The Statutory Prohibition of Insider Trading in Namibia: Lessons from South Africa

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SOLEMN DECLARATION

I **Thabang Terrance Mabina**, hereby declare that the Dissertation entitled:

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That I herewith submit in fulfilment of the requirements for the LLM degree is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any university or by any person for any qualification.

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Signed at ……this……..day of……..20…

Declared before me on this……..day of……..2017

Signature of Supervisor……..

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DEDICATION

To my Mother

And

The Rest of the Family

ABSTRACT

Insider trading is defined as a practice by which an individual that have price or value-sensitive non-public confidential information, concludes a transaction in securities to which that information relates, without sharing that information with others. Insider trading is often treated as an illegal conduct. However, insider trading is only illegal if it was unlawfully done for one's own gain or to avoid a loss by a person who had non-public price-sensitive information that relates to the affected securities. It is submitted that insider trading decreases or hampers confidence in the financial markets. Therefore, insider trading should be effectively regulated to promote international competitiveness in any country. Insider trading practices have affected the proper functioning of financial markets in several jurisdictions, including Namibia and South Africa. Consequently, this research usefully reveals that the Namibian insider trading regulatory framework is still characterised by numerous flaws and shortcomings that have negatively affected the combating of insider trading in Namibia. Accordingly, this research examines and investigates the adequacy of the Namibian insider trading laws in order to recommend possible measures that could be employed to promote an effective and adequate insider trading statutory regulatory framework in Namibia. The researcher hopes that this research will promote the efficiency and stability of the Namibian financial markets by the effective curbing of insider trading.

Key words: insider trading, financial markets, Namibia, regulatory framework, enforcement.

TABLE OF CONTENTS

CHAPTER FOUR THE ADEQUACY OF THE NAMIBIA INSIDER TRADING STATUTORY REGULATORY FRAMEWORK

CHAPTER FIVE THE PROHIBITION OF INSIDER TRADING IN SOUTH AFRICA

CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

It must be noted that although the globalization of financial markets brings many opportunities, it also brings many regulatory challenges in many jurisdictions.[1] Therefore, it is important to enact adequate insider trading laws to regulate and combat such challenges with the ultimate goal of increasing confidence in the financial markets.[2] It is submitted that the maintenance of the integrity of the financial markets and the promotion of investor confidence is crucially important in any country. This follows the fact that financial markets integrity increases the potential for investment, especially, foreign direct investment in any country. One of the ways of maintaining the integrity of financial markets is through the effective regulation of market abuse practices.[3] In this regard, the regulatory and enforcement authorities must ensure that there is proper compliance with the laws and regulations of such practices in their countries.[4]

Insider trading is defined as a practice by which an individual that have price or value-sensitive non-public confidential information, concludes a transaction in securities to which that information relates, without sharing that information with others.[5] In most cases, investors and other persons associate insider trading with illegal conduct.[6] However, it must be noted that not all insider trading is illegal. Insider trading is only illegal if it was unlawfully done for one's own gain or to avoid a loss by a person who had non-public price-sensitive information as stated above.[7] The lawful insider trading occurs when corporate insiders such as directors, shareholders and other employees buy and sell stock in their own companies while

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1 Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151,151.
2 Luiz 2011 *SA Merc LJ* 151.
3 See Luiz 2011 *SA Merc LJ* 151.
4 See Luiz 2011 *SA Merc LJ* 151.
5 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) 1.
6 McClean DE *Wall Street, Reforming the Unreformable: An Ethical Perspective* (Routledge, 2015) 69.
7 Dowie J, University O and Mageean D *The World of Monetary Risk* (The Open University, Michigan, 1980) 97.

in possession of non-public inside information, which relates to such stock.[8] On the other hand, the illegal insider trading occurs when the purchasing and selling of a security by insiders, directors, shareholders and other persons, was done in breach of a fiduciary duty or any other relationship of trust and confidence by such insiders, while in possession of material and confidential information about that security.[9]

Likewise, market manipulation includes the use of false statements to induce others to purchase and sell listed securities, or the use of fictitious or other transactions, devices or reports, which manipulate the price of listed securities.[10]

Notably, in the context of financial markets, market abuse usually involves insider trading and the market manipulation of financial markets either for one to make profit or to avoid a loss.[11] In broad terms, market abuse also includes conduct by which persons manipulate the financial markets to create a false impression of activity on the markets, or to manipulate the price of financial instruments or securities in respect thereof.[12] Furthermore, market abuse also includes insider trading or conduct that involves the buying or selling of financial instruments or securities by any person while in possession of confidential price-sensitive information.[13] Market abuse may also include the publication of false information or reports about a company or its securities in order to manipulate the market for such securities.[14]

In light of the above, it must be noted that market abuse is not specifically defined in many jurisdictions.[15] Nonetheless, various types of conduct, which are deemed as market abuse practices, are enumerated in market abuse legislation in many countries.[16] This entails that conduct, which constitutes or amounts to market abuse

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8 Rodgers W *Process Thinking: Six Pathways to Successful Decision Making* (iUniverse, 2006)105.

9 Rodgers *Process Thinking: Six Pathways to Successful Decision Making* 105.

10 Luiz 2011 *SA Merc LJ* 152.

11 Ferran E, Moloney N and Payne J *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 634-635.

12 Ferran *et al The Oxford Handbook of Financial Regulation* 635.

13 Lyon G and Du Plessis J *The Law of Insider Trading in Australia* (Federation Press, 2005) 2-3.

14 Gullifer L and Payne J *Corporate Finance Law: Principles and Policy* 2nd Ed (Bloomsbury Publishing, 2015) 579.

15 LaBrosse JR, Olivares-Caminal R and Singh D *Managing Risk in the Financial System* (Edward Elgar Publishing, 2011) 456.

16 Fischel DR and Ross DJ "Should the Law Prohibit Manipulation in Financial Markets" 1991 *Harvard Law Report* 503, 503; Myburgh A and Davis B *The Impact of South Africa's Insider*

is merely listed in such legislation. Despite this, it is important to note that market abuse includes both insider trading and market manipulation for the purposes of this dissertation.

This research outlines and examines the regulation of insider trading in Namibia. Sanctions and/or penalties that may be imposed for contravening insider trading are considered in this research. Moreover, a closer look into the adequacy and effectiveness of the current Namibian insider trading regulatory framework is provided. The research also investigates the role of the Namibia Financial Institutions Supervisory Authority (NAMFISA) to determine if it has adequately fulfilled its role as a corporate watchdog to combat insider trading in the Namibian financial markets.

Market abuse practices, particularly insider trading, is experienced in many financial markets of different jurisdictions, including Namibia. Consequently, this research provides a comparative analysis of the regulation of insider trading in Namibia and South Africa. This is done for the purposes of drawing possible lessons from the South African insider trading regulatory experiences as well as recommending possible measures that could be utilised to bring the Namibian insider trading legislation in line with the relevant anti-insider trading enforcement approaches in South Africa. Accordingly, Chapter Five specifically discusses the regulation of insider trading in South Africa.

It serves no purpose to identify problems within the current Namibian insider trading regulatory framework without recommending how to correct such problems. Therefore, this research recommends possible measures that could be employed to combat insider trading in the Namibian financial markets. It is hoped that this research will enhance the regulation of insider trading in Namibia.

Trading Regime: A Report for the Financial Services Board 8 http://www.genesis-analytics.com/public/FSBReport.pdf accessed 15 March 2017.

1.2 Background of the research

As stated above, the effects of insider trading have been experienced in several financial markets in many countries to date.[17] In this regard, this research provides the regulation of insider trading in Namibia and South Africa.

More often than not, insider trading is perceived as an illegal conduct.[18] Nonetheless, there has been an on-going debate on whether insider trading should be regulated or not.[19] Accordingly, insider trading can be regarded as both legal and illegal.[20]

In Namibia, insider trading was firstly treated as a dimension of corruption.[21] It was defined as the use of privileged information and knowledge that a person possesses as a result of his or her position to provide unfair advantage to another person to obtain a benefit or accrue a benefit for himself or herself.[22]

To date, there has not been any case of insider trading successfully prosecuted or settled in Namibia. However, this is not because insider trading does not take place in Namibia. This is relatively due to the lack of adequate and effective insider trading laws to curb insider trading in the Namibian financial markets.[23]

The statutory regulation of insider trading in Namibia can be traced back to 1973.[24] This was when the 1973 *Companies Act* was enacted. The enactment of the 1973 *Companies Act* was a move in the right direction towards the prohibition of insider trading in Namibia. This move was also an acknowledgment by the Namibian policy makers that insider trading was wrong and required legislative intervention. However, the 1973 *Companies Act* was later amended and repealed.[25]

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17 Chitimira H "A Historical Overview of the Regulation of Market Abuse under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 310.

18 McClean *Wall Street, Reforming the Unreformable: An Ethical Perspective* 69.

19 McClean *Wall Street, Reforming the Unreformable: An Ethical Perspective* 69.

20 McClean *Wall Street, Reforming the Unreformable: An Ethical Perspective* 69.

21 Hunter J "Actual Instances of Corruption" *Namibian Print Media* (1 April 2004-31 March 2006) 5.

22 Hunter *Namibia Print Media* 5.

23 Haoseb QS *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* (LLB Dissertation University of Namibia, 2004) 6.

24 This was when the Namibian legislature first established the *Companies Act* 61 of 1973 (1973 *Companies Act*).

25 The 1973 *Companies Act* has been repealed by the *Companies Act* 28 of 2004 (2004 *Companies Act*).

A further attempt by Namibian policy makers in the endeavor to combat market abuse practices was the introduction of the *Stock Exchanges Control Act*.[26] However, the *Stock Exchanges Control Act* only regulated market manipulation and not insider trading.[27] In this regard, the provisions of the *Stock Exchanges Control Act* are not discussed for the purposes of this dissertation.

In 2001, the Namibian legislature introduced the *Namibia Financial Institutions Supervisory Authority Act*,[28] with which the NAMFISA was established.[29] The NAMFISA was empowered to exercise supervision over the business of financial institutions and financial services in terms of the *NAMFISA Act*.[30] Additionally, the NAMFISA was empowered to advise the Minister of Finance on matters related to financial institutions and financial services, whether at its own accord or at the request of the said Minister.[31]

As effects of insider trading were gradually increasing, Namibian policy makers introduced the *Companies Act*.[32] In terms of the 2004 *Companies Act*, insider trading is specifically prohibited.[33] However, the provisions of the 2004 *Companies Act* are largely flawed and inadequate. The provisions of the 2004 *Companies Act* will be discussed in Chapter four of this dissertation.

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26 See section 1 of the *Stock Exchange Control Act* 1 of 1985 (*Stock Exchange Control Act*).

27 Section 40 of the *Stock Exchange Control Act* provides that no person shall by means of any statement, promise or forecast which he knows to be misleading induce any other person to buy or sell listed securities, or directly or indirectly, whether within or outside a stock exchange, by means of the creation of fictitious transactions or the spreading of false reports attempt to stimulate activities or influence the prices of securities on a licensed stock exchange. See also section 48 of the same Act.

28 See section(s) 2, 3 and 4 of the *Namibia Financial Institutions Supervisory Authority Act* 3 of 2001 (*NAMFISA Act*).

29 See section 2 of the *NAMFISA Act*.

30 Section 3(a) of the *NAMFISA Act*.

31 Section 3(b) of the *NAMFISA Act*.

32 See generally section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*).

33 Section 241 of the *Companies Act* 28 of 2004 provides that: every director, past director, officer or person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it becomes publicly known, may be expected materially to affect the price of the shares or debentures of the company and who deals in any way to his or her advantage, directly or indirectly, in those shares or debentures while that information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media commits an offence and is liable to a fine which does not exceed N$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

In this regard, in 2012, Namibian policy makers established the *Financial Institutions and Markets Bill*.[34] The 2012 *Financial Institutions and Markets Bill* is not yet adopted as an *Act* of parliament. The provisions of the 2012 *Financial Institutions and Markets Bill* are discussed comprehensively in Chapter Four of this dissertation.

1.3 Arguments For and Against the Regulation of Insider Trading

Since decades back, there has been an on-going debate on whether insider trading should be regulated or not.[35] In this regard, the regulation and deregulation of insider trading has attracted many academics, legal scholars and commentators such as Manne[36] and Bainbridge[37] in that they have brought forth arguments and dissenting views regarding the regulation of insider trading.

The law and economics debate about the regulation of insider trading has been both long standing and unresolved.[38] The early legal debate was centred on whether insider trading is unfair to public investors who are not privy to private corporate information.[39] Proponents of deregulation questions whether insider trading is even harmful, much less worthy of legal action. Their views on insider trading range from moral revulsion to positive evaluations of its economic benefits.[40] Accordingly, proponents of regulation and proponents of deregulation submit that insider trading should be regulated and deregulated respectively. Proponents of regulation support the current restrictions placed on insider trading while proponents of deregulation advocate for a laissez-faire government policy.[41] In this regard, the views of the proponents of regulation and deregulation are discussed below.

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34 See Chapter IX of the *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions And Markets Bill*).

35 Padilla A "Should the Government Regulate Insider Trading?" 2011 *Journal of Libertarian Studies* 379, 379.

36 See Manne HG "Insider Trading and the Stock Market" (1966) *New York Free Press*.

37 See Bainbridge S M "The Insider Trading Prohibition: A Legal and Economic Enigma" (1986) 38 *U Fla L Rev* 35, 35.

38 Langevoort DC "Cross Border Insider Trading" 2000 *Dick J Int I L* 165, 165.

39 Beny LN "Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate" 2007 *J Corp Law* 238, 239.

40 Hu J "The Insider Trading Debate" 1997 *Federal Reserve Bank of Atlanta Economic Review* 34, 34.

41 In Blenman J 2017 *Adam Smith: The Father of Economics* http://www.investopedia.com/updates/adam-smith-economics/ accessed 30 May 2017 Laissez-faire was defined as an economic theory that became popular in the 18th century. The driving principle behind laissez-faire, a French term that translates as "leave alone" (literally, "let you do"), is that the less the government is involved in the economy, the better

1.3.1 Arguments in Favour of the Insider Trading Regulation

Proponents of regulation of insider trading base their argument on the fact that insider trading hampers, reduces and affects public investor confidence.[42] Furthermore, proponents of regulation argue that insider trading should be regulated in order to protect investors.[43] This argument is based on the fact that insiders who trade in securities at the expense of outside investors reduces the potential of a company to attract investors.[44] The researcher is of the same view.

Bainbridge[45] argued that insider trading amounts to theft of a company or corporations' property and therefore must be controlled to reduce and avoid the consequences which may unfold thereof. Engelen and Liedekerte[46] also argue that the best means of protection is through the regulation of insider trading and that it is important for a company's competiveness and efficiency. The researcher supports this view because insider trading hampers the company's competitiveness and consequently leads to the loss of confidence and the lack of protection for investors. Dooley [47] argue that illegal disclosure of confidential information by an insider to any person constitutes an offence against the company to which that person owes the fiduciary duty to refrain from self-dealing in confidential information. This view was also supported by Williamu.[48] The researcher supports this view.

Proponents of regulation further argues that one way of improving the accuracy and efficiency of financial markets is through the regulation of insider trading.[49] This basically means that through the regulation of insider trading, the risk of manipulation of stock prices by insiders or high inflation in affected countries can be reduced.

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off business will be and by extension, the society as a whole. Laissez-faire economics are a key part of free market capitalism.

42 Engelen PJ and Van Liedekerke L "The Ethics of Insider Trading Revisited" 2007 *Journal of Business Ethics* 497, 500.

43 Engelen and Liedekerke 2007*Journal of Business Ethics* 500.

44 Engelen and Liedekerke 2007 *Journal of Business Ethics* 500.

45 See Bainbridge 1986 *University of Florida Law Review* 35.

46 See Engelen and Liedekerke 2007 *Journal of Business Ethics* 500.

47 See Dooley M P "Enforcement of Insider Trading Restrictions" (1980) 66 *Va L Rev* 1-89.

48 See Williamu G *Critical Analysis of the Insider Trading Framework of Tanzania* (LLM Thesis University of the Western Cape, 2015)1.

49 Kruger MC *The Regulation of Insider Trading on the JSE: A Comparative Study with Hong Kong* (LLM Dissertation NWU Potchefstroom, 2014) 9.

Another argument put forward by proponents of regulation is based on the theory of fairness and confidence in the market.[50] This argument rests on the fact that if, of the two potential players in the market, one has price-sensitive information and the other has not, this is unfair.[51] Consequently, the unfairness leads to loss of confidence in the market.

In respect of Namibia, insider trading is currently treated as a criminal wrong and certain liability is imposed for contravention. Nonetheless, this research intends to expose the lacuna in the insider trading regulatory framework of Namibia.

1.3.2 Arguments Against the Insider Trading Regulation

As a point of departure, proponents of deregulation of insider trading base their argument on financial market efficiency.[52] They argue that the regulation of insider trading is undesirable and unnecessary. The researcher submits that insider trading is necessary to protect mandatory disclosure systems and that it injures investors and the reputation of the company. Moreover, proponents of deregulation argue that the regulation of insider trading reduces financial market efficiency.[53]

As proponents of regulation argue that insider trading hampers investor confidence, proponents of deregulation on the other hand argues that the abnormal profits realised by inside traders, at the expense of outsiders, are rarely or never large enough to cause outsiders to flee the affected market.[54] However, it should be noted that the regulation of insider trading is not solely based on making a profit, the mere fact that it is a criminal wrong suggests that it is wrong, both morally and economically, and also gives effect to the principle of fairness.

Dent[55] argued that insider trading has the ability to generate substantial benefits without causing substantial damage. On the other hand, Manne[56] argued that insider

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50 Cohen RA 2011 *The Morality of Insider Trading* https://atlassociety.org/commentary/commentary-blog/4883-the-morality-of-insider-trading accessed 26 May 2017.

51 Dine J and Koutsias M *Company Law* (Palgrave Macmillian, New York 2014) 73.

52 Schindler M *Rumors in Financial Markets: Insights into Behavioral Finance* (John Wiley & Sons West Sussex, 2007) 40.

53 Hughes LE "The Impact of Iinsider Trading Regulations on Stock Market Efficiency: A Critique of the Law and Economics Debate and a Cross-Country Comparison" 2009 *Temp Int'l & Comp LJ* 479, 480.

54 Dent GJ "Why Legalised Insider Trading Would Be a Disaster" 2013 *Del J Corp L* 247, 248.

55 See Dent 2013 *Del J Corp L* 249.

trading profits are the best way to compensate executives and to induce innovation. This argument was further supported by Carlton and Fischel[57] when they submitted that *ex ante* contracts fail to appropriately compensate agents for innovations. The researcher argues that it is difficult to restrict trading to those who produced the information. Therefore, many may trade on the information without having contributed to its production. Gullifer[58] argues that insider trading is a victimless crime. He further submits that investors who trade with, or at the same time as, insiders are willing buyers and sellers.[59] However, the researcher is of the view that insider trading is unfair to those having no access to information, therefore statutory restriction is indeed necessary.

Furthermore, proponents of deregulation submit that regulating insider trading might result in serious prejudice to employees who ignorantly and innocently disclose inside information to other persons if these persons would later trade in securities on the basis of that particular information.[60] The researcher concurs with this argument. However, the researcher argues that such prejudice can be avoided through legislative provisions.

1.4 Statement of the problem

Insider trading has been and still is a constant problem experienced in different financial markets in different jurisdictions to date.[61] Namibia is no exception. It is submitted that the insider trading regulatory framework in Namibia is not adequate and effective enough to combat insider trading in the Namibian financial markets. For instance, the judicial system of Namibia relies mostly on the insider trading laws of other foreign jurisdictions such as the South African *Companies Act*.[62] It is submitted that the Namibian regulatory framework is not well developed on the regulation of

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56 See Manne (1966) New York. See also Marchioni O *2015 Should Insider Trading Be Legalised* http://www.johntommasi.com/blog/should accessed 23 May 2017.

57 Carlton D and Fischel D "The Regulation of Insider Trading" 1983 35 *Stan L Rev* 857, 876.

58 See Gullifer L and Payne J *Corporate Finance Law: Principles and Policy* 2nd Ed (Bloomsbury Publishing, United Kingdom 2015) 581.

59 Gullifer and Payne *Corporate Finance Law: Principles and Policy* 581.

60 See Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory framework* 8.

61 Chitimira 2014 *De Jure* 310.

62 See Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 6-7

insider trading.[63] For instance, currently there is no legislation that specifically regulates insider trading in Namibia.[64] Thus, the 2004 *Companies Act* is the only legislation that currently contains some insider trading provisions.[65]

In light of the above, the researcher submits that the 2004 *Companies Act* should be amended to enact more adequate provisions to regulate insider trading in Namibia.[66] The 2004 *Companies Act* only explains who stands to qualify as an insider and also what amounts to price-sensitive information for the purposes of the insider trading offence without adequately prohibiting all insider trading practices in Namibia.[67] Furthermore, the 2004 *Companies Act* provides that the insider trading offence can only be committed by those dealing in shares and debentures.[68] This could be inadequate since insider trading can be committed in respect of other securities such as future contracts.[69]

In terms of the 2004 *Companies Act*, if one is found guilty of insider trading, he or she is subjected to a fine of N$8000 and/or a period not exceeding two years of imprisonment.[70] This could be inadequate because insider trading could give rise to profits worth more than the N$8000 stipulated fine. This would not deter the commission of insider trading in the Namibian financial markets because offenders could even make a profit. Therefore, prescribing a fixed amount of N$8000 as a fine for liability for an offender who stands to make a profit worth more than N$8000 could be less deterrent and inadequate.

Moreover, the 2004 *Companies Act* only regulates the insider trading offence in respect of companies.[71] Thus, illicit insider trading involving institutions that are not companies is not expressly regulated in Namibia.[72] In light of the above, the researcher submits that the 2004 *Companies Act* is flawed in this instance. This

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63 Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 6.

64 In Namibia, insider trading is only regulated under section 241 of the 2004 *Companies Act*.

65 See section 241 of the 2004 *Companies Act*.

66 See section 241 of the 2004 *Companies Act*.

67 See section 241 of the 2004 *Companies Act*.

68 See section 241 of the 2004 *Companies Act*.

69 Gaillard E *Insider Trading: The Laws of Europe, the United States and Japan* (Kluwer Law and Taxation Publishers, 1992) 126.

70 See section 241 of the 2004 *Companies Act*.

71 See section 241 of the 2004 *Companies Act*.

72 See section 241 of the 2004 *Companies Act*.

follows the fact that the 2004 *Companies Act* does not regulate insider trading committed in respect of securities of institutions other than companies such as loan stocks.[73]

Notably, apart from the 2004 *Companies Act*, there is no other legislation that regulates insider trading in Namibia. Consequently, common law principles and foreign authorities are used to regulate insider trading in certain instances. Therefore, the absence of an adequate insider trading statutory regulatory framework in Namibia may lead to persons escaping their insider trading liability. This may consequently lead to the prejudice of those not in possession of the confidential price-sensitive information.

In light of the above, the researcher submits that there is still a lacuna in the Namibian insider trading statutory regulatory framework. For instance, there is relatively minimal regulatory mechanisms in place to specifically combat insider trading in the Namibian financial markets. Unlike South Africa that has criminal, civil and administrative penalties and/or sanctions for insider trading,[74] only criminal sanctions are employed in Namibia.[75] The researcher submits that the Namibian insider trading statutory regulatory framework must be amended to enact a specific anti-insider trading legislation. This approach could enhance the combatting of insider trading in Namibia.

1.5 Aims and Objectives

1.5.1 Aims

This research seeks to:

(a) examine and investigate the adequacy of the Namibian insider trading laws.

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73 Loan Stocks are sometimes referred to as Stock Lending or Securities Lending, it is defined as a temporary transfer of securities in exchange for collateral. It is a contract between two parties in which one party lends securities to another for a fixed or open term-see Choudhry M *The REPO Handbook* (Butterworths and Heinemann, 2002) 104.

74 See section 82 and 150 of the *Financial Markets Act* and section 6(i) of the *Protection of Funds Act* 24 of 1956.

75 See section 241 of the 2004 *Companies Act*.

(b) recommend possible measures that could be employed to promote an effective and adequate insider trading statutory regulatory framework in Namibia.

(c) promote the efficiency and stability of the Namibian financial markets by the effective combatting of insider trading.

1.5.2 Objectives

In order to achieve the aforesaid aims, the research:

(a) exposes and analyses the lacunae in the Namibian insider trading regulatory framework.

(b) recommends mechanisms that will ensure more efficient implementation and enforcement of insider trading laws in Namibia from the South African experience.

1.6 Rationale for the study

It is submitted that the regulation of insider trading is still flawed and inconsistently enforced in Namibia. Therefore, this research seeks to promote public investor confidence, public awareness of insider trading activity and market efficiency in Namibia.

This research aims to ensure or investigate whether the Namibian insider trading provisions are robust enough for deterrence purposes. This research also examines whether the Namibian insider trading prohibition is adequate enough to protect investors and promote market integrity. In this regard, this research exposes the lacunae in Namibian insider trading provisions and the specific areas that needs to be revamped.

Therefore, this research assesses the adequacy, effectiveness and weaknesses of the current insider trading regulatory framework. Moreover, it examines the role, powers, functions and the effectiveness of the NAMFISA.

1.7 Justifications for a comparative study

This research includes a comparative analysis of the South Africa insider trading laws. This is primarily done because South Africa has to a larger extent, managed to develop a relatively adequate anti-market abuse regulatory framework, through the enactment of the *Insider Trading Act*[76] and the *Securities Services Act*[77] which is now repealed by the *Financial Markets Act*.[78] The South African insider trading enforcement authorities have fairly managed to combat insider trading practices in financial markets to date.[79] Therefore, the researcher hopes that the Namibian insider trading enforcement authorities will adopt relevant enforcement approaches from their South African counterparts to enhance the curbing of insider trading in Namibia.

The South African insider trading regulatory framework has also managed to develop sanctions for non-compliance with its rules and regulations.[80] Therefore, a comparison between the Namibian and South African insider trading regulatory frameworks could yield positive results for the Namibian financial markets. Accordingly, South Africa was chosen because it has established a relatively adequate and effective regulatory framework on insider trading. In addition, the Namibian insider trading laws are relatively related to the South African insider trading laws[81] and the Namibian company law relatively stems from the South African company law.[82] Similarly, South Africa was chosen because it is regarded as having one of the best regulated stock exchanges according to the World Economic

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76 See section 2 of the *Insider Trading Act* 135 of 1998.

77 See section 73 of the *Securities Services Act* 36 of 2004.

78 See the Preamble of the *Financial Markets Act*.

79 This could be evidenced by recent prosecutions by the Directorate of Market Abuse (DMA) and the Enforcement Committee in *Zietsman v The Financial Services Board* 2016 (1) SA 218 (GP) and *Pather v Financial Services Board* (866/2016) [2017] ZASCA 125.

80 In South Africa, civil, criminal and administrative sanctions are used to discourage the practice of insider trading within its financial markets. See section 82 and 150 of the *Financial Markets Act* and section 6(i) of the *Protection of Funds Act*.

81 Shlimela R 2006 *Competition Scenario in Namibia* http://www.cuts-ccier.org/7up3/pdf/CRR-Namibia.pdf accessed 12 June 2017.

82 South African High Commission Date Unknown *South Africa's Relations with Namibia* http://www.dirco.gov.za/windhoek/bilateral.html accessed 07 November 2017.

Forum (WEF)[83] and it is ranked as the best regulator of securities in the Southern African Development Community (SADC).

Recently, the South African legislature has established the *Financial Sector Regulation Bill*[84] that will establish a regulatory body to replace the FSB in the regulation of financial institutions. However, the *Financial Sector Regulation Bill* does not expressly regulate market abuse.

1.8 Specific matters to be examined

For the purposes of this research, the following matters are specifically investigated:

(a) the researcher examines and investigates the adequacy of the regulatory framework of insider trading in Namibia. Furthermore, this research examines the flaws of the 2004 *Companies Act*. This is done by examining and investigating the strengths, weaknesses and the enforcement of the 2004 *Companies Act*.

(b) the role, powers and the authority given to the NAMFISA is investigated. This is mainly done to evaluate the effectiveness of the enforcement of insider trading laws in Namibia. This is done by analyzing the powers, roles and functions of this authority.

1.9 Limitation of the study

It is submitted that insider trading is a very broad concept, which cannot be adequately exhausted in this research.[85] Therefore, this research is mainly limited to the statutory regulation of insider trading in Namibia, particularly, the provisions of the 2004 *Companies Act*. Nonetheless, legislation prior to 2004 is discussed mainly to trace the historical development of the regulation of insider trading in Namibia. Moreover, the research is mainly limited to the statutory regulation of insider trading in South Africa for comparative purposes. However, this research only focuses on

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83 Unknown Author 2016 *JSE Remains Among the World's Top Regulated Exchanges* https://www.jse.co.za/articles/jse-among-top-regulated-exchanges accessed 07 November 2017.

84 The *Financial Sector Regulation Bill*, 2016.

85 Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 7.

the Namibian and South African legislation that is relevant to the topic under discussion.

Although the research does not have a specific heading for literature review, the researcher utilises primary and secondary sources that are relevant to the topic in the entire dissertation.

1.10 Research methodology

For the purpose of this research, a **qualitative research method** is used. Therefore, primary and secondary sources are utilised by the researcher. Primary sources include legislation and secondary sources includes books, journal articles, case law and other relevant sources. These sources are accessed from the library and the Internet. In this regard and for purposes of this research, the **dates available in the bibliography are those dates on which the researcher accessed the websites provided.**

A historical analysis is utilised in Chapter Two. This examines the development of insider trading legislation in Namibia. A comparative research method between Namibia and South Africa is employed in this research in order to recommend possible measures that could be employed by Namibia from South Africa to improve the combatting of insider trading in the Namibian financial markets.

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

1.11 Structure of the dissertation

This dissertation consists of seven Chapters:

Chapter One deals with the general research outline. It outlines the aims and objectives, statement of the problem, justifications for a comparative study, rationale of the study, specific matters to be examined, limitation of the study and the research methodology.

Chapter Two discusses the historical development of the statutory regulation of insider trading in Namibia prior to 2004. This chapter discusses the regulation of insider trading in terms of the 1973 *Companies Act* and the *NAMFISA Act*.

Chapter Three examines and investigates the role of the NAMFISA. This chapter also analyses the adequacy and effectiveness of the enforcement of insider trading laws by the NAMFISA.

Chapter Four examines the adequacy and effectiveness of the statutory prohibition of insider trading in Namibia. In this regard, the chapter discusses the scope, enforcement and interpretation of the concept of insider trading as well as the adequacy of statutory penalties and defenses in respect thereof. Furthermore, this chapter discusses whether the current insider trading regulatory framework in Namibia has successfully executed its objectives, which is to promote integrity and promote public investor confidence in the Namibian financial markets.

Chapter Five discusses the statutory regulation of insider trading in South Africa. Accordingly, this chapter includes a historical overview of the evolution of insider trading laws in South Africa prior to 2004. Furthermore, it includes the insider trading regulatory framework of South Africa post 2004 as well as the analysis of the roles of the regulators.

Chapter Six provides a comparative analysis of the statutory regulation of insider trading in Namibia and South Africa. This is done to examine whether the integration of some of the South African approach on insider trading could improve the regulation of insider trading in Namibia.

Chapter Seven provides conclusions and recommendations to solve the insider trading problem in Namibia.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF INSIDER TRADING LAWS IN NAMIBIA PRIOR TO 2004

2.1 Introduction

As indicated in Chapter One, insider trading is experienced in a number of financial markets of different countries.[86] Namibia is not an exception. It is not clear whether insider trading was treated as an offence prior to its statutory regulation in Namibia.[87] It should be noted that the statutory regulation of insider trading in Namibia can only be traced back to 1973.[88] Prior to 1973, there was no single legislation that prohibited insider trading in Namibia.

In light of the above, it should be noted that the move towards the prohibition and regulation of insider trading in Namibia was through the enactment of the *Companies Act*.[89] The 1973 *Companies Act* was originally a South African *Act*. However, the 1973 *Companies Act* also applied in Namibia because it was used across the South West Africa[90] and through the Caprivi Strip.[91] During this period, South Africa conquered and occupied the German South West Africa beginning from 1915.[92] Before Namibia gained independence, South Africa governed Namibia for 75 years and Namibia remained economically closely intertwined with South Africa.[93] Therefore, the current state of economic interdependence, integration and politics, are the resultant of the relations between Namibia and South Africa since Namibia's

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86 Thomas BT "Insider Trading: An Internal Problem with International Implications" 1983 *Conference of the International Faculty for Corporate and Capital Market Law* 1-4.

87 Insider trading firstly became an offence when the *Companies Act* 61 of 1973 (1973 *Companies Act*) was passed.

88 In Namibia, insider trading was firstly prohibited under the 1973 *Companies Act*. See section 233 of the 1973 *Companies Act*.

89 See section 233 of the 1973 *Companies Act*.

90 In 28 June 1919, South West Africa became a Protectorate of South Africa in terms of the *Treaty of Peace* of Versailles. It was a territory in Namibia administered by German colonial officials.

91 See generally section 2 of the 1973 *Companies Act*.

92 In terms of the *Treaty of Peace* and *South West Africa Mandate Act* 49 of 1925, the General Governor of South Africa was delegated the administration of the territory and also granted legislative and executive powers.

93 Hengari TA and Saunders C 2014 *Unequal but Intertwined: Namibia's bilateral relationship with South Africa* http://www.kas.de/upload/Publikationen/2014/namibias_foreign_relations/Namibias_Foreign_Relations_hengari_saunders.pdf. 169 accessed 09 August 2017.

independence in 1990.[94] In 1990, South Africa continued to claim legal possession of Walvis Bay, which is in Namibia.[95] It is for such reasons that the 1973 *Companies Act*, which was a South African *Act*, was used in Namibia.

In this regard, the provisions of the 1973 *Companies Act* were introduced to specifically combat negative effects of insider trading within the Namibian financial markets.[96] Nonetheless, these provisions were inadequate and ineffectively enforced. For instance, no successful prosecution of insider trading under the 1973 *Companies Act* was obtained by the regulatory authorities in Namibia. Accordingly, the 1973 *Companies Act* was later repealed.[97]

Another attempt by the Namibian policy makers in their endeavour to combat insider trading practices was the enactment of the *Namibia Financial Institutions Supervisory Authority Act*.[98] The *NAMFISA Act* established the Namibia Financial Institutions Supervisory Authority (NAMFISA).[99] This was aimed at establishing an authoritative body to enforce market abuse laws in Namibia.[100] However, attempts such as the introduction of the 1973 *Companies Act* and the establishment of the NAMFISA failed to solve the insider trading problem in Namibia.

