The regulation of insider trading in Zimbabwe: Proposals for reform

PP Mokone

orcid.org/0000-0002-4427-3444

A thesis submitted in fulfillment of the requirements for the degree Doctor of Laws at the North-West University

Promoter: Prof HT Chitimira

Graduation: July 2019

Student Number: 22921389

SOLEMN DECLARATION

I, **Philadelphia Pontsho Mokone**, hereby declare that the thesis entitled: **The Regulation of Insider Trading in Zimbabwe: Proposals for Reform**, is submitted in fulfilment of the requirements for the Doctor of Laws (LLD) degree and is a product of my research and/or opinions with the exception of references of the sources acknowledged herein. I have not at any prior time submitted it to any university or any person for any qualification.

Name of Candidate: Philadelphia Pontsho Mokone

University Number: 22921389

Signed by Mokone PP at NWU this 14Dth day of December 2018

Declared before me on this 14th day of December 2018

Signature of Promoter:

ACKNOWLEDGEMENTS

I would like to thank Professor HT Chitimira who selflessly and professionally mentored me in this research and nominated me for NRF Bursary Fund which helped me in my studies. His constant guidance, support and patience as my supervisor in this study facilitated the production of this work.

I would like to thank Mr P Alexander (Former Chief Investigator of the Directorate of Market Abuse), Mr S Keetse (Former Director of the Directorate of Market Abuse), Mataruka T (Legal and Licensing Officer of the Securities and Exchange Commission of Zimbabwe) and Mahombera N (Surveillance and Risk Manager of the Securities and Exchange Commission of Zimbabwe), for assisting me with the relevant information.

I would also like to thank the National Research Fund. *"This work is based on the research supported in part by the National Research Foundation of South Africa (Grant Number: 106056)".*

DEDICATION

I dedicate this work to my family and friends who have been supporting me in this journey.

ABSTRACT

Insider trading can be defined as a practice by which one person who is in possession of non public price-sensitive information deals with such information in relevant listed securities for personal benefit. In Zimbabwe, insider trading is prohibited by the *Securities Act* 17 of 2004 [Chapter 24:25] as amended. However, since the enactment of the Act very few insider trading cases have been settled by the Securities and Exchange Commission of Zimbabwe (SECZ) or prosecuted before the courts. The challenge with the regulation of insider trading in Zimbabwe is the lack of resources experienced by the enforcement authorities. Such lack of resources negatively affects the effective enforcement of the insider trading prohibition. In addition, the penalties are not stringent enough to combat insider trading activities. This research also examines and investigates the adequacy of the relevant Zimbabwean laws in order to recommend possible measures that could be employed to promote an effective and adequate insider trading statutory regulatory framework in Zimbabwe.

Keywords: insider trading, enforcement, regulation, penalties, inside information.

SOLEMN DECLARATION i
ACKNOWLEDGEMENTS ii
DEDICATION iii
ABSTRACT iv
CHAPTER ONE
RESEARCH OUTLINE AND CONTEXT
1.1 Introduction **1**
1.2 Background of the Research **3**
1.2.1 The Regulation of Insider Trading in Rhodesia prior to 1980 4
1.2.2 The Regulation of Insider Trading in Zimbabwe between 1980 and 2000 7
1.2.3 The Regulation of Insider Trading in Zimbabwe Subsequent to 2000 9
1.3 Literature Review **12**
1.4 Statement of the Problem **22**
1.5 Aim and Objectives **25**
1.5.1 Aims 25
1.5.2 Objectives 25
1.6 Rationale of the Study **26**
1.7 Justifications for Comparative Analysis **26**
1.8 Specific Matters to be Examined **28**
1.9 Limitation of Study **28**
1.10 Research Methodology **29**
1.11 Structure of the Dissertation **30**

CHAPTER TWO
THE HISTORICAL DEVELOPMENT OF THE REGULATION OF INSIDER TRADING IN ZIMBABWE
2.1 Introduction **34**
2.2 The Regulation of Insider Trading Prior to 2004 **35**
2.2.1 The Regulation of Insider Trading under the Rhodesia Stock Exchange Act 35

2.2.2 The Regulation of Insider Trading under the Zimbabwe Stock Exchange Act *36*

2.2.3 The Regulation of Insider Trading under the Companies Act *38*

2.2.4 The Regulation of Insider Trading under the Banking Act *39*

2.2.5 The Regulation of Insider Trading under the ZSE Listing Requirements *40*

2.2.6 The Regulation of Insider Trading under the Prevention of Corruption Act *41*

2.3 The Current Regulation of Insider Trading ***42***

2.3.1 The Regulation of Insider Trading under the Securities Act *42*

2.3.1.1 Definition of key concepts 42

2.3.1.2 Insider Trading Offences 47

2.3.1.3 Available Defences 50

2.3.1.4 Criminal Penalties 52

2.3.1.5 Civil Penalties 53

2.3.1.6 Administrative Penalties 57

2.4 Conclusion ***60***

CHAPTER THREE

THEORIES AND POLICY DEBATES ON THE REGULATION OF INSIDER TRADING

3.1 Introduction ***62***

3.2 Theories on Insider Trading ***63***

3.2.1 Classical Theory *63*

3.2.2 Misappropriation Theory *65*

3.2.3 Tipper-Tippee Theory *66*

3.2.4 Fiduciary duty theory *67*

3.2.5 Unified Theory *68*

3.2.6 Social Contract Theory (Equal Access Theory) *70*

3.2.7 Public Choice Theory *71*

3.3 The Pros and Cons for Insider Trading Regulation ***72***

3.4 Policy Implications ***86***

3.4.1 Market Efficiency *86*

3.4.2 Market Integrity *87*

3.4.3 Investor Protection 88
3.4.4 Deterrence 90
3.4.5 Financial Exclusion 91
3.4.6 Financial Inclusion 92
3.5 Conclusion ***93***

CHAPTER FOUR
SELECTED ROLE-PLAYERS IN THE ENFORCEMENT OF THE ZIMBABWEAN INSIDER TRADING LAWS
4.1 Introduction ***96***
4.2 The Functions and Historical Establishment of the SECZ ***98***
4.2.1 Historical Aspects of the SECZ 98
4.2.2 Functions and Powers of the SECZ 100
4.2.3 The Role of the SECZ 102
4.3 The Role of the ZSE in Detecting and Preventing Insider Trading ***111***
4.4 The Role of the Courts in Prosecuting Insider Trading Cases ***113***
4.6 Conclusion **115**

CHAPTER FIVE
THE FLAWS AND CHALLENGES IN THE ENFORCEMENT OF THE INSIDER TRADING PROHIBITION IN ZIMBABWE
5.1 Introduction ***119***
5.2 The Absence and Inadequacy of Key Definitions ***121***
5.3 The Adequacy of Prohibited Offences ***125***
5.4 The Adequacy of Available Penalties and Remedies ***127***
5.4.1 Criminal Sanctions 127
5.4.2 Civil Sanctions 129
5.4.3 Administrative Sanctions 131
5.5 The Adequacy of the SECZ ***135***
5.6 The Adequacy of the ZSE ***139***
5.7 The Adequacy of the Relevant Courts ***141***

5.8 The Lack and/or Inconsistent Co-operation between Enforcement Authorities ***143***

5.9 Lack of Insider Trading Awareness and Educational Programmes ***144***

5.10 Conclusion ***144***

CHAPTER SIX

THE REGULATION OF INSIDER TRADING IN THE UNITED STATES OF AMERICA

6.1 Introduction ***147***

6.2 Overview of Insider Trading Prohibition ***149***

6.2.1 The Regulation of Insider Trading under the Securities Act *149*

6.2.2 The Regulation of Insider Trading under the Securities Exchange Act *150*

6.2.2.1 Offences 150

6.2.2.2 Insider Trading Penalties 154

6.2.3 The Regulation of Insider Trading under the Insider Trading Sanctions Act *155*

6.2.5 Regulation of Insider Trading under the Securities Fraud Enforcement Act *156*

6.2.6 The Regulation of Insider Trading under the Sarbanes-Oxley Act *158*

6.2.7 The Regulation of insider trading under the Dodd-Frank Act *159*

6.3 The Enforcement of the Insider Trading Prohibition ***160***

6.3.1 The Role of the SEC *160*

6.3.3 The Role of the Department of Justice and the Courts *168*

6.4 Conclusion ***170***

CHAPTER SEVEN

THE REGULATION OF INSIDER TRADING IN SOUTH AFRICA

7.1 Introduction ***173***

7.2 Historical Overview of Insider Trading Prohibition ***175***

7.2.1 The Regulation of Insider Trading Prior to 1973 *175*

7.2.2 The Regulation of Insider Trading Between 1973 and 2004 *176*

7.2.2.1 The Regulation of Insider Trading by the 1973 *Companies Act* *176*

7.2.2.2 The Regulation of Insider Trading by the 1989 *Companies Amendment Act* *179*

7.2.2.3 The Regulation of Insider Trading by the 1990 *Companies Amendment Act* *180*

7.2.2.4 The Regulation of Insider Trading by the *Insider Trading Act* *184*

7.2.2.4.1 Definitions of Key Concepts 184

7.2.2.4.2 Insider Trading Offences 186

7.2.2.4.3 Insider Trading Criminal Penalties 188

7.2.2.4.4 Insider Trading Civil Penalties 189

7.2.2.4.5 Insider Trading Defences 191

7.2.2.4.6 Enforcement of the Insider Trading Prohibition 193

7.2.3 The Prohibition of Insider Trading Post 2004 194

7.2.3.1 The Regulation of Insider Trading by the *Securities Services Act* 194

7.2.3.1.1 Insider Trading Offences and Defences 195

7.2.3.1.2 Insider Trading Criminal Penalties 198

7.2.3.1.3 Insider Trading Civil Penalties 198

7.2.3.2 Regulation of Insider Trading Under the *Financial Markets Act* 199

7.2.3.2.1 Definitions and Key Concepts 199

7.2.3.2.2 Insider Trading Offences and Defenses 201

7.2.3.2.3 Insider Trading Criminal Penalties 201

7.2.3.2.4 Insider Trading Administrative Penalties 202

7.2.3.2.5 The Role of the Former FSB under the *Financial Markets Act* 203

7.2.3.2.6 The Role of the Former DMA 207

7.2.3.2.7 The Role of the Former EC 210

7.2.3.2.8 The Role of the Johannesburg Stock Exchange (JSE) 213

7.2.3.2.9 The Role of the Courts 215

7.3 Conclusion ***215***

CHAPTER EIGHT

OVERALL COMPARATIVE ANALYSIS OF THE REGULATION OF INSIDER TRADING IN ZIMBABWE, SOUTH AFRICA AND THE UNITED STATES OF AMERICA

