https://www.businesslive.co.za/bd/companies/financial-services/2017-02-17-the-rigging-of-the-rand-how-they-did-it/> accessed 10 October 2012 page unknown.

⁶⁵⁹ There is no section that deals with market manipulation under the *Financial Sector Regulation Act* 9 of 2017.

⁶⁶⁰ Chitimira *The Regulation of Insider Trading in South Africa* 106, Author unknown 2016 *JSE Remains Among the World's Top Regulated Exchanges* <https://www.jse.co.za/articles/jse-among-top-regulated-exchanges> accessed 15 October 2017.

6.6 Conclusion

As stated above, the *Financial Markets Act 2012* does not expressly provide civil and administrative remedies for market manipulation in South Africa.⁶⁶¹ However, common law remedies for market manipulation are available to victims of market manipulation in South Africa.⁶⁶² The *Financial Markets Act 2012* seems to be inadequate since it does not expressly provide civil remedies and penalties for market manipulation in South Africa.⁶⁶³ Civil and administrative remedies are only limited to insider trading.⁶⁶⁴ In this regard, it is submitted that South Africa should consider following the Zimbabwean example and introduce class actions to enhance the curbing of market manipulation in the South African financial markets.

Likewise, the *Securities Act 2004* should be amended to broaden the scope of its anti-market manipulation prohibition to cover practices and apply to both individuals and juristic persons. Moreover, the *Securities Act 2004* should be amended to enact adequate anti-market abuse penalties for deterrence purposes. Lastly, the *Securities Act 2004* should be amended to enact new provisions for the establishment of other regulatory bodies that will be statutorily obliged to assist the SECZ in combating market manipulation in Zimbabwe.

⁶⁶¹ See sections 82 of the *Financial Markets Act 2012*; see related discussion by Christodoulakis NM *Dynamic Modelling and Control of National Economies 1989: Selected Papers from the 6th IFAC Symposium, Edinburgh, UK, 27–29 June 1989* (Elsevier London 2014) 439.

⁶⁶² See section 82(8) of the *Financial Markets Act 2012*; see related discussion by Christodoulakis *Dynamic Modelling and Control of National Economies 1989* 439.

⁶⁶³ See section 80 and 81 of the *Financial Markets Act 2012*; see related discussion by Christodoulakis *Dynamic Modelling and Control of National Economies 1989* 439.

⁶⁶⁴ See sections 82 of the *Financial Markets Act 2012*; see related discussion by Barth, Tatom and Yago *China's Emerging Financial Markets: Challenges and Opportunities* 45.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This chapter provides overall conclusion on the regulation of market manipulation in Zimbabwe as indicated in the preceding chapters. Moreover, this chapter evaluates whether the *Securities Act*⁶⁶⁵ adequately regulates market manipulation in Zimbabwe. In this regard, it was noted that the *Securities Act* 2004 does not provide for administrative penalties to combat market manipulation.⁶⁶⁶ Furthermore, the Securities Exchange Commission of Zimbabwe (SECZ) has not brought many successful market manipulation settlements and prosecutions in Zimbabwe.⁶⁶⁷ This chapter recommends possible solutions to the problems associated with the regulation of market manipulation in Zimbabwe.⁶⁶⁸ It is hoped that such recommendations will help the policy makers to enact a robust anti-market manipulation legislation that effectively combats market manipulation practices in the Zimbabwean financial markets.⁶⁶⁹

7.2 Recommendations

Various recommendations aimed at resolving market manipulation problems in Zimbabwe are provided below.⁶⁷⁰ It is hoped that such recommendations will be utilized by the relevant authorities to combat market manipulation practices in Zimbabwe.⁶⁷¹ Given this background, it is recommended that:

⁶⁶⁵ See sections 96 and 97 of the *Securities Act* 17 of 2004 Chapter 24:25 as amended (*Securities Act* 2004).

⁶⁶⁶ There is no section that provides for administrative penalties under the *Securities Act* 2004.

⁶⁶⁷ Pogge T and Mehta K *Global Tax Fairness* (Oxford University Press United Kingdom 2016) 62; see related discussion by Author unknown "High-Frequency Trader Convicted of Goods Fraud" *The Herald* (5 November 2015) 5.