In this regard, in a bid to combat insider trading, the Namibian legislature enacted the *Companies Act*.[101] However, the insider trading provisions in terms of the 2004 *Companies Act*, like its predecessors, has its own inadequacies and inefficiencies. It could be argued that the insider trading statutory regulatory framework of Namibia is

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94 Hengari and Saunders 2014 http://www.kas.de/upload/Publikationen/2014/namibias_foreign_relations/Namibias_Foreign_Relations_hengari_saunders.pdf. 169.

95 See generally the preamble of the *Walvis Bay and Off-shore Islands Act* 1 of 1994.

96 Section 233 of the 1973 *Companies Act* provided that every director, past director, officer or any person who had knowledge of inside information concerning a transaction or proposed transaction or the affairs of the company, which, if it would become a public knowledge, could be expected to materially affect the price of the shares or debentures, shall be guilty of an offence if he or she would deal in any way to his or her advantage, directly or indirectly in such shares or debentures before public announcement of such information on a stock exchange or in a newspaper or through the medium of radio or television.

97 The 1973 *Companies Act* has been repealed by the *Companies Act* 28 of 2004 (2004 *Companies Act*).

98 See the Preamble and section 2, 3 and 4 of the *Namibia Financial Institutions Supervisory Authority Act* 3 of 2001 (*NAMFISA Act*).

99 Section 2 of the *NAMFISA Act*.

100 See section 3 of the *NAMFISA Act*.

101 See section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*).

still inadequate and ineffective.[102] In the premises, this chapter discusses the statutory regulation of insider trading under the 1973 *Companies Act*, the *NAMFISA Act* and the 2004 *Companies Act*. Additionally, this chapter provides an evaluation of the enforcement of insider trading prohibition. Additionally, the chapter includes an analysis of the common law prohibition of insider trading.

2.2 The Regulation of Insider Trading prior to 2004

2.2.1 The Regulation of Insider Trading under the 1973 Companies Act

The statutory prohibition of insider trading in Namibia was introduced by the 1973 *Companies Act*.[103] The 1973 *Companies Act* specifically prohibited insider trading.[104]

It should be noted that for the purposes of giving effect to the prohibition of insider trading in terms of the 1973 *Companies Act*, a wide range of definitions were provided under the 1973 *Companies Act*.[105] In this regard, the term "interest" meant, without derogating from the generality of the word, any right to subscribe for, or any right to any shares or debentures or any option in respect of shares and debentures.[106] The term "officer", was defined to include any employee who would be in possession of any information acquired as a result of his or her immediate relationship with directors and as a result of the office held, before such price-sensitive information was announced publicly under the 1973 *Companies Act*.[107]

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102 This followed the fact that the provisions of the 1973 *Companies Act* did not cover insider trading by juristic persons, tipping and also did not prohibit unlawful disclosure of inside information. Furthermore, the insider trading provisions under the 1973 *Companies Act* did not apply in respect of entities which were not companies for the purposes of the 1973 *Companies Act*. Lastly, the 1973 *Companies Act* could only apply in respect of listed securities. Thus, illicit trading in unlisted securities was not expressly prohibited. See section 229 and 233 of the 1973 *Companies Act*.

103 The 1973 *Companies Act* is the first statutory enactment to regulate market abuse in Namibia, particularly insider trading.

104 Section 233 of the 1973 *Companies Act* prohibited insider trading. For instance, every director, past director, officer or any person in possession of inside information which had not been publicly announced through any medium of communication and who dealt directly or indirectly to his or her advantage on the basis of such information would be guilty of insider trading.

105 See section 229 of the 1973 *Companies Act*.

106 See section 229 of the 1973 *Companies Act*; see related comments by Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER LJ* 994,937.

107 See section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PER LJ* 994.

The term "past director" meant a person who has ceased to be a director for a period of six months after they had ceased to be directors at the company concerned.[108] "Shares and debentures" of the company included shares and debentures of companies in the same group.[109] The term "person" meant a person in accordance with whose directions or instructions any of the directors is accustomed to act.[110]

Notably, the inclusion of the term "includes" in the above definitions, suggested that the above definitions were not exhaustive. This means that the definitions were not limited to what was expressly stated in the 1973 *Companies Act*. The inclusion of such definitions by the legislature was a positive move towards the effective curbing of market abuse in the Namibian financial markets. However, the definitions were also flawed to a certain extent.[111]

Accordingly, the researcher submits that these definitions are inadequate. This follows the fact that the 1973 *Companies Act* expressly stated that insider trading could be committed in respect of securities in the form of shares and debentures. Thus, policy makers overlooked the fact that insider trading can be committed in respect of securities other than shares and debentures. Furthermore, the provision was inadequate because it was restricted to primary insiders such as directors, past directors and officers. As a result, secondary offenders such as tippees were excluded from the ambit of the definition. Persons other than directors, past directors, officers or persons such as tippees and other third parties could also be involved in insider trading practices.

The 1973 *Companies Act* stipulated that directors should determine by resolution, the names of all directors or officers deemed to be in possession of such confidential information as soon as they acquire knowledge of the non-public inside information.[112] It was further required that those in possession of the non-public price-sensitive information must by a written notice, inform the company of the

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108 See section 229 of the 1973 *Companies Act*. See related comments by Chitimira 2014 *PER LJ* 994.

109 See section 229 of the 1973 *Companies Act*. See related comments by Khan MY *Indian Financial System* (Tata-McGraw-Hill Education, 2006) 80-81.

110 See section 229 of the 1973 *Companies Act*. See also Ervine C *Core Statutes on Company Law* (Springer, 2017) 388.

111 See related comments by Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South Africa Law Journal* 438, 437.

112 Section 232 of the 1973 *Companies Act*. See also 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) 28.

particulars.[113] Accordingly, this obligation could only cease upon the public announcement of such information.[114]

It was further provided that every director, past director, officer or any person who had knowledge of inside information concerning a transaction or proposed transaction or the affairs of the company, which, if it would become a public knowledge, could be expected to materially affect the price of the shares or debentures, shall be guilty of an offence if he or she would deal in any way to his or her advantage, directly or indirectly in such shares or debentures before public announcement of such information on a stock exchange or in a newspaper or through the medium of radio or television.[115] This provision specifically prohibited insider trading.

One may conclude that the Namibian policy makers were in the right direction in relation to the regulation of insider trading in Namibia. However, the 1973 *Companies Act* was flawed in a number of instances, which are discussed below.

Firstly, it should be noted that the 1973 *Companies Act* only prohibited insider trading in respect of primary insiders such as directors, past directors, employees and others working within a particular company. Therefore, secondary insiders were not expressly prohibited from committing insider trading.[116] This shows that liability for insider trading under the 1973 *Companies Act* did not extend to those who encouraged or discouraged others to commit insider trading. Furthermore, the 1973 *Companies Act* failed to extend liability to those who were not directly or indirectly in management or who were not employees of that particular company.[117]

Secondly, the prohibition of insider trading under the 1973 *Companies Act* was inadequate in that it only covered insider trading in respect of securities in entities to which the 1973 *Companies Act* was applicable and entities registered on a regulated

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113 See section 232 of the 1973 *Companies Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 28.

114 See section 232 of the 1973 *Companies Act*.

115 Section 233 of the 1973 *Companies Act*; see related comments by Pretorius JT *Hahlo's South African Company Law Through the Cases* (Juta and Company Ltd, 1999) 330.

116 See section 233 of the 1973 *Companies Act*; see Pretorius *Hahlo's South African Company Law Through the Cases* 330.

117 See section 229 of the 1973 *Companies Act* for the definition of the term person; third parties outsourced or contracting with the company can actually be in possession of confidential price-sensitive information.

market.[118] Consequently, insider trading was not prohibited in securities of other entities that were not companies for the purposes of the 1973 *Companies Act*. Insider trading in respect of securities of entities which were not registered on a regulated market were also not expressly prohibited under the 1973 *Companies Act*. This implied that insider trading was not prohibited in certain instances, other than those stated in the 1973 *Companies Act*.[119] Notably, insider trading was most likely to take place in entities not registered on a regulated market under the 1973 *Companies Act*. Therefore, illicit insider trading activities of such companies were not expressly prohibited under the 1973 *Companies Act*.

Thirdly, the 1973 *Companies Act* failed to recognise transactions conducted by corporate insiders in the best interests of the company.[120] In this regard, for the purposes of fairness, the insider trading provision should have created a clear distinction between corporate insiders who dealt in the best interests of the company and those who did not. The researcher contends that the 1973 *Companies Act* should have recognised corporate insiders who acted in the utmost best interests of the company. For example, those insiders who disclosed price-sensitive confidential information in the proper performance of the functions of his or her office or where an insider disclosed price-sensitive confidential information whereby it was necessary to do so for the completion of an affected transaction.[121]

Fourthly, the 1973 *Companies Act* could only apply in respect of securities and companies that were listed on a regulated market.[122] This indicates that insider trading was not prohibited on unlisted securities and unlisted companies. Consequently, insider trading that took place in unregulated markets was difficult to detect.

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118 See section 233 of the 1973 *Companies Act*; see related comments by Pretorius *Hahlo's South African Company Law Through the Cases* 330-331.

119 See generally section 233 of the 1973 *Companies Act*.

120 The 1973 *Companies Act* treated all offences of insider trading the same. See generally section 233 of the 1973 *Companies Act*.

121 This is regarded as a defence against the liability of insider trading in many countries including South Africa. See section 78 of the *Financial Markets Act* 19 of 2012.

122 See generally section 233 of the 1973 *Companies Act*; see related comments Pretorius *Hahlo's South African Company Law Through the Cases* 331-332.

Lastly, the 1973 *Companies Act* provided that insider trading can only be committed in respect of shares or debentures.[123] However, insider trading could be committed in respect of other securities other than shares and debentures such as future contracts.[124] In this regard, the researcher contends that this insider trading provision was inadequate as it failed to cover insider trading committed in respect of securities other than shares and debentures.[125]

2.2.2 Evaluation of the Enforcement of the Insider Trading prohibition under the 1973 Companies Act

The enforcement responsibility was vested in the Securities Regulation Panel established under the 1973 *Companies Act*.[126] The Securities Regulation Panel was required to monitor and enforce the insider trading prohibition under the 1973 *Companies Act*.[127] The Securities Regulation Panel was granted ostensibly wide powers to monitor and enforce insider trading laws.[128] Firstly, the Securities Regulation Panel was granted the powers to guard against insider trading by supervising any dealing in respect of securities in the regulated markets.[129] Secondly, the Securities Regulation Panel had the power to call and interrogate any person accused of insider trading.[130] It is provided that any person guilty of insider trading had to pay the Securities Regulation Panel a fine of R500 Million or be imprisoned for a period not exceeding 10 years or to both the fine and imprisonment.[131]

Nonetheless, it should be noted that the 1973 *Companies Act* has been amended and repealed by the provisions of the 2004 *Companies Act*. The provisions of the

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123 See section 233 of the 1973 *Companies Act*; see also section 1 of the 1973 *Companies Act* for the definition of the term "shares and debentures".

124 See Haoseb QS *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* (LLB Dissertation, The University of Namibia 2011) 10.

125 Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 10.

126 Section 440B of the 1973 *Companies Act*.

127 See section 440C(1)(b) of the 1973 *Companies Act*; see also Kirsch L and Janisch K *Business Blue-Book of South Africa 2009* (IHS, 2009) 503.

128 See Jooste D "Insider Dealing in South Africa-The Criminal Aspects" 1990 *De Ratione* 22.

129 Section 440C(1)(b) of the 1973 *Companies Act*; see also Michelle L *Business Blue-Book of South Africa 2003* 64th Ed (National Pub, 2003) 522.

130 Section 440D(1)(b) of the 1973 *Companies Act*; Michelle *Business Blue-Book of South Africa 2003* 522.

131 Section 441(1)(a) of the 1973 *Companies Act*; see further comments by Jooste R "Insider Dealing in South Africa" 1990 *South African Law Journal* 588, 588.

2004 *Companies Act* will be comprehensively discussed in Chapter Four of the dissertation.

2.3 The Regulation of Insider Trading under the NAMFISA Act

The flawed provisions and shortcomings that came along with the 1973 *Companies Act* led to enactment of the *NAMFISA Act*. The *NAMFISA Act* established the NAMFISA[132] as a regulatory and enforcement body to enforce insider trading laws in Namibia.[133]

The NAMFISA was empowered to supervise financial institutions and to advise the Minister of Finance on matters relating to financial institutions and financial services.[134] The NAMFISA had numerous duties or functions[135] to perform, which are discussed below.

Generally, the *NAMFISA Act* contained a number of definitions for the purposes of giving effect to the duties and functions of the NAMFISA. The term "financial institution" meant:

(a) a licensed stock exchange or stock broker as defined in terms of the *Stock Exchanges Control Act*,[136] and

(b) any other person who renders a financial service as a regular feature of the business of that person, but who is not registered as a financial institution or authorised to render a financial service.[137]

For the purposes of the *NAMFISA Act*, the term "financial services" includes any financial service rendered by a financial institution to the public or to a juristic person, and includes any service rendered by any other person and corresponding to a

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132 See section 2 of the *NAMFISA Act*. In South Africa, the *Financial Services Board Act* 97 of 1990 established the Financial Services Board (FSB) for the enforcement of the insider trading laws in South Africa. See section 2 of the *Financial Services Board Act*.

133 See section 3 of the *NAMFISA Act*. The FSB in South Africa is charged with the duty to enforce insider trading laws in South African financial markets. See section 84 of *the Financial Markets Act* 19 of 2012 (*Financial Markets Act*).

134 See section 3 of the *NAMFISA Act*.

135 See section 3 of the *NAMFISA Act*; see related roles of the FSB under section 84 of the *Financial Markets Act*.

136 See section 1 of the *Stock Exchanges Control Act* 1 of 1989; see also section 1(h) of the *NAMFISA Act*.

137 Section 1(n) of the *NAMFISA Act*; see related comments by Berkman H, Koch P and Westerholm PJ 2016 *Personal Trading by Employees of Financial Intermediaries* http://www.fmaconferences.org/JAF2016/Papers/Brokerpaper_withcontactinfo_Nov-10-2015.pdf. 6-7 accessed 07 November 2017.

service normally rendered by a financial institution.[138] The term "authority" meant the NAMFISA.[139] Notably, the term "includes" in the above definitions, implies that the definitions are not exhaustive.

The *NAMFISA Act* empowered the NAMFISA with the duty to exercise supervision of all Namibian financial institutions and companies in terms of the *NAMFISA Act*.[140] Moreover, the *NAMFISA Act* empowered the NAMFISA with a duty to advise the Minister on matters related to financial institutions and financial services, whether at its own accord or at the request of the Minister.[141]

Consequently, it could be argued that the Namibian legislature made significant progress in its quest to adequately and effectively combat insider trading in the Namibian financial markets. However, numerous flaws are still embedded in the *NAMFISA Act*. For instance, the *NAMFISA Act* did not have a specific provision that prohibited insider trading in Namibia. Furthermore, the NAMFISA was not expressly empowered to enforce the insider trading laws. However, the NAMFISA had powers to oversee the Namibian financial institutions and companies to *inter alia*, combat illicit trading practices. The absence of a clear mandate of the NAMFISA could have led to the ineffective enforcement of insider trading laws in Namibia. Accordingly, the researcher argues that the *NAMFISA Act* could have conferred upon the NAMFISA, specific powers in relation to insider trading in Namibia.

2.4 The Regulation of Insider Trading under the 2004 Companies Act

In 2004, the Namibian legislature introduced the 2004 *Companies Act* in a bid to remedy the flaws and shortcomings of the 1973 *Companies Act* and the *NAMFISA Act*.[142] The 2004 *Companies Act* expressly prohibits insider trading.[143] For instance, the 2004 *Companies Act* provides that every director, past director, officer or person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it becomes

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138 Section 1 of the *NAMFISA Act*.
139 Section 1 of the *NAMFISA Act*.
140 Section 3(a) of the *NAMFISA Act*.
141 Section 3(b) of the *NAMFISA Act*; see related comments by Parker GF "The Regulation of Insider Trading in Japan: Introducing a Private Right of Action" 1995 *Washington University Law Review* 1401, 1399.
142 This was through the introduction of the prohibition of insider trading in section 241 of the 2004 *Companies Act*.
143 See section 241 of the 2004 *Companies Act*.

publicly known, may be expected materially to affect the price of the shares or debentures[144] of the company and who deals in any way to his or her advantage, directly or indirectly, in those shares or debentures while that information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media commits an offence and is liable to a fine which does not exceed N$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.[145]

Although the insider trading prohibition under the 2004 *Companies Act* appears to be a duplicate of the insider trading prohibition under the 1973 *Companies Act*, the 2004 *Companies Act* was a positive move in the right direction towards the combatting of insider trading in Namibia. This follows the fact that insider trading related terms are relatively defined under the 2004 *Companies Act*. The provisions of the 2004 *Companies Act* are comprehensively discussed in Chapter Four of this dissertation.

2.5 The Common Law Prohibition of Insider Trading in Namibia

In addition to the statutory prohibition of insider trading, insider trading could also be prohibited by the common law fiduciary duties that are owed by corporate insiders such as directors or past directors, to their companies.[146] A fiduciary duty is defined as a legal or ethical relationship of confidence or trust regarding the management of money or property between two or more parties.[147] A fiduciary duty involves the fiduciary and the principal.[148] In a fiduciary relationship, directors owe a fiduciary duty to their companies. Consequently, directors are required to act in good faith and for the benefit of their companies.[149] Directors are also obliged not to have any ulterior motives such as to acquire personal benefits when performing their duties.[150] For the purposes of insider trading, the most relevant fiduciary is the duty to avoid a conflict of interest.

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144 See section 237 of the 2004 *Companies Act* for the definition of the term "shares and debentures".

145 Section 241 of the 2004 *Companies Act*.

146 Conant M "Duties of Disclosure of Corporate Insiders Who Purchase Shares" 1960 *Cornell L Rev* 53, 53.

147 CTI Reviews *Moral Issues in Business: Philosophy, Ethics* 11th Ed (Cram101 Textbook Reviews, 2016) 2-5.

148 CTI Reviews *Moral Issues in Business: Philosophy, Ethics* 2-5. See generally Bernard BS "The Principal Fiduciary Duties of Boards of Directors" at the Third Asian Roundtable on *Corporate Governance* (4 April 2001, Singapore) 8-9.

149 Job OC *Common Law Duties and Section 76 of the Companies Act, 71 of 2008 Compared* (LLM Dissertation, University of Pretoria 2012) 9.

150 Job *Common Law Duties and Section 76 of the Companies Act, 71 of 2008 Compared* 9.

In terms of the fiduciary duty to avoid conflict of interest, a director or any person in a fiduciary relationship with the company, must avoid the creation of a situation whereby his or her personal interests conflict with the interests of the company.[151] If a director uses price-sensitive confidential information of the company to deal or procure someone to deal on the basis of such information in the relevant securities will be guilty of violating the common law fiduciary duty to avoid a conflict of interest.[152]

In *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd and others*,[153] Van Dijkhorst J submitted that a director acts in breach of his or her fiduciary duty to the company when he or she sabotages the company's contractual opportunities for his or her own advantage, or when he or she uses confidential information to advance the interests of a rival concern or his or her own business to the prejudice of those of the company.

Moreover, in *Robinson v Randfontein Estates Gold Mining Co Ltd*,[154] the court held that the law on the position of trust occupied by a director in relation to a company is clear. It was further held that it is the director's duty to act for the benefit of the company and not for his or her own peculiar benefit, and that a director has a duty not to misappropriate corporate opportunities.[155] The position in Namibia with regard to the fiduciary duty to avoid conflict of interest is quite clear since an insider who uses inside information acquired as a result of his or her immediate relationship with the directors and shareholders, will be guilty and liable for insider trading.[156]

In the premises, the common law fiduciary duty to avoid a conflict of interest primarily suggests that a director of a company is not allowed to make profits where in so doing, he or she would conflict with the interests of the company.[157] In Namibia, it is

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151 Ndebele I *No Conflict Duty of Company Directors* (LLM Dissertation University of Pretoria, 2014) 11.

152 Ndebele *No Conflict Duty of Company Directors* 11.

153 *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd and others* 1981 (2) SA 173 T para 197-199.

154 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD para 168.

155 *Robinson v Randfontein Estates Gold Mining Co Ltd* para 177 – 180.

156 See section 241 of the 2004 *Companies Act*; also see clause 150 of the *Financial Institutions and Markets Bill*, 2012.

157 ENSafrica 2012 *Duties of Directors Under the New Companies Act – Business as Usual* https://www.ensafrica.com/news/duties-of-directors-under-the-new-companies-act-business as-usual?Id=381&STitle=corporate%20commercial%20ENSight. accessed 6 November 2017. See also Lacey A 2015 *Avoiding a Conflict of Interest: What can Directors do?*

provided that if an insider who knows that he or she has inside information and uses it to his or her advantage will be guilty and liable for insider trading.[158]

2.6 Conclusion

In light of the above, it is clear that the Namibian insider trading statutory regulatory framework was not only inadequate, but was also, to a larger extent, ineffectively enforced. The introduction of the 1973 *Companies Act* was the first attempt to combat the negative effects of insider trading in the Namibian financial markets. Although the 1973 *Companies Act* specifically prohibited insider trading and introduced penalties for the contravention, numerous shortcomings were still embedded in the 1973 *Companies Act.*[159] Thereafter, the *NAMFISA Act* was established in a bid to enhance the combatting of insider trading in Namibia. The *NAMFISA Act* introduced the NAMFISA to *inter alia* oversee the activities of financial institutions and companies in Namibia to combat unlawful practices such as insider trading.

In addition to statutory prohibition, insider trading was also prohibited in terms of the common law fiduciary duties. Precisely the duty to avoid a conflict of interest. In terms of the duty to avoid a conflict of interest, directors were expected to always put the company's interests above their personal interest.[160] The fiduciary duty to avoid conflict of interest was not sufficient enough to combat insider trading on its own. Eventually, the 2004 *Companies Act* was enacted. The provisions of the 2004 *Companies Act* are comprehensively discussed in Chapter Four of this dissertation.

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https://www.mccabes.com.au/avoiding-conflict-interest-what-can-directors-do/ accessed 04 November 2017.

158 See section 241 of the 2004 *Companies Act*; see related comments by Miller RL *Cengage Advantage Books: Fundamentals of Business Law: Excerpted Cases* (Cengage Learning, 2012) 528.

159 See the analysis in para 2.2.1 above.

160 See Cossin D Date Unknown *The Four Tiers of Conflict of Interest Faced by Board Directors* https://www.imd.org/board/publications/the-four-tiers-of-conflict-of-interest-faced-by-board-directors/. accessed 1 November 2017.

CHAPTER THREE

THE ROLE OF THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY IN RELATION TO THE ENFORCEMENT OF INSIDER TRADING LAWS IN NAMIBIA

3.1 Introduction

It would generally serve no purpose to enact legislation without establishing a regulatory body to enforce such legislation. In this regard, in order to combat insider trading within the Namibian financial markets, Namibian policy makers did not only enact anti-insider trading legislation, but also established a regulatory body to supervise financial institutions and also enforce such legislation in Namibia.[161] The establishment of the Namibia Financial Institutions Supervisory Authority (NAMFISA) was a positive move towards the enforcement of insider trading laws in Namibia.

The NAMFISA was established through the *Namibia Financial Institutions Supervisory Authority Act*.[162] Regulatory or enforcement authorities play a pivotal and crucial role in the enforcement of any legislation. In this regard, the NAMFISA plays a vital role in the enforcement of insider trading laws in Namibia. This is done by supervising the business of financial institutions and working closely with the Minister of Finance.[163]

This chapter analyses the role of the NAMFISA in relation to the enforcement of insider trading laws in Namibia. Therefore, the powers and functions of the NAMFISA are discussed. Furthermore, this chapter briefly discusses the establishment of the NAMFISA. Accordingly, the role of the NAMFISA is discussed under the *NAMFISA Act*, the *Namibia Financial Institutions Supervisory Authority Bill*,[164] and also in terms of the *Financial Institutions and Markets Bill*.[165] Lastly, the

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161 This regulatory body is called the Namibia Financial Institutions Supervisory Authority (NAMFISA) as established in terms of section 3(a) of the *Namibia Financial Institutions Supervisory Authority Act* 3 of 2001 *(NAMFISA Act)*.

162 Section 2 of the *NAMFISA Act* establishes an enforcement body called the Namibia Financial Institutions Supervisory Authority.

163 See related comments by Mwape N *The Effectiveness of the Provisions of the Namfisa Act and the Financial Intelligence Act in Seeking to Combat Fraud in Banking Institutions* (LLB Dissertation University of Namibia, 2010) 37.

164 See clauses 3,4 and 5 of the *Namibia Financial Institutions Supervisory Authority Bill*, 2012 (2012 *NAMFISA Bill*).

165 See clauses 155 and 157 of the *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions and Markets Bill*).

chapter analyses the effectiveness of the NAMFISA in enforcing and combatting insider trading in Namibian financial markets.

3.2 Establishment of the Namibia Financial Institutions Supervisory Authority

The NAMFISA is an independent body, which was established under the *NAMFISA Act*.[166] The NAMFISA was established as a result of the need to effectively regulate, monitor and control monetary issues in Namibia.[167] Therefore, the NAMFISA was established specifically to enforce laws regulating financial institutions and to supervise financial institutions in the financial services industry in the public interest.[168] It should be noted that the NAMFISA, in the performance of its duties, is fully funded by levies imposed in the financial service industry.[169]

Prior to the establishment of the NAMFISA, the Directorate in the Ministry of Finance performed the function of supervision over the business of financial institutions and advising the Minister of Finance.[170]

3.3 The Role of the NAMFISA under the NAMFISA Act

In order to combat insider trading within the Namibian financial markets, the *NAMFISA Act* conferred certain roles on the NAMFISA.[171] However, the *NAMFISA Act* does not confer upon the NAMFISA specific roles or functions in relation to the regulation of insider trading in Namibia. Precisely, the *NAMFISA Act* only provides the NAMFISA with duties in relation to the supervision and monitoring of financial institutions and financial services.[172]

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166 See section 2 of the *NAMFISA Act*; see also Matomola KS "Regulatory Reforms in Namibia to Address the Future of Insurance in Namibia" Presentation *at the OESAI 39th Annual Conference* (2015) 1-26.

167 Mapaure C and Ndjodi ML *The Law of Pre-Trial Criminal Procedure in Namibia* (University of Namibia Press, 2016) 152.

168 Matomola "Regulatory Reforms in Namibia to Address the Future of Insurance in Namibia" 1-26.

169 See section 9(b) and 25 of the *NAMFISA Act*.

170 See related comments at Department of Finance 2017 http://www.namfisa.com.na/introduction-to-namfisa/.

171 See section(s) 3 and 4 of the *NAMFISA Act*. In South Africa, certain roles are conferred on the Financial Services Board (FSB) to enforce market abuse laws. See section 84 of the *Financial Markets Act* 19 of 2012; see also section 3 of the *Securities Act* 17 of 2004 (Chapter 24:25) for the roles of Securities Exchange Commission of Zimbabwe (SECZ).

172 See section(s) 3 and 4 of the *NAMFISA Act*.

The NAMFISA is a regulatory body established to *inter alia* monitor, enforce, supervise and enhance the prohibition of insider trading within Namibian financial markets.[173] In this regard, the functions of the NAMFISA include:

(a) supervision in terms of the *NAMFISA Act* or any other law, over the laws regulating financial institutions, the business of financial institutions and over financial services;[174]

(b) advising the Minister on matters related to financial institutions and financial services, either of its own accord or at the request of the Minister.[175]

In addition, the NAMFISA has ostensibly wide powers in terms of the *NAMFISA Act*,[176] to ensure a proper and effective compliance with the laws regulating the business of financial institutions. Such powers include to:

(a) call to its assistance any person or persons as it may consider necessary to assist in the performance of its functions;[177]

(b) hire, purchase or acquire any moveable or immoveable property as it may consider necessary for the performance of its functions and may also let, sell or dispose of any property purchased or acquired in terms of this paragraph;

(c) enter into an agreement with any person for the performance of any specific act or function or the rendering of a specific service;

(d) insure itself against any loss, damage, risk or liability which it may suffer or incur;

(e) borrow money to a maximum amount approved by the Minister;

(f) accept any money or goods donated or bequeathed to it;

(g) appoint employees to assist it in the performance of its functions; and

(h) do anything which is necessary or expedient to perform its functions.[178]

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173 This is done though the regulation, monitoring, control and supervision of financial institutions and financial services laws in Namibia. See generally the Preamble of the *NAMFISA Act*.

174 Section 3(a) of the *NAMFISA Act*; see related comments by Chitimira H *A Comparative Analysis of the Market Abuse Provisions* (LLD Thesis, Nelson Mandela Metropolitan University 2012) 271-273.

175 Section 3(b) of the *NAMFISA Act*. See related comments by Chitimira *A Comparative Analysis of the Market Abuse Provisions* 271.

176 See generally section 4 of the *NAMFISA Act*.

177 Section 4(a) of the *NAMFISA Act*. See related roles of the FSB in terms of the *Financial Advisory and Intermediary Act* 37 of 2002 (*FAIS Act*).

The NAMFISA's role as a regulator is to foster a safe and sound financial sector through the enforcement of an adequate, effective and efficient regulatory and supervisory framework.[179] However, no specific provision is made for this functions.

In support of the national objectives enhancing financial intermediation, the NAMFISA has a wide range of regulatory initiatives that includes:

(a) enhancing of the financial markets to improve liquidity and access to capital in the market;

(b) improving financial literacy to facilitate improved decision making on the part of consumers; and

(c) creating a conducive and enabling legislative environment that balances risk, sustainability and returns to ensure financial stability and ultimately the protection of end-users of financial services as enshrined in the Namibia Financial Sector Strategy.[180]

Furthermore, the NAMFISA is obliged to ensure that there is financial stability in the Namibian financial markets.[181] In this regard, it has, over the years remained resolute and consistent in ensuring that the Namibian financial industry embraces good corporate governance through the appointment of fit and proper persons and having adequate and appropriate risk mitigating frameworks.[182] The relevance of this stems from the protection of consumer's investments, savings and contributions. Accordingly, all these requirements stem from the principle of fairness amongst consumers.[183]

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178 Section 4(h) of the *NAMFISA Act*; see related roles of the FSB in terms of section 84 of the *Financial Markets Act* and related roles and powers of the SECZ in terms of the section 3 of the *Securities Act*.

179 Motinga E 2017 *Regulatory and Supervisory Reform-Industry* https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017; see also IMF 2007 *Country Report Namibia: Financial System Stability Assessment* https://www.imf.org/external/pubs/ft/scr/2007/cr0783.pdf accessed 04 November 2017.

180 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

181 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

182 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

183 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

Moreover, the NAMFISA ensures that only fit and proper institutions are licensed to render financial services to customers.[184] This is done to promote and protect the integrity of the Namibian financial markets.[185] The NAMFISA is also responsible for preventing systemic failures in relation to financial institutions.[186] In order to keep the financial sector sound and intact, the NAMFISA resolves problems when they occur.[187]

In order to promote a strong and effective corporate governance, the NAMFISA is required to conduct reviews and evaluations of the institutions that it supervises.[188] Furthermore, the NAMFISA as a regulator, is required to ensure that directors and senior management have sufficient experiences, integrity and relevant skills and able to exercise or carry out independent judgment about the affairs of their institutions.

It should be noted that the principle of good faith plays a pivotal role in the exercise of the NAMFISA's powers and the performance of its functions. Accordingly, it is provided that any person who contravenes the secrecy provision under the *NAMFISA Act* shall be guilty of an offence and on conviction be liable to a fine not exceeding N$4 000 or imprisonment for a period not exceeding 2 years or to both such fine and imprisonment.[189] Notably, the principle of good faith plays a pivotal role in relation to insider trading in a sense that directors are under the expectation to execute their duties in the utmost good faith. Precisely, directors are expected to always avoid a conflict of interest in the course of their duties.[190] Thus, it is expected of directors to put the interests of the company above their own personal interest in the course of business.

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184 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

185 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

186 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

187 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

188 Motinga 2017 https://www.namfisa.com.na/wp-content/uploads/2017/04/Regulatory-and-Supervisory-reform-industry-release.pdf. accessed 04 May 2017.

189 Section 34 of the *NAMFISA Act*.

190 Giles S *Embedding Ethics in Corporate Culture: A Practical Guide to Minimising Reputational Risk* (John Wiley and Sons, 2015) 237.

3.4 The Role of NAMFISA under the NAMFISA Bill, 2012

Significant progress was made through the introduction of the 2012 *NAMFISA Bill*. The 2012 *NAMFISA Bill* was developed to establish an authority to exercise supervision over the compliance with financial services laws,[191] to provide for the functions and powers of the NAMFISA and to provide for incidental matters.[192] Although the 2012 *NAMFISA Bill* does not confer specific powers in relation to insider trading to the NAMFISA, the NAMFISA still plays a crucial role in the enforcement of financial services laws in Namibia.

Likewise, the 2012 *NAMFISA Bill* conferred upon the NAMFISA ostensibly wide objectives, which includes *inter alia* to:

(a) regulate and supervise financial institutions[193] and financial intermediaries[194] and other persons who are subject to the 2012 *Financial Institutions and Markets Bill* and moneylenders[195] as defined in terms of the *Usury Act*;[196] and

(b) foster the financial soundness of financial institutions and financial intermediaries, the stability of the financial institutions and markets sector,

(c) foster the highest standards of conduct of business by financial institutions and financial intermediaries, the fairness, efficiency and orderliness of the financial institutions and markets sector, the protection of consumers of financial services, the promotion of public awareness and understanding of the NAMFISA, financial institutions and financial intermediaries, and

(d) foster the reduction and deterrence of financial crime.[197]

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191 See clause 1 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "financial service laws".

192 See generally the Preamble of the 2012 *NAMFISA Bill*.

193 See clause 1 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "financial institutions".

194 See clause 1 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "financial intermediaries".

195 See section 1 of the *Usury Act* 73 of 1968 for the definition of the term "moneylenders".

196 The *Usury Act* 73 of 1968; see section 3(1)(a)(i)-(ii) of the 2012 *NAMFISA Bill*.

197 Clause 3(1)(b)(i)-(vii) of the 2012 *NAMFISA Bill*; also see generally clause 1 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "financial crime".