8.1 Introduction 218

8.2 Overall Analysis of the Key Definitions 218

8.3 Overall Analysis of the Insider Trading Offences 222

8.4 Overall Analysis of the Insider Trading Penalties 225

8.4.1 Criminal Penalties 225

8.4.2 Civil Penalties 226

8.4.3 Administrative Penalties 230

8.5 Overall Analysis of the Role of Regulatory Bodies and Related Authorities 231

8.5.1 The Role of Institutions that Detect Suspicious Trading Activities 231

8.5.2 Overall Analysis of the Role of National Regulatory Authorities and Related Bodies 233

8.5.3 Overall Analysis of the Role of the Courts 236

8.6 Cooperation between Domestic and International Enforcement Authorities 237

8.7 Enforcement of Insider Trading Awareness and Educational Programs 239

8.8 Conclusion 240

CHAPTER NINE

RECOMMENDATIONS AND CONCLUSION

9.1 Introduction 242

9.2 General Observations 243

9.3 Recommendations 247

9.4 Conclusion 263

BIBLIOGRAPHY 264

LIST OF ABBREVIATIONS 308

LIST OF TABLES

Table 6.1 Statistics of the Types of Actions Brought between 2016 and 2017 Financial Year 166
Table 6.2 Insider Trading Enforcement Actions 167
Table 7.1 Market Abuse Incidents since 2005 209
Table 7.2 New Market Abuse Cases Registered per Calendar Year and Investigations Completed since the Inception of the DMA 2005 (excludes investigations completed by the Insider Trading Directorate) 210

LIST OF FIGURES

Figure 9.1: New Zimbabwe Anti-Insider Trading Policy and Statutoty Regulatory Framework 261

CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1 Introduction

Financial markets play an important role in the growth of any economy.[1] These markets help to efficiently direct the flow of savings and investment in ways that facilitate the accumulation of capital and the production of goods and services.[2] A financial market is defined as a market where transactions of buying and selling securities takes place.[3] As a result, the buying and selling of securities in the markets must be governed by legislation and rules on the regulation of securities and related transactions enforced by regulators. The regulation of securities assists in promoting market efficiency and combating illicit activities in the financial markets.[4] However, illicit practices such as insider trading negatively affect the buying and selling of securities and financial instruments in the financial markets.[5] It is submitted that trading with non public price-sensitive information at the expense of ignorant investors negatively affects investor confidence and market efficiency.[6] Furthermore, investors may be reluctant to invest in a financial market that is inefficient. Insider trading could be defined as a "practice by which one person armed with

---

1 See related comments by Masoud NMH "Stock Markets: A Catalyst for Economic Growth" *International Journal of Finance and Banking Studies* 2013 12, 13; Nordin S and Nordin N "The Impact of Capital Market on Economic Growth: A Malaysian Outlook" 2016 *International Journal of Economics and Financial Issues* 259, 260-261; Sinha P, Viswanathan B and Narayanan B "Financial Market and Growth: Evidence From Postreforms India" 2015 *Journal Cogent Economics and Finance* 1, 2.

2 See related comments by Masoud 2013 *International Journal of Finance and Banking Studies* 13; Nordin and Nordin 2016 *International Journal of Economics and Financial Issues* 260-261.

3 See related comments by Nordin and Nordin 2016 *International Journal of Economics and Financial Issues* 260-261; Sinha, Viswanathan and Narayanan 2015 *Journal Cogent Economics and Finance* 2; Stiglitz JE "Financial Markets and Development" Year unknown *Oxford Review of Economic Policy* 55, 63; Darškuvienė V 2010 *Financial Markets* HYPERLINK "https://www.bcci.bg/projects/latvia/pdf/7_Financial_markets.pdf" https://www.bcci.bg/projects/latvia/pdf/7_Financial_markets.pdf accessed 29 August 2018 page number unknown.

4 See related comments by Sinha, Viswanathan and Narayanan 2015 *Journal Cogent Economics and Finance* 2; Stiglitz Year unknown *Oxford Review of Economic Policy* 55.

5 Chakravarta S and McConnell JJ "Does Insider Trading Really Move Stock Prices?" 1999 *Journal of Financial and Quantitative Analysis* 191, 192.

6 See analysis in paragraph 3.4 in Chapter Three of this thesis.

price or value sensitive non-public (confidential) information, concludes a transaction in securities to which that information relates without sharing that piece of information with others".[7] The researcher submits that primary insiders, secondary insiders and juristic persons should be restricted from insider trading. Thus, an insider would be gaining an unfair advantage over other persons who are ignorant of the price-sensitive inside information that he or she possesses.[8] Although the *Securities Act* does not expressly define the term "insider", it lists individuals who can be held liable for committing insider trading in Zimbabwe.[9] The list of insiders includes primary and secondary insiders. Primary insiders include directors, employees or shareholders of an issuer of securities to which the inside information relates.[10] Secondary insiders include a person who receives inside information through direct or indirect communication with a primary insider.[11] Secondary insiders are commonly known as "tippees" because they trade on the basis of inside information received from primary insiders in the form of "tips".[12]

---

7 Osode CP "Defending The Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory Law" in Okpaluba C *Contemporary South African Society* (New Africa Books South Africa 2004) 303; Sections 88 of the *Securities Act* 17 of 2004 [Chapter 24:25] as amended (*Securities Act*); Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1, 2-3; Black A "The Reform of Insider Trading Law in Australia" 1992 *UNSW Law Journal* 214, 214; Rider BAK and Tajima Y *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* (Kluwer Law International London 1998) 206-208.

8 Section 88(1)(a) of the *Securities Act*; see related comments by Rider and Tajima *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* 206-208; Luiz S "Insider Trading Regulation-If at First You Don't Succeed" 1999 *SA Merc LJ* 136, 138-139.

9 Sections 87 and 88 of the *Securities Act*; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 45-46; Osode PC "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 244; Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 695-696.

10 Sections 87 and 88 of the *Securities Act*; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 45-46; Rider and Tajima *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* 206.

11 Section 87 of *Securities Act*; Chitimira *The Regulation of Insider Trading in South Africa* 83; also see Rider and Tajima *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* 209.

12 See related comments by Jooste R "The Regulation of Insider Trading in South Africa another Attempt" 2000 *The South African Law Journal* 284, 288; Rider and Tajima *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* 209.

Insider trading has harmful effects such as inefficient financial markets and low investor confidence on all financial markets.[13] It is submitted that investors are reluctant to invest in financial markets where they are not protected. Therefore, failing to adequately regulate insider trading will undermine the integrity of financial markets and affect the confidence of investors to invest in any country.[14] Consequently, insider trading is illegal in Zimbabwe where it is regulated by the *Securities Act*.[15] The enactment of this Act is a positive indication that the legislature acknowledges the negative effects of insider trading in Zimbabwe such as market inefficiency and low investor confidence. Insider traders are able to gain part of the returns to corporate investments made at the expense of outside shareholders. This study examines whether the insider trading provisions contained in the *Securities Act* are adequate and robust enough to prevent and combat insider trading practices in the Zimbabwean financial markets. The researcher also comparatively discusses the regulation of insider trading in South Africa and the United States of America (USA).[16] South Africa is examined because its anti-insider trading framework has been regarded as the most progressive in the Southern African Development Community (SADC).[17] Furthermore, since the enactment of the *Financial Markets Act*[18] in South Africa, various insider trading offenders have been successfully investigated and held accountable by the Directorate of Market Abuse (DMA) and the Enforcement

---

13 See related comments by Cinar M "The Issue of Insider Trading in Law and Economics: Lessons for Emerging Financial Markets in the World" 1999 *Journal of Business Ethics* 345, 347; Fishea RPH and Robe MA "The Impact of Illegal Insider Trading in Dealer and Specialist Markets: Evidence from a Natural Experiment" 2002 *University of Michigan Journal of Law Reform* 461, 462.

14 Massawe HT and Kadilu M "Combatting Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa* 52, 53-54; Osode 2000 *Journal of African Law* 245.

15 See section 88 of the *Securities Act;* Mwenda KK "Insider Dealing Law in Zambia: A Flawed Concept" (1996-1999) *Ghana Law Journal* 137, 141-142.

16 See the justification for comparative analysis in paragraph 1.7 of Chapter One of this thesis.

17 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 *South African Mercantile Law Journal* 458, 491; It has been reported that the regulation of securities in South Africa has ranked first among 148 countries surveyed for the World Economic Forum Global Competitiveness Report for four consecutive years. For further information see Stander R "Market Intergrity and Twin Peaks" 2016 *Financial Services Board Newsletter* 1, 20; Ghati W *Critical Analysis of the Insider Trading Framework of Tanzania* (LLM-Thesis University of the Western Cape 2015) 36.

18 Section 88 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*); See insider trading statistics in paragraph 7.2.3.2.6 in Chapter Seven of this thesis.

Committee (EC) to date.[19] The researcher discusses the USA insider trading regulatory framework from a federal perspective. Thus, notwithstanding the fact that the USA insider trading laws are somewhat different from those of Zimbabwe, Zimbabwe could still learn from the USA which relatively have the best insider trading laws in the world.[20] This is done in order to suggest possible ways by which the Zimbabwean anti-insider trading regulatory framework can be made more adequate, stronger and competitive.