⁶⁶⁸ See sections 96 to 99 of *Securities Act* 2004; see related discussion by Ciro T *The Global Financial Crisis Triggers, Responses and Aftermath* (Routledge London 2016) 185.

⁶⁶⁹ See sections 96 to 97 of the *Securities Act* 2004; see related discussion under Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for An Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM Dissertation University of Fort Hare 2008) 144.

⁶⁷⁰ See sections 96-97 of the *Securities Act* 2004.

⁶⁷¹ Chitimira *The Regulation of Insider Trading in South Africa* 165.

(a) the *Securities Act 2004* should be revised to expressly empower the SECZ to investigate and enforce Internet-based market manipulation in Zimbabwe

The Internet could be providing market manipulation offenders in Zimbabwe the opportunity to participate in disclosure-based market manipulation activities easier.⁶⁷² False, misleading and deceptive information relating to securities may be perpetrated on the Internet. Disclosure-based market manipulation⁶⁷³ does not expressly prohibit Internet-based market manipulation in Zimbabwe. The *Securities Act 2004* should be amended to establish a specific regulatory body that prohibits and investigates Internet-based market manipulation practices in the Zimbabwean financial markets.⁶⁷⁴ It is submitted that the Zimbabwean policy makers must amend the *Securities Act 2004* in order to expressly prohibit the dissemination or publication of rumors, false, deceptive or misleading information through the Internet, electronic media or social media platforms. Similarly, South Africa's anti-market manipulation laws do not expressly prohibit Internet-based market manipulation. In this regard, it is submitted that both the *Financial Markets Act 2012*⁶⁷⁵ and the *Securities Act 2004* should be amended to expressly prohibit Internet-based market manipulation. This approach could enhance the combating of market manipulation in the Zimbabwean and South African financial markets.⁶⁷⁶

(b) the *Securities Act 2004* should be amended to expressly provide for other market abuse regulatory bodies apart from the SECZ

The *Securities Act 2004* should be amended to enact specific provisions that empowers other regulatory bodies apart from the SECZ to enhance the effectiveness

⁶⁷² There is no section that expressly deals with internet-based market manipulation under the *Securities Act 2004*; see related discussion by Chitimira H "Overview of the Market Abuse Regulation under the *Financial Markets Act 19 of 2012*" 2014 *OBITER LJ* 254, 268.

⁶⁷³ There is no section that expressly provides for Internet-based market manipulation under the *Securities Act 2004*, see sections 96; 97;98 and 99.

⁶⁷⁴ There is no section that expressly provides for other regulatory bodies under the *Securities Act 2004*; see related discussion by Chitimira H *Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Thesis Nelson Mandela Metropolitan University 2012) 535.

⁶⁷⁵ See section 80 and 81 of the *Financial Markets Act 19 of 2012* (*Financial Markets Act 2012*).

⁶⁷⁶ Doligalski T *Internet-based Customer Value Management Developing Customer Relationships Online* (Springer New York 2015) 81.

and the enforcement of market manipulation in Zimbabwe.⁶⁷⁷ In this regard, Zimbabwe should consider following the South African position which empowers the Financial Services Board (FSB) to work hand in hand with its committees, namely, the Enforcement Committee (EC) and the Directorate of Market Abuse (DMA) and other relevant authorities such as the Appeal Board and the Johannesburg Stock Exchange Limited (JSE). This shows that, the FSB is not the only enforcement body of market manipulation practices since it works in association with the JSE, the EC and the DMA.⁶⁷⁸ The FSB is an independent board and a national regulator which supervises and enforces the prohibition of market manipulation in South Africa.⁶⁷⁹ The DMA investigates market abuse practices such as market manipulation. The DMA is empowered to refer such practices to the EC. Thereafter, the EC may impose a penalty or cost order against the alleged offenders.⁶⁸⁰ Given this background, it is submitted that other regulatory bodies should be introduced to assist the SECZ in curbing market manipulation laws in Zimbabwe.⁶⁸¹

(c) the *Securities Act 2004* should be revised to expressly provide administrative penalties for market manipulation in Zimbabwe

The *Securities Act 2004* should be reviewed to statutorily and expressly empower the SECZ to employ administrative penalties.⁶⁸² Where an offender is found guilty of committing market manipulation, the SECZ must be empowered to impose administrative penalties such as seizure and forfeiture orders, revocation of a license, suspension or disqualification from the profession, seize and desist orders,

⁶⁷⁷ There are no sections that expressly for other market abuse bodies under the *Securities Act 2004*, see section 3; see related discussion by Pankoke SL Effective surveillance and enforcement techniques 2004 *TCLFS* 1,9.