Although the powers of the NAMFISA are not specific in respect of insider trading prohibition, the NAMFISA is empowered to ensure that financial institutions or intermediaries do not engage in financial crimes. Thus, insider trading as a financial crime, could be regulated by the NAMFISA. The main duty of the NAMFISA is to supervise the business of financial institutions. Accordingly, it therefore follows that the NAMFISA does enforce insider trading laws in Namibia. For instance, the NAMFISA has a duty to enforce laws regulating financial institutions and financial services. This could also include the enforcement of the insider trading under the *Companies Act*[198] or the 2012 *Financial Institutions and Markets Bill*, which are both intended to regulate insider trading in Namibian financial markets.

The 2012 *NAMFISA Bill* further states that in order to achieve the objects stated above, the NAMFISA must:

(a) monitor and assess risks in financial institutions and financial intermediaries and take steps to reduce risks as required in order to protect the public interest;[199]

(b) take into account the impact of the costs of regulation and supervision on public access to financial services;[200] and

(c) balance the effectiveness and costs of regulation and supervision with the efficiency of the financial system.[201]

Notably, apart from the objectives conferred upon the NAMFISA in terms of the 2012 *NAMFISA Bill*, a wide range of powers were also conferred upon the NAMFISA.[202] Firstly, the NAMFISA is empowered to employ outsiders to render services to the NAMFISA or call to its assistance any person.[203] Secondly, the NAMFISA was empowered to acquire, either through hiring or purchasing, moveable or immovable property and could dispose, either through letting or selling such property.[204] Thirdly, the NAMFISA could establish or participate in the daily running of a non-profit company, a partnership or any trust and for the purposes of consumer education and

198 See specifically section 241 of the *Companies Act* 28 of 2004.
199 See clause 3(2)(a) of the 2012 *NAMFISA Bill*.
200 See clause 3(2)(b) of the 2012 *NAMFISA Bill*; also see clause 1 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "financial services".
201 See clause 3(2)(c) of the 2012 *NAMFISA Bill*.
202 See generally clause 4 of the 2012 *NAMFISA Bill*.
203 See clause 4(a) of the 2012 *NAMFISA Bill*.
204 See clause 4(b) of the 2012 *NAMFISA Bill*.

the promotion of public awareness of the nature of the availability of the NAMFISA and other enforcement measures, take any reasonable steps as may be necessary.[205] It may appear as if the NAMFISA does not enforce insider trading laws. However, the mere fact that the NAMFISA enforces the laws regulating financial institutions and financial services is sufficient to prove that the NAMFISA does play a role in enforcing insider trading laws in Namibia.

Notably, apart from the powers and objectives conferred upon the NAMFISA, the NAMFISA also had numerous functions, which are to a larger extent, identical to the functions under the *NAMFISA Act*. The functions of the authority under the 2012 *NAMFISA Bill* includes inter alia:

(a) to advise the Minister on matters related to financial institutions, financial intermediaries and financial markets;[206]

(b) to monitor risks within the financial institutions and markets sector and take any reasonable measures necessary to mitigate such risks;[207]

(c) to ensure the provision, promotion, funding or otherwise support consumer education, consumer awareness and consumer confidence regarding consumer rights, financial services, financial institutions and financial intermediaries;[208] and

(d) to perform and carry out any function as may be conferred upon the NAMFISA.[209]

It should be noted that the 2012 *NAMFISA Bill* also established a board, which was charged with the responsibility to supervise the management and control of the affairs of the NAMFISA.[210]

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205 Clause 4(c) of the 2012 *NAMFISA Bill*; see the FSB Report by Keetse S "Directorate of Market Abuse" 2017 *FSB Bulletin* 20, 1.

206 Clause 5(1)(a) of the 2012 *NAMFISA Bill*; see Mwape *The Effectiveness of the Provisions of the Namfisa Act and the Financial Intelligence Act in Seeking to Combat Fraud in Banking Institutions* 38.

207 Clause 5(1)(b) of the 2012 *NAMFISA Bill*; see Mwape *The Effectiveness of the Provisions of the Namfisa Act and the Financial Intelligence Act in Seeking to Combat Fraud in Banking Institutions* 38.

208 Clause 5(1)(c) of the 2012 *NAMFISA Bill*; Mwape *The Effectiveness of the Provisions of the Namfisa Act and the Financial Intelligence Act in Seeking to Combat Fraud in Banking Institutions* 38.

209 Clause 5(1)(d) of the 2012 *NAMFISA Bill*; Mwape *The Effectiveness of the Provisions of the Namfisa Act and the Financial Intelligence Act in Seeking to Combat Fraud in Banking Institutions* 39.

As stated above, the 2012 *NAMFISA Bill* does not expressly confer upon the NAMFISA with powers specifically in relation to insider trading. Nonetheless, the 2012 *NAMFISA Bill* only provides the NAMFISA with powers in relation to supervision of financial institutions.

3.5 The Role of the NAMFISA under the 2012 Financial Institutions and Markets Bill

The 2012 *Financial Institutions and Markets Bill* was established to primarily consolidate and harmonise the laws regulating financial institutions and financial markets in Namibia and to provide for incidental matters.[211] Notably, the 2012 *Financial Institutions and Markets Bill* is in its final stage and it is not yet into effect.

It should be noted that under the 2012 *Financial Institutions and Markets Bill*, the NAMFISA is granted ostensibly wide powers in relation to insider trading. Precisely, these powers include prosecutorial powers. In terms of the 2012 *Financial Institutions and Markets Bill*, the NAMFISA is also given powers in civil proceedings.[212] For instance, the NAMFISA may withdraw, abandon or compromise any civil proceedings instituted under the insider trading provision of the 2012 *Financial Institutions and Markets Bill*. Furthermore, the 2012 *Financial Institutions and Markets Bill* empowers the NAMFISA to:

(a) investigate or instruct that an investigation take place on any alleged insider trading practice;[213]
(b) institute any civil proceedings where necessary in this context;[214]
(c) administer the proof of claims and distribution of payments;[215]
(d) make market abuse rules;[216] and

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210 See clause 10(1) of the 2012 *NAMFISA Bill*.
211 See generally the Preamble of the 2012 *Financial Institutions and Markets Bill*; see also the Preamble of the *Financial Markets Act*.
212 See generally clause 155 of the 2012 *Financial Institutions and Markets Bill*; see related powers of the FSB in section 84 of the Financial Markets Act; see also Chitimira H "Overview of Selected Role Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 118, 107.
213 Clause 157(2)(a) of the 2012 *Financial Institutions and Markets Bill*; see related comments on the United States Securities and Exchange Commission 2011 *Allegations of Enforcement Staff Misconduct in Insider Trading Investigations* https://www.sec.gov/files/oig-511.pdf accessed 07 November 2017.
214 Clause 157(2)(b) of the 2012 *Financial Institutions and Markets Bill*; See related powers of the FSB in section 84 of the *Financial Markets Act*.
215 Clause 157(2)(c) of the 2012 *Financial Institutions and Markets Bill*.

(e) consult with the relevant regulated markets in Namibia and require such markets to implement systems that are necessary for the effective monitoring and identification of possible contraventions of the insider trading provision.[217]

Additionally, the NAMFISA is empowered to propose market abuse rules or amendment of a rule.[218] Given this background, the NAMFISA has a duty to invite all affected persons who have any objections to the proposal or amendment to lodge their objections with the NAMFISA.[219] In cases where there are no objections or after careful consideration of objections by the NAMFISA, and a decision is made to introduce the market abuse proposed rule or amendment in the form published in the *Gazette*, the market abuse rule or amendment comes into operation on a date determined by the NAMFISA by further notice published in the *Gazette*.[220]

Notably, should the NAMFISA, after careful consideration of any objections received, decide to amend the proposed rule or amendment as published in the *Gazette*, the market abuse proposed rule or amendment as amended by the NAMFISA must be published by the NAMFISA by notice in the *Gazette.* This rule comes into operation on the date determined by the NAMFISA and included in that particular notice.[221]

Moreover, the 2012 *Financial Institutions and Markets Bill* provides that the NAMFISA may investigate any alleged market abuse practice.[222] In similar vein, the NAMFISA is also empowered to supervise and enforce market abuse laws in Namibia under the 2012 *Financial Institutions and Markets Bill*.[223] Although great progress is made through the introduction of powers in relation to insider trading, it appears that the powers of the NAMFISA under the 2012 *Financial Institutions and Markets Bill* are still lacking and limited to a certain extent, particularly in relation to

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216 Clause 157(2)(d) of the 2012 *Financial Institutions and Markets Bill*; See related roles of the FSB in terms of section 84(2)(f) of the *Financial Markets Act*.

217 Clause 157(2)(e) of the 2012 *Financial Institutions and Markets Bill*; See related comments by Herbert Smith Freehills 2016 *Financial Services Regulation* https://www.herbertsmithfreehills.com/file/11656/download?token=2pUg4Tdt accessed 14 November 2017.

218 See Clause 157 of the 2012 *Financial Institutions and Markets Bill*.

219 Clause 157(3) of the 2012 *Financial Institutions and Markets Bill*.

220 Clause 157(4) of the 2012 *Financial Institutions and Markets Bill*.

221 Clause 157(5) of the 2012 *Financial Institutions and Markets Bill*.

222 See clause 157(2)(a) of the 2012 *Financial Institutions and Markets Bill*.

223 See generally clause 157 of the 2012 *Financial Institutions and Markets Bill*.

the insider trading regulation in Namibia. Consequently, this could also contribute to the ineffective enforcement of insider trading laws in Namibia.

3.6 Effectiveness of the NAMFISA in Combatting Insider Trading in Namibia

The effectiveness of any legislation can be measured or determined by the number of cases brought to court, settled, abandoned or investigated.[224] In this regard, it has to be examined whether the powers of the NAMFISA under the *NAMFISA Act, the* 2012 *NAMFISA Bill* and the 2012 *Financial Institutions and Markets Bill* are adequate and effective enough to combat the problem of insider trading in the Namibian financial markets.

Notwithstanding the commendable efforts of the NAMFISA in the bid against insider trading in Namibia,[225] the NAMFISA is yet to succeed in its endeavour against insider trading. For instance, the NAMFISA is yet to obtain a successful prosecution of an insider trading case. Furthermore, the NAMFISA has restricted authority in a sense that it cannot execute its duties independently from the Minister of Finance.[226] This implies that the NAMFISA cannot make market abuse rules without the consent of the Minister of Finance.[227] This could negatively affect the execution of the NAMFISA's mandate in relation to insider trading prohibition in Namibia.

In addition, the NAMFISA still encounters problems in relation to the enforcement of insider trading laws in Namibia. This could probably be due to the fact that the NAMFISA currently has no prosecutorial powers.[228] Moreover, this could probably be due to the fact that the NAMFISA has no market surveillance systems in place to timeously detect any practice of insider trading. The researcher submits that the NAMFISA should consider establishing other offices and divisions to enhance the detection, prevention and deterrence of insider trading in Namibia.[229]

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224 Chitimira H and Lawack VA "Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market-Abuse Provisions in South Africa" 2013 *Obiter* 213, 200.

225 See the powers of the NAMFISA in section 3 of the *NAMFISA Act*. See also the powers of the NAMFISA in clause(s) 4 and 5 of the 2012 *NAMFISA Bill*; see also clause 157 of the 2012 *Financial Institutions and Markets Bill* for more powers of the NAMFISA.

226 See section(s) 3 and 4 of the *NAMFISA Act.*

227 See section(s) 3 and 4 of the *NAMFISA Act.*

228 The NAMFISA only has powers in civil proceedings in terms of clause of 155 of the 2012 *Financial Institutions and Markets Bill.*

229 See related comments by Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Thesis, Nelson Mandela Metropolitan University 2012) 95.

Additionally, the NAMFISA is yet to partake or establish insider trading educational and awareness programmes. This could contribute immensely to the ineffectiveness of the NAMFISA.

In spite of the fact that the NAMFISA has made considerable efforts to effectively curb insider trading in Namibia, its efforts could still be impeded or interrupted by the lack of co-operation with the Namibian courts. Accordingly, the researcher contends that the NAMFISA should consider working in close ties with the Namibian courts in the bid against insider trading in Namibia.

3.7 Conclusion

The insider trading enforcement framework established under the *NAMFISA Act* could be noted as a relatively great move towards the effective enforcement of insider trading laws in Namibia. Significant progress was made in the bid to establish a strong framework of insider trading in Namibia. For instance, the NAMFISA is given ostensibly wide powers under the 2012 *NAMFISA Bill* and the 2012 *Financial Institutions and Markets Bill*. These powers include powers to institute civil proceedings and to make market abuse rules.

Although significant progress was made, the powers of the NAMFISA are still flawed to a certain extent. For instance, the NAMFISA cannot execute its powers independently from the Minister of Finance.[230] This follows the fact that the NAMFISA must obtain consent of the Minister of Finance in carrying out its duties.[231] Additionally, the NAMFISA currently has no prosecutorial powers under the *NAMFISA Act*. On a similar note, the NAMFISA currently has no power to make market abuse rules and is yet to obtain a successful prosecution of insider trading.

Amongst others, it was also alluded to the fact that the NAMFISA currently has no market surveillance systems to timeously detect alleged insider practices. Accordingly, the researcher submits that the NAMFISA should consider developing market surveillance systems and establish other offices of NAMFISA in other regions to enhance the detection, prevention and deterrence of insider trading in Namibia

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230 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 96.

231 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 96.

and hopefully raise education and public awareness of the negative effects of insider trading.

Given this background, the researcher submits that there is still a need to introduce alternative enforcement measures to enhance the enforcement of insider trading laws in Namibia.

Accordingly, it is against this background that the next chapter discusses the adequacy of the current insider trading statutory prohibition of Namibia. Precisely, the next chapter discusses the prohibition of insider trading under the *Companies Act*[232] and the 2012 *Financial Institutions and Markets Bill*[233] and the adequacy therein.

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232 See section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*).
233 See clause 150 of the 2012 *Financial Institutions and Markets Bill*.

CHAPTER FOUR

THE ADEQUACY OF THE NAMIBIAN INSIDER TRADING STATUTORY REGULATORY FRAMEWORK

4.1 Introduction

Another attempt by the Namibian policy makers aimed at curbing the effects of insider trading in Namibia was made on 19 December 2004.[234] Consequent to the flaws and shortcomings of the *Companies Act*,[235] the 2004 *Companies Act* was then enacted.[236] In addition, the 2004 *Companies Act* came as a result of the need to broaden the scope of the prohibition of insider trading in Namibian financial markets.[237] Accordingly, the 2004 *Companies Act* amended and repealed the inadequate provisions of the 1973 *Companies Act*.[238]

More recently, the Namibian legislature introduced the *Financial Institutions and Markets Bill*.[239] The 2012 *Financial Institutions and Markets Bill* is in its final stage and it is expected to be passed into law at the end of the 2017 financial year.[240]

In this regard, the chapter analyses the insider trading provisions of the 2004 *Companies Act*. Accordingly, the analysis is a three-way approach. Firstly, the analysis includes a closer look into the meaning and interpretation of selected key concepts. Secondly, the chapter includes an analysis of the provision of insider trading including any available penalties. Lastly, the analysis looks into the adequacy and effectiveness of the prohibition, civil remedies, as well as any defences contemplated in terms of the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill*.

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234 See section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*).

235 See the analysis in Chapter Two of this dissertation. See also section 233 of the *Companies Act* 61 of 1973 (1973 *Companies Act*).

236 See the analysis of the insider trading regulation in terms of the 1973 *Companies Act* in Chapter Two of this dissertation. As pointed out in Chapter Two of this dissertation, the 1973 *Companies Act* was originally a South African *Act*. However, the 1973 *Companies Act* was also used in Namibia because it was used across the South West Africa and through the Caprivi Strip. This is because before Namibia gained independence, South Africa ruled Namibia for 75 years and Namibia remained economically closely intertwined with South Africa.

237 See generally the Preamble of the 2004 *Companies Act*.

238 See section 233 of the 1973 *Companies Act* and section 241 of the 2004 *Companies Act*.

239 The *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions and Market Bill*).

240 Matomola KS "Regulatory Reforms in Namibia to Address the Future of Insurance in Namibia" at the *OESAI 39th Annual Conference* (2015) 1-26.

4.2 The Regulation of Insider Trading under the 2004 Companies Act

The introduction of the 2004 *Companies Act* was an indication by the Namibian legislature that insider trading was wrong. Thus, statutory intervention was necessary. The 2004 *Companies Act* specifically prohibits insider trading.[241] Furthermore, the 2004 *Companies Act* includes a number of definitions for the purposes of giving effect to the insider trading prohibition under the 2004 *Companies Act.*[242] Penalties for the contravention of the insider trading prohibition are also provided for in the 2004 *Companies Act.*[243]

4.2.1 Definition of Selected Key Concepts

4.2.1.1 Insider Trading

It should be noted that even though insider trading is specifically prohibited under the 2004 *Companies Act*, there is no express definition of the term insider trading in the 2004 *Companies Act.*[244] Nonetheless, the 2004 *Companies Act* includes a number of practices which would lead to the insider trading liability.[245] In this regard, the 2004 *Companies Act* provides that it amounts to insider trading if a director,[246] past director,[247] officer[248] or any other person[249] in possession of inside information which has a material effect on the shares or debentures and who deals in any way to his or her advantage, directly or indirectly, in those shares or debentures while that

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241 See section 241 of the 2004 *Companies Act*; insider trading is prohibited in many jurisdictions including South Africa. See section 78 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*) for the prohibition of insider trading in South Africa.

242 See section 237 of the 2004 *Companies Act*; see related comments by Luiz S and Van Der Linde K "The Financial Markets Act 19 of 2012: see some Comments on the Regulation of Market Abuse" 2013 *SA Merc LJ* 459, 458.

243 See section 241 of the 2004 *Companies Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470-475.

244 In terms of the 2004 *Companies Act*, the term "insider trading" is not defined, rather the 2004 *Companies Act* makes provision of practices which constitutes to insider trading; see section 241 of the 2004 *Companies Act*; see also section 78 of the *Financial Markets Act*.

245 See section 241 of the 2004 *Companies Act*; see generally section 78 of the *Financial Markets Act.*

246 See section 237 of the 2004 *Companies Act* for the definition of the term "director"; see related comments 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) 26-27.

247 See section 237 of the 2004 *Companies Act* for the definition of the term "past director"; see related comments by Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 27.

248 See section 237 of the 2004 *Companies Act* for the definition of the term "officer"; see related comments by Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 27.

249 See section 237 of the 2004 *Companies Act* for the definition of the term "person".

information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media.[250]

Given this background, it follows that a person can only be deemed to be involved in insider trading if he or she has actual knowledge of the inside information.[251] This follows the fact that it is required that the insider must be having knowledge that what he or she has amounts to inside information for him or her to be liable of insider trading. Accordingly, such information can be acquired by virtue of being an insider. In terms of the 2004 *Companies Act*, an insider could be a director, past director, officer or any other person.[252]

It is required that such inside information must not have been announced publicly on a stock exchange or in a newspaper or any other medium of communication and that such inside information must be that which, if it becomes public knowledge, has the potential to materially affect the price or value of the shares or debentures concerned.[253]

4.2.1.2 Insider

The term "insider" is not expressly defined in the 2004 *Companies Act*. However, the 2004 *Companies Act* provides a wide range of definitions of individuals who qualify as insiders for the purposes of the insider trading offence, which includes a director, past director, officer or any other person.[254]

Firstly, the term "director" is defined as any person occupying the position of director or alternate director of a company, by whatever name that person may be designated.[255] Secondly, the term "past director" is defined as a person who has ceased to be a director of the company concerned for a period not exceeding six

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250 Section 241 of the 2004 *Companies Act*.

251 The phrase "having knowledge of any information concerning..." suggests that an insider ought to have known the information to commit insider trading under the 2004 *Companies Act*.

252 See section 241 of the 2004 *Companies Act*; see related comments by Jooste R "Insider Dealing in South Africa" 1990 *SA Merc LJ* 595, 588.

253 See section 241 of the 2004 *Companies Act*; see Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

254 See section 237 of the 2004 *Companies Act*; see Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

255 Section 237 of the 2004 *Companies Act*; see also Cassim R and Cassim FM *Contemporary Company Law* (Juta and Company Ltd, 2012) 404.

months.[256] Thirdly, the term "officer" is defined to include any employee who would be in possession of any information consequent on his or her immediate relationship with the directors of the company immediately before a public announcement is made in terms of the 2004 *Companies Act*.[257] Lastly, the term "person" means a person in accordance with whose instructions or directions any of the directors of a company is accustomed to act.[258]

4.2.1.3 Inside Information

There is no precise and express definition of the term "inside information" under the 2004 *Companies Act*. This has to a larger extent, contributed to the contravention of the insider trading prohibition in Namibia. Nonetheless, it can be inferred from the insider trading provision that inside information means information which:

(a) has not been publicly announced on a stock exchange, medium of radio or television or any other electronic media;[259] and

(b) has the potential to materially affect the price or value of the shares or debentures if it is made public knowledge.[260]

The absence of a clear and express definition of inside information in terms of the 2004 *Companies Act* could lead to the increased contravention of the insider trading provision in Namibia. This follows the fact that not all insiders know what amounts to inside information. Thus, inside information can be disclosed ignorant of the fact that the information is inside information.

4.2.1.4 Shares and Debentures

The 2004 *Companies Act* provides that the term "shares" means a share in the share capital of that particular company and includes stock, and in relation to an offer of

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256 Section 237 of the 2004 *Companies Act*; see related comments by Joubert WF and Scott J *The Law of South Africa* (Butterworths, 1982) 237.

257 Section 237 of the 2004 *Companies Act*; see related comments by Van Der Merwe M, Baker and Mckenzie 2015 *Corporate Governance and Directors' Duties in South Africa: Overview* https://uk.practicallaw.thomsonreuters.com/4-618 8268 accessed 08 November 2017.

258 Section 237 of the 2004 *Companies Act*; see related comments by Rowes P *Taxation and Self-Assessment: Incorporating the Finance Act 2004* (Cengage Learning EMEA, 2004) 49.

259 See section 241 of the 2004 *Companies Act*; see related comments by Van Eeden EP *A Comparative Evaluation of the Financial Markets Act 19 of 2012 and the Financial Sector Regulation Bill 2015* (LLM Dissertation University of Pretoria, 2016) 15-18.

260 See section 241 of the 2004 *Companies Act*; see related comments by Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012 and the Financial Sector Regulation Bill 2015* 18.

shares for subscription or sale, includes a share and a debenture of a company, whether a company within the meaning of this *Act* or not, and any rights or interests.[261]

A "debenture" includes a debenture stock, debenture bonds and any other securities of a company, whether constituting a charge on the assets of the company or not.[262] Accordingly, for the purposes of the insider trading prohibition, the term "shares and debentures" refers to shares and debentures of a company or of its subsidiary.[263]

4.2.2 Evaluation and Analysis of the Definition of Selected Key Concepts

4.2.2.1 Insider Trading

Notably, the 2004 *Companies Act* was a move in the right direction by the Namibian policy makers in the bid to combat insider trading in the Namibian financial markets. This follows the inclusion of the insider trading prohibition.[264] Although insider trading is not expressly defined, the 2004 *Companies Act* makes provision for a number of practices which would give rise to insider trading liability. Accordingly, numerous flaws and inadequacies can still be identified in the insider trading prohibition under the 2004 *Companies Act*.

Firstly, the prohibition of insider trading under the 2004 *Companies Act* is to a larger extent, restricted. This follows the fact that the prohibition is limited only to primary insiders such as directors, past directors and officers.[265] Thus, illicit insider trading by secondary insiders such as tippees is not prohibited under the 2004 *Companies Act*. The researcher submits that the exclusion of tippees and other secondary insiders in the insider trading prohibition is inadequate as it can lead to the contravention of the insider trading provisions by tippees and tippers. This implies that insider trading orchestrated through encouragement to deal or discouragement from dealing on the

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261 Section 1 of the 2004 *Companies Act.* See related comments by Heapy SC *A Company's Share Capital and the Acquisition of its own Shares: A Critical Comparison Between the Relevant Provisions of the Companies Act 61 of 1973 and the Companies Act 71 of 2008* (LLM Dissertation University of South Africa, 2010) 5-10.

262 Section 1 of the 2004 *Companies Act*; see related comments by Mohana Rao P *Fundamentals of Accounting for CPT* (PHI Learning Pvt Ltd, 2012) 470.

263 Section 237 of the 2004 *Companies Act*; see Kuchhal MC and Kuchhal V *Business Legislation for Management* 4th Ed (Vikas Publishing House, 2014) 366.

264 See section 241 of the 2004 *Companies Act.*

265 See section 241 of the 2004 *Companies Act*; see related comments by Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *J. Int'l & Comp. L* 694, 688.

basis of inside information is not prohibited under the 2004 *Companies Act*.[266] In other words, the researcher contends that the lack of liability for secondary insiders such as tippees is inadequate and can cause the increased contravention of the insider trading prohibition in Namibia.

Secondly, the prohibition of insider trading under the 2004 *Companies Act* suggests that only natural persons can commit or benefit from insider trading.[267] This follows the fact that juristic persons are not included within the ambit of the prohibition of insider trading. Therefore, this leaves a mala fide and selective disclosure of confidential inside information between companies in the same group in relation to shares or debentures of the company. The researcher submits that the exclusion of juristic persons within the prohibition is inadequate. This follows the fact that it could lead to insider trading by any company to the prejudice of another.

4.2.2.2 Insider

Insider trading can be committed by individuals other than those who have direct access to the confidential price-sensitive information as stated under the 2004 *Companies Act*.[268] Those having no direct access to inside information are referred to as secondary insiders. They are called secondary insiders because their direct or indirect source of the inside information is a primary insider such as a director, past director or an officer.[269] Therefore, the use of the term "individual" suggests that under the 2004 *Companies Act,* insider trading can only be committed by primary insiders such as directors, past directors or officers.[270] In this regard, the researcher contends that the exclusion of secondary insiders such as tippees in the prohibition of insider trading is inadequate because tippees can also commit insider trading through encouragement to deal or discouragement from dealing in securities on the basis of inside information.

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266 It is widely acknowledged that encouraging another person to deal or discouraging another person from dealing amounts to insider trading. Therefore, the lack of prohibition on such a practice is a compromise by the legislature.

267 The phrase "director, past director, officer or other person..."in section 241 of the 2004 *Companies Act* suggests that juristic persons are excluded from the ambit of the prohibition; see also the definition of the term "person" in section 237 of the 2004 *Companies Act*.

268 See generally Lotscher B and Friedrich A 2013 *Significant New Provisions on Insider Trading and Market Manipulation* http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Switzerland/CMS-von-Erlach-Henrici-Ltd/Significant-new-provisions-on-insider-trading-and-market-manipulation accessed 02 August 2017.

269 Seredyńska I *Insider Dealing and Criminal Law: Dangerous Liaisons* (Springer Science & Business Media, New York 2011) 29.

270 See section 241 of the 2004 *Companies Act*.

The phrase "every director, past director, officer or person" implies that juristic persons are excluded within the scope of the prohibition of insider trading under the 2004 *Companies Act*. This implies that insider trading by juristic persons is not prohibited under the 2004 *Companies Act*. In this regard, it is contended that the scope of the definition is to a larger extent restricted. It should be noted that insider trading can equally be orchestrated through juristic persons. This follows the fact that directors can easily engage in insider trading through juristic persons under their control and easily hide behind the banner of that particular juristic person.[271] Accordingly, the researcher contends that the exclusion of juristic persons from the definition of an insider is a major flaw and a compromise by the legislature.

Notably, the difference between primary and secondary insiders is that primary insiders have direct access to the inside information by virtue of being a director, past director or an officer.[272] On the other hand, secondary insiders do not have a direct access to the inside information. Thus, their direct access of the inside information is a primary insider.[273] Secondary insiders includes' tippers and tippees.[274]

4.2.2.3 Inside Information

As stated above, insider trading can only be committed in respect of inside information.[275] Therefore, it is essential that the 2004 *Companies Act* expressly define what constitutes inside information for the purposes of giving effect to the insider trading prohibition. However, the 2004 *Companies Act* does not expressly define the term "inside information". It should be noted that the absence of a clear, precise and express definition of inside information could lead to the contravention of the insider trading provision under the 2004 *Companies Act*.

In this regard, the researcher contends that not all information can qualify as inside information for the purposes of the insider trading prohibition under the 2004

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271 Cassim F and Cassim MF *Contemporary Company Law* 997.

272 Bainbridge SM *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013) 457; Seredyńska *Insider Dealing and Criminal Law: Dangerous Liaisons* 23.

273 Beinert D *Corporate Acquisitions and Mergers in Germany* (Springer Netherlands, 2000) 38.

274 Alexander RH *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routlege, 2016) 230; Cole E and Ring S *Insider Threat: Protecting the Enterprise from Sabotage, Spying, and Theft* (Syngress, 2005) 36.

275 Mann RA and Roberts BS *Smith and Roberson's Business Law* (Cengage Learning, 2014) 982.

Companies Act.[276] Therefore, the lack of a clear and express definition of inside information in the 2004 *Companies Act* could give rise to increased insider trading practices in the Namibian financial markets. The 2004 *Companies Act* should expressly define inside information to inter alia increase public awareness on the prohibition of insider trading in Namibia.

4.2.2.4 Shares and Debentures

The 2004 *Companies Act* specifically prohibits insider trading in respect of securities such as shares and debentures. Thus, other securities such as future contracts are not covered within the scope of the definition of shares and debentures under the 2004 *Companies Act*. The researcher contends that the provision is flawed in this instance. This follows the fact that the insider trading offence can actually be committed in respect of securities other than shares and debentures.[277] In this regard, the researcher argues that the prohibition of insider trading under the 2004 *Companies Act* is rigid and narrow in the sense that it only applies to shares and debentures. The prohibition should also include insider trading committed in respect of securities other than shares and debentures. Therefore, the researcher contends that the insider trading provision under the 2004 *Companies Act* should also apply in respect of other securities other than shares or debentures.

4.2.3 The Prohibition of Insider Trading

The 2004 *Companies Act* specifically prohibits insider trading in Namibia.[278] For instance, the 2004 *Companies Act* provides that every director, past director, officer or person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it becomes public known, may be expected materially to affect the price of the shares or debentures of the company and who deals in any way to his or her advantage,

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276 Not all information qualifies as inside information for the purposes of the insider trading offence. See Higher One Holdings Inc 2016 *Insider Trading Policy* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTY4MDd8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1 accessed 02 August 2017.

277 Insider trading can also be committed in respect future contracts. See related comments by Haoseb QS *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* (LLB Dissertation, University of Namibia 2011) 10; see also Silverman SD 2012 *Insider Trading in the Commodities and Futures Markets* https://www.marylandbusinesslitigationlawyerblog.com/2012/09/insider_trading_in_the_commodi.html accessed 26 October 2017.

278 See section 241 of the 2004 *Companies Act*.

directly or indirectly, in those shares or debentures while that information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media commits an offence.[279]

One may actually conclude that great progress was made in the bid to combat insider trading through the introduction of the 2004 *Companies Act*. However, the insider trading provision under the 2004 *Companies Act* is to a larger extent a repetition of the insider trading provision under the 1973 *Companies Act*.[280] It appears that the flaws and shortcomings of the 1973 *Companies Act* were reintroduced under the 2004 *Companies Act*. The 2004 *Companies Act* has not actually addressed the shortcomings of the 1973 *Companies Act*. The 2004 *Companies Act*, like its predecessor, has only raised more questions than solutions. Numerous flaws and inadequacies are still apparent in the 2004 *Companies Act* and such flaws and shortcomings are discussed below.

4.2.4 Evaluation and Analysis of the Prohibition of Insider Trading

Firstly, it should be noted that the insider trading provision under the 2004 *Companies Act* is only applicable to natural persons.[281] This is one of the shortcomings of the 2004 *Companies Act*. Insider trading can easily be orchestrated through juristic persons.[282] Therefore, the limitation of liability to natural persons can actually contribute to the commission of insider trading by juristic persons. In light of the above, it can be inferred that insider trading committed through juristic persons is not prohibited under the 2004 *Companies Act*.

Secondly, insider trading prohibition under the 2004 *Companies Act* is only restricted to securities in the form of shares and debentures.[283] However, Insider trading can be committed in respect of securities other than shares and debentures. Therefore, this restriction on the applicability of the insider trading prohibition under the 2004

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279 Section 241 of the 2004 *Companies Act*.

280 See the insider trading provision under the 1973 *Companies Act* and the 2004 *Companies Act*.

281 The phrase "every director, past director, officer or any person..." suggest that only natural persons can be involved in insider trading. See section 241 of the 2004 *Companies Act*.

282 De Villiers M *Share Repurchase is the Ultimate Insider Trading* (LLM Dissertation University of Pretoria, 2016) 18.

283 See section 241 of the 2004 *Companies Act*.

Companies Act could lead to insider trading practices in the Namibian financial markets.

Thirdly, the insider trading prohibition under the 2004 *Companies Act* is only applicable to primary insiders.[284] Nonetheless, insider trading can be committed not only by primary insiders such as directors, past directors or officers but also by secondary insiders such as tippees.[285] Accordingly, the exclusion of other categories of insiders from the ambit of the 2004 *Companies Act* is one of the main flaws of the 2004 *Companies Act*. This follows the fact that insider trading orchestrated through encouragement or causing another to deal in securities on the basis of inside information and discouraging another from dealing in securities on the basis of inside information is not prohibited under the 2004 *Companies Act*.[286] Accordingly, the researcher contends that the 2004 *Companies Act* should be amended to expressly prohibit insider trading by secondary insiders and other fortuitous persons who obtained relevant inside information from the primary insider.

Fourthly, the 2004 *Companies Act* only prohibits insider trading if the information concerned is one which has the potential to materially affect the price or value of the shares or debentures.[287] However, the definition of the term "material effect" is not provided. This could enable those who commit insider trading on the basis of inside information which is not regarded as material or that could cause a material effect on the affected securities to escape liability. Accordingly, the 2004 *Companies Act* still fails to address the unanswered question as to what is the required degree of materiality for purposes of giving effect to the insider trading liability.

Fifthly, dealing in securities either directly or indirectly is prohibited in terms of the 2004 *Companies Act*.[288] However, the 2004 *Companies Act* fails to provide a clear and precise definition of the term "deal" or "dealing" in this context. Notably, insider

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284 See section 241 of the 2004 *Companies Act*.

285 Ebaugh NS "Insider Trading Liability for Tippers and Tippees: A Call for the Consistent Application of the Personal Benefit Test" 2003 *Texas Journal of Business Law* 267, 265.

286 See Nagy DM 2016 *Beyond Dirks: Gratuitous Tipping and Insider Trading* https://corpgov.law.harvard.edu/2016/09/26/beyond-dirks-gratuitous-tipping-and-insider trading/ accessed 24 October 2017.