1.2 Background of the Research

1.2.1 The Regulation of Insider Trading in Rhodesia prior to 1980

The Rhodesia Stock Exchange (RSE) was established as the national stock exchange in Rhodesia in 1946.[21] The RSE adopted the rules and regulations that were regulating the Johannesburg Stock Exchange Limited (JSE) and made slight changes in these rules to suit the Rhodesian financial markets.[22] It is submitted that the JSE rules regulated proprietary rights such as matters relating to capital, liquidations and new shares. However, not all the rules and regulations of the JSE[23] were relevant to the Rhodesian

---

19 See insider trading statistics in paragraph 7.2.3.2.6 of Chapter Seven of this thesis. Although few cases of insider trading have been prosecuted due to the difficulty of burden of proof and the delay or backlog of the South African justice system, several cases have been settled and the EC imposed administrative sanctions. See related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 470.

20 See related comments by Botha 1991 *SA Merc LJ* 1-2; Replogle R 2011 *Insider Trading in the United States* HYPERLINK "http://m.acc.com/legalresources/quickcounsel/InsiderTradingUS.cfm accessed 17 August 2017" http://m.acc.com/legalresources/quickcounsel/InsiderTradingUS.cfm accessed 17 August 2017 page number unknown; Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012) 188.

21 Karekwaivenani G "A History of the Rhodesian Stock Exchange: The Formative Years, 1946-1952" 2003 *The Journal of Humanities of the University of Zimbabwe* 9, 17; Muzamani JT "The Zimbabwe Stock Exchange" 1993 *African Review of Money Finance and Banking* 75, 76.

22 Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; Muzamani 1993 *African Review of Money Finance and Banking* 76-77.

23 See the paragraph 27 JSE rules.

financial markets.[24] For instance, the JSE rules[25] were silent on insider trading and/or market abuse offences.[26] Furthermore, these JSE rules did not regulate the disclosure of non public price-sensitive inside information in order to prohibit insider trading.[27] It is submitted that the lack of regulation of non public price-sensitive inside information negatively affected the efficiency of the Rhodesian financial markets.

The RSE rules regulated the RSE and issues regarding the buying and selling of shares.[28] Consequently, in 1947 the RSE committee recommended to the Parliament that a statutory framework must be introduced to regulate the management of the RSE and provide for the registration of stock brokers and dealers in shares.[29] However, the Parliament rejected this recommendation.[30] Parliament took the view that it was still early to enact legislation that would regulate the RSE and the Rhodesian financial markets because the Rhodesian financial markets were still in their early stages.[31] Parliament wanted the Rhodesian financial markets to grow first.

The *Rhodesian Stock Exchange Act*[32] was finally enacted in 1974 and it is the first legislation to regulate the RSE including trading in securities on the Rhodesian financial

---

24 See related comments by Muzamani 1993 *African Review of Money Finance and Banking* 76-77; Securities and Exchange Commission of Zimbabwe 2014 *Capital Markets Development: A Journey that Never Ends* HYPERLINK http://www.herald.co.zw/capital-markets-developments-a-journey-that-%09never-ends/accessed%2024http://www.herald.co.zw/capital-markets-developments-a-journey-that- never-ends/accessed 24 May 2017 12.

25 See paragraph 27 of the JSE rules.

26 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; Muzamani 1993 *African Review of Money Finance and Banking* 77.

27 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; Muzamani 1993 *African Review of Money Finance and Banking* 77.

28 See RSE rules; see related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 22; Muzamani 1993 *African Review of Money Finance and Banking* 75-83.

29 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 22; Muzamani 1993 *African Review of Money Finance and Banking* 75-83.

30 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; also see related comments by Muzamani 1993 *African Review of Money Finance and Banking* 75-83.

31 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 22; Muzamani 1993 *African Review of Money Finance and Banking* 75-83.

32 Section 15(1) of the *Rhodesian Stock Exchange Act* 27 of 1973.

markets.[33] The *Rhodesia Stock Exchange Act* did not expressly prohibit insider trading or any market abuse practices.[34] However, the *Rhodesia Stock Exchange Act* provided that the RSE committee had the responsibility to ensure that there was fairness and efficiency in dealings in listed securities in Rhodesia.[35] However, it is not clear how fairness and efficiency in securities dealings was achieved.[36] The researcher argues that fairness could not be achieved in the Rhodesian financial markets while insiders were allowed to trade with price-sensitive inside information at the expense of ignorant investors. It was important to regulate insider trading in order to level the playing field between individuals who had access to material inside information and those who did not have such information and thereby avoid the unfair use of inside information in the Rhodesian financial markets. The researcher argues that the provisions of the *Rhodesia Stock Exchange Act* were not adequate enough to ensure fairness and efficiency in the Rhodesian financial markets. More discussion on the *Rhodesia Stock Exchange Act* is undertaken in paragraph 2.2.1 of Chapter Two of this thesis.

The *Companies Act*[37] came into effect in 1952 and, since then, it has been amended several times. Although the *Companies Act* regulated the registration and management

---

33 *Rhodesia Stock Exchange Act* of 1974. The *Rhodesia Stock Exchange Act* was repealed by the *Zimbabwe Stock Exchange Act* [Chapter 24:18]; see related comments by Muzamani 1993 *African Review of Money Finance and Banking* 76-77; also see Lynton Edwards 2017 *History of the Zimbabwe Stock Exchange* HYPERLINK "https://lynton-edwards.com/about-the-zimbabwe-stock-%09exchange/"https://lynton-edwards.com/about-the-zimbabwe-stock-exchange/ accessed 21 June 2017 page number unknown.

34 See generally sections 1-96 of the *Rhodesia Stock Exchange Act;* also see related comments by Chitimira 2008 *The Regulation of Insider Trading in South Africa* 22-24.

35 Section 15(1)(f) of the *Rhodesia Stock Exchange Act*; also see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 22-24.

36 Section 15(1)(f) of the *Rhodesia Stock Exchange Act*; also see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 22-24.

37 See the second schedule of the *Companies Act* 47 [Chapter 24:03] of 1957 (*Companies Act*); see related comments by Saungweme P, Ricardo P and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630, 1630-1631; Popova T, Georgakopoulos G, Sotiropoulos L *et al* "Mandatory Disclosure and Its Impact on the Company Value" 2013 *International Business Research Journal* 1, 2; Ansah SO "The Impact of Corporate Attributes on the Extent of Mandatory Disclosure and Reporting by Listed Companies in Zimbabwe" 1998 *The International Journal of Accounting* 605, 608-610; Chanakira N 2004 *ZSE Insider Trading Set to Worsen* HYPERLINK https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-%09set-to-worsen/ https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 24 April 2018 page number unknown.

of all companies operating in Rhodesia, it did not regulate the disclosure of non public price-sensitive information.[38] This implies that any person could trade with non public price-sensitive information without incurring insider trading liability. More discussion on the *Companies Act* will be done in paragraph 2.2.3 of Chapter Two of this thesis.

1.2.2 The Regulation of Insider Trading in Zimbabwe between 1980 and 2000

There were several allegations of insider trading that were internally investigated by the Zimbabwe Stock Exchange (ZSE) particularly in 1999.[39] However, no evidence of improper dealings was established in all the investigated cases because there was no legislation that prohibited insider trading in Zimbabwe.[40] In addition to the ZSE's investigation, the Zimbabwe Anti-Corruption Committee (ZACC) also undertook an independent investigation into the allegations of insider trading.[41] The ZACC is an institution that has the constitutional mandate to combat corruption in both the private and public sectors.[42] The ZACC has sometimes investigated alleged cases of insider trading

---

38 See the sections 21-23, 74-105 and 169-194 of the *Companies Act*; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2; Ansah 1998 *The International Journal of Accounting* 608-610.

39 See related comments by Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/ accessed 24 April 2017 page number unknown.

40 See related comments by Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/ accessed 24 April 2017 page number unknown; Nyakazeya 2008 HYPERLINK "https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-%09in-progress-zse/" https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading- in-progress-zse/ accessed 23 October 2017 page number unknown; Benade LM "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *The Comparative and International Law Journal of Southern Africa* 277, 297-298; Botha 1991 *South African Mercantile Law Journal* 4.

41 In terms of section 237 of the Constitution of Zimbabwe Amendment (No. 20) of 2013 the ZACC had the authority to undertake investigation on corruption in the public and private sector; Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/"https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 24 April 2017 page number unknown; DeMarzo MP, Fishman MJ and Hagerty KM "The Optimal Enforcement of Insider Trading Regulations" 1998 *Journal of Political Economy* 602, 604 and 606.

42 See section 255(1) of the Constitution of Zimbabwe; also see Section 12(a)-(i) of the *Anti-Corruption Commission Act* [Chapter 9:22] of 2004 (*Anti-Corruption Commission Act*); Kim SH "Insider Trading as Private Corruption" 2014 *UCLA Law Review* 934, 951-972; Jabbar SFA "Insider dealing: fraud in Islam?" 2012 *Journal of Financial Crime* 140, 141.

on the ZSE.[43] However, the ZACC failed to identify the perpetrators of insider trading because there was no legislation that prohibited insider trading in Zimbabwe between 1980 and 2000.[44] Some of the cases that the ZACC has investigated include First Mutual Assurance Company of Zimbabwe Ltd in respect of dividends and Econet Wireless Holdings Ltd, for floating of shares.[45] However, no one was convicted of insider trading in these cases because the ZACC could not find improper dealing with non public price-sensitive information.[46] It is submitted that ZACC is ineffective in fighting corruption mostly because of political interference in its work and lack of resources which have reduced the ZACC's independence.[47] The ZACC regarded trading with non public price-sensitive information as fraud and manipulation in Zimbabwe because at common law, directors owed a fiduciary duty to shareholders.[48] However, there was no legislation that prohibited

---

43 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider-trading- set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider-trading- set-to-worsen/ accessed 24 April 2017 page number unknown; Ali PU and Gregoriou GN *Insider Trading: Global Developments and Analysis* (CRC Press London 2009) 371.