⁶⁷⁸ Chitimira H "A historical overview of the regulation of market abuse under the *Securities Services Act 36 of 2004*" 2014 *De Jure* 310, 327; see related discussion Nathalie HC *South Africa: Detailed Assessment Of Observance Of The International Association Of Insurance Supervisors Insurance Core Principle* (International Monetary Funds Washington DC 2012) 23.

⁶⁷⁹ Reinecke MFB, Van Niekerk JP and Nieber PM 2012 *The Financial Services Board Within The Supervisory Regime* <http://www.cebs.co.za/wp-content/uploads/2012/07/The-role-of-the-FSB-in-South-Africa-September-2013.pdf> accessed 20 October 2017 16.

⁶⁸⁰ Kuger MC *The regulation of insider trading on the JSE: A comparative study with Hong Kong* (LLD Dissertation North West University 2014) 31.

⁶⁸¹ See section 3 of the *Securities Act 2004*.

⁶⁸² There is no section that expressly provides for administrative penalties under the *Securities Act 2004*.

warnings, and the freezing of assets against the offenders.⁶⁸³ It is submitted that different administrative penalties should be employed against any individual or juristic person that commits or attempts to commit market manipulation practices in Zimbabwe.⁶⁸⁴ As indicated in this research, in chapter five, the *Protection of Funds Act 2001*⁶⁸⁵ provides for administrative penalties for market manipulation in South Africa. In this regard, Zimbabwe should consider the South African position which provides for administrative penalties to combat market manipulation.⁶⁸⁶ This approach could enhance the SECZ to obtain more successful settlements of market manipulation cases in Zimbabwe.

(d) the Securities Act 2004 should be amended to expressly prohibit market manipulation activities by juristic persons

The *Securities Act 2004*⁶⁸⁷ prohibits any person who commits or attempts to commit market manipulation practices.⁶⁸⁸ However, the *Securities Act 2004* does not define the word person.⁶⁸⁹ In other words, the *Securities Act 2004* does not expressly prohibit juristic persons from committing market manipulation.⁶⁹⁰ Accordingly, it is submitted that the *Securities Act 2004*⁶⁹¹ should be amended in order to expressly provide the definition of the term “person”. This definition should also directly apply to

⁶⁸³ There is no section that expressly provides for administrative penalties under the *Securities Act 2004*; see related discussion under Moloney N, Ferran E and Payne J *The Oxford Handbook of Financial Regulation* (Oxford University Press United Kingdom 2015) 647.

⁶⁸⁴ There is no section that expressly provides for administrative penalties under the *Securities Act 2004* in relation to this, see sections 98 and 99 of the *Securities Act 2004*.

⁶⁸⁵ There is no section that expressly provides for administrative penalties under the *Securities Act 2004*; see related discussion under Wei *Corporate Governance and China's H-share Market* (Edward Elgar Publishing Limited United States of America 2008) 60.

⁶⁸⁶ See section 6H of the *Financial Institutions Protection of Funds Act 28 of 2001* (*Protection of Funds Act 2001*); see related discussion by Noel M *et al Development of Capital Markets and Institutional Investors in Russia: Recent Achievements and Policy Challenges Ahead* (World Bank Publications Washington DC 2006) 37.

⁶⁸⁷ See sections 2; 96 and 97 of the *Securities Act 2004*; see related discussion by Noel *et al Development of Capital Markets and Institutional Investors in Russia* 37.

⁶⁸⁸ See section 96 and 97 of the *Securities Act 2004*; see related discussion by Wei Y *Securities Markets and Corporate Governance: A Chinese Experience* (Routledge New York 2016) 19.