287 See section 241 of the 2004 *Companies Act*.

288 See section 241 of the 2004 *Companies Act*.

trading can be committed innocently or ignorantly.[289] Therefore, the researcher contends that the provision should create a distinction for those who deal in securities in good faith and those who deal in securities in bad faith.

Lastly, the insider trading provisions under the 2004 *Companies Act* do not outline whether anyone in possession of inside information can be involved in insider trading or whether only those who actually knew that they had inside information can actually incur liability. In this regard, it is contended that the legislature should consider making actual knowledge of the inside information in one's possession a prerequisite for insider trading liability in Namibia.

4.2.5 Criminal Liability and Penalties

The 2004 *Companies Act* provides for criminal liability and penalties for the contravention of its insider trading provisions.[290] In this regard, the 2004 *Companies Act* provides that every director, past director, officer or person in possession of inside information that relates to a transaction or proposed transaction and who deals directly or indirectly for his or her own benefit before public announcement of such information commits an offence of insider trading and would be liable to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.[291]

4.3 The Adequacy of the Insider Trading Prohibition under the 2004 Companies Act

As stated above, the Namibian policy makers must be commended for the introduction of the 2004 *Companies Act*. Nonetheless, numerous shortcomings are still apparent in the insider trading provisions under the 2004 *Companies Act*. Notably, one may conclude that the insider trading regulatory framework of Namibia is adequate and effective. Nonetheless, the absence of any successful prosecution under the 2004 *Companies Act* could suggest that the framework is inadequate and

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289 Smith K *What Is Insider Trading and How to Avoid It – Definition, Laws & Cases* http://www.moneycrashers.com/what-is-insider-trading-definition-laws-cases/ accessed 02 August 2017.

290 See section 241 of the 2004 *Companies Act*; in South Africa, criminal liability and criminal penalties are provided under section 109 of the *Financial Markets Act*.

291 Section 241 of the 2004 *Companies Act*; see also section 78 of the *Financial Markets Act* for similar provisions.

ineffective. Many reasons can be attributed to the ineffectiveness of the insider trading prohibition under the 2004 *Companies Act*.

The success of any legislation ought to be measured by the level of its effective enforcement in the courts.[292] Therefore, the absence of any successful prosecution under a particular legislation could suggest that such legislation is ineffective. In light of this, the researcher contends that the Namibian insider trading statutory regulatory framework of Namibia is inadequate and ineffective. For instance, the prohibition of insider trading in terms of the 2004 *Companies Act* is restricted only to actual dealing in shares and securities.[293] Thus, insider trading through encouraging another person to deal or discouraging another person from dealing in securities on the basis of inside information or insider trading through disclosure of inside information is not prohibited under the 2004 *Companies Act*.[294] In this regard, the researcher contends that the prohibition of insider trading under the 2004 *Companies Act* is too restricted because it excludes secondary insiders such as tippees. Furthermore, the researcher argues that the prohibition of insider trading under the 2004 *Companies Act* is restricted as it excludes insider trading through disclosure of inside information. Accordingly, the researcher submits that the prohibition of insider trading should be applicable not only to actual dealing and primary insiders, but also insider trading by secondary insiders who encourage or discourage others from dealing in securities on the basis of inside information and also those who disclose inside information.

Another shortcoming is that the insider trading prohibition is limited only to natural persons. The researcher argues that insider trading can also be committed through juristic persons.[295] Natural persons can easily hide behind the banner of the juristic person to commit insider trading. This is one the flaws of the insider trading prohibition under the 2004 *Companies Act*.

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292 See 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) 59.

293 See generally section 241 of the 2004 *Companies Act*.

294 See generally Johannesburg Securities Exchange (JSE) 2015 *Insider Trading and Other Market Abuses* 18-19 https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf. accessed 11 August 2017; See also section 78(4)(5) of the *Financial Markets Act* 19 of 2012.

295 De Villiers *Share Repurchase is the Ultimate Insider Trading* 18.

Moreover, the fact that the insider trading prohibition only applies in securities such as shares and debentures could be one contributing factor to the inadequacy and ineffectiveness of the insider trading prohibition in Namibia. Notably, insider trading can be committed in respect of securities other than shares and debentures.[296] Therefore, placing such restrictions on the prohibition could contribute towards the increased contravention of the insider trading provision under the 2004 *Companies Act*.

In addition, the 2004 *Companies Act* does not provide an adequate definition of the term "inside information". The 2004 *Companies Act* expressly provides that insider trading can only be committed in respect of inside information.[297] Nonetheless, the 2004 *Companies Act* does not define inside information. Thus, this could lead to the increased commission of insider trading in Namibia. Therefore, it is of pivotal importance that the 2004 *Companies Act* provide a definition of inside information for the purposes of the insider trading offence. The absence of a clear and precise definition of inside information is one fact that attributes to the ineffectiveness of the insider trading provision under the 2004 *Companies Act*.

Additionally, the 2004 *Companies Act* provides a relatively low criminal liability and penalties for the contravention of the insider trading provision. The 2004 *Companies Act* provides that every director, past director, officer or person guilty of the offence of insider trading is liable to a fine not exceeding N$8 000 or imprisonment for a period not exceeding two years or both the fine and imprisonment. The researcher argues that these penalties are significantly low and inadequate, thus cannot therefore deter insider trading in Namibian financial markets.

Taking into consideration the effects of insider trading, the researcher contends that the liability imposed under the 2004 *Companies Act* is inadequate and thus ineffective. This follows the fact that insider trading offenders can make a profit of say N$100 000 in one transaction. Therefore, imposing a fine of N$8 000 or a two years imprisonment or both, cannot under normal circumstances stop a person who stand to make a profit of N$100 000 or even more from dealing in securities on the

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296 See related comments by Silvermain SD 2011 *What Type of Insider Trading is Prohibited by the CFTC Within the Commodities and Futures Markets?* https://www.marylandcriminalattorneyblog.com/2011/02/what_type_of_insider_trading_i.html. accessed 24 October 2017.

297 See generally section 233 of the 1973 *Companies Act*.

basis of inside information. Haoseb[298] argues that the provision is too stringent and should be afforded some flexibility. The researcher holds a similar view and contends that in imposing penalties, the profit made or loss avoided should be considered. Haoseb further argued that the provision should be amended to include a phrase like "or any punishment, monetary or otherwise, which the Court deems appropriate in the circumstances".[299]

Suppose A is to make a profit of N$150 000 or avoids a loss of N$150 000 by way of dealing or not dealing in shares or debentures on the basis of inside information. Then he/she receives a penalty of N$8 000 or two years imprisonment or both. Accordingly, such a fine or imprisonment will not deter or stop A from dealing or not dealing in shares or debentures on the basis of inside information.

The absence of civil remedies and defences in the 2004 *Companies Act* is a major flaw that has negatively affected the combatting of insider trading in Namibia.

In light of the above, one can conclude that the insider trading regulatory framework, particularly under the 2004 *Companies Act*, is inadequate and ineffectively enforced in Namibia.

4.4 The Regulation of Insider Trading under the 2012 Financial Institutions and Markets Bill

As stated above, the 2004 *Companies Act* is characterised by a number of shortcomings.[300] Consequently, such shortcomings led to the drafting of the 2012 *Financial Institutions and Markets Bill* in a bid to improve the prohibition of insider trading in Namibia. The 2012 *Financial Institutions and Markets Bill* is in its final stage and it is hoped that once it is passed into law, it will address the flaws of the 2004 *Companies Act* and combat insider trading in the Namibian financial markets.[301] In light of the flaws and inadequacies contained in the 2004 *Companies Act*, it is hoped that the 2012 *Financial Institutions and Markets Bill* will provide a

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298 Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 10.

299 Haoseb *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* 10.

300 See the discussion in para 4.3 Above.

301 Matomola KS "Regulatory Reforms in Namibia to Address the Future of Insurance in Namibia" 1-26.

clear roadmap for an adequate and effective regulatory framework of insider trading in Namibia.[302]

Notably, the 2012 *Financial Institutions and Markets Bill* specifically prohibits insider trading.[303] Furthermore, the 2012 *Financial Institutions and Markets Bill* makes provision for civil and criminal liability for insider trading.[304] In addition, the 2012 *Financial Institutions and Markets Bill* provides civil and criminal penalties for the insider trading offence.[305] The 2012 *Financial Institutions and Markets Bill* further makes provision for a wide range of definitions developed to give effect to the insider trading offence.[306]

4.4.1 Definition of Selected Concepts

4.4.1.1 Insider Trading

The term "insider trading" is not expressly defined under the 2012 *Financial Institutions and Markets Bill*. However, the 2012 *Financial Institutions and Markets Bill* provides a number of practices which would give rise to the insider trading offences in Namibia.[307] Accordingly, the 2012 *Financial Institutions and Markets Bill* provides that it is insider trading if:

(a) an insider who knows that he or she has inside information and deals directly or indirectly or through an agent for his or her own account in securities traded on a regulated to which the inside information relates, or which are likely to be affected by the inside information;[308]

(b) an insider who knows that he or she has inside information and directly or indirectly, or through an agent, or any other person deals for another

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302 See generally the Preamble of the 2012 *Financial Institutions and Markets Bill*; see also clause 2 of the 2012 *Financial Institutions and Markets Bill*.

303 See clause 150 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78 of the *Financial Markets Act*.

304 See clause 154 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82 of the *Financial Markets Act*.

305 See clause 160 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82 and 109 of the *Financial Markets Act*.

306 See clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 77 of the *Financial Markets Act*.

307 See generally clause 150 of the 2012 *Financial Institutions and Markets Bill*. In many jurisdictions including South Africa, insider trading is not expressly defined, the *Financial Markets Act* only makes provision for practices that constitutes insider trading. See section 78 of the *Financial Markets Act*.

308 Clause 150(a) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(1)(a) of the *Financial Markets Act*. See related comments by Jooste 2000 *SA Merc LJ* 293. See also Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

person in the securities traded on a regulated market to which the inside information relates or which are likely to be affected by the inside information;[309]

(c) an insider who knows that he or she has inside information and discloses the inside information to another person;[310] and

(d) an insider who knows that he or she has inside information and encourages or causes another person to deal or discourages or stops another person from dealing in the securities traded on a regulated market to which the inside information relates or which are likely to be affected by the inside information.[311]

It is by implication of the insider trading provision under the 2012 *Financial Institutions and Markets Bill* that one could only be involved in insider trading if he or she had actual knowledge of the inside information and he or she knew that he or she had inside information.[312] It should be noted that secondary insiders such as tippees are now included within the confines of the insider trading prohibition under the 2012 *Financial Institutions and Markets Bill*.[313] Furthermore, the 2012 *Financial Institutions and Markets Bill* makes provision for the definition of the terms "deal"[314] and "publication".[315] However, the 2012 *Financial Institutions and Markets Bill* still excludes juristic persons within the scope of the insider trading prohibition.[316] This

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309 Clause 150(b) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(2)(a) of the *Financial Markets Act.* See related comments by Jooste 2000 *SA Merc LJ* 293. See also Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

310 Clause 150(c) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(4)(a) of the *Financial Markets Act*. See related comments by Jooste 2000 *SA Merc LJ* 295. See also Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

311 Clause 150(d) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(5) of the *Financial Markets Act.* See related comments by Jooste 2000 *SA Merc LJ* 294. See also Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

312 See Langevoort C "What Were They Thinking? Insider Trading and the Scienter Requirement" 2012 *Georgetown Public Law and Legal Theory Research* 7, 1.

313 The prohibition of insider trading in respect of encouraging another person to deal or discouraging another person from dealing suggests that secondary insiders such as tippees are also prohibited. See related comments by Opoku K *What is Really Wrong with Insider Trading* (LLM Dissertation University of Cape Town, 2014) 57.

314 See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "deal".

315 See para 4.4.1.2 below for the definition of the term "publication"; See related comments by 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* 461, 458.

316 See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "insider". See related comments Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

problem continues to be embedded in the Namibian insider trading regulatory framework under the 2012 *Financial Institutions and Markets Bill* as it is under the 2004 *Companies Act*.

4.4.1.2 Inside Information

Unlike the 2004 *Companies Act*, the 2012 *Financial Institutions and Markets Bill* expressly defines inside information.[317] The term "inside information" is defined as specific or precise information, which has not been made public and which:

(a) is obtained or learned as an insider; and
(b) if it were made public, it is likely to have a material effect on the price or value of any security listed on a regulated market.[318]

In terms of the 2012 *Financial Institutions and Markets Bill*, information is made public if:

(a) it is published in accordance with the rules of the relevant regulated market for the purpose of informing clients and their professional advisers;
(b) it is contained in records which by virtue of any enactment are open to inspection by the public;
(c) it can be readily acquired by those likely to deal in any listed securities to which the information relates or an issuer to which the information relates; and
(d) it is derived from other information which has been made public.[319]

One may conclude that significant progress is made through the introduction of the definition of the term "inside information" under the 2012 *Financial Institutions and Markets Bill*. However, the 2012 *Financial Institutions and Markets Bill* fails to define the terms "specific" or "precise" information. The position is not clear whether it is left to the court to determine what amounts to specific or precise information. This leaves room for contravention of the insider trading provision. In addition, the 2012 *Financial Institutions and Markets Bill* fails to extend liability to those who obtained inside information in performance of their duties such as those outsourced by the company.

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317 See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "inside information". See related comments Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

318 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

319 Clause 151(1)(d) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 461.

This leaves a room for abuse as outsourced companies or individuals could actually have inside information upon which they could encourage or discourage or tip another person to deal or refrain from dealing on the basis of such inside information. As the case may be, such outsourced parties could also deal on the basis of such information themselves.

Additionally, 2012 *Financial Institutions and Markets Bill* provides that the information must be that which can materially affect the price of the shares.[320] However, the 2012 *Financial Institutions and Markets Bill* does not define the term "material effect". This is another glaring omission of the 2012 *Financial Institutions and Markets Bill*. Accordingly, as not all are aware as to what amounts to material effect, the 2012 *Financial Institutions and Markets Bill* should make provision for the degree of materiality.

4.4.1.3 Insider

The provision of a definition of the term "insider" is another improvement that came along with the 2012 *Financial Institutions and Markets Bill*.[321] This was not the case with the 2004 *Companies Act*. In terms of the 2012 *Financial Institutions and Markets Bill*, the term "insider" means a person who has inside information:

(a) through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates or having access to such information by virtue of employment, office or profession; and

(b) with knowledge that the direct or indirect source of the information was a person referred to in subsection (a) above.[322]

In light of the above, the Namibian policy makers must be commended for broadening the scope and stretching the arms of the definition to include secondary

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320 See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "inside information"; see related comments by Ali PU and Gregoriou NG *Insider Trading: Global Developments and Analysis* (CRC Press, 2008) 103.

321 See clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 77 of the *Financial Markets Act*. See related comments by Jooste 2000 *South African Law Journal* 288.

322 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; see related comments by Lyon G and Du Plessis J *The Law of Insider Trading in Australia* (Federation Press, 2005) 2.

insiders such as employees and tippees within the confines of the definition.[323] Nonetheless, it can be inferred from the use of the term "individuals" in the definition of the term "insider", that juristic persons are excluded within the confines of the insider trading prohibition under the 2012 *Financial Institutions and Markets Bill*. This could encourage the practice of insider trading through juristic persons.

4.4.1.4 Market Corner and Market Abuse Rules

It should further be noted that the 2012 *Financial Institutions and Markets Bill* now provides the definitions of the terms "market corner" and "market abuse rules".[324] Firstly, the term "market abuse rules" includes rules made under the 2012 *Financial Institutions and Markets Bill.*[325] Secondly, the term "market corner" is defined to include any arrangement, commitment, agreement or understanding involving the purchasing, selling or issuing of securities listed on a regulated market:

(a) by which a person, or two or more associates or two or more persons acting in concert, acquire direct or indirect beneficial ownership of, or exercise control over, or are able to influence the price of securities listed on a regulated market; and

(b) instances where the effect of the arrangement, agreement, commitment or understanding is, or is likely to be that the trading price of those securities, as reflected through the facilities of that regulated market, is or is likely to be abnormally influenced or arbitrarily dictated by such person or persons in that the trading price deviates or is likely to deviate materially from the trading price, which would otherwise likely have been reflected through the facilities of that regulated market on which those securities are traded.[326]

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323 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(5) of the *Financial Markets Act*; also see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

324 See clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 77 of the *Financial Markets Act*.

325 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; see related comments by Bainbridge S *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013) 426.

326 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; see related comments by Bainbridge *Research Handbook on Insider Trading* 426-427.

4.4.1.5 Securities

Included among the definitions under the 2012 *Financial Institutions and Markets Bill* is the definition of the term "securities". Securities are defined to include participatory interests in collective investment schemes as defined in Chapter 4 of the 2012 *Financial Institutions and Markets Bill*, money market instruments and other products or interests included as securities.[327] However, this definition is only restricted to securities traded on a regulated market. Thus, insider trading that is perpetrated on unregulated financial markets is not expressly covered by the definition of securities contained in the 2012 *Financial Institutions and Markets Bill.*

4.4.2 The Prohibition of Insider Trading

4.4.2.1 Prohibition on Actual Dealing in Securities for Own Account

The 2012 *Financial Institutions and Markets Bill* provides that an insider who knows that he or she has inside information and deals directly or indirectly or through an agent for his or her own account in securities traded on a regulated market to which the information relates, or which are likely to be affected by the inside information, would be guilty of an insider trading offence.[328] Although this is encouraging, some shortcomings are still found in this prohibition as discussed below.

Firstly, like in the 2004 *Companies Act*, the insider trading provision under the 2012 *Financial Institutions and Markets Bill* is limited to natural persons.[329] This suggests that insider trading by juristic persons is still not expressly prohibited under the 2012 *Financial Institutions and Markets Bill*. Secondly, the absence of a clear and precise definition of the term "material effect" could still contribute towards the increased contravention of the insider trading prohibition. Lastly, the prohibition only applies in respect of listed securities, therefore actual dealing in securities for own account in respect of unlisted securities is not prohibited under the 2012 *Financial Institutions*

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327 Clause 149 of the 2012 *Financial Institutions and Markets Bill*; see related comments by Kashyap AK *Financial Markets Regulation and Legal Challenges in South Asia* (IGI Global, 2016) 57.

328 Clause 150(1) of the 2012 *Financial Institutions and Markets Bill*; see also similar provisions in section 78(1)(a) of the *Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

329 See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "insider"; see related comments by Kashyap *Financial Markets Regulation and Legal Challenges in South Asia* 57.

and Markets Bill. This could also contribute to the increased commission of insider trading in Namibia.

4.4.2.2 Prohibition on Actual Dealing in Securities for Another Persons' Account

Actual dealing in securities for another persons' account is expressly prohibited under the 2012 *Financial Institutions and Markets Bill*.[330] For instance, an insider who knows that he or she has inside information and directly or indirectly, or through an agent, or any other person, deals for another person in the securities traded on a regulated market to which the inside information relates or which are likely to be affected by the inside information, would be guilty of the insider trading offence.[331] This provision is inadequate in certain respects. For instance, it is limited only to natural persons. Thus, actual dealing in securities for another juristic persons' account is not expressly prohibited under the 2012 *Financial Institutions and Markets Bill*. The researcher argues that the legislature should look into including juristic persons within the ambit of the insider trading provision.

4.4.2.3 Prohibition on Disclosure of Inside Information

The Namibian legislature must be commended for introducing an offence for improper disclosure of inside information in Namibia. In this regard, the 2012 *Financial Institutions and Markets Bill* provides that an insider who knows that he or she has inside information and who discloses the inside information to another person commits an insider trading offence.[332] Although significant progress is made, the prohibition is still inadequate. For instance, inside information can be disclosed ignorantly and innocently. Say the director of the company, while having a family gathering, ignorantly and unknowingly discloses inside information to the family upon which a family member later deals on the basis of such inside information.

In this regard, the inclusion of those who ignorantly or innocently disclose inside information within the ambit of the prohibition could be prejudicial and offensive.

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330 See clause 150(3) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78(2)(a) of the *Financial Markets Act*; Also see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

331 Clause 150(3) of the 2012 *Financial Institutions and Markets Bill*; also see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

332 Clause 150(5) of the 2012 *Financial Institutions and Markets Bill*; Also see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470; see also Jooste R "The Regulation of Insider Trading in South Africa-Another Attempt" 2000 *South African Law Journal* 295, 284.

Accordingly, the researcher contends that the provision should afford bona fide insiders some protection. Lastly, this insider provision is inadequate because it is limited to natural persons.[333] Thus, disclosure of inside information by juristic persons is not prohibited under the 2012 *Financial Institutions and Markets Bill*. It should be noted that it is immaterial whether the other party had acted upon the inside information or not, a mere disclosure is sufficient to secure the prosecution of an insider.

4.4.2.4 Prohibition on Encouraging or Discouraging Another Person to Use Inside Information when Dealing in Securities

Notably, the 2012 *Financial Institutions and Markets Bill* specifically prohibits tipping.[334] For instance, an insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities traded on a regulated market to which the inside information relates, or which are likely to be affected by the inside information, would be guilty of an insider trading offence.[335] However, this prohibition is restricted only to natural persons. Thus, tipping by juristic persons is not prohibited under the 2012 *Financial Institutions and Markets Bill*.

Moreover, this prohibition only prohibits tipping in relation to dealing in listed securities.[336] Thus, tipping in relation to unlisted securities is not expressly prohibited under the 2012 *Financial Institutions and Markets Bill*. This is one other shortcoming that will come along with the 2012 *Financial Institutions and Markets Bill*. This follows the fact that tipping could occur in respect of unlisted securities.[337]

4.4.3 Criminal Liability and Penalties

The criminal liability and penalties under the 2012 *Financial Institutions and Markets Bill* has slightly increased as compared to the criminal liability and penalties under

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333 The referral of persons as individuals in the definition of an insider suggest that juristic persons are excluded within the ambit of the prohibition. See clause 149 of the 2012 *Financial Institutions and Markets Bill* for the definition of the term "insider".

334 See clause 150(7) of the 2012 *Financial Institutions and Markets Bill*. See further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

335 Clause 150(7) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Jooste 2000 *South African Law Journal* 294.

336 See clause 150(7) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Jooste 2000 *South African Law Journal* 294.

337 Opoku *What is Really Wrong with Insider Trading* 57.

the 2004 *Companies Act*. The 2012 *Financial Institutions and Markets Bill*, also provides that a person who is convicted of an offence of insider trading is liable on conviction to a fine not exceeding N$5 000 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.[338]

The researcher argues that this provision is inadequate. This follows the fact that insider trading offences differs in nature. Therefore, imposing a maximum penalty for all insider trading offences is inappropriate, irrational and prejudicial. For instance, the nature of tipping is less serious than actual dealing in securities. Therefore, imposing the same penalty for tipping and actual dealing in securities is unfair to such a tippee. Accordingly, the researcher contends that the provision should impose different penalties as the nature of insider trading offences are different. Additionally, the researcher submits that imposing a fixed fine of N$5 000 000 is not adequate enough for deterrence purposes. This follows the fact that an insider could make a profit of N$10 000 000 therefore charging such an insider a penalty of N$5 000 000 will not deter such an insider from dealing on the basis of inside information.[339] The researcher argues that in imposing a penalty, the profit made or loss avoided should be taken into consideration. In this regards, the researcher contends that the penalties are relatively low.

4.4.4 Civil Liability for Insider Trading

4.4.4.1 Liability for Actual Dealing in Securities for Own Account

An insider who knows that he or she has inside information and deals directly or indirectly or through an agent, for his or her own account in the securities traded on a regulated market to which the inside information relates or in securities likely to be affected by the information and makes a profit or would have made a profit had he or she sold the securities or avoids a loss through such dealing and fails to prove, on a balance of probabilities, any of the defences contemplated in the 2012 *Financial Institutions and Markets Bill*, is liable, at the suit of the NAMFISA in the court, to pay to the NAMFISA:

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338 Clause 160(b) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 109 of the *Financial Markets Act* See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

339 See generally Van der Linigen B "Tougher Legislation to Combat Insider Trading" 1997 *Fourth Quarter FSB Bulletin* 10.

(a) the equivalent of the profit made or would have been made or loss avoided;
(b) a penalty for compensatory purposes determined by the courts' discretion;
(c) a penalty for punitive purpose determined by the courts' discretion;
(d) interest from the date of the illegal transaction; and
(e) costs of suit on such scale as the court deems appropriate.[340]

4.4.4.2 Liability for Actual Dealing in Securities for Another Persons' Account

An insider who knows that he or she has inside information and deals directly or indirectly, for any other person in the securities listed on a regulated market to which the inside information relates or in securities likely to be affected by such information, makes a profit for that other person or would have made a profit or avoids a loss through such dealing and fails to prove on a balance of probabilities any of the defences contemplated, is liable at the suit of the NAMFISA in the court, to pay the NAMFISA:

(a) the equivalent of the profit made or would have been made or loss avoided;
(b) a penalty for compensatory purposes determined by the discretion of the court;
(c) a penalty for punitive purposes determined by the discretion of the court;
(d) interest from the date of the illegal transaction;
(e) the commission or consideration received for such dealing; and
(f) costs of suit on such scale the court deems appropriate.[341]

Although significant progress is made in this regard, the provision is still flawed. This follows the fact that the provision is restricted in a sense that it only covers insiders who actually dealt for the benefit of another. Thus, the liability for actual dealing for another persons' benefit does not extend to the person who actually received the benefit. The researcher is of the view that the legislature should make provision for joint and several liability for both parties.

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340 Clause 154(3) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82(1) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

341 Clause 154(5)(f) of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82(2) of the Financial Markets Act; see also related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470-473.

4.4.4.3 Liability for Disclosure of Inside Information

The 2012 *Financial Institutions and Markets Bill* further provides that an insider who knows that he or she has inside information and discloses the inside information to any other person and fails to prove on a balance of probabilities any of the defences contemplated is liable, at the suit of the NAMFISA in the court, to pay to the NAMFISA:

(a) the equivalent of the profit made or would have been made or loss avoided;
(b) a penalty for compensatory purposes determined by the courts' discretion;
(c) a penalty for punitive purposes determined by the courts' discretion;
(d) interest from the date of the illegal transaction;
(e) the commission or consideration received for such dealing; and
(f) costs of suit on such scale the court deems appropriate.[342]

Notably, the 2012 *Financial Institutions and Markets Bill* fails to effectively provide how inside information could be lawfully disclosed. This could to a larger extent, contribute to the increased disclosure of inside information and consequently lead to insider trading liability. The researcher argues that the legislature should define or explain how information could be lawfully disclosed.

4.4.4.4 Liability for Encouraging or Causing Another Person to Deal in Securities

Notably, an insider who knows that he or she has inside information and encourages or causes any other person to deal in securities traded on a regulated market to which the inside information relates or which are likely to be affected by the inside information is liable, at the suit of the NAMFISA in the court, to pay to the NAMFISA:

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided;
(b) a penalty for compensatory purposes determined by the courts' discretion;
(c) a penalty for punitive purposes determined by the courts' discretion;

342 Clause 154(7)(f) of the 2012 *Financial Institutions and Markets Bill*, see similar provisions in section 82(2) of the *Financial Markets Act*; see also related comments by Ferran E and Ho LC *Principles of Corporate Finance Law* (Oxford University Press, 2014) 410.

(d) interest from the date of the illegal transaction;

(e) the commission or consideration received for such encouragement; and

(f) costs of suit on such scale the court deems appropriate.[343]

As much as encouraging another to deal in securities on the basis of inside information constitutes a punishable offence, the same applies to discouraging another from dealing in securities on the basis of inside information. Accordingly, the researcher contends that the liability is restricted in this regard. This follows the fact that the liability only covers insiders who encourage others to deal in securities on the basis of inside information. Thus, no liability is imposed on those who discourage others from dealing in securities on the basis of inside information. This could lead to increased contravention of the insider trading prohibition by discouraging dealing.

4.4.5 Available Defences

The 2012 *Financial Institutions and Markets Bill* also contains a wide range of statutory defences available to those who are accused of insider trading offences.[344] Accordingly, proving any of the contemplated defences on a balance of probabilities removes insider trading liability. Notably, the defences are discussed below.

Firstly, an insider or offender can escape liability if he or she proves on a balance of probabilities that he or she was acting in pursuit of the completion of an affected transaction and only became an insider after he or she had given the instruction to deal to a registered authorised user or a registered securities dealer and the instruction was not changed in any manner after he or she became an insider.[345] This means that an insider cannot incur liability for insider trading concerning a transaction entered into before he or she actually became an insider. In this regard, Namibian policy makers ought to be commended for such progress. Nonetheless, the onus of proof on the part of the insider is relatively stringent and could therefore

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343 Clause 154(8)(f) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Cassim F *Contemporary Company Law* (Juta and Company Ltd, 2011) 874; see also similar provisions in section 82(2) of the *Financial Markets Act*.

344 See clause 150(2)(4) and (6) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Lyon and Du Plessis *The Law of Insider Trading in Australia* 71.

345 Clause 150(2)(a) of the 2012 *Financial Institutions and Markets Bill*; see similar provision in section 78(1)(b)(i) of the *Financial Markets Act*. See related comments by Jooste 2000 *South African Law Journal* 296.

be of less assistance to those who allegedly contravened the insider trading prohibition.

Secondly, the 2012 *Financial Institutions and Markets Bill* states that an insider may escape liability for insider trading if he or she could prove on a balance of probabilities that he or she:

(a) is a registered authorised representative of a registered authorised user or of a registered securities dealer and was acting on specific instructions from a client, except where the inside information was disclosed to him or her by that client;[346]

(b) was acting on behalf of a public sector body in pursuance of monetary policy, policies in respect of exchange rates, the management of public debt or external reserves;[347]

(c) was acting in pursuance of the completion of an affected transaction;[348] or

(d) only became an insider after he or she had given the instruction to deal to an authorised user or securities dealer and the instruction was not changed in any manner after he or she became an insider.[349]

Although great progress is made in these regards, it appears that some of these defences could still fail. Firstly, as it is provided that an insider could escape liability upon proving on a balance of probabilities that he or she was acting on behalf of a public sector body. In this regard, the researcher argues that this defence could be abuse by government officials. Furthermore, it is provided that an insider could escape liability upon proving that he or she was acting in pursuance of the completion of an affected transaction. Accordingly, this defence was developed to ensure that the lawful conclusion of contracts were not abused or rather frustrated in

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346 Clause 150(4)(a) of the 2012 *Financial Institutions and Markets Bill*; see similar provision in section 78(2)(b)(i) of the *Financial Markets Act*. See related comments by Jooste 2000 *South African Law Journal* 296.

347 Clause 150(4)(b) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Dorsten JL *The Law of Company Directors in South Africa* (Meridian Press, 1999) 488.

348 Clause 150(4)(c) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Cassim and Cassim *Contemporary Company Law* 958; Also see similar provision in section 78 of the *Financial Markets Act*.

349 Clause 150(4)(d) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Cassim and Cassim *Contemporary Company Law* 960. Also see similar provision in section 78(2)(b)(ii) of the *Financial Markets Act*.

any way. Accordingly, the researcher submits that although Namibian policy makers made significant progress, some of these defences are still prone to abuse.

Thirdly, an insider may escape liability if he or she can prove on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purposes of the proper performance of the functions of his or her employment, office, or profession in circumstances unrelated to dealing in any security listed on a regulated market and that at the same time he or she disclosed such information he or she did not know that it was inside information.[350] The primary purpose of this defence was to afford protection to bona-fide disclosures of non-public inside information made by insiders in course of their employment or office on behalf of the company or in a professional capacity. Notably, the 2012 *Financial Institutions and Markets Bill* does not define the term "proper performance". In this regard, the researcher argues that the absence of such a definition could lead to ignorant disclosure of inside information. In other words, reliance on this defence could fail due to a lack of understanding of the term "proper performance".

4.5 Conclusion

In light of the above, it is tempting to conclude that great progress was made by the Namibian legislature by introducing the 2004 *Companies Act*. The 2004 *Companies Act* contains the insider trading provisions and penalties for the contravention of such provisions.[351] Furthermore, great progress has been made through the introduction of the 2012 *Financial Institutions and Markets Bill*. Although it is not yet an *Act* of Parliament, it should be noted that great progress is being made and an acknowledgment on the part of the Namibian legislature that insider trading practices must be prohibited to enhance market integrity. Firstly, the 2012 *Financial Institutions and Markets Bill*, provides a wide range of definitions, such as "inside information", "insider", "market corner", "shares and debentures" and "insider trading".[352] Secondly, the 2012 *Financial Institutions and Markets Bill* provides for the prohibition

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350 Clause 150(6) of the 2012 *Financial Institutions and Markets Bill*; see similar provision in section 78(4)(b) of the *Financial Markets Act*; see related comments by Cassim and Cassim *Contemporary Company Law* 961; see also Albelooshi A *The Regulation of Insider Dealing: An Applied and Comparative Legal Study towards Reform in the UAE* (LLD Thesis University of Exeter, 2008) 88-89.

351 See section 241 of the 2004 *Companies Act*.

352 See clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 77 of the *Financial Markets Act*. See further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

of all insider trading offences.[353] Thirdly, the 2012 *Financial Institutions and Markets Bill* provides for the civil and criminal liability arising from insider trading.[354] Lastly, the 2012 *Financial Institutions and Markets Bill* provides a wide range of defences.[355]

It is, however, unfortunate to note that numerous flaws and shortcomings are still found in both the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill*.[356] Definitions are still too restricted, penalties are still significantly low, the prohibition too is still restricted in both the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill*. Numerous shortcomings are also reflected in the defences contemplated in the 2012 *Financial Institutions and Markets Bill*. It is, therefore, clear that the statutory regulatory framework of insider trading in Namibia is still inadequate and ineffectively enforced.

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353 See clause 150 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78 of the *Financial Markets Act*; See Jooste 2000 *South African Law Journal* 293-296.

354 See clause 154 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82 and 109 of the *Financial Markets Act.* See further Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

355 See clause 150 of the 2012 *Financial Institutions and Markets Bill*. See similar provisions in section 78 of the *Financial Markets Act*; see also Cassim and Cassim *Contemporary Company Law* 958-963.

356 See the analysis in para 4.3 and 4.4 above.

CHAPTER FIVE

THE PROHIBITION OF INSIDER TRADING IN SOUTH AFRICA

5.1 Introduction

It is a fact widely acknowledged that the effects of insider trading are experienced in the financial markets of different countries, including South Africa.[357] In this regard, South Africa has established a relatively adequate and effective statutory regulatory framework to deal with the problem of insider trading in South African financial markets.[358] The South African insider trading regulatory framework prohibits insider trading both indirectly, through common law[359] and directly, through statutory provisions.[360] In light of this, it appears that South Africa has established a relatively adequate insider trading regulatory framework.