44 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse- insider- trading-set-to-" https://www.thestandard.co.zw/2004/04/16/zse- insider- trading-set-to-worsen/ accessed 24 April 2017 page number unknown; Ali and Gregoriou *Insider Trading: Global Developments and Analysis* 371; Ferrara RC, Herbert T and Donna M *Ferrara on Insider Trading and the Wall* (Law Journal Press New York 2006) 7.

45 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; Chanakira 2003 *Zimbabwe: ZSE Insider Trading Set to Worsen* 2003 HYPERLINK "http://allafrica.com/stories/200310170258.html" http://allafrica.com/stories/200310170258.html accessed 24 April 2017 page number unknown; Ali and Gregoriou *Insider Trading: Global Developments and Analysis* 371; Ferrara, Herbert and Donna *Ferrara on Insider Trading and the Wall* 7.

46 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider- trading-set-to-worsen/ accessed 24 April 2017 page number unknown.

47 Pindula 2017 *Zimbabwe Anti-Corruption Commission* HYPERLINK "https://www.pindula.co.zw/Zimbabwe_Anti-%09Corruption_Commission" https://www.pindula.co.zw/Zimbabwe_Anti- Corruption_Commission accessed 14 April 2018 page number unknown; Ng D "The Impact of Corruption on Financial Markets" 2006 *Managerial Finance Journal* 822, 827-829; Venard B and Hanafi M Organizational Isomorphism and Corruption in Financial Institutions: Empirical Research in Emerging Countries" 2008 *Journal of Business Ethics* 481, 482-483.

48 Bauman TA "Insider Trading at Common Law" 1984 *The University of Chicago Law Review* 838, 840-843; Hazen TL "Corporate Insider Trading: Reawakening TheCommon Law" 1982 *Washington and Lee Law Review* 845,846.

the unlawful use of non public price-sensitive information in Zimbabwe.[49] Therefore, the ZACC investigated the alleged insider trading cases in a bid to combat corruption in Zimbabwe. Furthermore, the ZACC investigated insider trading cases in a bid to promote honesty, financial discipline and transparency in the public financial markets.[50] Lastly, there was no provision in the *Companies Act*[51] that prohibited insider trading or regulated the disclosure of inside information between 1980 and 2000.[52] Furthermore, the ZSE listing requirements were adopted in 1998 by the ZSE to facilitate the listing of securities and to provide an efficient financial market. However, the ZSE listing requirements did not regulate insider trading nor prohibit issuers of securities from dealing with non public price-sensitive information in the Zimbabwean financial markets.[53]

1.2.3 The Regulation of Insider Trading in Zimbabwe Subsequent to 2000

The ZSE considered acts of insider trading as fraud. In order to prosecute cases of insider trading, the ZSE relied on the *Prevention of Corruption Act.*[54] This Act provided that any agent who intentionally fails to disclose to his principal, the full nature of any transaction carried out in connection with the company for personal benefit shall be guilty of corruption.[55] It is submitted that every agent is expected to avoid conflict of interest and

---

49 See section 11(a) of the *Anti-Corruption Commission Act* Chapter 9:22 of 2004; see related comments by Muzamani 1993 *African Review of Money Finance and Banking* 77-84.

50 See section 255(c) of the Constitution of Zimbabwe; see related comments by Klaw "Why Now is the Time to Statutorily Ban Insider Trading under the Equality of Access Theory" 2016 *William and Mary Business Law Review* 275,298-308.

51 Section 82(1) of the *Companies Act* 15 [Chapter 24:03] of 1981 as amended (*Companies Act*); Chitimira H A "Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 939, 942, 946-951; Osode 2000 *Journal of African Law* 241.

52 See sections 21-23, 74-105 and 169-194 of the *Companies Act*; Chitimira 2014 *PELJ* 942, 946-951; Osode 2000 *Journal of African Law* 241.

53 See section 3.69(i) of the ZSE listing requirements; see related comments by Fishman MJ and Hagerty KM "Insider Trading and the Efficiency of Stock Prices" 1992 *The Rand Journal of Economics* 106, 114-115; Grossman SJ "An Analysis of the Role of 'Insider Trading' on Futures Markets" 1986 *The Journal of Business* 129, 130.

54 Section (3)(1)(a)-(f) of the *Prevention of Corruption Act* [Chapter 9:16] of 2001 (*Prevention of Corruption Act*); see related comments by Botha 1991 *South African Mercantile Law Journal* 4-17; Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 693-701.

55 Section 3(a)-(f) of the *Prevention of Corruption Act;* see related comments by Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455, 456-462; Botha 1991 *South African Mercantile Law Journal* 4-17; Osode 1999 *African Journal of International and Comparative Law* 693-701.

should act in the interest of the company. However, the *Prevention of Corruption Act* did not prohibit insider trading. Prior to 2004, insider trading was not an offence in Zimbabwe because there was no law that prohibited the practice in the Zimbabwean financial markets.[56] Moreover, the *Prevention of Corruption Act* did not define the terms 'dishonesty' and 'agent'.[57] The *Prevention of Corruption Act* also failed to prohibit the illicit disclosure of non public price-sensitive information in the Zimbabwean financial markets.[58] Consequently, people who committed insider trading were not prosecuted because insider trading was not statutorily prohibited in Zimbabwe.[59]

The *Securities Act* was enacted in 2004 to regulate securities and capital markets in Zimbabwe.[60] The Act prohibits insider trading and market manipulation in Zimbabwe.[61] The Securities and Exchange Commission of Zimbabwe (SECZ) was established in 2009 pursuant to the provisions of the *Securities Act*.[62] The SECZ is statutorily obliged to protect investors, reduce systemic risk, and promote market integrity in the Zimbabwean financial markets.[63] It is submitted that since the enactment of the *Securities Act,* there

---

56 Section 3 of the *Prevention of Corruption Act*; see related comments by Bainbridge 1985 *Virginia Law Review* 456-462; Botha 1991 *South African Mercantile Law Journal* 4-17; Osode 1999 *African Journal of International and Comparative Law* 693-701.

57 Section 2 of the *Prevention of Corruption Act*; see related comments by Bainbridge 1985 *Virginia Law Review* 456-462; Botha 1991 *South African Mercantile Law Journal* 4-17; Osode 1999 *African Journal of International and Comparative Law* 693-701.

58 Section 3 of the *Prevention of Corruption Act*; see related comments by Bainbridge 1985 *Virginia Law Review* 456-462; Botha 1991 *South African Mercantile Law Journal* 4-17; Osode 1999 *African Journal of International and Comparative Law* 693-701.

59 Section 3 of the *Prevention of Corruption Act*; see related comments by Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 24 April 2017 page number unknown; Botha 1991 *South African Mercantile Law Journal* 4-17; Osode 1999 *African Journal of International and Comparative Law* 693-701; Mwenda KK "Can Insider Trading Predicate the Offence of Money Laundering?" 2006 *Journal of Business and Securities Law* 128, 129, 146-147.

60 Section 88 of the *Securities Act*. However, the *Securities Act* of 2004 was amended by the *Securities Amendment Act* of 2013.

61 Sections 88 and 96 of the *Securities Act;* see related comments by Chitimira H "Overview of the Federal Prohibition on Market Abuse in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 119, 126 and 127.

62 Section 3 and 4 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

63 Section 4 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

has been tremendous work done by the SECZ to combat insider trading by market participants in Zimbabwe.[64]

Rule 3.9 of the ZSE Listing Requirements provided that an issuer must make a cautionary announcement as soon as possible when the confidentiality of price-sensitive information cannot be maintained or has been breached.[65] This rule was aimed at preventing insiders from trading with non public price-sensitive information at the expense of other investors without that information for personal gain. It is submitted that rule 3.9 further intended to create an efficient financial market where insiders and outside investors have equal access to valuable information. The ZSE Listing Requirements also outlined the procedures that must be followed during and after the publication of the price-sensitive information by issuers.[66] Furthermore, every company listed on the ZSE was obliged to comply with the ZSE Listing Requirements.[67] Despite these positive developments, insider trading is still occurring in the Zimbabwean financial markets. This is as a result of lack of adequate regulation of non public price-sensitive information and enforcement of the prohibition of insider trading in the Zimbabwean financial markets.[68] The researcher discusses challenges in relation to detection, investigation and prosecution of insider trading in Chapter Five of this thesis.

---

64 See related comments by Osode 2000 *Journal of African Law* 239-240; Securities and Exchange Commission of Zimbabwe 2014 HYPERLINK https://www.herald.co.zw/capital-markets-developments-a-%09journey-that-never-ends/ https://www.herald.co.zw/capital-markets-developments-a-journey-that-never-ends/ accessed 11 April 2018 page number unknown; 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* 200, 201-206.

65 See Rule 3.9 of the ZSE Listing Requirements; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 109-111.

66 See Rule 3.4 and 3.5 of the ZSE Listing Requirements; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91; Chitimira 2014 *Speculum Juris* 109-111.

67 See Rule 3.1 of the ZSE Listing Requirements; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91; Chitimira 2014 *Speculum Juris* 109-111.

68 See related comments by Tsaurai K and Odhiambo NM "The Dynamics of Capital Market Development in Zimbabwe" 2012 *Corporate Ownership and Control Journal* 355, 362; Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635-1636.

1.3 Literature Review

The regulation of insider trading started in the 1920s when the stock market crashed in the USA.[69] Bumgardner acknowledges that the 1920s crash was caused by a wide variety of efforts to manipulate prices of specific securities and the markets as a whole in the USA financial markets.[70] Furthermore, during the hearings on the causes of the 1920s stock market crash, it was recommended that securities must be regulated through relevant legislation. In light of the recommendations made during the Pecora Hearings, the USA enacted the *Securities Act*[71] and the *Securities Exchange Act*[72] to control the illicit practices that could have contributed to the stock market crash.[73] Furthermore, the United States Securities Exchange Commission (SEC) was established under the *Securities Exchange Act* to supervise securities trading and prevent corporate abuses relating to dealings in securities and corporate reporting.[74] However, the debates about

---

69 Shen H "A Comparative Study of Insider Trading Regulation Enforcement in the US and China" 2007 *Journal of Business and Securities Law* 41, 42; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 210-211; Bainbridge SM "The Law and Economics of Insider Trading: A Comprehensive Primer" 2001 *University of California Los Angeles Law Review* 2, 3-9.