⁶⁸⁹ There is no section that expressly provides for the definition of persons under the *Securities Act 2004* in relation to this, see sections 96 and 97 of the *Securities Act 2004*; see related discussion by Wei *Securities Markets and Corporate Governance: A Chinese Experience* 19.

⁶⁹⁰ See sections 2; 96 and 97 of the *Securities Act 2004*; see related discussion by Ferran E and Chan L *Principles of Corporate Finance Law* (Oxford University Press United Kingdom 2014) 361.

⁶⁹¹ See section 2 of the *Securities Act 2004*; see related discussion by Ferran and Chan *Principles of Corporate Finance Law* 361.

both juristic and natural persons.⁶⁹² This could further discourage unscrupulous persons to perpetrate market manipulation activities through their companies and other juristic persons in Zimbabwe without liability.⁶⁹³ As indicated earlier,⁶⁹⁴ the *Financial Markets Act 2012* prohibits market manipulation practices by any “person”, which is defined to include partnerships, trusts and other juristic persons.⁶⁹⁵ In this regard, Zimbabwe should consider the South African position⁶⁹⁶ which expressly prohibits market manipulation by both individuals and juristic persons. This approach could further increase the settlements and prosecutions of market manipulation cases in Zimbabwe.

(e) the *Securities Act 2004* should be amended to statutorily define the concept of market manipulation

The *Securities Act 2004* does not statutorily and expressly define the concept of market manipulation.⁶⁹⁷ Similarly, the *Financial Markets Act 2012* does not expressly define market manipulation.⁶⁹⁸ In relation to this, it is submitted that the concept of market manipulation should be expressly defined in order to enhance the enforcement of the market manipulation prohibition in both the South African and the Zimbabweans financial markets. Such definition must include all the elements and various types of market manipulation.⁶⁹⁹ Moreover, all practices that interferes or attempts to interfere with the free and fair operation of the financial markets by creating an artificial, false or misleading appearance with respect to the price of

⁶⁹² See section 2 of the *Securities Act 2004*; see related discussion by Chitimira *The Regulation of Insider Trading in South Africa* 142.

⁶⁹³ See section 2 read with sections 96 and 97 of the *Securities Act 2004*; see related discussion by Wei *Securities Markets and Corporate Governance: A Chinese Experience* 19.

⁶⁹⁴ See related remarks in chapter 5 of this dissertation.

⁶⁹⁵ See sections 1 and 77 read with sections 80 and 81 of the *Financial Markets Act 2012*, which expressly provide for the definitions of the terms “juristic person” and “persons”.

⁶⁹⁶ See sections 81 and 81 read with section 77 of the *Financial Markets Act 2012*.

⁶⁹⁷ See sections 2, 96 and 97 of the *Securities Act 2004*; see related discussion by Mads Andeaes T and Wooldridge F *European Comparative Company Law* (Cambridge University Press United Kingdom 2009) 28.

⁶⁹⁸ See sections 77; 80 and 81 of the *Securities Act 2004*; see related discussion by Mads Andeaes T and Wooldridge F *European Comparative Company Law* 28.

⁶⁹⁹ Harrison K and Ryder N *The Law Relating to Financial Crime in the United Kingdom* (Routledge London 2017) 143.

securities, commodities or financial instruments in the regulated financial markets must be prohibited under the *Securities Act 2004*.⁷⁰⁰

(f) the SECZ should have adequate surveillance systems in place to detect and prevent market manipulation activities in the Zimbabwean financial markets

As stated in Chapter Six of this research, the SECZ only relies on the disclosure reviews and examinations by securities dealers, investment advisers, self-regulatory organizations (SROs) and other market participants, to detect market manipulation practices within the financial markets.⁷⁰¹ This suggests that the SECZ does not have its own surveillance systems that timeously detect, investigate and prevent market manipulation practices in Zimbabwe.⁷⁰² Consequently, the SECZ should have its own surveillance systems in place in order to detect and prevent market manipulation activities in Zimbabwe. On the other hand, the JSE has surveillance systems that have been specifically designed to detect unusual trading volumes and price movements, which could be indicative of market manipulation.⁷⁰³ In this regard, Zimbabwe should consider the South African position which has surveillance systems that detect market manipulation. This approach could enhance the SECZ to obtain more successful settlements of market manipulation cases in Zimbabwe.