In light of the above, this chapter discusses the statutory regulation of insider trading in South Africa. This is done by examining the statutory prohibition of insider trading in South Africa prior to 2004. Moreover, this chapter provides the prohibition of insider trading under the *Companies Act*[361] and its amendments[362] as well as the regulation of insider trading under the *Insider Trading Act.*[363]

The chapter further discusses the statutory prohibition of insider trading in South Africa after 2004. Accordingly, the statutory prohibition of insider trading under the *Securities Services Act* and the *Financial Markets Act* is provided.

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357 Myburgh A and Davis B 2004 *The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board* http://www.genesis-analytics.com/public/FSBReport.pdf 8 accessed 15 June 2017; Van Deventer G 2008 *Anti-Market Abuse Legislation in South Africa* http://www.fsb.co.za/public/marketabuse/FSBReport.pdf 1-5 accessed 15 June 2017.

358 Since 1973, South Africa has embarked on a journey to combat insider trading and such can be evidenced by the introduction of the *Companies Act* 61 of 1973 (1973 *Companies Act*); the *Stock Exchange Control Act* 1 of 1985 (*Stock Exchange Control Act*); the *Insider Trading Act* 135 of 1998 (*Insider Trading Act*), the *Financial Markets Control Act* 55 of 1989 (*Financial Markets Control Act*), the *Securities Services Act* 36 of 2004 (*Securities Services Act*) and the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*). See also Kawadza H "Extra Judicial Enforcement of Securities Regulation and the Public Interest Theory: A South African Perspective" 2015 *Speculum Juris* 49, 49.

359 The most relevant common law duty for the purposes of insider trading is the fiduciary duty of avoiding a conflict of interests.

360 See section 78 of the *Financial Markets Act*.

361 Section 233 of the 1973 *Companies Act*.

362 Amendments of the 1973 *Companies Act* includes the *Companies Amendment Act* 78 of 1989 (*Companies Amendment Act*) and the *Second Companies Amendment Act* 69 of 1990 (*Second Companies Amendment Act*).

363 Section 2 of the *Insider Trading Act*.

Numerous regulators were established to enforce market abuse laws in South Africa from time to time.[364] Consequently, the chapter discusses the scope, the role and powers of such regulators. This is done to examine how insider trading laws are enforced in South Africa and hopefully recommend possible measures that can be employed by Namibian insider trading regulators to enhance the combatting of insider trading in Namibia.

5.2 The Prohibition of Insider Trading prior to 2004

5.2.1 The Prohibition of Insider Trading under the Companies Act 61 of 1973

The statutory prohibition of insider trading in South Africa can be traced back to the early 1970s.[365] Precisely, the 1973 *Companies Act* was enacted and introduced some provisions that prohibited insider trading.[366] The introduction of insider trading provisions in the 1973 *Companies Act* came as a result of the findings of the Van Wyk De Vries Commission, which found that insider trading is:

(a) a malpractice that should be condemned;[367] and

(b) not only practiced by directors, but also by officers, employees and other persons.[368]

The 1973 *Companies Act* specifically prohibited insider trading.[369] For instance, the 1973 *Companies Act* contained a number of definitions for the purposes of giving effect to the insider trading prohibition.[370] Firstly, the term "interest" meant, without derogating from the generality of the word, any right to subscribe for, or any right to shares or debentures or any option in respect of shares or debentures.[371] The term "officer", included any employee who would be in possession of any information

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364 These includes the Financial Services Board (the FSB); the Directorate of Market Abuse (DMA); and the Enforcement Committee.

365 This was through the introduction of section 233 of the 1973 *Companies Act*.

366 See section 233 of the 1973 *Companies Act*.

367 Van Wyk De Vries Commission of Enquiry into the Companies Act Main Report, Pretoria, 15/04/1970 para 44.49.

368 Van Wyk De Vries Commission of Enquiry into the Companies Act para 44.49-44.50.

369 See generally section 232 and 233 of the 1973 *Companies Act*.

370 See generally section 229 of the 1973 *Companies Act*; see further Joubert W and Scott J *The Law of South Africa* (Butterworths, 1982) 237.

371 Section 229 of the 1973 *Companies Act*; see further Joubert and Scott *The Law of South Africa* 237.

acquired as a result of the position held and the immediate relationship with directors immediately before public announcement of such information.[372]

The term "past director" was defined to include a person who has ceased to be a director for a period of six months after stopping to be a director.[373] A "person" was defined to include any person according to whose instructions directors would normally act.[374] Lastly, the term "shares and debentures" included shares and debentures of companies in the same group.[375]

It was a requirement in terms of the 1973 *Companies Act* that directors, as soon as they acquire knowledge of the confidential information, they were required to determine the names of all officers deemed to be in possession of such information.[376] Additionally, it was further required that such directors were required to inform the company forthwith and by written notice of the particulars.[377] Accordingly, this obligation would only cease to exist upon public announcement of the information concerned.

Furthermore, the 1973 *Companies Act* provided that every director, past director, officer or any person who had knowledge of inside information concerning a transaction or a proposed transaction or the affairs of the company, which, if it would become publicly known, could be expected to materially affect the price of the shares or debentures, shall be guilty of an offence if he or she deal in any way to his or her advantage, directly or indirectly in such shares or debentures before public announcement of such information on a stock exchange or in a newspaper or through the medium of radio or television.[378]

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372 Section 229 of the 1973 *Companies Act*.

373 Section 229 of the 1973 *Companies Act*; see related comments by Fernando AC *Corporate Governance: Principles, Policies and Practices* (Pearson Education India, 2009) 189.

374 Section 229 of the 1973 *Companies Act*; see related comments by Fernando *Corporate Governance: Principles, Policies and Practices* 189.

375 Section 229 of the 1973 *Companies Act*; see related comments by Fernando *Corporate Governance: Principles, Policies and Practices* 189.

376 Section 232 of the 1973 *Companies Act*; see further comments 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) 27.

377 Section 230(a) and (b) of the 1973 *Companies Act*; Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 27.

378 Section 233 of the 1973 *Companies Act*; see similar provisions in section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*)

Although insider trading was prohibited in this regard, the provision was flawed in a number of respects and thus ineffective.[379] For instance, the prohibition only extended to primary insiders such as directors or past directors. This left room for insider trading practice by secondary insiders such as tippees and tippers. Similarly, the prohibition under the 1973 *Companies Act* only covered insider trading committed in respect of listed securities in entities which were companies for the purposes of the 1973 *Companies Act*. This also left room for the commission of insider trading in entities which were not companies for the purposes of the 1973 *Companies Act*. The insider trading prohibition under the 1973 *Companies Act* was also flawed in a sense that it only covered insider trading in respect of natural persons. Thus, illicit trading by juristic persons was not expressly prohibited under the 1973 *Companies Act*.

In light of this, it appeared that the 1973 *Companies Act* was not adequate and thus not effective for combatting insider trading in the South African financial markets.[380] Consequently, the *Companies Amendment Act* was the enacted to address the flawed provisions of the 1973 *Companies Act*.[381]

5.2.2 *The Prohibition of Insider Trading under the Companies Amendment Act 78 of 1989*

The provisions of the 1973 *Companies Act* did not effectively solve the insider trading problem in South Africa.[382] Consequently, the *Companies Amendment Act* introduced another provision to combat insider trading.[383] In terms of the *Companies Amendment Act*, insider trading was expressly prohibited.[384] For instance, the *Companies Amendment Act* provided that a director, past director or any other person connected with a company who had knowledge of any information which, when published, was likely to affect the price of such securities, would be guilty of an offence if he or she would in such securities within 24 hours after the public

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379 Bhana N "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *SA Journal of Business Management* 198, 198.

380 See Botha D "The Economics of the Crime and Punishment of Insider Trading in South Africa" 1992 *SA Merc LJ* 145, 156; See also related comments by Botha D "Control of Insider Trading in South: A Comparative Analysis" 1991 *SA Merc LJ* 1,1.

381 See Botha D "The Legal Status of an Insider Trading Contract" 1992 *SA Merc LJ* 84, 83.

382 See the analysis in para 5.2.1 above; see related comments by Botha 1991 *SA Merc LJ* 1.

383 See section 440(F) of the *Companies Amendment Act*.

384 See generally section 440 of the *Companies Amendment Act*.

announcement of that information on a stock exchange, or in a newspaper or television or by any other means of communication.[385]

Insider trading offenders were also liable to a fine of R500 Million or to imprisonment for a period not exceeding 10 years or to both the fine and imprisonment.[386] However, this provision never came into force.

5.2.3 *The Prohibition of Insider Trading under the Second Companies Amendment Act 69 of 1990*

The effects of insider trading were gradually escalating in the South African financial markets. Consequently, the South African legislature went back to the drawing board and introduced the *Second Companies Amendment Act*.[387] The *Second Companies Amendment Act* extensively revised the provisions of the *Companies Amendment Act*. The *Second Companies Amendment Act* defined the term "securities" to include company shares as well as stock debentures convertible into shares and any rights or interests in a company or rights or interests in respect of any such shares, stock or debentures including any financial instruments.[388]

The *Second Companies Amendment Act* provided that any person who would knowingly deal directly or indirectly in a security on the basis of unpublished price-sensitive information in that security, would be guilty of an offence if he or she knew that such information had been obtained:

(a) by virtue of a relationship of trust or any contractual relationship, irrespective of whether or not the person concerned was a party to that relationship; or

(b) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method irrespective of the nature thereof.[389]

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385 Section 440F(2)(a) of the *Companies Amendment Act*.

386 See generally 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) 33.

387 The *Second Companies Amendment Act* 69 of 1990 (*Second Companies Amendment Act*) was introduced to *inter alia*, enhance the prohibition of insider trading in South Africa and to repeal the flawed provisions of the *Companies Amendment Act*. See related comments by Botha 1991 *SA Merc LJ* 1-2.

388 See section 440A(1) of the *Second Companies Amendment Act* for the definition of the term "security"; see also related comments by Jooste R "Insider Dealing in South Africa" 1990 *South African Law Journal* 589-590, 609.

389 Section 440F(1)(b) of the *Second Companies Amendment Act*.

It is argued that great progress was made by the South African legislature in this regard. This follows the fact that this provision prohibited, to a certain extent, insider trading through tipping.[390]

Moreover, under the *Second Companies Amendment Act*, unpublished price-sensitive information was defined as information which:

(a) related to matters of internal affairs of a company, or to its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction;
(b) was not generally available to the reasonable investor; and
(c) would reasonably be expected to affect materially, the price of such securities if it were generally available.[391]

Two rebuttable presumptions were introduced under the *Second Companies Amendment Act*. Firstly, it was presumed that if the accused was in possession of the price-sensitive information during the time of the alleged dealing, it would be deemed that he or she knowingly dealt on the basis of such information unless something to the contrary is proved.[392] Secondly, it was presumed that if proved that the unpublished price-sensitive information was obtained in one of the ways stated above, unless something to the contrary is proven, the accused is deemed to have known that the information had been so obtained.[393]

Although these presumptions were aimed at curbing insider trading in the South African financial markets, it appears that these presumptions treated all forms of insider as illegal. Thus, the provision failed to take into account ignorant or unintentional disclosures of inside information. Therefore, it could be argued that the presumptions were inadequate as they could cause prejudice to those who ignorantly and unintentional disclosed inside information or to those who disclosed inside information in the course of their employment. In light of the above flaw and

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390 See generally section 440(1)(b) of the *Second Companies Amendment Act*.
391 See section 440F(2)(a) of the *Second Companies Amendment Act*.
392 See generally Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 36.
393 See generally Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 36.

many others, the provisions of the *Second Companies Amendment Act* fell short of solving the insider trading problem in South Africa.

It should be noted that in terms of the *Second Companies Amendment Act*, the maximum sentence remained a fine of R500 Million or imprisonment for a period not exceeding 10 years or to both the fine and imprisonment.[394] As such, the penalties for insider trading remained the same as those that were provided under the *Companies Amendment Act.*

5.2.4 The Prohibition of Insider Trading under the Insider Trading Act

Numerous flaws and inadequacies were embedded in the 1973 *Companies Act*, including its amendments. Consequently, this gave rise to the need to enact a separate *Act* that would specifically prohibit insider trading in South Africa.[395] In this regard, the *Insider Trading Act* was enacted in an attempt to broaden the scope of insider trading prohibition in South Africa.[396] This came through the introduction of the *Insider Trading Act*. The provisions of the *Insider Trading Act* repealed and replaced the provisions of the 1973 *Companies Act* and all its amendments.[397]

The *Insider Trading Act* treated insider trading as both a criminal and a civil wrong.[398] Accordingly, a wide range of civil remedies were provided to those who would suffer prejudice as a result of insider trading under the *Insider Trading Act*.[399] The *Insider Trading Act* provided a wide range of definitions to give effect to the insider trading prohibition.[400] Such definitions are briefly discussed below.

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394 See generally Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 37.

395 See Osode "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 240, 239.

396 This is when the *Insider Trading Act* first came into operation. The *Insider Trading Act* was specifically introduced to combat insider trading practices in the South African financial markets. The *Insider Trading Act* came as a result of the need to enact a separate *Act* to specifically curb and combat the effects of insider trading in South Africa; see related comments by Osode 2000 *Journal of African Law* 240; see also Jooste R "The Regulation of Insider Trading in South Africa-Another Attempt" 2000 *South African Law Journal* 304, 284.

397 See generally the Preamble and section 17 of the *Insider Trading Act*; see also Osode 2000 *Journal of African Law* 239.

398 See section(s) 5 and 6 of the *Insider Trading Act*; see also Mitchell J *Effectiveness of Insider Trading Law in South Africa's Equity Market: The Mergers and Acquisitions Example* (LLM Dissertation University of the Witswatersrand, 2015) 3-6.

399 See generally section 6(4)(a) of the *Insider Trading Act*.

400 See section 1 of the *Insider Trading Act*.

5.2.4.1 Definition and Interpretation of Concepts

The term "insider trading" was not expressly defined in the *Insider Trading Act*. Nonetheless, the *Insider Trading Act* provided a number of practices that were deemed to constitute insider trading. Accordingly, it would amount to insider trading if any individual who was aware of the fact that he or she was in possession of confidential price-sensitive information knowingly dealt directly or indirectly for his or her benefit or the benefit of any other person, in securities to which such information related or where the price of such securities were likely to be affected.[401] The researcher argues that insider trading should be defined to include, but not limited to the following:

(a) actual dealing in securities listed on a regulated market for own benefit;

(b) actual dealing in securities listed on a regulated market for the benefit of another;

(c) unlawful or improper disclosure of inside information that has not been made lawfully public; and

(d) encouraging another person to deal or discouraging another person from dealing in listed securities.

The term "insider" was defined as an individual in possession of inside information as a result of holding an office of a director, employee or shareholder of an issuer of securities or financial instruments to which the information relates or having access to such information by virtue of his or her employment.[402] Furthermore, an "insider" was defined as an individual who has inside information and knows that the direct or indirect source of the inside information was a director, employee or shareholder.[403]

Great progress was made in this regard. However, the researcher argues that the definition should be broadened to include third parties who may be outsourced to

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401 Section 2(1)(a) of the *Insider Trading Act*; see further comments by 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* 463, 458.

402 Section 1 of the *Insider Trading Act*; see related comments by Lyon G and Du Plessis J *The Law of Insider Trading in Australia* (Federation Press, 2005) 4.

403 Section 1 of the *Insider Trading Act*; see Lyon and Du Plessis *The Law of Insider Trading in South Africa* 4.

perform some duties on behalf of the company.[404] This follows the fact that outsourced individuals could actually be in a possession of the inside information of a particular company and could therefore engage in insider trading on the basis of such inside information. On a similar note, it appears that the definition of the term "insider" only covered natural persons. Thus, juristic persons were excluded from the ambit of the definition of an insider.

In this regard, two categories of insiders were provided under the *Insider Trading Act*.[405] Firstly, there were primary insiders who acquired the inside information as a result of their office as directors, employees or shareholders.[406] Secondly, there were secondary insiders such as tippees and those who knew that the source of their inside information were primary insiders.[407] It appears the South African legislature over looked the possibility that outsourced companies or individuals could also acquire inside information during the course of their work on behalf of the company and engage in insider trading on the basis of that inside information. This could also be problematic.

The term "inside information" was defined as specific or precise information which has not been made public and which is obtained or learned by an individual as an insider and which, if it were made public, would be likely to have a material effect on the price or value of any securities.[408] However, it should be noted that not all information constituted inside information for the purposes of insider trading liability under the *Insider Trading Act*. In this regard, only information that is accurate would qualify as inside information.[409] Accordingly, there was a number of requirements to be met in order for information to qualify as inside information, namely that:

(a) the information must be specific or precise;

(b) the information ought to be only accessible to insiders;

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404 See related comments by Wiley 2016 *Business Conduct and Ethics Policy* http://eu.wiley.com/WileyCDA/Section/id-301715.html accessed 03 November 2017.

405 See section 1 of the *Insider Trading Act* for the definition of the term "insider". See related comments by Alexander RCH *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routlege, 2016) 61.

406 See section 1 of the *Insider Trading Act* for the definition of the term "insider"; see further Alexander *Insider Dealing and Money Laundering in the EU: Law and Regulation* 61.

407 See section 1 of the *Insider Trading Act* for the definition of the term "insider"; see further Alexander *Insider Dealing and Money Laundering in the EU: Law and Regulation* 61.

408 Section 1 of the *Insider Trading Act*.

409 See Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 48.

(c) the information must not have been made public; and

(d) the information must be that which has potential to materially affect the price or value of securities.

This provision was flawed to a certain extent. Precisely, the absence of the definition of the term "specific or precise" and the term "public" could to a larger extent, contribute to the increased practices of insider trading in South African financial markets if such terms are not properly understood by offenders. Therefore, it is submitted that the legislature should have defined such terms.

The term "securities" was defined to include securities as stipulated in terms of the *Stock Exchanges Control Act*[410] and any instruments or rights bearing substantially similar characteristics to such securities and which are dealt in on a regulated market.[411] This was a great improvement by the South African legislature.

5.2.4.2 Prohibition of Insider Trading

Notably, the *Insider Trading Act* did not only outlaw the actual dealing in securities on the basis of inside information. Numerous offences of insider trading were also outlawed under the *Insider Trading Act*. The *Insider Trading Act* provided that any individual who knew that he or she was in possession of inside information, dealt for his or her own benefit or any other person, directly or indirectly in securities to which such information related or which the securities were likely to be affected by it, was guilty of an offence.[412] However, there were certain requirements that had to be met before anyone could incur the liability under the *Insider Trading Act*. It was required that:

(a) the prohibition of insider trading must have extended only to natural persons;

(b) the individual must have been aware that he or she has inside information;

(c) the individual must have dealt to either make a profit or avoid a loss; and

410 See section 1 of the *Stock Exchange Control Act* 1 of 1989.

411 See section 1 of the *Insider Trading Act*.

412 Section 2(1)(a) of the *Insider Trading Act*. See also Osode 2000 *Journal of African Law* 241.

(d) the inside information must have had a material effect or likely to have made a material effect on the price or value of securities concerned.[413]

Given this background, it therefore suffices that juristic persons were not prohibited to commit insider trading under *Insider Trading Act*.[414] This could lead to the increased contravention of the insider trading prohibition by juristic persons under the *Insider Trading Act*.

To this end, the question of the degree of materiality remained unaddressed under the *Insider Trading Act*. The absence of a clear and precise definition of the term "material effect" could also contribute to the ineffectiveness of the insider trading prohibition under the *Insider Trading Act*.

Furthermore, the *Insider Trading Act* specifically prohibited tipping.[415] Any individual who knew that he or she had inside information and encouraged or caused another person to deal or discouraged or stopped another person from dealing in securities to which such information related or was likely to be affected by it, shall be guilty of an offence.[416] However, liability under this provision was qualified by a number of requirements, namely that:

(a) the prohibition of insider trading only extended to natural persons;
(b) the individual must have been aware that he or she was in possession of inside information; and
(c) the liability must be based on the encouragement to deal or discouragement from dealing.[417]

Against this background, it appears that juristic persons were still not expressly prohibited to commit insider trading under *Insider Trading Act*. This could lead to the increased contravention of the insider trading prohibition by juristic persons under

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413 Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 54.

414 The use of the term "natural persons" in section 2(1) of the *Insider Trading Act* suggests that illicit trading by juristic persons was not expressly prohibited under the *Insider Trading Act*.

415 See section 2(1)(b) of the *Insider Trading Act*. See Osode 2000 *Journal of African Law* 241.

416 Section 2(1)(b) of the *Insider Trading Act*. See also Osode 2000 *Journal of African Law* 242; see also Henning JJ and Ebersohn GJ "Insider Trading, Money Laundering and Computer Crime" 2001 *Transaction of the Centre for Business Law* 119, 109.

417 Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* 56.

the *Insider Trading Act*. Therefore, it could be argued that the prohibition of insider trading under the *Insider Trading Act* was inadequate. For instance, tipping was only prohibited in respect of dealing in listed securities. Thus tipping in relation to securities in unlisted entities was not expressly prohibited under the *Insider Trading Act*.

Disclosure of inside information was also prohibited under the *Insider Trading Act*.[418] For instance, any individual who knew that he or she has inside information and disclosed such information to another person, would be guilty of an offence.[419] Yet again, the prohibition of insider trading in this regard only extended to improper disclosure of inside information by natural persons. Given this background, it is clear that improper disclosure of inside information by juristic persons was not expressly prohibited under the *Insider Trading Act*. It appears that the *Insider Trading Act* yet again over looked the possibility of ignorant disclosure of inside information. Therefore, it is argued that the *Insider Trading Act* was prejudicial and unfair to those who ignorantly disclosed inside information.

5.2.4.3 Criminal Liability and Penalties

The *Insider Trading Act* provided maximum sentences and fines for the contravention of insider trading provisions.[420] For instance, any individual guilty and convicted of an insider trading offence, could be sentenced to a fine not exceeding R2 Million or imprisonment for a period not exceeding 10 years or to both the fine and imprisonment.[421] Accordingly, the onus of proof rested solely on the prosecution to prove beyond a reasonable doubt that the offender had contravened the provisions of the *Insider Trading Act*. Making a profit or avoiding a loss was not a prerequisite to criminal liability. The mere fact that an individual knowingly dealt in securities for personal benefit or for the benefit of another could also give rise to criminal liability.[422]

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418 See section 2(2) of the *Insider Trading Act*; see related comments by Campbell C *International Liability of Corporate Directors* [2007] (Lulu.com 2007) 228.

419 Section 2(2) of the *Insider Trading Act*. See further Osode 2000 *Journal of African Law* 242.

420 See generally section 5 of the *Insider Trading Act*. See Osode 2000 *Journal of African Law* 245.

421 Section 5 of the *Insider Trading Act*. See related comments by Osode 2000 *Journal of African Law* 246.

422 See Coppolo G 2002 *Civil and Criminal Liability of Corporate Officers and Directors* https://www.cga.ct.gov/2002/rpt/2002-R-0704.htm accessed 01 November 2017.

In light of the above, it is evident that the South African legislature over looked the nature of different offences of insider trading and imposed maximum penalties for all the offences of insider trading regardless of their nature. Since other offences could be regarded as of a serious nature, the researcher argues that the legislature should have imposed different penalties for different offences of insider trading under the *Insider Trading Act*. Moreover, the researcher is of the view that the imposition of a R2 Million fine or both was relatively low for deterrence purposes.

5.2.4.4 Civil Liability, Civil Remedies and Civil Penalties

Apart from criminal liability, civil liability could also be imposed on offenders as a result of insider dealing.[423] The *Insider Trading Act* provided that any individual who knew that he or she has inside information and dealt directly or indirectly for his or her own benefit in securities to which such information related or which were likely to be affected by it, could be ordered to pay the FSB an amount contemplated in the civil provision of the *Insider Trading Act*.[424] These provisions were primarily introduced to assist the FSB in helping those who were prejudiced by insider trading to be compensated. Accordingly, the onus of proof rested solely on the FSB to prove that the accused practiced insider trading.

Furthermore, it was provided that any individual who knew that he or she had inside information and dealt to make a profit or to avoid a loss through such information was guilty of an offence and such offenders were ordered to pay the FSB an amount provided in the civil proceedings of the *Insider Trading Act*.[425] In this regard, the onus of proof rested on the FSB to prove on a balance of probabilities, the amount of profit made or loss avoided by the offenders. Additionally, the *Insider Trading Act* provided that any individual who knowingly disclosed inside information to others and failed to prove on a balance of probabilities any of the defences provided under the *Insider Trading Act* could be exposed to civil liability.[426] The mere fact that only the FSB was entitled to claim compensation on behalf of affected parties could have largely, discouraged affected parties from claiming compensation. Furthermore, it is argued

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423 See generally section 6 of the *Insider Trading Act*.

424 Section 6(4) of the *Insider Trading Act*; see further Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

425 See section 6(4)(a) of the *Insider Trading Act*. See related comments by Osode 2000 *Journal of African Law* 245-246.

426 See related comments by Osode 2000 *Journal of African Law* 246; see also section 6(4)(a) of the *Insider Trading Act*.

that the onus of proof placed on the FSB was rather very stringent and could have led to many offenders escaping the insider trading liability.

Another civil liability which could arise was for encouraging or causing another person to deal in securities or financial instruments.[427] The *Insider Trading Act* provided that any individual who knew that he or she had inside information and who knowingly encouraged or caused another person to deal in securities to which such information related or was likely to be affected by it and failed to prove on a balance of probabilities any of the defences that were contemplated in the provisions of the same *Act*, shall be guilty of an offence and could be ordered to pay the FSB the relevant amount contemplated therein.[428] Although this was a great improvement from the 1973 *Companies Act* regime, it appears that the application of the *Insider Trading Act* was too rigid and restricted in this regard. This follows the fact that the *Insider Trading Act* only imposed the civil liability for those who encouraged another person to deal in securities. Therefore, civil liability could not arise in respect of discouraging another person from dealing in securities under the *Insider Trading Act*.

Moreover, the *Insider Trading Act* provided that any individual who knew that he or she had inside information and dealt directly or indirectly in securities for any person and failed to prove on a balance of probabilities any of the relevant defences, shall be guilty of an offence.[429] Accordingly, the offenders were jointly and severally liable, together with that other person, to pay the FSB the amount contemplated in the relevant civil proceedings of the *Insider Trading Act*.[430]

Lastly, the *Insider Trading Act* made provision for civil liability for actual loss avoided or profit made.[431] In this regard, the FSB was entitled to sue by way of civil proceedings in any court of competent jurisdiction for the payment of the amount profited or loss avoided by the offender, interest, costs of suits and a penalty

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427 See section 6(2)(b) of the *Insider Trading Act*. See Osode 2000 *Journal of African Law* 246.

428 See section 6(2)(b) of the *Insider Trading Act*. See related comments by Osode 2000 *Journal of African Law* 247.

429 Section 6(2)(c) of the *Insider Trading Act*; see also Claessens S and Laeven L *A Reader in International Corporate Finance* (World Bank Publications, 2006) 91.

430 Section 6(2)(c) of the *Insider Trading Act*; see related comments by Jooste R "The Regulation of Insider Trading in South Africa-Another Attempt" 2000 *South African Law Journal* 299.

431 See section 6(4)(a) of the *Insider Trading Act*.

determined by the discretion of the court, but not exceeding three times the amount of the profit made or loss avoided.[432]

5.2.4.5 Available Defences

The *Insider Trading Act* provided a number of defences to those who allegedly contravened the insider trading provision.[433] Accordingly, an insider who could prove any of the following defences on a balance of probabilities would not be guilty of insider trading. The defences *inter alia*, included proof that the offenders:

(a) were acting on specific instructions of a client;[434]
(b) would have acted in the same manner without the inside information;[435]
(c) were acting on behalf of a public sector body in pursuit of a monetary policy, policies in respect of exchange rates, the management of public debt or foreign exchange reserves;[436] and
(d) were acting in pursuit of the completion or implementation of an affected transaction.[437]

Nonetheless, the defences were not limited to the ones stated above. For instance, it was provided that the offenders could escape liability by proving on a balance of probabilities that they reasonably believed that no person would deal in securities as a result of their disclosure.[438] Furthermore, the *Insider Trading Act* provided that no liability shall arise should an individual prove on a balance of probabilities that he or she disclosed the inside information in the proper performance of the function of his or her employment, office or profession and at that time that inside information was essential for such a transaction.[439]

To a certain extent, such defences were inadequate and flawed. For instance, some of the defences could still not apply or suffice in instances of negligence or ignorance

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432 Section 6(4)(a) of the *Insider Trading Act*.
433 See section 4 of the *Insider Trading Act*. See also Osode 2000 *Journal of African Law* 251.
434 See section 4(1)(b) of the *Insider Trading Act*; see Osode 2000 *Journal of African Law* 251.
435 See section 4(1)(b) of the *Insider Trading Act*; see Osode 2000 *Journal of African Law* 251.
436 See section 4(1)(c) of the *Insider Trading Act*. See also Osode 2000 *Journal of African Law* 25.
437 Section 4(1)(d) of the *Insider Trading Act*.
438 Section 4(2)(a) of the *Insider Trading Act*. See related comments by Osode 2000 *Journal of African Law* 252.
439 Section 4(2)(b) of the *Insider Trading Act*.

by the other party. Unintentional and ignorant disclosure could also cause some of the defences to fail.

With regard to the defence that one may claim that he or she was acting on behalf of a public sector body under the *Insider Trading Act*, the researcher contends that government officials could abuse this defence. Nonetheless, the South African legislature ought to be commended for introducing defences for those who allegedly contravened the insider trading prohibition under the *Insider Trading Act*. This reflected a move from a relatively harsh insider trading regulatory framework which did not afford offenders any defence to a relatively fair insider trading regulatory framework.

5.3 The Prohibition of Insider Trading post 2004

5.3.1 The Prohibition of Insider Trading under the Securities Services Act

The *Securities Services Act* was introduced in a bid to remedy the inadequacies and flaws of the *Insider Trading Act*.[440] The *Securities Services Act* repealed all flawed provisions of the *Insider Trading Act* in an attempt to improve the prohibition of insider trading in South Africa.[441] It should be noted that the *Securities Services Act*, like its predecessors,[442] specifically prohibited insider trading.[443] In addition, the *Securities Services Act* further contained a number of definitions for the purposes of insider trading prohibition.[444] It is therefore essential that some of the key terms be defined for the purposes of giving effect to the insider trading prohibition.

5.3.1.1 Definition of Concepts

The *Securities Services Act* made provision for the definition of key terms. Under the *Securities Services Act*, the term "inside information" was defined as specific or precise information, which has not been made public and which:

(a) is obtained or learned as an insider; and

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440 Jooste R A "Critique on the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437, 437; see the Preamble of the *Securities Services Act*.

441 Jooste 2006 *South African Law Journal* 437; see the Preamble of the *Securities Services Act*.

442 Insider trading was specifically prohibited in section 2 of the *Insider Trading Act*.

443 See section 73 of the *Securities Services Act*; see similar provisions in section 78 of the *Financial Markets Act*.

444 See generally section 72 of the *Securities Services Act*; see similar provisions in section 77 of the *Financial Markets Act*.

(b) if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market.[445]

Likewise, the definition of the term "specific or precise" and the definition of the term "material effect" are not defined under the *Securities Services Act* as was not defined under the *Insider Trading Act*. Given this background, it appears that the question of the degree of materiality required remained unanswered under the Securities Services Act. This could have largely contributed to the increased contravention of the insider trading prohibition under the *Securities Services Act*. Similarly, the absence of a clear and precise definition of the term "specific or precise" could have also contributed to the commission of insider trading in the South African financial markets.

The term "insider" was defined as a person in possession of inside information as a result of being a director, employee or shareholder of issuer of securities listed on a regulated market to which such information related.[446] Notably, such a person could obtain inside information by virtue of employment, office or profession, or where such person knows that the direct source of the inside information was an insider. The term "person" included a partnership or any trust.[447]

Accordingly, the South African legislature should be amended for the inclusion of tippees and tippers in the definition of an insider under the *Securities Services Act*. Furthermore, it should be noted that the *Securities Services Act* did not include juristic persons within the ambit of the definition of the term insider.[448]

In addition, the term "market corner" was defined as any agreement, arrangement, commitment, or understanding involving the purchasing, selling or issuing of securities listed on a regulated market by which a person, or a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of securities listed on a regulated market

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445 Section 72 of the *Securities Services Act*; see related comments by Lyon and Du Plessis *The Law of Insider Trading in Australia* 14.

446 Section 72 of the *Securities Services Act*; see related comments by Lyon and Du Plessis *The Law of Insider Trading in Australia* 14; see further comments by Jooste 2013 *South African Law Journal* 288.

447 Section 72 of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 438-441.

448 Jooste 2006 *South African Law Journal* 438.

and where the effect is likely to be that the trading price of such securities, is or is likely to be negatively influenced or arbitrarily dictated by such person or group of persons in that the said trading price deviates or is likely to negatively and materially deviate from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded.[449]

5.3.1.2 Insider Trading Offences

The *Securities Services Act* provided that actual dealing directly or indirectly or through an agent in securities listed on a regulated market by an insider who knew that he or she was in possession of inside information to which such securities relates or which are likely to be affected by it for his or her personal benefit could give rise to the insider trading offence.[450] Notably, the insider trading prohibition was not limited only to actual dealing under the *Securities Services Act*. A number of instances could give rise to insider trading under the *Securities Services Act*.[451]

Accordingly, the *Securities Services Act* provided that any insider who knew that he or she had inside information and who dealt directly or indirectly for the benefit of any person in any listed securities to which such inside information related or which are likely to be affected by it committed an offence.[452] In addition, the *Securities Services Act* provided that an insider who knew that he or she had inside information and encouraged or caused another to deal, or discouraged or stopped another from dealing in the securities listed on a regulated market to which the information related or which were likely to be affected by it was liable to an offence of insider trading.[453] In this regard, it was provided that the insider must have been aware that he or she has inside information.

One glaring omission which appears to be embedded repetitively under the *Insider Trading Act* and the *Securities Services Act* is that the prohibition of insider trading

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449 Section 72 of the *Securities Services Act*; see related comments by Alam N and Rizvi SAR *Inslamic Capital Markets: Volatility, Performance and Stability* (Springer, 2016) 109.

450 Section 73(1) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 241.

451 See generally section 73 of the *Securities Services Act*; see similar provisions in section 77 of the *Financial Markets Act*.

452 Section 73(2) of the *Securities Services Act*; see further Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

453 Section 73(4) of the *Securities Services Act*; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

was only restricted to securities listed on the regulated market and in entities which were companies for the purposes of the insider trading. Thus, illicit trading or tipping in respect of unlisted securities and in relation of entities that are not companies for the purposes of insider trading were not expressly prohibited under the *Securities Services Act*.