70 Bumgardner L "A Brief History of the 1930s Securities Laws in the United States and the Potential Lesson for Today" *New York University Law Review* Page unknown; Hanáková B *Social Consequences of the Wall Street Crash on 1930's America* (Thesis Masaryk University 2015) 17-21.

71 See the *Securities Act* of 1933 Public Law 22, 48 Stat.74 15 USC 77a-77mm et seq (2000) as amended (*Securities Act*); see related comments by Roiter ED "Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws" 1982 *Fordham Law Review* 781, 783-786; Page A and Yang K "Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?" 2005 *University of California, Davis Law Review* 1, 13-14 and 40.

72 *Securities Exchange Act* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended (*Securities Exchange Act)*; Specifically for insider trading see sections 16(b) and 10(b) of the *Securities Exchange Act*; Gevurtz FA "The Road Not Taken: A Comparison of the EU and US Insider Trading Prohibitions" 2017 *Washington University Journal of Law and Policy Forthcoming* 1, 2-4.

73 See related comments by McConnell JJ and Chakravarty S "Does Insider Trading Really Move Stock Prices" 1999 *Journal of Financial and Quantitative Analysis* 191, 191; Newkirk CT 1998 *Speech by SEC Staff: Insider Trading – A US Perspective* HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm%20accessed%2022%20April%202018" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 22 April 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 210-212; Chitimira *The Regulation of Insider Trading in South Africa* 1; Bainbridge SM "Insider Trading: An Overview" 2001 *University of California Los Angeles Law Review* 1, 3-9.

74 Section 4 of the *Securities Exchange Act*; see related comments by Newkirk 1998 HYPERLINK"https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm%20accessed%2022" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 22 April

regulation of insider trading started when Manne[75] argued for the deregulation of insider trading in the 1960s.[76] The researcher provides a general overview of the existing literature on the regulation of insider trading in financial markets. This is done to examine the strengths and weaknesses of regulating insider trading.

Mwenda argues that the regulation of insider trading is important because it promotes fairness and protects investor confidence in the securities markets.[77] This is supported by Werhane[78] and Chitimira[79] who argue that insider trading is unfair because insiders have an informational advantage compared to other market participants. This implies that insiders obtain benefits in the form of abnormal returns at the expense of uninformed outsiders.[80] Accordingly, the researcher submits that allowing insiders to earn profit by trading with inside information destroys the fairness and integrity of the financial markets.[81] Moreover, Botha argues that regulation is necessary because deregulation of insider trading could affect investor assessment of the integrity of financial markets.[82] As a result, investors become reluctant to invest in the financial markets of a country that

---

2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 210-212.

75 Manne GH "Insider Trading and the Law Professors" 1970 *Vanderbilt Law Review* 547, 549-548; Manne HG "Insider Trading and Property Rights in New Information" 1985 *Cato Journal* 933,935-938.

76 Bainbridge SM "Manne on Insider Trading" 2008 *University of California, Los Angeles School of Law Review* 1, 1-2.

77 Mwenda KK "Redefining Insider Dealing Law for Emerging Markets: A Comparative Legal Study" 1997 *Zimbabwe Law Review* 29, 43; Perino AM "The Lost History of Insider Trading" 2018 *University of Illinois Law Review* 1, 29; Schotland AR "Unsafe at any Price: A Reply to Manne, Insider Trading and the Stock Market" 1967 *Virginia Law Review* 1425, 1426; Fox BM "The National Perspective: Five Rationales Concerning Insider Trading" 1992 *Law and Contemporary Problems* 266, 267-269.

78 Werhane HP "The Ethics of Insider Trading" 1989 *Journal of Business Ethics* 841, 841-843; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 8; Bauman TA "Insider Trading at Common Law" 1984 *The University of Chicago Law Review* 838, 847-848; Fox 1992 *Law and Contemporary Problems* 268-269.

79 Chitimira 2008 The Regulation of Insider Trading in South Africa 8; Bauman TA "Insider Trading at Common Law" 1984 *The University of Chicago Law Review* 838, 847-848; Fox 1992 *Law and Contemporary Problems* 268-269.

80 See related comments by Werhane 1989 *Journal of Business Ethics* 841-843; also see Bauman 1984 *The University of Chicago Law Review* 847-848.

81 Veenman D *Insider Trading. The Interrelation Between Accounting Information, Stock Prices,and Reported Insider Trades* (Thesis University of Amsterdam 2010) 24-25; Loeffen HGC The Effects of Unregulated Insider Trading (Master's Thesis Tilburg University 2014) 4; Massawe and Kadilu 2014 *Law in Africa* 53-54.

82 See similar comments by Botha 1991 *SA Merc LJ* 4.

does not prohibit insider trading.[83] The researcher argues that although insider trading is regulated in Zimbabwe, such regulation must be enhanced by enacting adequate insider trading provisions in the *Securities Act* that will be effectively enforced by regulatory institutions. It is submitted that inadequate insider trading provisions assist the offenders to escape insider trading liability.

Although, the researcher could not find empirical evidence that investors are affected by insider trading in Zimbabwe, it is submitted that the SECZ has investigated some cases of insider trading since 2005 to date.[84] The researcher submits that the fact that insider trading is regulated in Zimbabwe is proof enough that insider trading practices negatively affect public investor confidence and efficiency of the Zimbabwean financial markets.

Osode argues that the regulation of insider trading is justified through the public interest theory and the private interest theory.[85] The public interest theory proves that the government has the responsibility to curb inefficiencies in the financial markets.[86] The researcher submits that the regulation of insider trading was prompted by the amount of insider trading activities that were taking place in the Zimbabwean financial markets.[87] Furthermore, insider trading regulation was aimed at protecting the integrity of the Zimbabwean financial markets and promoting market efficiency.[88] The private interest theory posits that public regulation is intended to promote the economic interest of interest groups competing among themselves to maximize the incomes or wealth of their

83 Anderson JP "Insider Trading and the Myth of Market Confidence" 2017 *Washington University Journal of Law and Policy* 1, 2; Huang H *International Securities Markets: Insider Trading Law in China* (Kluwer Law International Netherlands 2006) 106-107; Levmore S "In Defense of the Regulation of Insider Trading" 1998 *Harvard Journal of Law and Public Policy* 101, 101-102.

84 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

85 Osode PC "Regulatory Theory, Private Interests and the Rationality of Insider Trading Regulation In The United States And Canada" 1998 *Journal of South African Law* 427, 428-432; Osode 1999 *African Journal of International and Comparative Law* 690-693.

86 Osode 1998 *Journal of South African Law* 428-431; Osode 1999 *African Journal of International and Comparative Law* 690.

87 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

88 Sections 4(1)(c)-(f); 88; 90 and 91 of the *Securities Act*; see related comments by Austin J "What Exactly Is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation" 2016 *William and Mary Business Law Review* 1, 6-10.

membership by protecting investors.[89] It is submitted that regulation of insider trading in Zimbabwe is aimed at protecting investors and other market participants by promoting equal access to valuable information to all market participants.

Chuang[90] and Cassim[91] argue that insider trading is unfair because the use of inside information for personal interest violates a relationship of trust between the insider and the company or its shareholders. In terms of common law, directors owe a fiduciary duty to their company.[92] Rider also supports this view and argues that directors are under an obligation not to abuse their position for personal benefit.[93] The researcher also supports Rider's view because directors should act in the interest of the company they are working for. It is generally accepted that directors owe a fiduciary duty to their company in Zimbabwe. Moreover, the *Securities Act* prohibits any person who is in possession of non public price-sensitive information from dealing in relevant securities to the detriment of investors.[94] However, the *Securities Act* is not clear whether its regulation of insider trading is also based on fiduciary theory.[95] The policy goal of insider trading regulation in Zimbabwe is deterrence because insider trading is a criminal and civil wrong.

---

89 See related comments by Osode 1998 *Journal of South African Law* 431-434; Gubler ZJ "Public Choice Theory and the Private Securities Market" 2013 *North Carolina Law Review* 745, 768 and 776.

90 Chuang YC "A Critique of US Insider Trading Regulation Theory" 2001 *Zhongyuan Finance and Economics Law Journal* 1, 10; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 1, 10; Cox DJ "Insider Trading and Contracting: A Critical Response to the Chicago School" 1986 *Duke Law Journal* 628, 628; Fox 1992 *Law and Contemporary Problems* 268-269.

91 Cassim F *et al Contemporary Company Law* (Juta and Company Limited South Africa Cleremont 2011) 836; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 1, 10; Cox 1986 *Duke Law Journal* 628; Fox 1992 *Law and Contemporary Problems* 268-269.

92 Siebecker MR "Political Insider Trading" 2017 *Fordham Law Review* 2717, 2766; also see Choruma A 2016 *Behaviour Expected of Company Directors* HYPERLINK "http://www.financialgazette.co.zw/behaviour-expected-of-company-direcotors/" http://www.financialgazette.co.zw/behaviour-expected-of-company-direcotors/ accessed 20 October 2017 page number unknown.

93 Rider BAK "The Control of Insider Trading-Smoke and Mirrors" 2000 *Dickinson Journal of International Law* 1, 3; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 9-10; Cohen JM, Dunning KM and Shill GM "Erosion of the Fiduciary-Duty Requirement in Insider-Trading Actions" 2010 *Securities Litigation Journal* 12, 12-17.

94 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92.

95 Section 88 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2012 *African Journal of Business Management* 1630, 1631.