⁷⁰⁰ See sections 2, 96 and 97 of the *Securities Act 2004*; see section 77; 80 and 81 of the *Securities Act 2004*; see related discussion under Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *JCCLP* 24, 36-37; Wei *Securities Markets and Corporate Governance: A Chinese Experience* 19.

⁷⁰¹ There is no section that expressly provides for the detection and surveillance of market manipulation practices under the *Securities Act 2004*; see related discussion by Author unknown 2014 *Risk Oversight Framework* <http://www.seczim.co.zw/component/content/article/13-secz/supervision/41-risk-oversight-framework> accessed 12 October 2017 page unknown.

⁷⁰² There is no section that expressly provides for the detection and surveillance of market manipulation practices under the *Securities Act 2004*; Chitimira *Comparative Analysis of the Enforcement of Market Abuse Provisions* 535.

⁷⁰³ Chitimira *Comparative Analysis of the Enforcement of Market Abuse Provisions* 535; see related discussion by Chimpango BK *The Development of African Capital Markets: A Legal And Institutional Approach* (LLD Thesis Nottingham Trent University 2014) 91.

- (g) the *Securities Act 2004* should be amended to enact provisions that expressly empower the SECZ to co-operate with local and international regulatory bodies**

The SECZ must be statutorily empowered to co-operate and engage with other similar regulatory bodies for the purposes of sharing relevant information, cross-border market manipulation, mutual co-operations, enforcement agreements and resources and technological surveillance system sharing.⁷⁰⁴ The SECZ should co-operate with other local and international regulatory bodies in order to enhance the enforcement of market manipulation prohibition in Zimbabwe. It is submitted that the *Securities Act 2004* should be revised in order to provide provisions which empowers the SECZ to find assistance and to also assist foreign regulators with investigations pertaining to any cross-border market manipulation cases in Zimbabwe.

- (h) the *Securities Act 2004* should be amended to statutorily and expressly provide for other anti-market manipulation measures to improve the prosecution and settlement of market manipulation cases in Zimbabwe**

The *Securities Act 2004* does not expressly provide for other alternative enforcement methods such as administrative sanctions, whistle-blowing, private rights of action to enhance the enforcement of the market manipulation in Zimbabwe.⁷⁰⁵ For instance, very few market manipulation cases have been successfully settled by the SECZ in Zimbabwe. Many cases have probably been abandoned due to the insufficient knowledge and suspected incompetence of court officials.⁷⁰⁶ The researcher submits that the policy makers should consider introducing other measures such as arbitration and alternative dispute resolution to improve the settlement of market

⁷⁰⁴ There is no section that expressly provides for cross boarder market manipulation under the *Securities Act 2004* in relation to this, see section 3 of the *Securities Act 2004*; see related discussion by Chimpango *The Development of African Capital Markets* 91.

⁷⁰⁵ See sections 98 and 99 of the *Securities Act 2004*; see related discussion by Markham J *Law Enforcement and the History of Financial Market Manipulation* (Routledge London 2015) 359.

⁷⁰⁶ *Zimbabwe Stock Exchange v Securities Commission of Zimbabwe* H.C.8347 2010; *Securities Commission of Zimbabwe, Ambassador C. Mutsvangwa v Lifestyle Holdings Limited & Zimbabwe Stock Exchange* H.C.1985 2013; *Remo Investments Brokers, Mohamed Iqbal Mahmed, Rezana Ebrahim and John Motsi v Securities Commission of Zimbabwe* S.C. 13/13 (ref: MISC6/12) 2012; *ISB Securities (Pvt) Ltd and Geoff Senzo Mhlanga v Securities Commission of Zimbabwe and the Chief Executive Officer Zimbabwe Stock Exchange* H.C.5769 2009; *Bartholomew Mswaka v Securities Commission of Zimbabwe* H.C.8067 2010 however, these cases were never resolved by the SECZ.