Furthermore, insider trading prohibition was extended to illicit disclosure of confidential price-sensitive information under the *Securities Services Act*.[454] Precisely, the *Securities Services Act* provided that an insider who knew that he or she had inside information and who disclosed such information to another person was guilty of an offence.[455] The failure of the legislature to outline how the inside information could be lawfully disclosed could also be problematic and contribute to the improper disclosure of inside information.

5.3.1.3 Criminal Liability for Insider Trading

The *Securities Services Act* also imposed criminal liability for insider trading on the offenders. In this regard, an insider who was convicted of insider trading under the *Securities Services Act*, was liable to a fine not exceeding R50 Million or to imprisonment for a period not exceeding 10 years or to both fine and imprisonment.[456] Given this background, it appears that the South African legislature imposed maximum penalties for all the insider trading offences. Accordingly, it could be argued that the South African legislature over looked the different nature of the insider trading offences. It is submitted that the legislature should have imposed different penalties for different offences of insider trading under the *Securities Services Act*.

It is further argued that the penalties imposed under the *Securities Services Act* were to a larger extent low for the purposes of deterrence of insider trading in the South African financial markets. For instance, imposing penalties of R50 Million for an insider who could make a profit of R100 Million would normally not deter such an insider.

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454 See section 73(3) of the *Securities Services Act*; see further comments by Alexander *Insider Dealing and Money Laundering in the EU: Law and Regulation* 140.

455 Section 73(3) of the *Securities Services Act*; see further comments by Alexander *Insider Dealing and Money Laundering in the EU: Law and Regulation* 140.

456 Section 115(a) of the *Securities Services Act*; see similar provisions in section 109 of the *Financial Markets Act*.

5.3.1.4 Civil Liability for Insider Trading

Apart from criminal liability, offenders could also incur civil liability for insider trading.[457] In this regard, the *Securities Services Act* provided that an insider who knew that he or she had inside information and dealt directly or indirectly or through an agent for his or her own account in securities listed on a regulated market to which such information related or are likely to be affected by it and who made a profit or would have made it or avoids a loss through such dealing was guilty of insider trading. The offender could, however, escape liability if he or she proved on a balance of probabilities one of the relevant defences under the *Securities Services Act*.[458] Moreover, an insider who engaged in insider trading and made a profit or avoided a loss for personal benefit or for the benefit of any other person could also incur civil liability. Such an insider was then required to pay the equivalent to the profit made or loss avoided to the FSB.

In addition, the *Securities Services Act* provided that a person or insider who indulged in insider trading for the benefit of another person was jointly and severally liable together with such other person to pay a compensatory penalty to the FSB including interests and costs as determined by the court.[459] Similarly, an insider who knew that he or she had inside information and improperly disclosed such information to other persons was liable for civil penalties.[460] Lastly, civil liability could arise where any person knowingly encouraged or caused another to deal in listed securities.[461]

Although significant progress was made, numerous flaws experienced during the *Insider Trading Act* regime remained unanswered under the *Securities Services Act*. For instance, the onus of proving vested upon the FSB was rather too stringent. Consequently, this could have led to other insiders escaping liability for insider trading under the *Securities Services Act*. Moreover, the mere fact that affected

457 See generally section 77 of the *Securities Services Act*; see similar provisions in section 82 of the *Financial Markets Act*.

458 Section 77(1)(a)(b)(c) of the *Securities Services Act*; see related comments by Tomasic R Bottomley S and McQueen R *Corporations Law in Australia* (Federations Press, 2002) 637.

459 Section 77(5) of the *Securities Services Act*; see further Cassim and Cassim *Contemporary Company Law* 969.

460 Section 77(3) of the *Securities Services Act*; see related comments by Thomas J and Gibson R *South African Mercantile and Company Law* (Juta and Company Ltd, 2003) 367.

461 Section 77(4) of the *Securities Services Act*; see further Cassim and Cassim *Contemporary Company Law* 969.

parties had no direct right of action could have also discouraged affected parties claiming compensation from the FSB.

5.3.1.5 Available Penalties and Defences

Numerous penalties were imposed against the insider trading offender under the *Securities Services Act*.[462] The *Securities Services Act* provided that an insider who actually indulged, directly or indirectly, in insider trading and failed to prove on a balance of probabilities any of the relevant defences provided under the *Securities Services Act*, was liable at the suit of the FSB in any competent court, to pay to the FSB:

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided;
(b) a penalty for compensatory and punitive purposes;
(c) interest; and
(d) cost of suit.[463]

The *Securities Services Act* further stipulated that an insider who dealt directly or indirectly for any other person, made a profit or avoided a loss was liable for the insider trading offence. Such person was liable at the suit of the FSB in any competent court, to pay to the board the equivalent of the profit made or would have been made or the equivalent of the loss avoided, a penalty for punitive or compensatory purposes, interest, consideration for such dealing and the cost of suit.[464] Nevertheless, the offenders could escape liability if they rely on any of the defences that were provided in the *Securities Services Act*.

In addition, the *Securities Services Act* provided penalties for disclosure of confidential price sensitive information.[465] Accordingly, the *Securities Services Act* stated that any person in possession of inside information and who discloses such information and fails to prove on a balance of probabilities any of the defences

462 See generally section 115 of the *Securities Services Act*; see similar provisions in section 82 of the *Financial Markets Act*.
463 See generally section 77 of the *Securities Services Act*; see related comments by Lyon and Du Plessis *The Law of Insider Trading in Australia* 107.
464 Section 77(2) of the *Securities Services Act*.
465 See section 77(3) of the *Securities Services Act*; see related comments by Bainbridge *Research Handbook on Insider Trading* 433.

contemplated, is liable at the suit of the board in any competent court, to pay to the board:

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided;
(b) a penalty for compensatory and punitive purposes;
(c) interest;
(d) the commission or consideration for such dealing; and
(e) the cost of suit.[466]

It should be noted that the penalties were not limited to the ones stated above. The penalties were further extended to those who encouraged or caused another person to deal in securities.[467] In this regard, the *Securities Services Act* provided that an insider who encouraged or caused another person to deal in securities listed on a regulated market was liable at the suit of the board at any competent court, to pay to the board:

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided;
(b) a penalty for punitive or compensatory purposes;
(c) interest;
(d) commission or consideration for such encouragement; and
(e) cost of suit.[468]

Lastly, the *Securities Services Act* further made provision for offenders for joint and several liability at the suit of the FSB to any competent court, to pay to the FSB, the equivalent of the profit made or would have been made or the equivalent of the loss avoided, interest and the cost of suit.[469]

To this end, the *Securities Services Act* still imposed a rather stringent onus on the FSB to prove that the offender did commit insider trading. This could have

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466 Section 77(3) of the *Securities Services Act*; see related comments by Bainbridge *Research Handbook on Insider Trading* 433.

467 See section 77(4) of the *Securities Services Act*; see further comments by Ferrara RC, Thomas H and Nagy DM *Ferrara on Insider Trading and the Wall* (Law Journal Press, 2017) 4-7.

468 Section 77(4) of the *Securities Services Act*; see Ferrara, Thomas and Nagy *Ferrara on Insider Trading and the Wall* 4-7.

469 See section 77(5) of the *Securities Services Act*; see further Jooste 2006 *South African Law Journal* 454.

contributed to offenders escaping liability as the onus could be difficult to discharge. Furthermore, the absence of a direct of action could have also discouraged affected parties from reporting the cases of insider trading. One other prevalent omission in the *Securities Services Act* is that it only imposes penalties for encouraging or causing another person to deal in securities. Thus, no penalties for discouraging or stopping another person from dealing in securities under the *Securities Services Act*. This could have led to the increased insider trading practice through discouraging another from dealing in securities on the basis of insider trading.

The *Securities Services Act* did not only impose penalties to those who allegedly contravened the law, but also made provision for a number of defences that could be invoked by those who allegedly contravened a certain provision.[470] Accordingly, it is provided that an insider will not incur liability for insider trading if he or she can prove on a balance of probabilities that he or she:

(a) was acting in pursuit of the completion of an affected transaction;
(b) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed after being an insider;
(c) is an authorised user and was acting on specific instructions from a client, save where the inside information was disclosed to him or her by that client;
(d) was acting on behalf of a public sector body in pursuit of monetary policy, policies in respect of exchange rates, the management of public debt or external exchange reserves; or
(e) disclosed inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession.[471]

The defences under the *Securities Services Act* appeared to be more of a duplicate of the defences that were provided under the *Insider Trading Act*. Therefore,

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470 See section 73(1)(b), 73(2)(b) and 73(3)(b) of the *Securities Services Act*; see Jooste 2006 *South African Law Journal* 446.

471 Section 73(3)(b) of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 446. Also see similar provisions in section 78 of the *Financial Markets Act*.

numerous flaws that were embedded in the *Insider Trading Act*, still remained unaddressed under the *Securities Services Act*. For instance, the applicability of the defences could still not find application due to professional negligence and ignorance. On the other hand, other defences were still prone to abuse by government officials.

Although some flaws remained unaddressed under the *Securities Services Act*, the introduction of the *Securities Services Act* was a positive move and thus played a crucial role in the eradication of insider trading in South Africa. It served a whole lot of purposes in this regard, including inter alia:

(a) increasing confidence in the South African financial markets by requiring that securities services be provided in a fair, efficient and transparent manner and contributing to the maintenance of a stable financial market environment;
(b) promoting the protection of regulated persons and clients;
(c) reducing systemic risks; and
(d) promoting the international competitiveness of securities services in the Republic.[472]

5.3.1.6 Administrative Penalties

Apart from civil and criminal penalties that were provided, there were also administrative penalties which could be imposed for the contravention of the insider trading offence.[473] For instance, the Enforcement Committee could impose a civil monetary penalty, an order for remedial action, cost orders, separate order for legal costs, remuneration for cost orders, a fine for punitive purposes and other appropriate disciplinary measures.[474] Precisely, the Enforcement Committee could impose could impose an administrative compensatory amount which is payable to the FSB for distribution to all relevant victims of insider trading.[475]

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472 Section generally 2 of the *Securities Services Act*.
473 See generally section 94 of the *Securities Services Act*.
474 See section 94(e) and section 102-105 of the *Securities Services Act* read with section 6A-6H of the *Protection of Funds Act* 28 of 2001.
475 See related comments by Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Thesis Nelson Mandela Metropolitan University, 2012) 68.

5.3.2 *The Prohibition of Insider Trading under the Financial Markets Act*

Another attempt by the South African legislature to combat insider trading in South African financial markets was introduced by the *Financial Markets Act*.[476] The insider trading provisions of the *Financial Markets Act* amended and repealed the flawed insider trading provisions of the *Securities Services Act*.[477] The *Financial Markets Act* was introduced to, *inter alia*, provide for the regulation of financial markets, to licence and regulate exchanges, control securities repositories, clearing houses and trading repositories, to regulate and control securities trading, clearing and settlement, and the custody and administration of securities, to prohibit insider trading and other market abuses.[478]

Accordingly, the *Financial Markets Act* came as a result of the shortcomings experienced during the *Securities Services Act* regime.[479] Notably, the *Financial Markets Act* specifically prohibits all offences of insider trading.[480] In addition, more severe criminal and civil sanctions are provided in the *Financial Markets Act*.[481] In order to give effect to the prohibition, a wide range of definitions are provided as indicated below.

5.3.2.1 Definition of Concepts

The term "insider trading" is not expressly defined in the *Financial Markets Act*. Nonetheless, a number of practices that could give rise to the insider trading liability are provided under the *Financial Markets Act*.[482] Firstly, the *Financial Markets Act* provides that it would be insider trading if an insider[483] who knows that he or she has inside information[484] and deals directly or indirectly or through an agent for his or her

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476 The *Financial Markets Act* outlaws of the offences of insider trading. See section 78 of the *Financial Markets Act*.

477 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, 458; see also the Preamble of the *Financial Markets Act*.

478 See the Preamble of the *Financial Markets Act*. See further Luiz and Van Der Linde 2013 *SA Merc LJ* 458; Kleitman Y 2013 *Corporate and Commercial Alert* 5 https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2013/corporate/downloads/Corporate-and-Commercial-alert-July-2013.pdf. accessed 08 November 2017.

479 Luiz and Van Der Linde 2013 *SA Merc LJ* 458

480 See section 78 of the *Financial Markets Act*; see further analysis by Jooste 2000 *South African Law Journal* 293-295.

481 See section 82 and 109 of the *Financial Markets Act*.

482 See generally section 78 of the *Financial Markets Act*.

483 See section 77 of the *Financial Markets Act* for the definition of the term "insider".

484 See section 77 of the *Financial Markets Act* for the definition of the term "inside information".

own account in the securities[485] listed on a regulated market[486] to which the inside information relates or which are likely to be affected by it.[487] Secondly, it would give rise to insider trading liability if an insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it.[488]

Although the introduction of the *Financial Markets Act* could be seen as a positive move in the bid against insider trading in South Africa, numerous flaws that were embedded in the *Securities Services Act* are still found in the *Financial Markets Act*. For instance, the legislature should have defined the phrase "through an agent" in the above provisions. The absence of a definition of such a phrase could lead to other offenders escaping liability as the result of the wrong interpretation of the phrase.

Thirdly, the *Financial Markets Act* provides that it would amount to insider trading if any person, who knew that a person is an insider, deals directly or indirectly for such an insider or through an agent in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it commits an offence.[489] Fourthly, it would constitute insider trading if an insider who knows that he or she has inside information and who discloses such information to another person commits an offence.[490] Lastly, the *Financial Markets Act* states that if an insider who knows that he or she has inside information and who encourages another person to deal or discourages another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it is guilty of insider trading.[491]

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485 See section 1 of the *Financial Markets Act* for the definition of the term "securities".

486 In terms of section 77 of the *Financial Markets Act* the term "regulated market" means any market, domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.

487 See section 78(1)(a) of the *Financial Markets Act*; see Jooste 2000 *South African Law Journal* 293.

488 See section 78(2)(a) of the *Financial Markets Act*; see related comments by Bainbridge *Research Handbook on Insider Trading* 57.

489 See section 78(3)(a) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 467.

490 See section 78(4)(a) of the *Financial Markets Act*; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

491 See section 78(5)(a) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

As was the case with the *Securities Services Act*, the *Financial Markets Act* also fails to define or rather explain how inside information could be lawfully and properly disclosed. This is one glaring omission, which remain unanswered to date. Also, the *Financial Markets Act* like its predecessor, only apply in respect of illicit trading in respect of securities listed on a regulated market. To this end, it remains to be seen whether illicit trading in relation to unlisted securities or securities in unregistered entities will ever be included in the insider trading regulatory framework of South Africa.

Another important term defined under the *Financial Markets Act* is the term "insider".[492] An insider is defined as a person in possession of inside information and where such information is obtained by virtue of being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates or having access to such information by result of employment, office or profession or where such a person knows that the direct or indirect source of the information is a person such as a director, employee or shareholder.[493] The term "inside information" is defined as specific or precise information, which has not been made public[494] and which is obtained or learned as an insider and if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market in terms of the *Financial Markets Act.*[495]

The referral of insiders as director, employees or shareholders in the definition of the term "insider" suggests that juristic persons are not covered in the ambit of the definition. With regard to the definition of the term "insider", the question of whether insider trading could only be committed by natural persons remains to be unaddressed under the *Financial Markets Act*. With regard to the definition of the term "inside information", the absence of the definition of the term "specific or precise" could still contribute to the increased contravention of the insider trading provision under the *Financial Markets Act* if not properly understood. Offenders could still claim ignorance in this regard.

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492 See section 77 of the *Financial Markets Act* for the definition of the term "insider". See also Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

493 See section 77 of the *Financial Markets Act.* See further Cassim R "Some Aspects of Insider Trading: Has the Securities Services Act 36 of 2004 Gone too Far" 2007 *SA Merc LJ* 44, 43.

494 See section 79 of the *Financial Markets Act* for the definition of the term "publication". See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 460.

495 Section 77 of the *Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 460.

Moreover, market abuse rules are defined to include rules made in terms of the *Financial Markets Act.*[496] The term "market corner" is defined as any arrangement, agreement, commitment or understanding involving the purchasing, selling or issuing of securities listed on a regulated market by which a person, a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of, securities listed on a regulated market and where the effect of the arrangement, agreement, commitment or understanding is or is likely to be that the trading price of the securities listed on a regulated market, as reflected through the facilities of a regulated market, is or is likely to be abnormally influenced or dictated by such person or group of persons in that such trading price deviates or is likely to deviate from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded.[497]

5.3.2.2 Insider Trading Offences

The *Financial Markets Act* outlaws all offences of insider trading.[498] Firstly, the *Financial Markets Act* states that an insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it commits an insider trading offence.[499] This specifically prohibits an insider to engage in actual dealing for own account. Secondly, the *Financial Markets Act* provides that an insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it will be guilty of insider trading.[500] This provision prohibits actual dealing for another person's account.

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496 Section 77 of the *Financial Markets Act.*

497 Section 77 of the *Financial Markets Act*; see also Du Plessis R and Cassim R 2005 *The Securities Services Act* http://www.bowmanslaw.com/insights/the-securities-services-act-rudolph-du-plessis-and-rehana-cassim/ accessed 10 August 2017.

498 Section 78 of the *Financial Markets Act* outlaws actual dealing for own account, actual dealing for the benefit of another person, improper disclosure of inside information and encouraging or causing another person to deal in securities or discouraging or stopping another person from dealing in securities on the basis of inside information.

499 Section 78(1)(a) of the *Financial Markets Act*; see also Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

500 Section 78(2)(a) of the *Financial Markets Act*. See Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

Additionally, any person, who knew that a person is an insider and who deals directly or indirectly for such an insider or through an agent in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it could incur insider trading liability.[501] Moreover, an insider who knows that he or she has inside information and who discloses such information to another person commits an insider trading offence.[502]

Lastly, the *Financial Markets Act* provides that an insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it would be guilty of insider trading.[503] This generally prohibits insider dealing by secondary insiders such as tippees.[504]

The insider trading provision under the *Financial Markets Act* is still flawed in a number of instances. For instance, the *Financial Markets Act* still has addressed the issue of how could inside information be lawfully and properly be disclosed. Once again, the referral of insiders as directors, employees or shareholders still suggests that juristic persons are excluded in the ambit of the insider trading prohibition under the *Financial Markets Act.*

5.3.2.3 Criminal Penalties for Insider Trading

It should be noted that the criminal penalties under the *Financial Markets Act* are relatively the same as those that were imposed on the offenders under the *Securities Services Act.*[505] Accordingly, the *Financial Markets Act* provides that a person found guilty of insider trading is liable to a fine not exceeding R50 Million or to imprisonment for a period not exceeding 10 years, or both the fine and

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501 Section 78(3)(a) of the *Financial Markets Act*. See Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

502 See Luiz and Van Der Linde 2013 *SA Merc LJ* 470; section 78(4)(a) of the *Financial Markets Act.*

503 See Luiz and Van Der Linde 2013 *SA Merc LJ* 470; section 78(5)(A) of the *Financial Markets Act.*

504 See Luiz and Van Der Linde 2013 *SA Merc LJ* 470; the inclusion of those who encourage one to deal or discourage one from dealing in section 78(5)(a) of the *Financial Markets Act* suggest that the prohibition also includes tippees.

505 Section 109(a) of the *Financial Markets Act* read with section 115(a) of the *Securities Services Act.*

imprisonment.[506] It appears that the South African legislature still over looked the nature of different offences of insider trading under the *Financial Markets Act*. This follows the fact that the *Financial Markets Act* still imposes maximum penalties for all insider trading offences irrespective of the nature and the particular offence of insider trading. This could be prejudicial and unfair in a sense that imposing the same penalties for a tippee and an insider who actually dealt on the basis of inside information could be unfair to the tippee.

5.3.2.4 Civil Penalties for Insider Trading

In addition to criminal penalties, insider trading offenders could also incur civil liability.[507] For instance, any person guilty of insider trading in the form of actual dealing for own account or for any other person or a person who dealt for an insider directly or indirectly or through an agent on the basis of the information possessed by the insider, while aware that such person is an insider, is liable to pay an administrative sanction not exceeding:

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided through such dealing;
(b) an amount of up to R1 million, to be adjusted by the registrar annually to reflect the Consumer Price Index, plus three times the equivalent of the profit
made or would have been made or the equivalent of the loss avoided;
(c) interest; and
(d) cost of suit, including investigation cost, on such scale as determined by the Enforcement Committee.[508]

The *Financial Markets Act* also provides that an insider who knows that he or she has inside information and who discloses such information to any other person or an insider who knows that he or she has inside information and who encourages another to deal or discourages another from dealing, is liable to pay an administrative sanction not exceeding:

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506 Section 109(a) of the *Financial Markets Act*; see similar provisions in section 241 of the 2004 *Companies Act*.

507 See generally section 82 of the *Financial Markets Act*; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

508 Section 82(1) of the *Financial Markets Act*. See Luiz and Van Der Linde 2013 *SA Merc LJ* 473.

(a) the equivalent of the profit made or would have been made or the equivalent of the loss avoided through such dealing;

(b) an amount of up to R1 Million, to be adjusted by the registrar annually to reflect the Consumer Price Index, plus three times the equivalent of the profit made or would have been made or the equivalent of the loss avoided;

(c) interest;

(d) cost of suit, including investigation cost, on such scale as determined by the Enforcement Committee; and

(e) the commission or consideration received for such disclosure, encouragement or discouragement.[509]

It is contended that the legislature should have attempted to make it clear how inside information could be lawfully and properly disclosed. This omission was also found in the *Securities Services Act*. Accordingly, it appears that the South African legislature is hesitant in addressing this continuing issue. This could, to a larger extent, contribute to the commission of insider trading by unlawful disclosure of non-public inside information.

The person or insider who indulged in insider trading activities for the benefit of another person will be jointly and severally liable together with that other person to pay the FSB a penalty for compensatory and administrative purposes plus interest or costs as determined by the relevant Enforcement Committee.[510]

It appears that the South African legislature have made commendable efforts to impose joint and severally liability for offenders. This is a move in the right direction in the bid to effectively combat insider trading in the South African financial markets.

5.3.2.5 Administrative Penalties for insider trading

Apart from the civil and criminal penalties imposed under the *Financial Markets Act,* the *Financial Markets Act* also imposes administrative penalties for the contravention

509 Section 82(2) of the *Financial Markets Act;* see Luiz and Van Der Linde 2013 *SA Merc LJ* 473.

510 Section 82(3) of the *Financial Markets Act*; see further Luiz and Van Der Linde 2013 *SA Merc LJ* 475.

of the insider trading prohibition.[511] For instance, the *Financial Markets Act* provides that any person who contravenes the insider trading provision will be liable to pay an administrative sanction not exceeding the profit made or would have been made if the transaction was completed or the equivalent of the loss avoided.[512] Additionally, such a person may be required to pay an administrative amount of R1 Million, interest, cost of suit including investigation costs or the commission or consideration received for disclosure of non-public inside information or for encouragement or discouragement.[513] Notably, these penalties are required to be distributed as compensation to persons who were affected by the insider dealing.[514]

To this end, the *Financial Markets Act* is silent on who is to determine the administrative sanction. Nonetheless, the *Protection of Funds Act* provides that the Enforcement Committee is to determine whether there has been a contravention and the administrative amount to be paid.[515]

5.3.2.6 Available Defences

The *Financial Markets Act* contains a wide range of defences available to those who allegedly contravened the insider trading provision.[516] Accordingly, proving on a balance of probabilities any of the defences contemplated in terms of the insider trading provision, extinguished liability for insider trading. An insider would not be guilty of insider trading if such an insider proves on a balance of probabilities that he or she only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider.[517] This defence could, however, seems to imply that the instruction to deal must be given directly to the authorised user. Therefore, the position is not clear whether the defence will cover instructions given to agents.[518]

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511 See section 82(2) of the *Financial Markets Act*. See further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 477.

512 Section 82(2)(a) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 474.

513 See section 82(2)(b)-(e) of the *Financial Markets Act*; see also Luiz and Van Der Linde 2013 *SA Merc LJ* 475.

514 See Luiz and Van Der Linde 2013 *SA Merc LJ* 475.

515 See section 6 of the *Protection of Funds Act*.

516 See generally section 78 of the *Financial Markets Act*; see related comments by Jooste 2000 *South African Law Journal* 296.

517 Section 78(1)(b)(i) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

518 Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

The insider could further prove that he or she was acting in pursuit of a transaction in respect of which all the parties to the transaction has possession of the same inside information, trading was limited to those parties in possession of inside information and the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information.[519] This defence is defined as the best protection for a bona fide commercial transaction, which is not intended to gain something from the price sensitive information.[520] Similarly, an insider could prove that he or she is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time.[521]

In addition, an insider will not be guilty of insider trading if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary for the purposes of the proper performance of the functions of his or her employment, office or profession and that at the time he or she disclosed such information he or she was not aware that it was inside information.[522]

It appears that the defences provided under the *Financial Markets Act* are similar to those that were provided under the *Securities Services Act*. Accordingly, numerous flaws that were embedded in the *Securities Services Act* remains to be prominent under the *Financial Markets Act*. It is submitted that the approach used in the *Securities Services Act* should have not been blindly adopted in the *Financial Markets Act.* This follows the fact that numerous flaws which were entrenched in the defences under the *Securities Services Act* are still entrenched in the defences under the *Financial Markets Act*.

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519 Section 78(1)(b)(ii) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 463-467.

520 See Luiz and Van Der Linde 2013 *SA Merc LJ* 464.

521 Section 78(2)(b)(i) of the *Financial Markets Act*; see related comments by Jooste 2013 *SA Merc LJ* 463.

522 Section 78(4)(b) of the *Financial Markets Act*; see related comments by Jooste 2013 *SA Merc LJ* 463.

5.4 Overview Role of the Regulatory Authorities

Notably, it would often serve no purpose to enact insider trading legislation without establishing regulatory bodies to enforce such legislation.[523] Accordingly, various role players have been established to enforce the prohibition of insider trading in the South African financial markets.[524] The role players includes the Financial Services Board (FSB), the Directorate of Market Abuse (DMA) and the Enforcement Committee. These role players play a very crucial role in combatting insider trading in South Africa as discussed below.[525]

5.4.1 The Role of the FSB

In 1990, the South African legislature enacted the *Financial Services Board Act*, which established the FSB as an independent board charged with a duty to monitor and enforce insider trading prohibition in South Africa.[526] The FSB had a wide range of functions under the *Financial Services Board Act* which, *inter alia*, includes:

(a) supervision of compliance with laws regulating financial institutions and the provision of financial services;

(b) advising the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the minister; and

(c) promotion of programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of financial products and services.[527]

In addition to such functions, the FSB was also granted ostensibly wide powers to ensure the proper and adequate supervision and enforcement of the South African

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523 See Thompson JH "A Global Comparison of Insider Trading Regulation" 2013 *International Journal of Accounting and Financial Reporting* 2, 1.

524 These include inter alia, the FSB, the DMA and the Enforcement Committee.

525 See the discussion in 5.4.1, 5.4.2 and 5.4.3 below for the roles of the FSB, the DMA and the Enforcement Committee.

526 Section 2 of the *Financial Services Board Act*. In Namibia, the *Namibia Financial Institutions Supervisory Authority Act* 3 of 2001 (*NAMFISA Act*) established the Namibia Financial Institutions Supervisory Authority (NAMFISA) to enforce insider trading laws in the Namibian financial markets. See section 2 of the *NAMFISA Act*.

527 Section 3(c) of the *Financial Services Board Act*; see related roles of the NAMFISA in section(s) 3 and 4 of the *NAMFISA Act*.

insider trading prohibition under the *Financial Markets Act*.[528] These powers include, but not limited to the following:

(a) investigate any matter relating to an offence of insider trading;
(b) investigate or assist, at the request of a supervisory authority, any relevant supervisory authority in an investigation into possible offences of insider trading;
(c) make market abuse rules concerning the manner in which investigations of any alleged insider trading are to unfold;
(d) administering of proof of claims and distribution of payments in civil cases of insider trading; and
(e) institute civil proceedings for any alleged insider trading practice.[529]

Moreover, the FSB has the power to prosecute matters relating to market-abuse practices, provided that the relevant courts decline to prosecute such matters or the matter is settled out of court.[530]

5.4.2 The Role of the DMA

Another attempt by the South African legislature to combat insider trading in South Africa was the establishment[531] of the DMA. The DMA has ostensibly wide powers as discussed below.

Firstly, the DMA has the power to institute any market abuse related civil proceedings and to investigate any matter relating to market abuse;[532] Moreover, the DMA has the power, on behalf of the FSB, to take a decision whether to refer a matter to the Enforcement Committee or to institute derivative civil proceedings or to refer a matter to the Director of Public Prosecutions (DPP).[533] Likewise, the DMA

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528 See section 84 of the *Financial Markets Act*.

529 Section 84(2) of the *Financial Markets Act*; see related roles of the NAMFISA in clause 155 and 157 of the *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions and Markets Bill*).

530 Section 82(9) of the *Securities Services Act*.

531 The DMA was established as a committee of the FSB to perform some of its functions-see section 83(1)(a) of the *Securities Services Act*; see also section 85(1)(a) of the *Financial Markets Act*.

532 Section 85(1)(c)(i) and (ii) of the *Financial Markets Act*; see also 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 the Western Cape, 2015) 31.

533 Loubser R 2006 *Insider Trading and other Market Abuses (Including the Effective Management of Price–sensitive Information) in the Insider Trading Booklet final draft* http://www.jse.co.za/public/insider/JSEbooklet.pdf accessed 29 July 2017; see also Chitimira

may, on behalf of the FSB, publish a list of market-abuse cases under investigation and proposed action, if any, in the press after every one of its meetings.[534]

5.4.3 The Role of the Enforcement Committee

One other regulator established[535] in South Africa is the Enforcement Committee. The Enforcement Committee was established as a committee of the FSB to administer and adjudicate on all matters relating to market abuse.[536] The Enforcement Committee is made up of members who are appointed by the FSB.[537] However, the Enforcement Committee could also appoint additional members with relevant and appropriate skills and experience.[538]

The functions of the Enforcement Committee included powers to deal with any matter referred to it in accordance with the relevant provisions of the *Securities Services Act*.[539] Additionally, the Enforcement Committee is also required to furnish an annual report to the FSB on any activities the Enforcement Committee embarked on during the preceding year.[540]

Among the powers granted to the Enforcement Committee, the committee could also impose compensatory orders on the market abuse offenders in cases where there is a link between the unlawful conduct and calculable damages suffered by the affected

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H and Lawack V "Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" 2013 *Obiter* 200, 200.

534 Loubser 2006 http://www.jse.co.za/public/insider/JSEbooklet.pdf. accessed 29 July 2017.

535 The Enforcement Committee was established as another committee of the FSB which administrated and adjudicated on all forms of market abuse; see also Luiz "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 151.

536 Van Deventer G 2009 *Harnessing Administrative Law In Encouraging Compliance* 3 https://www.moonstone.co.za/upmedia/uploads/library/Moonstone%20Library/MS%20Compliance/Enforcement%20Committee%20Introduction%202009-10.pdf. accessed 04 November 2017.

537 Section 98 of the *Securities Services Act.* See related comments by Packies *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* 35.

538 Section 98(2) of the *Securities Services Act*; See related roles of the NAMFISA in clause 155 of the 2012 *Financial Institutions and Markets Bill*. See related comments by Packies *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* 35.

539 Section 99 of the *Securities Services Act*. See related comments by Packies *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* 35.

540 Section 99(2) of the *Securities Services Act.*

party or the applicant.[541] Furthermore, the Enforcement Committee may also impose cost orders on the market-abuse offenders for the investigation and preparation costs of the FSB.[542]

Lastly, for the purposes of consumer education and the protection of public, the Enforcement Committee could use administrative sanctions recovered from the market-abuse offenders.[543]

5.5 Conclusion

In light of the statutory prohibition of insider trading in South Africa since the inception of the 1973 *Companies Act*, one may conclude that great progress was made to date. Firstly, the 1973 *Companies Act* and its amendments were positive attempts by the South African legislature in the bid against insider trading. Nonetheless, the 1973 *Companies Act* and its amendments were flawed in many instances.[544] Consequently, a need for a separate legislation to specifically curb the effects of insider trading in the South African financial markets. The *Insider Trading Act* was then enacted.

The introduction of the *Insider Trading Act* repealed the flawed provisions of the 1973 *Companies Act* and its amendments. Although significant progress was made in the *Insider Trading Act*, the provisions of the *Insider Trading Act* were also flawed to a larger extent.[545] This subsequently led to the introduction of the *Securities Services Act*. The *Securities Services Act* repealed the *Insider Trading Act*. The *Securities Services Act* was introduced to broaden the scope of the insider trading

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541 Van Deventer 2009 https://www.fsb.co.za/Departments/communications/Documents/2009%20FSB%20Bulletin%20First%20Quarter.pdf accessed 29 July 2017. See further section 6 of the *Protection of Funds Act*. See related comments by Packies *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* 35.

542 Van Deventer 2009 https://www.fsb.co.za/Departments/communications/Documents/2009%20FSB%20Bulletin%20First%20Quarter.pdf accessed 29 July 2017. See related comments by Packies *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* 35-36.

543 Section 77(7)(8)(9) of the *Securities Services Act*. See related comments by Packies *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* 36.

544 See the analysis in para 5.2 above.

545 See the analysis in para 5.2.4 above.

prohibition in South Africa. However, the *Securities Services Act*, like its predecessor, did not solve the insider trading problem in South Africa.[546] Given this background, the *Financial Markets Act* was introduced to enhance the prohibition of insider trading in South Africa.

Although significant changes were introduced through the *Financial Markets Act*, some of the flaws and shortcomings still remains to be unaddressed under the *Financial Markets Act*.[547] To a certain extent, the *Financial Markets Act* appears be a duplicate of the *Securities Services Act*. This follows the fact that some of the flaws that were entrenched in the *Securities Services Act* appears to be entrenched in the *Financial Markets Act* as discussed in this Chapter.

Apart from the insider trading legislation, some regulatory bodies were also established to enhance the combatting of insider trading in South Africa. This included the FSB, the DMA and the Enforcement Committee. These regulatory bodies were granted ostensibly wide powers to broaden the scope of the insider trading prohibition in the South African financial markets. It is against this background that the researcher argues that South Africa has established a relatively adequate, effective and strong insider trading regulatory framework.