Langevoort argues that the regulation of insider trading promotes equal access to non public price-sensitive information in the financial markets.[96] Brudney also supports this argument and submits that investors should have equal opportunity to obtain and evaluate information relevant to trading decisions.[97] The researcher also supports this view and submits that equal access to inside information allows the investors to make good investment judgments before trading in securities. Furthermore, Lyon and Du Plessis allude that the principle of equal access to information is derived from the market fairness theory.[98] The researcher discusses market fairness theory and equal access to information theory in paragraph 3.2 of Chapter Three of this thesis. Moreover, the researcher submits that market fairness theory and equal access to information theory are accepted as the underlying theories for the regulation of insider trading in Zimbabwe.[99] Osode argues that the regulation of insider trading is not only to deter insider trading activities but to promote the prompt disclosure of valuable information to the financial markets.[100] The researcher supports this view and submits that the disclosure of valuable information promotes efficiency in the financial markets.[101] Furthermore, price-sensitive inside information is valuable to the investors and financial markets analysts because they use it to make informed judgments about their investments. The ZSE listing requirements regulates the disclosure of information in Zimbabwe. For instance, the ZSE listing requirements prohibit any issuer who deals with non public price-sensitive inside

---

96 Langervoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 162, 167; Perino 2018 *University of Illinois Law Review* 29; Bewaji W Insider Trading in Developing Jurisdictions Achieving an Effective Regulatory Regime (Routledge London and New York 2012) 41-43.

97 Brudney V "Insiders, Outsiders, and Informational Advantages under the Federal Securities Law" 1979 *Harvard Law Review* 322, 334 and 342; Lyon G and JJ Du Plessis *The law of Insider Trading in Australia* (The Federation Press Sydney 2005) 8-10.

98 See similar discussion by Lyon and Du Plessis *The Law of Insider Trading in Australia* 8-10; Krawiec KD "Fairness, Efficiency, And Insider Trading: Deconstructing the Coin of the Realm in the Information Age" 2001 *North Western University Law Review* 443, 459-463 and 465.

99 See section 4(1)(c) of the *Securities Act*; also see similar discussion by Lyon and Du Plessis *The law of Insider Trading in Australia* 8-10.

100 Osode PC "The Regulation of Insider Trading In Canada: A Critical Appraisal 1999 *Anglo-American Law Review* 166, 167, 169-170; Herne S "Inside Information: Definitions in Australia, Canada, the UK and the US" 1986 *Journal of Comparative Business and Capital Market Law* 1, 3; Osode "Defending The Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory Law" 303-304.

101 Osode 1999 *Anglo-American Law Review* 167, 169-170; Herne 1986 *Journal of Comparative Business and Capital Market Law* 3.

information.[102] Nonetheless, the researcher submits that the ZSE should adopt more stringent rules to regulate the disclosure of price-sensitive information in the Zimbabwean financial markets.[103]

Gullifer and Payne[104] argue that insider trading is a victimless crime. Furthermore, Gullifer and Payne submit that investors in relevant securities with non public price-sensitive inside information do so at times from a willing buyer and willing seller basis.[105] The researcher argues that insider trading causes harm to an individual, company and the financial markets. Thus, regulating insider trading is necessary because it is unfair to those lacking access to non public inside information.

Massawe and Mwajuma assert that investors often lose confidence in the financial markets when they realise that they are not operating on the same level as insiders.[106] In support of that, Chitimira also acknowledges that in financial markets that do not prohibit insider trading, investors are reluctant to invest because they know that they are not protected.[107] The researcher submits that deregulation of insider trading limits investment in the country and thus weakens the economic growth of the country.[108] Furthermore, to enhance investor protection the SECZ has been given the mandate to protect investors in the Zimbabwean financial markets.[109] For instance, the SECZ has the mandate to combat insider trading or market manipulation in the Zimbabwean financial markets to protect investor confidence. Therefore, insider trading must be regulated to promote

---

102 See Rule 3.69(i) of the ZSE listing requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111.

103 See Rule 3.1-3.11 of the ZSE listing requirements.

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

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

106 Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Zekos JI "Is the Law Effective in Protecting Markets from Insider Trading?" 2017 *Hertfordshire Law Journal* 2, 2; Cox 1986 *Duke Law Journal* 628-629.

107 Chitimira 2008 *The Regulation of Insider Trading in South Africa* 7; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 7-8; Fischel DR and Carlton DW "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857, 857-858.

108 Montagiano CP "The Global Crackdown on Insider Trading: A Silver Lining to the Great Reccession"2012 *Indiana Journal of Global Legal Studies* 575, 575-577; Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Fischel and Carlton "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857, 857-858.

109 See section 4(1)(f) of the *Securities Act*; Mwenda 1997 *The Zimbabwe Law Review* 42-43; Chitimira *The Regulation of Insider Trading in South Africa* 10, 11, 12 and 15.

public investor confidence in the financial markets.[110] Although investors can still continue to invest in financial markets that do not regulate insider trading, investors are less likely to invest in financial markets that do not regulate insider trading compared to financial markets that regulate the practice. In order to attract investors, Zimbabwe must establish an investor-friendly environment by enacting adequate insider trading laws to protect investors.[111]

Dooley and Bainbridge argue that price-sensitive inside information is the intangible property of a company.[112] For instance, when the director develops new assets or conducts other business matters on behalf of the company, the information that the director has regarding those matters belongs to the company not the director.[113] Thus, it is difficult to restrict insider trading profits to those who produced the information.[114] The researcher submits that current directors of a company that are non excutive directors are employees of that company and in most instances, companies spend their resources in inventing assets or ideas, therefore, the insiders should be prohibited from trading with inside information for personal benefit.

Bainbridge argues that the cost of producing an asset or idea normally exceeds distribution costs.[115] Accordingly, insiders may not trade on inside information even if they

---

110 Huang H *International Securities Markets: Insider Trading Law in China* (Kluwer Law International Netherlands 2006) 117; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 7-9; Cox 1986 Duke Law 628-630; Fischel and Carlton 1982 *Stanford Law Review* 857-858; Padilla A "Should the Government Regulate Insider Trading?" 2011 *Journal of Libertarian Studies* 379, 381-385; Mwenda 1997 *The Zimbabwe Law Review* 42-43.

111 Chauhan Y, Chaturvedula C, and Viswanathan I "Insider Trading, Market Efficiency, And Regulation a Literature Review" 2014 *The Review of Finance and Banking* 7, 11; Nuno F and Ferreira AM "Insider Trading Laws and Stock Price Informativeness" 2009 *The Review of Financial Studies* 3, 16; Osode 2000 *Journal of African Law* 240; Cox 1986 *Duke Law Journal* 628-629; Osode 1998 *Journal of South African Law* 429.

112 Dooley MP "Enforcement of Insider Trading Restrictions" 1980 *Virginia Law Review* 1, 21; Bainbridge MS "Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud" 1999 *SMU Law Review* 1589, 1591-1592; Morgan JR "Insider Trading and the Infringement of Property Rights" *Ohio State Law Journal* 79, 94-95; Macey JR "From Fairness to Contract: The New Direction of the Rules Against Insider Trading" 1984 *Hofstra Law Review* 9, 60.

113 Bainbridge 1999 *SMU Law Review* 1591-1592; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11; see related comments by Dooley 1980 1980 *Virginia Law Review* 21; see similar comments by Dent GW "Why Legalized Insider Trading Would Be a Disaster" 2013 *Delaware Journal of Corporate Law* 247, 249.

114 Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11.

115 Bainbridge SM *Securities Law: Insider Trading* (Foundation Press New York 1999) 781-782.

did not contribute to its production. If inside information is not protected, the company that spent a lot of money producing the information would not profit from its invention cost.[116] This is unfair to the company since it would have contributed its resources to the production.[117] Consequently, directors are prohibited from trading on inside information of the corporation even when the director was involved in the development of a new asset of the company in Zimbabwe[118] because inside information still belongs to the company.[119] Accordingly, the director or insider uses the company's resources in developing the new asset or idea for the benefit of the company.[120] In addition, directors also have the fiduciary duty to act in the best interest of the company.[121] Although inside information is regarded as an asset which can be traded on, it is important to regulate the use of inside information to protect its ownership and determine how inside information must be disclosed.[122] The researcher submits that inside information should be regulated because it is the asset of the company, not of the employees. Directors, shareholders and employees of the company should act in the interest of the company. Therefore, the researcher agrees that inside information is the property of the company and should be regulated.

Manne argues that insider trading is an effective way to compensate corporate agents for innovations.[123] This argument is flawed because corporate insiders expose the company to danger or threats of takeover bids.[124] For instance, the exposure can be in the form of risky or unwise decisions by managers involving investment or production decisions taken

116 Bainbridge *Securities Law: Insider Trading* 781-782.
117 Bainbridge 2001 *University of California Los Angeles Law Review* 78-82.
118 Section 88 of the *Securities Act*; see related comments by Mwenda 1996-1999 *Ghana Law Journal* 141-142.
119 Section 87 of the *Securities Act*; see related comments by Mwenda 1996-1999 *Ghana Law Journal* 141-142.
120 Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11.
121 Bainbridge 2001 *University of California Los Angeles Law Review* 37-39; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11.
122 Morgan RJ "Insider Trading and the Infringement of Property Rights" 1987 *Ohio State Law Journal* 81, 82; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11.
123 Manne H *Insider Trading and the Stock Market* (The Free Press: New York 1966) 155; Banoff AB "The Regulation of Insider Trading in the United States, United Kingdom, and Japan 1988 *Internationalization of Securities Markets Journal* 145, 145-146; Aboody D, *et al* "Top Executives Insider Trading Profits and Firm Performance" 2010 *University of California Los Angeles Journal* 1, 3; Smith DG "Insider Trading and Entrepreneurial Action" 2017 *North Carolina Law Review* 1508, 1508.
124 See related comments by Schotland 1967 *Virginia Law Review* 1429.

in order to make unfair profits at the expense of the company.[125] Put differently, managers will sometimes not act in the interest of the company looking at the profit that they will get from trading with inside information. In support of this argument, Easterbrook argues that using inside information as a means of managerial compensation could cause managers to give up their commitment to act in the best interest of the company.[126] As a result, the company could end up being liquidated due to the loss sustained while the insider escapes liability. The researcher argues that insider trading should be regulated to protect the company from incurring the loss instead the insider should incur liability.