manipulation cases in Zimbabwe.⁷⁰⁷ Persons with the relevant expertise should be employed to participate in the arbitration process to increase awareness, improve negotiations and settlements of market manipulation cases in the Zimbabwean financial markets.⁷⁰⁸

(i) the *Securities Act 2004* should be amended to provide for adequate penalties for market manipulation

As indicated in this research, in chapter four, criminal penalties may be imposed on offenders of market manipulation. Under the *Securities Act 2004*, a person who commits or attempts to commit trade-based market manipulation shall be guilty of an offence and liable to a fine not exceeding level 10 and imprisonment for a period not exceeding 5 years or both such fine and imprisonment.⁷⁰⁹ Furthermore, a person who attempts or commits disclosure based market manipulation shall be guilty of an offence and liable to a fine not exceeding level 7 or imprisonment not exceeding 2 years or both.⁷¹⁰ However, the criminal penalties provided under the *Securities Act 2004* are not deterrent enough to combat market manipulation in Zimbabwe. This could have culminated in the paucity of successful prosecutions of market manipulation cases to be obtained by the relevant courts in Zimbabwe to date. Put differently, the current anti-market manipulation criminal penalties are still minimal and less dissuasive for deterrence purposes. Furthermore, although the *Securities Act 2004* provides class actions, its civil penalties of market manipulation are still very minimal and restricted for deterrence purposes.⁷¹¹ This could have enabled many persons to continue engaging themselves in market manipulation and related unlawful trading practices in the Zimbabwean financial markets given the provision of a few and very less deterrent penalties.

⁷⁰⁷ See sections 98 and 99 of the *Securities Act 2004*; see related discussion by Chitimira *Comparative Analysis of the Enforcement of Market Abuse Provisions* 544, Chitimira *The Regulation of Insider Trading in South Africa* 165.

⁷⁰⁸ El-Dean *Privatisation and the Creation of A Market-Based Legal System* (Boston Netherlands 2002) 244.

⁷⁰⁹ See section 96(3) of the *Securities Act 2004*; see related discussion by Langenfeld J *The Law and Economics of Class Actions* (Emerald Group Publishing United Kingdom 2014) 117.

⁷¹⁰ See section 97(2) of the *Securities Act 2004*; see related discussion by Langenfeld *The Law and Economics of Class Actions* 117.

⁷¹¹ See section 98 of the *Securities Act 2004*; see related discussion by see related discussion by Markham J *Law Enforcement and the History of Financial Market Manipulation* 359.

On the other hand, the *Financial Markets Act* 2012 does not expressly provide class actions for market manipulation in South Africa.⁷¹² In this regard, The *Financial Markets Act* 2012 should be amended in line with the *Securities Act* 2004 to expressly provide class actions for market manipulation in South Africa.⁷¹³ This could enable the South African anti-market manipulation enforcement authorities to obtain more settlements in civil cases involving market manipulation consistently.

7.3 Conclusion

As indicated before,⁷¹⁴ various flaws such as inadequate penalties, lack of definitions of key terms and the narrow scope and application of the market manipulation prohibition are still found in the *Securities Act* 2004. Consequently, it is hoped the relevant authorities and policy makers utilise some recommendations from the South African anti-market manipulation regulatory framework as provided in this research. In this regard, it is submitted that the *Securities Act* 2004 should be amended to enact adequate provisions for anti-market manipulation penalties and broaden the scope and application of the market manipulation prohibition to cover both juristic persons and individuals in all the relevant financial markets in Zimbabwe. This could enable the courts and the SECZ to obtain more successful settlements and prosecutions in market manipulation cases in Zimbabwe. It is hoped that the recommendations made in this research will enhance the combating of market manipulation in the Zimbabwean financial markets.

⁷¹² There is no section that expressly provides for class actions under the *Financial Markets Act* 2012; see related discussion by Jongryn M and Brady D *The Rule of Law in South Korea* (Hoover Press California 2013) 140.

⁷¹³ See sections 82 of the *Securities Act* 2004; see related discussion by Jongryn and Brady *The Rule of Law in South Korea* 140.

⁷¹⁴ See related discussion in chapter 4 of this dissertation.

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