546 See the analysis in para 5.3.1 above.
547 See the analysis in para 5.3.2 above.

CHAPTER SIX

OVERVIEW COMPARATIVE ANALYSIS OF THE STATUTORY PROHIBITION OF INSIDER TRADING IN NAMIBIA AND SOUTH AFRICA

6.1 Introduction

As pointed out in Chapter(s) Four and Five, insider trading is a problem experienced in many financial markets of numerous jurisdictions including the Namibian and South African financial markets. Accordingly, this chapter seeks to comparatively examine, investigate and explore the regulation of insider trading in Namibia and South Africa.[548] This chapter discusses the statutory prohibition of insider trading prior and post 2004 in Namibia and South Africa. Moreover, this chapter explores and examines the definition and the prohibition of insider trading in both jurisdictions as well as the penalties and defences for the contravention of the insider trading prohibition. Lastly, this chapter investigates the enforcement of insider trading laws in both jurisdictions.

Notably, this is done to *inter alia,* determine whether insider trading laws in Namibia and South Africa are effectively and adequately enforced. Furthermore, this is done to recommend possible measures which could be employed in Namibia or South Africa to enhance the prohibition of insider trading in their respective financial markets.

6.2 The Statutory Prohibition of Insider Trading Prior to 2004

As stated in Chapter Five, the statutory prohibition of insider trading in South Africa only dates back as far as 1973.[549] The early developments of the prohibition of insider trading in South Africa can be traced back to the 1973 *Companies Act*.[550] Before the introduction of the 1973 *Companies Act*, it was only required that certain particulars about shareholding of directors be recorded by the company.[551] Notably, because of a lack of prosecution under the 1973 *Companies Act* for a period of

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548 This is done to examine whether some of the insider trading provisions could assist in enhancing the insider trading regulatory framework of Namibia.

549 This is when section 233 of the *Companies Act* 61 of 1973 (1973 *Companies Act*) was first introduced. The 1973 *Companies Act* is the first piece of legislation to regulate insider trading in South Africa.

550 See section 233 of the 1973 *Companies Act*.

551 See 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) 23.

twenty years, the 1973 *Companies Act* then appeared to be inadequate and thus ineffective.[552] Consequently, the *Companies Amendment Act*[553] came into being. In a period not exceeding one year, the *Companies Amendment Act* was replaced by the *Second Companies Amendment Act*. These amendments also appeared to be inadequate and ineffective in a number of respects.[554]

The 1973 *Companies Act* together with its amendments fell short of solving the insider trading problem in South Africa. There was a need to enact separate legislation in another attempt to combat insider trading.[555] Consequently, the South African legislature enacted the *Insider Trading Act*.[556] Notably, the coming into operation of the *Insider Trading Act* brought significant improvements, which includes: (i) the provision of definition of terms such as inside information,[557] insider,[558] regulated market[559] and securities;[560] (ii) the inclusion of tippees in the scope of the insider trading provision;[561] (iii) the prohibition on unlawful disclosure of inside information;[562] (iv) the provision of insider trading defences; and (v) the introduction of insider trading civil liability.[563] However, numerous flaws were still embedded in the *Insider Trading Act*.[564]

Likewise, the early developments of the insider trading prohibition in Namibia can be traced back to the 1973 *Companies Act*. The 1973 *Companies Act* was the first

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552 Cokayne R "Setback for South Africa's First Insider Trading Case" *Business Report* 28 April 2004.

553 See section 440 of the *Companies Amendment Act* 78 of 1989 (*Companies Amendment Act).*

554 See the analysis in para 5.2.2 and 5.2.3 in Chapter Five of this dissertation.

555 The introduction of the *Insider Trading Act* came as the result of the flawed provisions of the 1973 *Companies Act* and its Amendments.

556 The *Insider Trading Act* came as a result of the need to enact a separate *Act* for the regulation of insider trading in South Africa.

557 See generally section 1 of the *Insider Trading Act* for the definition of the term "inside information".

558 See generally section 1 of the *Insider Trading Act* for the definition of the term "insider". See related comments by Lyon G and Du Plessis J *The Law of Insider Trading in Australia* (Federation Press, 2005) 2.

559 See generally section 1 of the *Insider Trading Act* for the definition of the term "regulated market". See related comments by Jeunemaître A *Financial Markets Regulation: A Practitioner's Perspective* (Springer, 1997) 188.

560 See generally section 1 of the *Insider Trading Act* for the definition of the term "securities".

561 See section 2(1)(b) of the *Insider Trading Act*; see related comments by Osode P "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill" 2000 *Journal of African Law* 242, 239.

562 See section 2(2) of the *Insider Trading Act*; see further comments by Osode 2000 *Journal of African Law* 242.

563 See generally section 6 of the *Insider Trading Act*.

564 See related comments in para 5.2.4 in Chapter Five of this dissertation.

legislative enactment that prohibited insider trading in Namibia.[565] However, it should be noted that the 1973 *Companies Act* was a South African *Act* and was also used in Namibia.[566] This implied that all flaws and shortcomings experienced in South Africa were also embedded in Namibia.

In light of this, it appears that the Namibian legislature was reluctant to enact insider trading laws. This follows the fact that Namibia used the South African 1973 *Companies Act*. The researcher contends that the Namibian policy makers blindly adopted the 1973 *Companies Act*. This follows the fact that numerous flaws experienced in South Africa were simultaneously experienced in Namibia. On the other hand, South Africa had already made impressive attempts to regulate insider trading through the enactment of the 1973 *Companies Act* and later enacted the *Insider Trading Act*.

6.3 *The Statutory Prohibition of Insider Trading Post 2004*

Although the *Insider Trading Act* was a great move towards combatting insider trading in the South African financial markets, various flaws and shortcomings that were embedded in its provisions affected its efficiency and effectiveness.[567] Accordingly, in 2004, the South African legislature introduced the *Securities Services Act*[568] which repealed the provisions of the *Insider Trading Act*.[569] The *Securities Services Act* introduced relatively adequate civil, criminal and administrative penalties for insider trading.[570] A wide range of definitions for the purposes of the insider trading offences and defences were other improvements brought by the *Securities Services Act*.[571] However, like its predecessors, the *Securities Services*

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565 Unknown Author 2017 *Overview of Governance Regime* http://thelawreviews.co.uk/edition/the-corporate-governance-review-edition7/1140921/namibia accessed 6 November 2017.

566 See Hengari TA and Saunders C 2014 *Unequal but Intertwined: Namibia's bilateral relationship with South Africa* http://www.kas.de/upload/Publikationen/2014/namibias_foreign_relations/Namibias_Foreign_Relations_hengari_saunders.pdf. 169 accessed 09 August 2017.

567 See related comments in para 5.2.4 in Chapter Five of this dissertation.

568 See section 73 of the *Securities Services Act* 36 of 2004 (*Securities Services Act*).

569 See generally the Preamble of the *Securities Services Act*; see also Jooste R "A Critique on the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437, 437.

570 See section 77 and section 115 of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 437.

571 See section 72 of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 438 and 446.

Act was also characterised by a number of flaws and shortcomings.[572] This led to the enactment of the *Financial Markets Act*.[573]

The *Financial Markets Act* relatively reinforced the insider trading regulatory framework of South Africa. Insider trading is specifically prohibited in terms of the *Financial Markets Act*.[574] More civil, criminal and administrative penalties are introduced and a wide range of defences are provided for those who allegedly contravened the insider trading provision.[575]

Like the position in South Africa, the 2004 *Companies Act* prohibits insider trading practices in Namibia.[576] Although great progress has been made by the Namibian legislature, the 2004 *Companies Act* provides minimal penalties.[577] Also, the scope and application of the insider trading provision is too restricted.[578] This follows the fact that the insider trading prohibition under the 2004 *Companies Act* is limited only to natural persons.[579] Moreover, insider trading related terms such as inside information, insider, shares and debentures are not adequately defined under the 2004 *Companies Act*. The insider trading prohibition in terms of the 2004 *Companies Act* is more of a duplicate of the insider trading provision under the 1973 *Companies Act*. For instance, the insider trading prohibition under the 1973 *Companies Act* only applied to individuals.[580] Companies and other entities were not covered by the insider trading prohibition under the 1973 *Companies Act*. Additionally, the insider trading prohibition under the 1973 *Companies Act* only prohibited insider trading by primary insiders.[581] Thus, insider dealing by secondary insiders and fortuitous persons was not prohibited under the 1973 *Companies Act*. Accordingly, primary insiders refer to directors, employees or shareholders of the company. Secondary

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572 See the analysis in para 5.3.1 in Chapter Five of this dissertation.

573 The *Financial Markets Act* 19 of 2012 (*Financial Markets Act*).

574 Section 78 of the *Financial Markets Act*. See similar provisions in clause 150 of the 2012 *Financial Institutions and Markets Bill*.

575 See section 82 and 109 read with section 78 of the *Financial Markets Act*. See similar provisions in clause 150 and 154 of the 2012 *Financial Institutions and Markets Bill*.

576 Section 241 of the 2004 *Companies Act*.

577 See section 241 of the 2004 *Companies Act*.

578 The insider trading prohibition under section 241 of the 2004 *Companies Act* is restricted because it applies only to natural persons. Furthermore, it is restricted because it applies only in respect of shares and debentures and only to securities listed on a regulated market.

579 The phrase "every director, past director, officer or person..." in section 241 of the 2004 *Companies Act* suggests that juristic persons are not included in the provision. Furthermore, juristic persons are not included in the definition of the term "person" in section 237 of the 2004 *Companies Act*.

580 See section 233 of the 1973 *Companies Act*.

581 See section 233 of the 1973 *Companies Act*.

insiders are those who does not have a direct access to the inside information and who received inside information from a primary insider. All these flaws and shortcomings appears repetitively under the 2004 *Companies Act*.

Recently, the Namibian legislature introduced the *Financial Institutions and Markets Bill*.[582] This is generally aimed at broadening the scope and prohibition of insider trading in Namibia.[583] The 2012 *Financial Institutions and Markets Bill* will be the first piece of Namibian legislation to prohibit all offences of insider trading including:

(a) the prohibition of actual dealing for another person's account;[584]

(b) the prohibition of unlawful disclosure of non-public inside information;[585] and

(c) the prohibition of encouraging another person to deal or discouraging another person from dealing.[586]

The 2012 *Financial Institutions and Markets Bill* also provides a wide range of definitions including the definition of key terms such as inside information, insider, market abuse rules and market corner.[587] The 2012 *Financial Institutions and Markets Bill* also makes provision for civil and criminal liability.[588] In light of the insider trading prohibition under the 2004 *Companies Act*, it appears that South Africa has established a relatively strong insider trading regulatory framework than Namibia. For instance, the 2004 *Companies Act* does not prohibit insider trading by juristic persons.[589] Moreover, the 2004 *Companies Act* does not prohibit insider

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582 See Chapter IX of the *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions and Markets Bill*).

583 See the Preamble and clause 150 of the 2012 *Financial Institutions and Markets Bill.*

584 See clause 150(3) of the 2012 *Financial Institutions and Markets Bill*; see related comments by 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* 465, 458.

585 See clause 150(5) of the 2012 *Financial Institutions and Markets Bill*; see Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

586 See clause 150(7) of the 2012 *Financial Institutions and Markets Bill*; see Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

587 See clause 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78 of the *Financial Markets Act*. See related comments by Jooste "The Regulation of Insider Trading in South Africa-Another Attempt" 2000 *South African Law Journal* 288-293.

588 See clause 154 and 160 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 82 and 109 *Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

589 The referral of insiders as directors, past directors and officers in section 241 of the 2004 *Companies Act* implies that juristic persons are not included within the ambit of the prohibition.

trading by secondary outsiders such as tippees and tippers.[590] Lastly, insider trading related terms are not expressly defined under the 2004 *Companies Act*. On the other hand, the *Financial Markets Act* prohibits insider trading by secondary insiders.[591] This means that tipping is prohibited under the *Financial Markets Act*. Additionally, insider trading related terms such as insider, inside information, securities, market corner and market abuse rules are adequately defined under the *Financial Markets Act*.[592] Notably, criminal and civil and/or administrative sanctions are among the provisions of the *Financial Markets Act*.[593]

In light of the above, it is argued that the South African approach towards insider trading is relatively adequate and stringent than the Namibian insider trading regulatory framework. Nonetheless, it is hoped that the recently established 2012 *Financial Institutions and Markets Bill* will broaden the scope and prohibition of insider trading in Namibia. It is further hoped that the 2012 *Financial Institutions and Markets Bill* will assist in providing a way forward in the bid to combat insider trading in Namibia. The 2012 *Financial Institutions and Markets Bill* has numerous flaws and shortcomings that could contribute to the increased contravention of the insider trading prohibition in Namibia.[594]

6.4 The Definition of Insider Trading

Although the term insider trading is not expressly and specifically defined in the *Financial Markets Act*, the *Financial Markets Act* makes provision for a number of practices, which would amount to insider trading.[595] In addition, the *Financial*

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590 Tipping is also considered to be an offence of insider trading. See Johnson DL and Greffenius R 2011 *Insider Trading by Friends and Family: When the SEC Alleges Tipping* 1 https://www.americanbar.org/content/dam/aba/publications/blt/2011/08/insider-trading-sec-tipping-201108.pdf. accessed 07 November 2017.

591 See section 77 of the *Financial Markets Act* for the definition of the term "insider"; see also section 78(5) of the *Financial Markets Act*; See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

592 See section 77 of the *Financial Markets Act*.

593 *See section 82 and 109 of the Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

594 See related comments in para 4.4 in Chapter Four of this dissertation.

595 These includes actual dealing for own account, actual dealing for another person's account, improper disclosure of non-public inside information and encouraging and discouraging another person from dealing in securities. See generally section 78 of the *Financial Markets Act*; see similar provisions in clause 150 of the 2012 *Financial Institutions and Markets Bill*.

Markets Act provides numerous definitions of insider trading related terms such as inside information, insider, market abuse rules and market corner.[596]

It should be noted that the Namibian insider trading regulatory framework under the 2004 *Companies Act* has attempted to define other insider trading related terms.[597] However, the 2004 *Companies Act* fails to expressly define the term insider trading. Furthermore, insider trading related terms are also not expressly defined under the 2004 *Companies Act*.[598] Insider trading related terms are expressly defined under the 2012 *Financial Institutions and Markets Bill*.[599] The 2012 *Financial Institutions and Markets Bill*, however, fails to expressly define the fundamental concept of insider trading. To this end, it appears that the Namibian insider trading regulatory framework has blindly followed the South African approach. In light of this, the researcher argues that the South African approach should have not been blindly adopted in Namibia. This follows the fact that numerous flaws and shortcomings embedded in the South African insider trading regulatory framework are also experienced in the Namibian insider trading regulatory framework.

6.5 Insider Trading Offences

Currently, South Africa has established a relatively adequate and effective insider trading regulatory framework.[600] This follows the fact that the *Financial Markets Act* specifically outlaws all offences of insider trading.[601] Accordingly, the contravention of the insider trading prohibition under the *Financial Markets Act* gives rise to civil, criminal and administrative liability. For instance, actual dealing directly, indirectly or through an agent in securities listed on a regulated market to which such information relates or is likely to be affected by it, by an insider who knew that he or she had inside information and who dealt for personal benefit commits an offence and will be

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596 See section 77 of the *Financial Markets Act* for the definition of the terms "insider", "inside information", "market abuse rules" and "market corner". See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

597 See section 1 of the 2004 *Companies Act*.

598 Such key terms include insider and inside information; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

599 See section 149 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 77 of the *Financial Markets Act*.

600 See section 78 of the *Financial Markets Act*; see similar provisions in clause 150 of the 2012 *Financial Institutions and Markets Bill*.

601 Section 78 of the *Financial Markets Act*. In Namibia, all offences of insider trading are only prohibited under clause 150 of the 2012 *Financial Institutions and Markets Bill*. Thus, currently the 2004 *Companies Act* only prohibits actual dealing in securities traded on a regulated market.

liable for insider trading.[602] The lack of a clear and precise definition of the term "through an agent" could still lead to the increased contravention of the insider trading prohibition. This follows the fact insiders who dealt through agents could still escape insider trading liability. Moreover, such agents may also escape insider trading liability. In addition, this prohibition is restricted because it applies only to securities listed on a regulated market. Thus, illicit trading on securities which are not listed on a regulated market is not prohibited under the *Financial Markets Act.*

The *Financial Markets Act* further provides that an insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it will be guilty and liable insider trading.[603] This prohibition is flawed in a number of respects. For instance, it is restricted because it applies only to securities listed on a regulated market. Thus, illicit trading on other trading platforms is not expressly prohibited under the *Financial Markets Act.*

Additionally, it would amount to insider trading if any person, who knew that a person is an insider, deals directly or indirectly for such an insider or through an agent in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it.[604]

Moreover, unlawful disclosure of inside information is prohibited under the *Financial Markets Act.*[605] For instance, an insider who knows that he or she has inside information and who discloses such information to another person commits an insider trading.[606] The application of this prohibition appears to be restricted. For instance, the prohibition only prohibits unlawful disclosure by natural persons. Thus, improper disclosure of inside information by juristic persons is not expressly

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602 Section 78(1) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 241.

603 Section 78(2) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

604 Section 78(3) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 467.

605 See section 78(4) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470. See also Osode 2000 *Journal of African Law* 242.

606 Section 78(4) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470. See also Osode 2000 *Journal of African Law* 242.

prohibited under the *Financial Markets Act*. This is one glaring omission by the South African legislature.

Lastly, tipping is expressly prohibited under the *Financial Markets Act*.[607] It is provided that an insider who knows that he or she has inside information and who encourages another person to deal or discourages another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it would be guilty of insider trading.[608] Although significant progress was made in this regard, the mere fact that the insider must have known that he or she had inside information could lead to the failure of this prohibition because insiders could always claim ignorance or that they did not know whether what they knew was inside information or not.[609]

In Namibia, insider trading is prohibited under the 2004 *Companies Act*.[610] For instance, the 2004 *Companies Act* provides that every director, past director, officer or person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it becomes public known, may be expected materially to affect the price of the shares or debentures of the company and who deals in any way to his or her advantage, directly or indirectly, in those shares or debentures while that information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media commits an offence.[611]

This is a positive attempt by the Namibian legislature in the bid to combat insider trading. However, it is flawed to a larger extent. Firstly, it only covers insider trading by natural person. Thus, insider trading by companies and other juristic persons is not expressly prohibited under the 2004 *Companies Act*. Secondly, the prohibition fails to prohibit tipping in securities listed on a regulated market. One other glaring omission of the 2004 *Companies Act* is that it does not prohibit improper disclosure

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607 See section 78(5) of the *Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470. See also Osode 2000 *Journal of African Law* 242.

608 Section 78(5) of the *Financial Markets Act*. See related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470; see also Osode 2000 *Journal of African Law* 242.

609 Alexander RHC *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routlege, 2016) 66.

610 Section 241 of the 2004 *Companies Act*.

611 Section 241 of the 2004 *Companies Act*.

of non-public inside information by insiders. Therefore, insiders could still escape insider trading liability for improperly disclosing non-public inside information. This could lead to the contravention of the insider trading prohibition in Namibia.

Given this background, it appears that the Namibian legislature overlooked the essence of prohibiting tipping and improper disclosure of non-public price sensitive. However, the position seems to be slightly revised under the 2012 *Financial Institutions and Markets Bill.* Although the 2012 *Financial Institutions and Markets Bill* appears to be a duplicate of the South African *Financial Markets Act*, great progress is made by the Namibian legislature in the bid against insider trading in Namibia. Insider trading is expressly prohibited under the 2012 *Financial Institutions and Markets Bill*.[612] For instance, the 2012 *Financial Institutions and Markets Bill* provides that actual dealing directly, indirectly or through an agent in securities traded on a regulated market by an insider who knew that he or she had inside information to which the concerned securities relates or is likely to be affected by it for personal benefit commits an offence.[613]

Taking into consideration the insider trading provision under the 2004 *Companies Act*, one may conclude that great progress is made. However, the 2004 *Companies Act* is restricted because it only covers insider trading in respect of securities listed on a regulated market. Thus, insider dealing in securities not listed on a regulated market is not expressly prohibited.

Moreover, actual dealing directly, indirectly or through an agent by an insider who has inside information in securities traded on a regulated market to which such information relates or is likely to be affected by it for the benefit of another person will be guilty and liable of an insider trading offence.[614] Accordingly, the Namibian legislature ought to be applauded in this regard. However, the provision is still flawed. For instance, the prohibition only covers insider trading in securities listed on a regulated market. This implies that insider trading in securities not listed on a regulated market is not prohibited.

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612 See generally section 150 of the 2012 *Financial Institutions and Markets Bill*; see similar provisions in section 78 of the *Financial Markets Act*.

613 Section 150(1) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 241; see also Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

614 Section 150(3) of the 2012 *Financial Institutions and Markets Bill*.

Additionally, unlawful or improper disclosure of non-public inside information is prohibited under the 2012 *Financial Institutions and Markets Bill*.[615] For instance, an insider who knows that he or she has inside information and who discloses such information to another commits an offence.[616] However, the failure of the 2012 *Financial Institutions and Markets Bill* to provide adequate guidelines on how non-public price sensitive information can be properly disclosed by insiders or issuers of securities could give rise to a host of other challenges. For instance, insiders could escape insider trading liability upon claiming ignorance on how non-public price sensitive information can be properly disclosed.

Tipping is also prohibited under the 2012 *Financial Institutions and Markets Bill*.[617] For instance, it is provided that an insider who has inside information and who encourages dealing or discourages dealing will be guilty of insider trading.[618] However, this provision could still fail because of the failure to impose liability on the person who is encouraged or discouraged to deal or to refrain from dealing.

Notably, although the Namibian legislature has made significant progress in the quest to combat insider trading in the Namibian financial markets, it appears that the Namibian legislature blindly adopted or duplicated the *Financial Markets Act*. This follows the fact that all the flaws and shortcomings embedded in the *Financial Markets Act* appears to be also embedded in the 2012 *Financial Institutions and Markets Bill*. Nonetheless, in light of the flaws stated above, it becomes evident that South Africa has established a relatively adequate and strong insider trading regulatory framework. Accordingly, the researcher submits that the integration of some of the South African provisions could enhance the prohibition of insider trading in Namibia. This follows the fact that in Namibia, only actual dealing for one's own account is currently prohibited. Thus, illicit trading for another person's account is not

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615 See section 150(5) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 242; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

616 Section 150(5) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 242; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

617 See section 150(7) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 242; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

618 Section 150(7) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 242; see further comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

expressly prohibited. In addition, the 2004 *Companies Act* does not expressly prohibit the improper disclosure of inside information. Likewise, the 2004 *Companies Act* does not prohibit tipping.

6.6 Available Penalties

In South Africa, insider trading is discouraged through the imposition of civil, criminal and administrative penalties on insider trading offenders.[619] As such, these penalties are briefly discussed below.

As pointed out, the *Financial Markets Act* imposes criminal penalties on offenders of insider trading.[620] For instance, the *Financial Markets Act* provides that any person guilty of insider trading is liable to pay a criminal sanction not exceeding R50 Million or imprisonment for a period not exceeding 10 years or both the fine and imprisonment.[621] On the other hand, the 2004 *Companies Act* provides that any person guilty of insider trading will be liable to a fine of N$8 000 or imprisonment for a period not exceeding 2 years or both the fine and imprisonment.[622]

In this regards, the researcher argues that the criminal penalties are relatively low for the deterrence purposes. This follows the fact that insider trading can involve a transaction of an amount of R200 Million. Therefore, it is submitted that fining an insider an amount of R50 Million or N$8 000 would generally not deter an insider who stands to make a profit far more than the fine. Accordingly, the researcher contends that in imposing criminal penalties, the profit made or loss avoided should be taken into consideration.

Similarly, the researcher argues that imposing maximum penalties for all insiders could be prejudicial to other types of insiders. For instance, imposing the same penalties for an individual and a company or other juristic persons could be unfair and prejudicial to an individual. Additionally, imposing the same penalties for an

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619 See section 82 and 109(a) of the *Financial Markets Act*. See further section 6 of the *Protection of Funds Act* 28 of 1986. See related comments by Chitimira H "Overbiew of the Federal Prohibition of Market Abuse in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 123, 119.

620 See generally section 109 of the *Financial Markets Act*.

621 See section 109(a) of the *Financial Markets Act*. See related comments by McGree RVV *Corporate Governance in Transitioning Economies* (Springer Science and Business Media, 2008) 63.

622 See section 241 of the 2004 *Companies Act*. See also related comments by Haoseb QS *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* (LLB Dissertation University of Namibia, 2004) 10.

insider guilty of actual dealing in securities and an insider guilty of tipping can be prejudicial to the tipper. This argument stems from the fact that the nature of these two offences differ. Although both the positions of Namibia and South Africa, the South African criminal penalties appears to be relatively better than that of Namibia. Accordingly, the Namibian legislature could take some lesson from the South African counterparts to increase the penalties to enhance the deterrence of insider trading in the Namibian financial markets.

Apart from criminal penalties, the *Financial Markets Act* also imposes civil and/or administrative penalties for the contravention of the insider trading prohibition.[623] Precisely, the *Financial Markets Act* provides that any person guilty of insider trading under the *Financial Markets Act* will be guilty and liable to pay a civil and/or administrative sanction not exceeding the equivalent of the profit made or would have been made in the transaction or the loss avoided, an amount of R1 Million, interest, and the cost of suit including investigation costs determined on the scale of the Enforcement Committee.[624]

The *Financial Markets Act* further provides that any person guilty of encouraging or discouraging dealing on the basis of inside information and guilty of improper disclosure of inside information will be liable to pay all the penalties stated above and the commission or consideration received for the encouragement, discouragement and the commission or consideration for the disclosure respectively.[625]

Unlike South Africa, the 2004 *Companies Act* of Namibia does not provide for civil and/or administrative sanctions.[626] Civil penalties are only provided under the 2012 *Financial Institutions and Markets Bill.* For instance, the 2012 *Financial Institutions and Markets Bill* provides that any person guilty of insider trading will be liable to pay to NAMFISA the equivalent of the profit made or loss avoided, a penalty for

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623 See section 82 of the *Financial Markets Act*.

624 Section 82(1) of the *Financial Markets Act* See similar provisions in clause 154 of the 2012 *Financial Institutions and Markets Bill*.

625 Section 82(2) of the 2004 *Companies Act*. See related comments by Schrindler M *Rumors in Financial Markets: Insights into Behavioral Finance* (John Wiley and Sons, 2007) 37.

626 See section 241 of the 2004 *Companies Act*. See related comments by Haoseb QS *The Effectiveness of Namibian Legislation in the Regulation of the Offence of Insider Trading* (LLB Dissertation University of Namibia, 2004) 10.

compensatory and punitive purposes, interest, costs of suit the commission or consideration received for the dealing.[627]

In light of the above, it seems that the Namibian legislature currently relies solely on criminal penalties. It is submitted that reliance only on criminal penalties is not effective enough for the purposes of deterring insider trading in any financial market.[628] This could probably be due to the standard of proof required for criminal prosecutions. The researcher argues that all types of penalties such as civil, criminal and administrative penalties should be used interchangeably like in South Africa to help attain more convictions of insider trading.

Given this background, it could be concluded that the South African legislature has established a relatively adequate insider trading framework. Although the penalties imposed for insider trading in South Africa has their flaws and shortcomings, South Africa uses all the three penalties such as civil, criminal and administrative penalties. To this end, Namibia could take some lessons from the South African insider trading penalties to assist in discouraging insider trading in Namibia.

6.7 Defences

The *Financial Markets Act* makes provision for a wide spectrum of defences.[629] The primary purpose of such defences is to protect those who allegedly practiced insider trading, provided they prove on a balance of probabilities any of the contemplated defences under the *Financial Markets Act*. The historical developments of the insider trading defences in South Africa can be traced back to the *Insider Trading Act*.[630] Nonetheless, the defences are only discussed in terms of the *Financial Markets Act*.[631]

The *Financial Markets Act* provides that an insider would not be guilty of insider trading provided he or she proves on a balance of probabilities that he or she only became an insider after he or she had given the instruction to deal to an authorised

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627 See clause 154 of the 2012 *Financial Institutions and Markets Bill*.

628 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 117.

629 See section 78 of the *Financial Markets Act*; see similar provisions in clause 150 of the 2012 *Financial Institutions and Markets Bill*. See related comments by Jooste 2000 *South African Law Journal* 296.

630 See section 4 of the *Insider Trading Act*. See further comments by Osode 2000 *Journal of African Law* 250.

631 Section 78 of the *Financial Markets Act*.

user and the instruction was not changed in any manner after he or she became an insider.[632] Moreover, an insider can escape liability if he or she can prove that he or she was acting in pursuit of a transaction in respect of which all the parties to the transaction was in possession of the said inside information.[633] The purpose of this defence is to ensure the lawful conclusion of contracts between parties in possession of the same inside information.

Moreover, the accused could escape liability if he or she prove, on a balance of probabilities, that he or she is an authorised user and was acting on specific instructions from a client and was not aware that the client was an insider at that particular time.[634] Negligence could however, defeat the whole purpose of this defence. The *Financial Markets Act* further provides that an insider would not be liable for insider trading should he or she prove that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession.[635] This defence was aimed at protecting bona fide disclosures made in the course of employment. However, the absence of the definition the term "proper performance" could lead to the ignorant disclosure of inside information.

Likewise, offenders could escape liability if they prove that they were not aware that such information was inside information.[636] The purpose of this defence is to protect those who disclosed such information in good faith in the cause of employment, office or profession.

In contrast to this, the 2004 *Companies Act* of Namibia does not currently make provision for any defence to those who allegedly practiced insider trading.[637] Accordingly, the lack of defences under the 2004 *Companies Act* imply that the accused cannot argue that he or she was aware of the inside information.

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632 Section 78(1)(b)(i) of the *Financial Markets Act*; see related comments by Cassim R and Cassim FM *Contemporary Company Law* (Juta and Company Ltd, 2012) 958.

633 Section 78(1)(b)(ii) of the *Financial Markets Act*; see similar provision in clause 150 of the 2012 *Financial Institutions and Markets Bill*.

634 Section 78(2)(b)(i) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 251.

635 Section 78(4)(b) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 252.

636 Section 78(4)(b) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 251.

637 Insider trading defences are only provided for under clause 150 of the 2012 *Financial Institutions and Markets Bill*.

Furthermore, this implies that even those who committed insider trading in good faith and in the proper performance of the functions of their employment or office are exposed to liability. The lack of defences under the 2004 *Companies Act* is one glaring omission by the Namibian legislature. Nonetheless, numerous defences are introduced under the 2012 *Financial Institutions and Markets Bill*.

For instance, the 2012 *Financial Institutions and Markets Bill* provides that an insider would not be guilty of insider trading if he or she proves on a balance of probabilities that:

(a) he or she was acting in pursuit of the completion of an affected transaction;[638]

(b) he or she only became an insider after he or she had given the instruction to deal to a registered user and the instruction was not changed in any manner after being an insider;[639]

(c) he or she is a registered authorized representative of a registered authorized user and was acting on specific instructions from a client, except where the inside information was disclosed to him or her by that client;[640] and

(d) was acting on behalf of a public sector body in pursuance of monetary policy, policies in respect of exchange rates, the management of public debt or external exchange reserves.[641]

In this regard, it seems the Namibian legislature has blindly followed the South African approach. Thus, numerous flaws and shortcomings entrenched in the *Financial Markets Act* are also entrenched in the 2012 *Financial Institutions and Markets Bill*. It is evident that the South African approach should not have been followed in Namibia.

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638 Clause 150(2)(a) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Cassim and Cassim *Contemporary Company Law* 958; see also similar provisions in section 78 of the *Financial Markets Act*.

639 Clause 150(2)(b) of the 2012 *Financial Institutions and Markets Bill*; see similar provision in section 78 of the *Financial Markets Act*. See related comments by Jooste 2000 *South African Law Journal* 296.

640 Clause 150(3)(a) of the 2012 *Financial Institutions and Markets Bill*; see similar provision in section 78 of the *Financial Markets Act*. See related comments by Jooste 2000 *South African Law Journal* 296.

641 Clause 150(3)(b) of the 2012 *Financial Institutions and Markets Bill*; see related comments by Osode 2000 *Journal of African Law* 250-251.

6.8 The Enforcement of the Insider Trading Prohibition

In South Africa, the courts, the Director of Market Abuse (DMA), the Enforcement Committee and the Johannesburg Stock Exchange (JSE) plays a pivotal role in the enforcement of insider trading laws. This is evidenced by the number of cases investigated and prosecutions of insider trading in South Africa. On the other hand, the Namibian courts, the NAMFISA and the Namibia Stock Exchange (NSX), are charged with the duty to enforce insider trading laws and supervision of the business of financial institutions in Namibia. Accordingly, the roles played by these regulatory bodies are separately discussed below.

6.8.1 The Enforcement of Insider Trading Prohibition by the DMA and the NAMFISA

The DMA is established as a committee of the FSB and is mandated to investigate, and in appropriate instances, take enforcement action in cases of market abuse in the South African financial markets.[642] The DMA can refer cases of insider trading to the FSB's Enforcement Committee.[643] Furthermore, the DMA is empowered to institute any civil proceedings of insider trading.[644]

Moreover, the DMA has powers to summon, interrogate, search or seize any person suspected of insider trading practice.[645] Moreover, DMA may also withdraw, abandon or compromise any civil proceedings in respect of insider trading.[646] Notably, the DMA has established itself as a reputable regulatory body in the South African financial markets. Unlike the DMA, the NAMFISA is not empowered to institute any prosecutorial proceedings.[647] Precisely, the NAMFISA is only empowered to summon, interrogate, search or seize any person and institute civil proceedings under the 2012 *Financial Institutions and Markets Bill*.[648]

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642 Unknown Author 2017 *FSB Press Release* https://www.fsb.co.za/NewsLibrary/PRESS%20DMA%20-%202017-07-03.pdf accessed 07 November 2017.

643 Unknown Author 2017 https://www.fsb.co.za/NewsLibrary/PRESS%20DMA%20-%202017-07-03.pdf accessed 07 November 2017.

644 Unknown Author 2007 *Watchdog Probes 14 JSE Firms for Insider Trading* https://www.iol.co.za/business-report/economy/watchdog-probes-14-jse-firms-for-insider trading-718917 accessed 28 October 2017.

645 See related comments in para 5.4.2 in Chapter Five of this dissertation.

646 See related comments in para 5.4.2 in Chapter Five of this dissertation.

647 The NAMFISA is only granted prosecutorial powers under the 2012 *Financial Institutions and Markets Bill*. See clause 155 of the 2012 *Financial Institutions and Markets Bill*.