Deregulation of insider trading could cause insiders to focus on identifying stock trading profit instead of focusing on building companies in Zimbabwe.[127] As a result, the interest of shareholders and managers must be harmonised through a statutory framework to avoid the harm that could result from deregulation of insider trading.[128] The harm that can be caused by the conflict of interest between shareholders and managers is that companies may stop attracting investors.[129] For instance, when investors see that they are being taken advantage of by issuers, they become reluctant to invest in such companies. The argument that insider trading is an efficient compensation mechanism also ignores the fact that insider trading practices decrease investor confidence in the financial markets. The researcher submits that for the Zimbabwean economy to grow it needs to attract investors. Therefore, the regulation of insider trading is important to protect investors from insider trading practices in the financial markets.[130]

---

125 See related comments by Schotland 1967 *Virginia Law Review* 1469-1470.

126 Easterbrook FH "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information" 1981 *Supreme Court Review* 309, 332; Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11; Bainbridge *Securities Law: Insider Trading* 780-782, 788-790; Chitimira *The Regulation of Insider Trading in South Africa* 9.

127 Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11; Bainbridge *Securities Law: Insider Trading* 780-782, 788-790.

128 Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 10-11; Bainbridge *Securities Law: Insider Trading* 780-782, 788-790.

129 Dent GW "Why Legalized Insider Trading Would Be a Disaster" 2013 *Delaware Journal of Corporate Law* 247, 260-261; Osode 1998 *Journal of South African Law* 429.

130 Mwenda 1997 *The Zimbabwe Law Review* 29, 42-43; Chitimira *The Regulation of Insider Trading in South Africa* 10, 11, 12 and 15; Mwenda KK "Can Insider Trading Predicate The Offence of Money Laundering?" 2006 *Journal of Business and Securities Law* 127, 131.

Calton, Fischel,[131] Semaan, Freeman and Adams[132] argue that insider trading laws have rarely been enforced and have had little observable effect on insider trading. This argument is flawed as there are many insider trading cases that have been successfully investigated and prosecuted in different jurisdictions, where insider trading is regulated.[133] For instance, in South Africa, the courts recently adjudicated *Zietsman and another v Directorate of Market Abuse and another*[134] and moreover, more than 381 insider trading cases have been investigated by the Directorate of Market Abuse (DMA).[135] Huang argues that insider trading laws are enforceable only if they are adequate and effective enough to combat insider trading in the financial markets.[136] In addition to that, the enforcement institutions must employ people who have relevant expertise and experience and must have adequate resources to effectively curb insider trading. Moreover, the enforcement institutions must cooperate with each other to curb insider trading activities in the financial markets. The researcher supports this view because the cooperation of enforcement authorities will enhance the enforcement of the insider trading prohibition.

131 Carlton DW and Fischel DR "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857, 859.

132 Semaan L, Freeman M and Adams M "Is Insider Trading a Necessary Evil? An International Comparative Analysis" 1999 *Companies and Securities Law Journal* 220, 230.

133 See related comments by Chitimira H "An Overview Analysis of Selected Challenges in the Enforcement of the Prohibition of Insider Trading and Market Manipulation in the European Union and South African Regulatory Frameworks" 2015 *Law, Democracy and Development Journal* 94, 106; Financial Services Board 2017 *2017 Annual Report* HYPERLINK "https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf" https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 27 August 2018 60-61.

134 *Zietsman and another v Directorate of Market Abuse and another* 2016 (1) SA 218 (GP) (24 August 2015). 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.

135 See insider trading statistics on Financial Services Board *2017* HYPERLINK "https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf" https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 27 August 2018 60-61. 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.

136 Huang H "The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform" 2004 *Australian Journal of Corporate Law* 1, 31-32; Dalko V and Wang MH "Why is Insider Trading Law Ineffective? Three Antitrust Suggestions" 2016 *Studies in Economics and Finance Journal* 704, 708-710.

It is unfair to say that insider trading compensate the company agents while tippees can also benefit from inside information.[137] The researcher argues that insider trading should be regulated to prohibit both the insiders and tippees from trading with non public price-sensitive information for personal benefit.

The regulation of insider trading is necessary to promote fairness in the financial markets.[138] As discussed above, Zimbabwe prohibits illegal practices of insider trading in the *Securities Act*.[139] The researcher argues that the Zimbabwean legislature should consider: (a) adopting stringent and robust insider trading provisions; (b) establishing relevant enforcement institutions that have the authority to prevent, detect, investigate and prosecute insider trading activities; and (c) providing the enforcement institutions with relevant resources to combat insider trading. Put differently, the Zimbabwean anti-insider trading regulatory framework should be adequate and robust enough to prevent and combat insider trading practices in the financial markets. This approach could protect all investors in the Zimbabwean financial markets.

1.4 Statement of the Problem

Although the researcher could not find accurate data that can quantify the extent of the occurrence of insider trading in Zimbabwe, it is generally acknowledged that insider trading is still occurring in the Zimbabwean financial markets.[140] It is noted that the SECZ receives alleged insider trading cases from market participants and the police.[141] While

137 See similar comments by Beny LN "The Political Economy of Insider Trading Legislation and Enforcement: Internationa Evidence" 2002 *Harvard Law School Review* 1, 7.

138 Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 6-7; Padilla 2011 *Journal of Libertarian Studies* 392-394.

139 Section 88 of the *Securities Act*; Osode 2000 *Journal of African Law* 241.

140 The researcher relied on the interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. Also see Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635; Nyakazeya P 2008 *Investigations on Insider Trading in Progress – ZSE* HYPERLINK "https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-in-progress-zse/"https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-in-progress-zse/ accessed 28 March 2017 page number unknown.

141 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

an attempt to regulate insider trading has been made through legislation, such legislation still needs to be improved and aligned with recent developments and best international regulatory practices on the regulation of insider trading.[142] Insider trading provisions are currently contained in the *Securities Act* which regulates the Zimbabwean financial markets to reduce trading misconduct among all market participants.[143] The Act includes provisions to license[144] and regulate exchanges, central securities depositories,[145] custody and administration of securities,[146] insider trading,[147] and misrepresentation of information.[148] Nonetheless, there is no separate legislation that specifically regulates insider trading in Zimbabwe. Moreover, the insider trading provisions contained in the *Securities Act* are currently not adequate and robust enough to prevent insider trading.[149] For instance, since the inception of the Act, very few, insider trading cases have been successfully settled or prosecuted in Zimbabwe to date.[150] Furthermore, neither the *Securities Act* nor any legislation provides for the role of the ZSE in preventing and detecting insider trading. Furthermore, the *Securities Act* does not specifically give guidelines on the role of the SECZ in investigating insider trading cases. Given this background and for the purposes of this research, the following flaws and problems are examined:

---

142 See sections 88 of the *Securities Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

143 See sections 87-95 of the *Securities Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459.

144 See sections 38-49 of the *Securities Act;* see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

145 See sections 68-86 of the *Securities Act;* see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

146 See sections 29-37 and 63-67 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

147 See sections 87-95 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

148 See sections 96-97 of the *Securities Act;* see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

149 See section 87-95 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635; Luiz and Van Der Linde 2013 *SA Merc LJ* 487-491.

150 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; McLucas RW, Walsh JH and Fountain LL "Settlement of Insider Trading Cases with the SEC" 1992 *The Business Lawyer Journal* 79, 87.

(a) there is minimal co-operation between the SECZ and other enforcement agencies in Zimbabwe.[151] Therefore, it is submitted that the anti-insider trading enforcement authorities in Zimbabwe should consistently co-operate with each other to effectively combat insider trading practices in Zimbabwe. It is also hoped that the Zimbabwean policy makers will amend the *Securities Act* to enact provisions that obliges the SECZ to co-operate with other relevant authorities in Zimbabwe and elsewhere.

(b) the role of the ZSE, the SECZ and other related institutions on insider trading-related awareness and educational programmes have remained flawed and inconsistently enforced in Zimbabwe.[152] Accordingly, the role of these institutions is discussed to explore their strengths and weaknesses in the enforcement of the insider trading prohibition in Zimbabwe. In this regard, it is important to note that the *Securities Act* does not expressly provide for anti-insider trading awareness and educational programmes.[153] These flaws could have exacerbated the poor enforcement of the insider trading provisions in Zimbabwe to date.

(c) insider trading penalties contained in the *Securities Act* are relatively minor for deterrence purposes.[154] Accordingly, other alternative sanctions and remedies should be enacted to enhance the combating of insider trading in Zimbabwe. In this regard, the relevant authorities should consider, were applicable, adopting some anti-insider trading enforcement approaches from the USA and the South African experiences.

---

151 Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635-1636; Nyakazeya 2008 HYPERLINK "https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-in-progress-zse/" https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-in-progress-zse/ accessed 28 March 2017 page number unknown.

152 Musikavanhu T "Investor Education, Whose Responsibility?" 2014 *SECZ Newsletter* 4, 5; Sections 4(1)(f) and 87-95 of the *Securities Act*; Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1636.

153 See sections 87-95 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 African Journal of Business Management 1636; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 118-119.

154 See sections 90-91 of the *Securities Act;* see related comments by Oberg J "Is it Essential to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 16-19.

1.5 Aims and Objectives

1.5.1 Aims

This research seeks to examine the adequacy of the insider trading provisions contained in the *Securities Act*.[155] This is mainly done in order to recommend the enactment of a robust and adequate insider trading statutory framework in Zimbabwe. It is hoped that such framework will increase integrity, competitiveness and effectiveness of the Zimbabwean financial markets in the future.