648 See clause 155 of the 2012 *Financial Institutions and Markets Bill*.

The DMA has, to date, made commendable efforts in enhancing the combatting of insider trading in South Africa. For instance, since 1999 the DMA and its predecessor, the Insider Trading Directorate (ITD) have investigated a total of 378 insider trading cases.[649] Although 279 of such cases were closed due to lack of evidence, 88 of such cases were pursued and the DMA decided to proceed with enforcement action.[650] To date, penalties imposed on offenders by the DMA amount to approximately R102 Million.[651] The DMA has investigative personnel to timeously investigate any practice of insider trading. However, the same cannot be said about the NAMFISA. This follows the fact that the NAMFISA has in some instances, hired investigating personnel from South Africa to investigate allegations of insider trading in Namibia.[652] For instance, in 2014 six South African financial investigators were contracted by the NAMFISA to investigate and inspect the affairs of the Financial Investment Solutions (FIS) for possible insider trading practice.[653]

Accordingly, it is submitted that the NAMFISA should take some lessons from the South African counterparts and employ personnel with relevant skills and qualifications to investigate and inspect any allegations of insider trading.

6.8.2 The Enforcement of Insider Trading Prohibition by the Enforcement Committee and the NAMFISA

The Enforcement Committee is made up of members appointed by the FSB.[654] Accordingly, the Enforcement Committee was established to *inter alia*, enhance the enforcement and combatting of insider trading in Namibia.[655] The Enforcement Committee is empowered to impose administrative penalties such as a penalty for punitive purposes.[656] Moreover, the Enforcement Committee may also impose

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649 Keetse S "Market Abuse Investigations Update" 2016 *FSB Bulletin* 6, 1.

650 Keetse 2016 *FSB Bulletin* 6.

651 Keetse 2016 *FSB Bulletin* 6.

652 Unknown Author 2014 *Namfisa and FIS at Loggerheads* http://www.informante.web.na/namfisa-and-fis-loggerheads.14736 accessed 27 November 2017.

653 See Unknown Author 2014 http://www.informante.web.na/namfisa-and-fis-loggerheads.14736 accessed 27 November 2017.

654 Govender D 2010 *The Enforcement Committee of the Financial Services Board: Presentation at the Annual FAIS Conference* https://www.fsb.co.za/Departments/fais/Communication/Documents/The%20Enforcement%20Comittee%20of%20the%20FSB-%20Deva%20Govender.pdf accessed 07 November 2017.

655 See the powers of the Enforcement Committee in para 5.4.3 in Chapter Five of this dissertation.

656 See the powers of the Enforcement Committee in para 5.4.3 in Chapter Five of this dissertation.

compensatory orders on the market abuse offenders.[657] Cost orders may also be imposed by the Enforcement Committee. Notably, the Enforcement Committee may also receive cases from the DMA.[658]

The Enforcement Committee continues to play a significant role in the enforcement of insider trading laws in South Africa. It is therefore evident that the establishment of the Enforcement Committee was a move in the right direction in the bid against insider trading in South Africa. Recently, in *Zietsman v The Financial Services Board*,[659] the Enforcement Committee fined the appellants in the sum of R1 000 000 and ordered them to pay the costs, jointly and severally. In 2017, MJ Brown was fined by the Enforcement Committee for an amount of R350 000 for trading in 117 000 shares on the JSE on the basis of inside information.[660] Likewise, the NAMFISA is also charged with a duty to enforce insider trading laws in Namibia.[661] The NAMFISA is granted similar powers in relation to the supervision of business of financial institutions in Namibia.[662] Similar to the Enforcement Committee, the NAMFISA has limited powers. This follows the fact that the NAMFISA cannot execute its duties without attaining the required consent of the Minister of Finance.[663] Although the NAMFISA has made commendable efforts to effectively combat insider trading in Namibia, the NAMFISA is yet to attain its successful prosecution on insider trading.[664]

In light of the above, it suffices that the Enforcement Committee has been relatively effective in relation to the detection, prevention and deterrence of insider trading in South Africa. The same cannot be said about the NAMFISA. This could probably be due to several factors such as the lack of prosecutorial powers and the lack of

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657 See the powers of the Enforcement Committee in para 5.4.3 in Chapter Five of this dissertation.

658 See the powers of the Enforcement Committee in para 5.4.3 in Chapter Five of this dissertation.

659 *Zietsman and Another v Directorate of Market Abuse and Another* (A679/14) [2015] ZAGPPHC 651 2016 (1) SA 218 (GP) para 3.

660 Burkhardt P "Insider Trading Rocks SA Coal Mine" *NEWS24* (15 March 2017).

661 See related comments in para(s) 3.2, 3.3 and 3.4 in Chapter Three of this dissertation.

662 See section(s) 3 and 4 of the *NAMFISA Act*. See related comments in para 3.2 in Chapter Three of this dissertation.

663 See section(s) 3 and 4 of the *NAMFISA Act*. See also related comments in para 3.2 in Chapter Three of this dissertation.

664 See the Namibia Financial Institutions Supervisory Authority 2017 *Annual Report* https://www.namfisa.com.na/wp-content/uploads/2017/09/Annual-Report-2017.pdf accessed 27 November 2017.

adequate surveillance systems to timeously detect insider trading practices within the Namibian financial markets.[665]

6.8.3 The Enforcement of Insider Trading Prohibition by the Courts

The South African courts continues to play a crucial role in the enforcement of insider trading laws in South Africa. However, only courts of competent authority may preside over market abuse cases.[666] It should be noted that the courts normally preside over market abuse cases on a referral bases from the FSB.

The *Financial Markets Act* does not provide which courts could be deemed as courts of competent authority. Accordingly, the *Financial Markets Act* provides that the prosecution of market abuse cases vests with the Director of Public Prosecutions (DPP).[667] Nonetheless, the DPP may only preside over market abuse on a referral basis. Accordingly, an insider accused of insider trading could only be prosecuted upon the DPP proving beyond a reasonable doubt that the accused did commit the insider trading offence.[668] The courts may also preside over an appeal by any person aggrieved by the decision of the FSB, the Registrar of Securities Services or the Board of Appeal (BOA) and also empowered to review such a decision.[669]

Unlike the position in South Africa, there appears to be no co-operation between the NAMFISA and the Namibian courts, specifically in relation to insider trading prohibition. This could probably be due to the fact that the NAMFISA has no prosecutorial powers. Furthermore, it could be due to the fact that the powers of the NAMFISA are not specific in relation to insider trading. Accordingly, it is submitted that the NAMFISA should be given prosecutorial powers to ensure co-operation between the NAMFISA and the Namibian courts in the bid against insider trading.

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665 The 2004 *Companies Act* does not confer any prosecutorial power upon the NAMFISA. See section 241 of the 2004 *Companies Act*. The NAMFISA is only granted prosecutorial powers under the 2012 *Financial Institutions and Markets Bill*. See clause 155 of the 2012 *Financial Institutions and Markets Bill*.

666 Competent courts include High Court and Regional Courts. See Chitimira H "Overview of Selected Role Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 118.

667 Chimpango B *The Development of African Capital Markets: A Legal and Institutional Approach* (Taylor & Francis, 2017) 130; see also Chitimira 2014 *Speculum Juris* 118. See also section 84(10) of the *Financial Markets Act*.

668 Chitimira 2014 *Speculum Juris* 119.

669 Chitimira 2014 *Speculum Juris* 120.

6.8.4 The Enforcement of Insider Trading Prohibition by the JSE and the NSX

The JSE plays a very crucial role in the detection of insider trading in the South African financial markets. Precisely, the JSE is charged with the duty to detect and prevent insider trading in the South African financial markets.[670] This is done through its Market Practices Department and the Surveillance Division.[671]

In order to give effect to the prevention of insider trading in South Africa, all the registered companies are promptly required to disclose price-sensitive information in relation to any securities.[672] This is done *inter alia* to, reduce the occurrence of insider trading in the South African financial markets. It is also required of such companies and other issuers of securities to make a public announcement through the Exchange News Service.[673] In order to avoid unlawful or improper disclosure of inside information, the JSE provides procedures that must be followed throughout the publication process.[674]

In respect of the detection of insider trading in the South African financial markets, the JSE established the Surveillance Division.[675] The Surveillance Division was established primarily to detect insider trading practices.[676]

On the other hand, the NSX aims to enable and deepen the capital markets of Namibia.[677] This is achieved through working closely with other stakeholders and the financial sector.[678] Throughout the years, the NSX has been mandated to:

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670 Chimpango *The Development of African Capital Markets: A Legal and Institutional Approach* 130.

671 Chimpango *The Development of African Capital Markets: A Legal and Institutional Approach* 130.

672 Chitimira 2014 *Speculum Juris* 119-110.

673 The Stock Exchange News Service is defined as a service provided by the JSE upon which users can access company announcements such as mergers, take-overs, rights offers, capital issues, cautionaries - all of which have a direct impact on the movement in the market.

674 See JSE 2017 *JSE Listing Requirements* https://www.jse.co.za/content/JSEEducationItems/Service%20Issue%2017.pdf accessed 07 November 2017.

675 Chitimira 2014 *Speculum Juris* 110.

676 Borkum H 2003 *Inside the JSE, Watchers Keep Tabs on Insider Trading* https://www.iol.co.za/business-report/opinion/inside-the-jse-watchers-keep-tabs-on-insider trading-770606 accessed 26 October 2017.

677 See Nuyoma D 2016 *Namibia Stock Exchange Annual Report* 1 http://nsx.com.na/wp-content/uploads/2012/11/NSX-Annual-Report-Low-Res-0022.pdf accessed 27 November 2017.

678 See Nuyoma 2016 http://nsx.com.na/wp-content/uploads/2012/11/NSX-Annual-Report-Low-Res-0022.pdf accessed 27 November 2017.

(a) make capital investments easier and providing a wide range of tradable instruments; and

(b) create and maintain an effective, regulated environment to facilitate the way issuers of securities and investors contract safely and securely.[679]

However, it appears that the NSX has not been very effective in respect to the combatting of insider trading in Namibia. Unlike the NSX, the JSE contributes immensely to the detection of insider trading practices in South Africa.

Given this background, it therefore follows that South Africa has established a relatively strong insider trading laws enforcement framework. Numerous role players have been established. Also, there appears to be co-operation between these role players and the courts in the bid to combat insider trading in South Africa. This could also be evidenced by recent prosecutions of the FSB's DMA and the Enforcement Committee.[680]

Unlike the position in South Africa, there appears to be no co-operation between the Namibian courts and the NAMFISA. The powers of the NAMFISA are not robust enough for combatting insider trading in the Namibian financial markets.[681] Also, the NAMFISA currently has no prosecutorial powers in relation to insider trading.[682] To this end, the NAMFISA is yet to obtain a successful prosecution or settlement of an insider trading case in the Namibian financial markets. In addition, the NSX does not have specific duties or powers in relation to the combatting of insider trading.

Given this background, it is clear that South Africa has established a relatively strong and robust insider trading enforcement framework compared to Namibia. Nonetheless, the insider trading enforcement framework of Namibia could be enhanced through the adoption of the *Namibia Financial Institutions Supervisory Authority Bill*[683] and the 2012 *Financial Institutions and Markets Bill*. This follows the

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679 See Nuyoma 2016 http://nsx.com.na/wp-content/uploads/2012/11/NSX-Annual-Report-Low-Res-0022.pdf accessed 27 November 2017.

680 See *Zietsman case*; see also *Pather and Another v Financial Services Board and Others* (866/2016) [2017] ZASCA 125.

681 This could probably be due to the fact that the powers of the NAMFISA are restricted and that it cannot execute its duties independently form the Minister of Finance. See section 3 of the *NAMFISA Act* 3 of 2001.

682 These powers are only given to the NAMFISA under the 2012 *Financial Institutions and Markets Bill*. See clause 155 of the 2012 *Financial Institutions and Markets Bill*.

683 The *Namibia Financial Institutions Supervisory Authority Bill*, 2012 (2012 *NAMFISA Bill*).

fact that the NAMFISA is given rather robust and strong powers under the 2012 *NAMFISA Bill* and the 2012 *Financial Institutions and Markets Bill*. These powers include prosecutorial powers. Furthermore, the NAMFISA is granted powers to make market abuse rules under the 2012 *Financial Institutions and Markets Bill*.[684]

6.9 Conclusion

Although it appears that the South African insider trading regulatory framework is not completely adequate since it has its own flaws, it is submitted that the South African approach towards the practice of insider trading is to a larger extent, comparable to other regulatory framework of numerous countries. Regardless of the flaws of the South African insider trading regulatory framework, it should be noted that numerous cases have been settled in the South African courts.

Given this background, the researcher contends that the Namibian legislature should draw some useful lessons from its South African counterpart. The researcher strongly recommends the establishment of other regulatory bodies to enhance the insider trading prohibition in Namibia. Therefore, it is hoped that the Namibian legislature would adopt some of the South African approaches towards insider trading prohibition. For instance, the Namibian legislature could incorporate administrative penalties like its South African counterpart. Also, the Namibian legislature could establish alternative enforcement measures and other regulatory bodies to work closely with the NAMFISA.

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684 See generally clause 155 and 157 of the 2012 *Financial Institutions and Markets Bill*.

CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

Although the Namibian legislature has made significant progress in the combatting of insider trading in its financial markets, numerous flaws and shortcomings are still found in the Namibian insider trading regulatory framework.[685] The introduction of the *Financial Institutions and Markets Bill*,[686] which appears to be more of a duplicate of the South African *Financial Markets Act*,[687] is a clear reflection of the intentions of the Namibian legislature to effectively combat insider trading in its regulated financial markets.[688] Nonetheless, the 2012 *Financial Institutions and Markets Bill* seems to be a blind adoption of the *Financial Markets Act*. This follows the fact that the 2012 *Financial Institutions and Markets Bill* contains similar provisions.[689] Moreover, flaws and shortcomings embedded in the *Financial Markets Act* are also found in the 2012 *Financial Institutions and Markets Bill.*[690] The 2012 *Financial Institutions and Markets Bill* is in its final stage and it is expected to come into effect at the end of the 2017 financial year. As pointed out earlier, the 2012 *Financial Institutions and Markets Bill* appears to be a blind adoption of the South African approach under the *Financial Markets Act*. Thus, significant flaws of the *Financial Markets Act* appears repetitively under the 2012 *Financial Institutions and Markets Bill*. It therefore follows that this approach should have not been blindly followed in Namibia.

Apart from the 2012 *Financial Institutions and Markets Bill*, there is still no piece of legislation in Namibia that makes provision for civil liability for insider trading and defences for those who allegedly contravened the insider trading provision.[691]

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685 See the analysis in Chapter Four of this dissertation.

686 The *Financial Institutions and Markets Bill*, 2012 (2012 *Financial Institutions and Markets Bill*).

687 The *Financial Markets Act* 19 of 2012 (*Financial Markets Act*).

688 The 2012 *Financial Institutions and Markets Bill* was developed primarily to consolidate and harmonise the laws regulating financial institutions and financial markets in Namibia- See the Preamble of the 2012 *Financial Institutions and Markets Bill*; see also Chapter IX of the 2012 *Financial Institutions and Markets Bill*; The 2012 *Financial Institutions and Markets Bill* prohibits all offences of insider trading-see clause 150 of the 2012 *Financial Institutions and Markets Bill.*

689 See section 78 of the *Financial Markets Act* read with clause 150 of the 2012 *Financial Institutions and Markets Bill*

690 See the analysis in Chapter Four and Chapter Five of this dissertation.

691 The 2012 *Financial Institutions and Markets Bill* is the first legislation to provide for defences for insider trading in Namibia-see clause 150 of the 2012 *Financial Institutions and Markets Bill.*

Moreover, the criminal penalties for insider trading under the current *Companies Act*[692] is relatively minimal and thus ineffective for deterrence purposes. There are no clear, precise and adequate definitions of insider trading related terms in the 2004 *Companies Act*.[693] There is currently no right of action for all affected and aggrieved persons. In addition, the insider trading provisions appears to be restricted in a number of respects.[694]

Accordingly, it is against this background that this chapter seeks to recommend possible measures that can be employed to eradicate insider trading practices in the Namibian financial markets. In this regard, it is hoped that such recommendations will assist the relevant authorities to effectively combat insider trading in Namibia. This could further help such authorities to maintain the integrity of the Namibian financial markets.

7.2 Recommendations

The researcher provides some recommendations that are aimed at enhancing the detection, prevention and combatting of insider trading in Namibia. In addition, such recommendations are explained as indicated below.

Accordingly, it is recommended that:

(a) *the current insider trading provisions under the 2004 Companies Act should be repealed or amended*

Currently, the Namibian insider trading regulatory framework is characterised by numerous flaws and shortcomings.[695] For instance, the penalties imposed under the 2004 *Companies Act* are relatively low for deterrence purposes. Insider trading related terms such as insider trading, insider, inside information and market abuse rules are also not adequately defined under the 2004 *Companies Act*. The application of the insider trading provision under the 2004 *Companies Act* is restricted only to natural persons and primary insiders such as directors and officers.[696] Furthermore, the 2004 *Companies Act* only applies to securities traded on

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692 Section 241 of the *Companies Act* 28 of 2004 (2004 *Companies Act*).

693 Insider trading related terms includes "inside information", "insider", "market corner" and "market abuse rules". See clause 149 of the 2012 *Financial Institutions and Markets Bill*.

694 See the analysis in para 4.3 in Chapter Four of this dissertation.

695 See the analysis in para 4.3 in Chapter Four of this dissertation.

696 See section 241 of the 2004 *Companies Act*.

a regulated market only and only applies to securities such as shares and debentures.[697] Thus, the 2004 *Companies Act* does not expressly prohibit insider trading by juristic persons and secondary insiders such as tippees and tippers. The 2004 *Companies Act* does not expressly prohibit insider trading in entities which are not companies for the purposes of the 2004 *Companies Act*.

In light of the above, the researcher recommends that the current insider trading provisions should be repealed or amended. Alternatively, it is recommended that the current insider trading provisions should be revised to ensure that it is applicable to all the relevant persons, companies and other juristic persons.

(b) *the 2012 Financial Institutions and Markets Bill be urgently adopted as an Act of Parliament to enhance the combatting of insider trading in Namibia*

Although the 2012 *Financial Institutions and Markets Bill* is more of a duplicate of the *Financial Markets Act* of South Africa, significant progress in relation to the regulation of insider trading is made in Namibia.[698] In light of the insider trading provisions under the 2012 *Financial Institutions and Markets Bill*, it appears that the insider trading regulation in Namibia could be enhanced.[699] Accordingly, if the 2012 *Financial Institutions and Markets Bill* is adopted, it will be Namibia's first insider trading legislation to make provision for civil liability arising from insider trading.[700] Moreover, the 2012 *Financial Institutions and Markets Bill* will be Namibia's first legislation to provide defences for those who allegedly contravened the insider trading provision.[701] It should further be noted that the 2012 *Financial Institutions and Markets Bill* expressly defines insider trading related terms.[702]

Accordingly, the researcher recommends that the 2012 *Financial Institutions and Markets Bill* be adopted as an *Act* of Parliament to enhance the regulation of insider

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697 See section 241 of the 2004 *Companies Act*.

698 Insider trading related terms are adequately defined, civil liability for insider trading is provided for, defences for insider trading are introduced and the penalty for insider trading has slightly increased-see clause 149, 154, 150 and 160 of the 2012 *Financial Institutions and Markets Bill*.

699 The 2012 *Financial Institutions and Markets Bill* specifically prohibits insider trading in clause 150; Insider trading related terms are defined in terms of the 2012 *Financial Institutions and Markets Bill*. See clause 149 of the 2012 *Financial Institutions and Markets Bill*.

700 See clause 154 of the 2012 Financial Institutions and Markets Bill entitled "Civil Liability Arising from Insider Trading".

701 See clause 150 of the 2012 *Financial Institutions and Markets Bill*.

702 See clause 149 of the 2012 *Financial Institutions and Markets Bill* entitled "Definitions".

trading in Namibia. This could assist in the effective combatting of insider trading. As highlighted earlier, the 2012 *Financial Institutions and Markets Bill* already has its flaws and shortcomings.[703] Therefore, the 2012 *Financial Institutions and Markets Bill* could alternatively be amended and adopted to address the flaws and shortcomings that are already embedded in the 2012 *Financial Institutions and Markets Bill.*

(c) *the legislature should promote insider trading educational and awareness programmes*

Currently, there are relatively few and inadequate awareness and education programmes on insider trading in Namibia. This could be one of the reason the Namibian insider trading regulatory framework has not been very effective in relation to the combatting of insider trading practices to date. Awareness and educational programmes are important because they ensure that the public and all relevant persons are aware of their rights and the effects of insider trading.[704] Moreover, such programmes are essential for imparting knowledge to the public and all relevant persons on what amounts to lawful and unlawful trading in securities in the Namibian financial markets. Unlike Namibia, the Financial Services Board has also embarked on an endeavour to increase awareness to the public and other relevant persons through the Consumer Education Department programmes on insider trading.[705] This department has the duty to raise and promote insider trading awareness in South Africa.[706]

In this regard, the researcher recommends that awareness and educational programmes should be introduced by the Namibia Financial Institutions Supervisory Authority (NAMFISA) to enhance the regulation and enforcement of the insider trading laws in Namibia. This could also enhance the integrity of the Namibian financial markets.

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703 *See the* analysis in para 4.4 in Chapter Four of this dissertation.

704 OECD *Securities Markets in Eurasia* (OECD Publishing, 2005) 17.

705 Michaels R 2000 *Media Release: FSB to Promote Consumer Education* https://www.fsb.co.za/Departments/communications/Documents/Consumer%20Education.pdf accessed 09 October 2017.

706 Michaels 2000 https://www.co.za/Departments/communication/Documents/Consumer%20Education.pdf accessed 09 October 2017.

(d) ***deterrence should not be the only policy goal for the insider trading prohibition in Namibia***

It should be noted that the imposition of severe civil and criminal penalties to those who allegedly contravened the insider trading provisions could increase deterrence of insider trading in Namibia.[707] However, Namibia should not only rely on the policy goal of deterrence to combat insider trading. Instead, other anti-insider trading enforcement approaches such as detection and prevention of insider trading must be utilised as well. In South Africa, the FSB also focuses on the detection and prevention of insider trading through the Johannesburg Securities Exchange (JSE) surveillance systems, and press or media releases (radio and television) respectively.[708] Accordingly, the researcher recommends that the policy goal of deterrence should be supported by other policy goals such as remedial, correctional and or other non-deterrent measures. Notably, failure to timeously detect or prevent insider trading practices could lead to the increased insider trading practices in Namibia.

For instance, the imposition of other appropriate sanctions such as a ban from directorship or the cancellation of trading licences might effectively prevent the commission of insider trading in the Namibian financial markets. Therefore, it is recommended that deterrence should not be the only policy goal and other enforcement methods such as detection and prevention of insider trading should be adopted.

(e) ***the mandatory duty to properly disclose inside information should be statutorily imposed on all entities and issuers of securities***

The 2004 *Companies Act* does not provide for a mandatory duty of disclosure of inside information by companies and other registered issuers of securities. Likewise, the 2012 *Financial Institutions and Markets Bill* does not expressly provide for mandatory duty of disclosure of inside information on all issuers of securities. Notably, the *Financial Markets Act* also does not expressly provide for mandatory

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707 CSA Insider Trading Task Force 2003 *Illegal Insider Trading in Canada: Recommendations On Prevention, Detection and Deterrence* http://investorvoice.ca/Research/CSA_InsiderTradingTaskForce_12Nov03.pdf accessed 26 September 2017 35.

708 International Monetary Fund *South Africa: Detailed Assessment of Implementation on IOSCO Principles-Securities Markets* (International Monetary Fund) 644.

duty of disclosure of inside information on all issuers of securities. It appears that both the Namibian and South African policy makers over looked the fact that the duty of disclosure of information by companies and other issuers of securities has numerous benefits including:

(i) the reduction of insider trading activities;
(ii) giving equal opportunities to all persons to trade on disclosed inside information; and
(iii) enhancing the efficiency of the financial market by increasing information on which market analysts can draw from.[709]

In the premises, it is recommended that the Namibian and South African legislature should statutorily introduce a duty on companies and other issuers of securities to disclose any inside information that is likely to have a material effect on the price of securities or financial instruments in the Namibian and South African financial markets. Accordingly, failure by a company or an issuer of securities to timeously disclose inside information should be made a punishable offence.

(f) *adequate defences for insider trading should be enacted*

Apart from defences provided under the 2012 *Financial Institutions and Markets Bill*,[710] there are currently no defences available to a person who allegedly contravened the insider trading provision in Namibia. Unlike South Africa, it appears that the Namibian legislature over looked the fact that others might commit insider trading unknowingly and unintentionally.[711] For instance, the legislature should consider enacting defences for those who unknowingly discloses non-public inside information or those who might be forced to trade in securities on the basis of inside information.

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709 Steinberg MI *Securities Regulation: Liabilities and Remedies* (Law Journal Press, 2016) 2-77.
710 See clause 150 of the 2012 *Financial Institutions and Markets Bill*.
711 This follows the fact that Namibian insider trading regulatory framework does not make provision for any defence for those who commits insider trading unknowingly or unintentionally.

(g) *a private right of action to issuers of securities and other affected parties should be introduced*

The 2004 *Companies Act* does not provide for a private right of action for affected and aggrieved persons.[712] Unlike the *Financial Markets Act*, where affected and aggrieved persons could claim compensation through the FSB,[713] such private right of action is not provided for under the 2004 *Companies Act*. Having a private right of action to issuers of securities can actually assist in discouraging insider trading activity.[714] In this regard, it is recommended that the Namibian legislature should introduce a private right of action to either claim directly from offenders or from the NAMFISA.

(h) *the legislature should introduce different penalties for different offenders and insider trading offences*

As stated in Chapter Four, insider trading can be committed by both natural persons and juristic persons.[715] Moreover, there are various practices which amounts to insider trading and which differs in nature.[716] For instance, insider trading can be committed for own benefit or the benefit of another, tippees, encouragement or discouragement of others from dealing and through illicit disclosure of non-public price-sensitive information.[717]

In light of the above, the researcher recommends that different penalties should be imposed for insider trading for one's own benefit or the benefit of another, tipping, and for encouraging or discouraging other from dealing in securities on the basis of non-public price sensitive inside information. The researcher also recommends that different penalties should be imposed against those who unlawfully disclose no-public price sensitive information that relates to listed and affected securities.

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712 See section 241 of the 2004 *Companies Act*.

713 See the role of the Financial Services Board (FSB) in Chapter Five of this Dissertation.

714 Kravitt JHP *Securitization of Financial Assets* 3rd Ed (Aspen Publishers, 2012) 12-10; Karjala DS "Statutory regulation of Insider trading in Impersonal Markets" 1982 *Duke Law Journal* 637.

715 De Villiers M *Share Repurchase is the Ultimate Insider Trading* (LLM Dissertation University of Pretoria, 2016) 18.

716 These practices include insider trading for own benefit, for the benefit of another person, tipping, encouraging dealing in securities or discouraging dealing on the basis of inside information and disclosure of inside information. See clause 150 of the 2012 *Financial Institutions and Markets Bill*; See also section 78 of the *Financial Markets Act*.

717 See para 3.4.2 in Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER LJ* 956, 937.

Likewise, it is recommended that different penalties should be provided for natural and juristic persons. This follows the fact that the nature of dealing for one's own benefit or the benefit of another, the nature of tipping and the nature of unlawful disclosure of non-public price sensitive information are not the same, therefore, imposing the same or equal penalties for different insider trading offences would be unfair and prejudicial on other insiders such as tippees or tippers.

(i) *the legislature should establish other regulatory bodies for the enforcement of insider trading laws apart from the NAMFISA*

In South Africa, the FSB was established, which also has two regulatory committees including the Directorate of Market Abuse (DMA) and the Enforcement Committee, for the enforcement of the insider trading prohibition.[718] Nonetheless, the same cannot be said about Namibia. In Namibia, the responsibility of the enforcement of the insider trading prohibition lies solely with the NAMFISA.[719] Insider trading laws are supported by effective enforcement.[720] Given this background, the researcher recommends the establishment of other regulatory bodies apart from the NAMFISA to enhance the combatting and enforcement of insider trading in Namibia.

(j) *companies should have internal regulatory measures that prohibits insider trading*

Notably, all issuers of securities and companies should be encouraged and statutorily mandated to detect and prevent insider trading within their respective entities. In this regard, the researcher recommends that companies and other issuers of securities should introduce internal regulatory measures to combat insider trading.[721] For instance, companies may provide incentives for those who report any practice of insider trading. This could also enhance the prevention and detection of insider trading in Namibia.

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718 These includes the FSB as established in terms of the *Financial Services Board Act* 97 of 1990, the Director of Market Abuse (DMA) as established as another committee of the FSB in terms of section 83(1)(a) of the *Securities Services Act* 36 of 2004 and the Enforcement Committee established as another committee of the FSB which adjudicated and administrated on all forms of market abuse. See also Luiz "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 151

719 See the roles, objectives and powers of the NAMFISA in Chapter Three of this Dissertation.

720 Armour J, Awrey D, Davies PL, Enriques L, Gordon JN, Mayer C and Payne J *Principles of Financial Regulation* (Oxford University Press, 2016) 578.

721 Pandey A 2017 *What Measures Must a Listed Company Implement to Ensure it Complies With Insider Trading Regulations* https://blog.ipleaders.in/listed-company-insider-trading-regulation/ accessed 26 September 2017.

(k) ***the NAMFISA should have adequate surveillance systems with electronic alerts to specifically identify insider trading***

It is often difficult to detect insider trading in any financial market.[722] In many jurisdictions, including South Africa, insider trading is primarily detected through the use of market surveillance systems.[723] The effective use of market surveillance systems could enhance the detection and combatting of insider trading in Namibia.[724]

Therefore, it is recommended that the relevant authorities of Namibia should provide adequate surveillance systems in order to detect insider trading in the Namibian financial markets. This could enable the NAMFISA to timeously detect and prevent insider trading activities in the Namibian financial markets.

(l) ***the legislature should introduce administrative sanctions for the insider trading offence***

Currently in Namibia, insider trading is discouraged through criminal sanctions and penalties.[725] Thus, no provision is made for administrative and civil sanctions. Unlike Namibia, the South African insider trading regulatory framework provides for administrative sanctions, criminal sanctions and civil penalties for insider trading.[726] In South Africa, administrative sanctions are proven to be the most effective sanctions.[727] Most of the insider trading cases in South Africa have been for administrative sanctions.[728] Moreover, administrative sanctions appears to be more flexible and thus finds application in most of the insider trading cases. Accordingly,

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722 Unknown Author 2009 *Why Insider Trading is Hard to Define, Prove and Prevent* http://knowledge.wharton.upenn.edu/article/why-insider-trading-is-hard-to-define-prove-and prevent/ accessed 06 November 2017.

723 The South African FSB uses the JSE surveillance systems to detect insider trading. See Borkum H 2003 *Inside JSE, Watchers Keep Tabs on Insider Trading* https://www.iol.co.za/business-report/opinion/inside-the-jse-watchers-keep-tabs-on-insider trading-770606. accessed 22 October 2017.

724 Jaswal A 2015 *Market Surveillance Systems for Exchanges: A Look at the Leading Products* https://www.celent.com/insights975512227 accessed 24 October 2017.

725 See section 241 of the 2004 *Companies Act*.

726 See Cairns P 2015 *Precedent-Setting Case Clarifies Insider Trading in SA* https://www.moneyweb.co.za/news/companies-and-deals/precedent-setting-case-clarifies-insider-trading-in-sa/. accessed 24 October 2017.

727 This information was obtained from an interview that was conducted at the FSB by the researcher, with Mr Solly Keetse (Director of the DMA) and Mr Alexander Pascoe (Chief Investigator of the DMA) on the 6th of October 2017.

728 See the Financial Services Board 2017 *Enforcement Actions* https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx. accessed 24 October 2017.

the researcher recommends that the Namibian legislature should adopt administrative sanctions. This follows the fact that reliance on criminal sanctions and penalties only could lead to many offenders escaping insider trading liability.

7.3 Conclusion

The 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill* signifies great progress by the Namibian policy makers in the bid to effectively combat insider trading in the Namibian financial markets. However, taking into consideration the flaws and shortcomings embedded in the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill* as discussed in this dissertation, it therefore follows that such progress has not yielded the expected or intended results as it fell short of solving the insider trading problem in Namibia.[729]

Although the 2012 *Financial Institutions and Markets Bill* signifies a new regime in the insider trading regulatory framework of Namibia, it appears that some of the flaws and shortcomings that were embedded in the 1973 *Companies Act* and the 2004 *Companies Act* are still, to a larger extend, not adequately addressed in the 2012 *Financial Institutions and Markets Bill*.[730]

For instance, the application of the insider trading prohibition under the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill* is still to a larger extent, restricted as highlighted in this dissertation. Similarly, the penalties imposed in both the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill* still appears to be relatively low to effectively deter insider trading in Namibia.

The establishment of the NAMFISA was also one improvement by the Namibian policy makers in the quest to effectively curb insider trading in Namibian financial markets. However, it is unfortunate to note that the NAMFISA is yet to yield intended results which is to effectively enforce insider trading laws in the Namibian financial institutions. Accordingly, the researcher argues that the establishment of the NAMFISA has not addressed the issue of effective enforcement of insider trading laws in the Namibian financial institutions.

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729 Numerous flaws and shortcomings are still identified under both the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill*. See related analysis in Chapter Four of this dissertation.

730 See the analysis in Chapter Four of this dissertation.

In light of these flaws and shortcomings, it is submitted that the insider trading provisions under the 2004 *Companies Act* and the 2012 *Financial Institutions and Markets Bill* be extensively revised in accordance with the recommendations made in this dissertation. It is further submitted that the legislature should consider establishing other regulatory bodies to work closely with the NAMFISA in the bid to combat insider trading in Namibia.

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LIST OF ABBREVIATIONS

AD	Appellate Division
BOA	Board Of Appeal
Cornell L Rev	Cornell Law Review
Del J Corp L	Delaware Journal of Corporate Law
Dick J Int'l L	Dickinson Journal of International Law
DMA	Directorate of Market Abuse
DPP	Directorate of Public Prosecutions
FIS	Financial Investment Solutions
FSB	Financial Services Board
IOSCO	International Organisation of Securities Commission
ITD	Insider Trading Directorate
J Corp Law	Journal of Corporation Law
LLM	Master of Law
NAMFISA	Namibia Financial Institutions Supervisory Authority
NSX	Namibia Stock Exchange
PER LJ	Potchefstroom Electronic Law Journal
SADC	Southern African Development Community
SA Merc LJ	South African Mercantile Law Journal
SECZ	Securities Exchange Commission of Zimbabwe
Stan L Rev	Stanford Law Review

Temp Int'l & Comp LJ	Temple International & Comparative Law Journal
U Fla L Rev	University of Florida Law Review
Va L Rev	Virginia Law Review
WEF	World Economic Forum