1.5.2 Objectives

In order to achieve the aims of this research, the researcher will:

(a) discuss the insider trading provisions contained in the *Securities Act* in order to explore their adequacy. This is done to recommend the enactment of a specific legislation that regulates insider trading in Zimbabwe or the amendment of the *Securities Act* so as to introduce more adequate provisions on the regulation of insider trading in Zimbabwe;

(b) examine the effectiveness of the Zimbabwean anti-insider trading enforcement framework;

(c) investigate the adequacy of the current insider trading penalties contained in the *Securities Act* in Zimbabwe. This is done to examine whether such penalties are deterrent enough to enhance the regulation of insider trading in Zimbabwe;

(d) discuss the use of insider trading-related awareness and other preventative measures to combat illicit insider trading in Zimbabwe; and

(e) conduct a comparative study of the USA and South African insider trading regulatory frameworks in order to recommend possible measures that could be

155 Sections 87-95 of the *Securities Act;* see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

employed in Zimbabwe to enhance the regulation of insider trading in the Zimbabwean financial markets.

1.6 Rationale of the Study

Insider trading poses a threat to the financial and economic growth of the Zimbabwean financial markets.[156] Therefore, it is important to adequately regulate insider trading in Zimbabwe.[157] Market efficiency and public investor confidence are important factors that could drive the growth of the economy and investments in Zimbabwe.[158] The regulation of insider trading plays a very important role in curbing illicit trading practices such as insider trading in the Zimbabwean financial markets.[159] Accordingly, the regulation of insider trading is necessary for the promotion of accurate and strong financial markets in Zimbabwe. The researcher submits that although insider trading is prohibited in Zimbabwe, the provisions for insider trading regulation are not adequate and robust enough to prevent and combat insider trading. Furthermore, the *Securities Act* does not provide strong enforcement measures and remedies that could prevent the insider trading practices in Zimbabwe.[160] It is hoped that this research will help the relevant authorities in Zimbabwe to enact a robust, effective and adequate insider trading regulatory framework that will be consistently enforced.

1.7 Justifications for Comparative Analysis

The comparative study is carried out to investigate possible measures that can be adopted or learnt from the South African and the USA insider trading regulatory

---

156 Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1630 and 1637; also see McDowell J and Novis G "The Consequences of Money Laundering and Financial Crime" 2001 *Electronic Journal of the US Department of State* 6, 8.

157 Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1630 and 1637; Mwenda 1996-1999 *University of Ghana Law Journal* 138.

158 See related comments by Mwenda 1997 *The Zimbabwe Law Review* 42-43; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 11; McDowell and Novis 2001 *Electronic Journal of the US Department of State* 8.

159 Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1630 and 1637; McDowell and Novis 2001 *Electronic Journal of the US Department of State* 8.

160 See sections 87-95 of the *Securities Act;* see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1636.

frameworks to enhance the regulation of insider trading in Zimbabwe. The researcher only provides a comparative analysis of the regulation of insider trading in South Africa and the USA. The USA comparative analysis is confined to federal level-regulation. The regulation of insider trading in USA is examined because it is the first country to regulate insider trading by statute.[161] Moreover, its insider trading enforcement framework has been regarded by most researchers and financial markets experts as one of the most effective and progressive frameworks to date.[162] The regulation of insider trading in the USA is also considered because its federal insider trading provisions are relatively adequate and robust enough for deterrence purposes.[163] For example, the USA federal anti-insider trading regulatory and enforcement framework includes private actions and various self-regulatory organisations that complement the United States Securities and Exchange Commission (SEC) to effectively combat insider trading.[164] South Africa was considered because it has the most progressive insider trading laws in the Southern African Development Community (SADC).[165] Since the enactment of the *Financial Markets Act* 19 of 2012 in South Africa, various insider trading offenders have been successfully investigated by the Directorate of Market Abuse.[166] This implies that the

---

161 Shen 2008 *Journal of Business and Securities Law* 43; also see Chitimira H "An Analysis of the Market Abuse Prohibition Enforcement in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 188, 188; also see Steinberg IM "Insider Trading Regulation- A Comparative Analysis" 2003 *The International Lawyer* 159, 153.

162 Shen 2008 *Journal of Business and Securities Law* 43; also see Chitimira 2014 *Mediterranean Journal of Social Sciences* 188; also see Steinberg 2003 *The International Lawyer* 153; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 23; also see Noked N 2013 US Insider Trading Enforcement Goes Global HYPERLINK "https://corpgov.law.harvard.edu/2013/05/26/u-s-insider- trading-enforcement-goes-global/" https://corpgov.law.harvard.edu/2013/05/26/u-s- insider- trading-enforcement-goes-global/ accessed 30 October 2017 page number unknown.

163 Chitimira 2014 *Mediterranean Journal of Social Sciences* 188; see related comments by Replogle 2011 HYPERLINK "http://m.acc.com/legalresources/quickcounsel/InsiderTradingUS.cfm%20accessed%2017" http://m.acc.com/legalresources/quickcounsel/InsiderTradingUS.cfm accessed 17 August 2017 page number unknown.

164 See related comments by Steinberg 2003 *The International Lawyer* 154; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 188.

165 It has been reported that the regulation of securities in South Africa was ranked first among 148 countries surveyed for the World Economic Forum Global Competitiveness Report for four consecutive years; see Stander R "Market Integrity and Twin Peaks" 2016 *Financial Services Board Newsletter* 1, 20; Luiz and Van Der Linde 2013 *SA Merc LJ* 491.

166 See related statistics on the Financial Services Board 2017 *Financial Services Board 2017 Annual Report* website HYPERLINK "https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx%20accessed%2020" https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx accessed 20

insider trading provisions in South Africa are somewhat better enforced than those of Zimbabwe.

1.8 Specific Matters to be Examined

(a) The researcher examines the strengths and weaknesses of the provisions dealing with the enforcement of the insider trading prohibition in Zimbabwe.

(b) The role of the SECZ in the prevention, detection and investigation of insider trading practices is analysed.

1.9 Limitation of Study

The *Securities Act* regulates securities trading and other related activities.[167] However, this research focuses mainly on the insider trading provisions that are contained in the Act.[168] Therefore, this research does not discuss all the provisions of the *Securities Act* since it is limited to those that are relevant to the topic.[169] Accordingly, this research analyses the enforcement of the insider trading provisions in Zimbabwe.[170] This is done to explore whether such provisions are being effectively enforced by the SECZ and other relevant authorities.[171] The regulation of insider trading prior to 2004 is briefly discussed to provide a background on the development, prohibition and enforcement of insider

---

October 2017 60; Financial Services Board 2016*Financial Services Board 2016 Annual Report* website https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx accessed 17 August 2018 40; Although few cases of insider trading have been prosecuted due to the difficulty of burden of proof and the delay or backlog of cases in the South African courts, several cases have been settled and the EC has imposed administrative sanctions on many offenders to date.

167 See sections 3 and 4 of the *Securities Act* (Securities Exchange Commission Zimbabwe), sections 29 and 30 of the *Securities Act* (registration of securities exchanges), sections 38-49 of the *Securities Act* (licensing of brokers and other persons), sections 68-86 of the *Securities Act* (central securities depositories), sections 96-97 of the *Securities Act* (market manipulation) and sections 100-107 of the *Securities Act* (supervision of institutions).

168 Sections 87-95 of the *Securities Act;* see related comments by Mwenda 1996-1999 *Ghana Law Journal* 141-148.

169 See sections 87-95 of the *Securities Act.*

170 See sections 87-95 of the *Securities Act.*

171 Abubakar G "Impediments to Effective Enforcement of Insider Trading Regulations in Nigeria" 2013 *International Journal Management* 13, 17; also see Carvajal A and Elliott J "The Challenge of Enforcement in Securities Markets: Mission Impossible?" 2009 *International Monetary Fund* 1, 3 and 6.

trading laws in Zimbabwe. A historical background of insider trading is provided for the purposes of understanding how it was previously regulated. This is done to give a basis for this research concerning insider trading challenges in Zimbabwe. Moreover, only the regulation of insider trading in South Africa as well as the USA from the federal perspective is compared to Zimbabwe. This comparative study is done in order to suggest possible ways which can be incorporated into the Zimbabwean anti-insider trading regulatory framework from the stated jurisdictions to make it more adequate, stronger and competitive.

1.10 Research Methodology

For the purposes of addressing the isolated problems as discussed and making appropriate recommendations for an adequate insider trading statutory regulatory framework in Zimbabwe, a qualitative research method was used as indicated below:

(a) Primary and secondary sources

The researcher has employed both primary and secondary sources to explore relevant information on the topic under discussion. The researcher has utilised primary sources such as legislation, directives, rules, regulations, policies, reports and relevant case law. The secondary sources used in this research include books, journal articles, conference papers, academic theses and Internet sources. The researcher utilised data from both primary and secondary sources. These sources were used in order to support the arguments that are made in this research. Electronic and/or Internet sources were utilised, where possible, in this thesis. The Internet was utilised in this research because past and recent publications such as electronic books, cases, journal articles and websites are easily accessible on the Internet. Notably, the dates referred to after the Internet sources are the dates on which the researcher accessed them.

(b) Library

A library is a collection of sources of information made accessible to a community for reference or borrowing. It provides physical or digital access to relevant material on different subjects to the researcher. The library was utilised in this thesis because it contains relevant materials for this research such as books, case law, journals, legislative reports and other relevant materials.

(c) Comparative Research Method

A comparative study of insider trading legislation in South Africa and the USA was undertaken in this research. These countries have relatively more effective anti-insider trading measures which could be adopted in Zimbabwe.

The researcher uses the *Potchefstroom Electronic Law Journal* referencing style in the entire thesis.

1.11 Structure of the Dissertation

This thesis has nine chapters as indicated below:

CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

This chapter deals with the general research context. It outlines the aims, objectives, statement of the problem, the rationale of the study as well as the methodology of the study.

CHAPTER TWO

THE HISTORICAL DEVELOPMENT OF THE REGULATION OF INSIDER TRADING IN ZIMBABWE

This chapter discusses the historical development of the regulation of insider trading in Zimbabwe. This chapter investigates the regulation of insider trading prior to 2004 and under the *Securities Act* to determine the adequacy and effectiveness of the regulation of insider trading in Zimbabwe.

CHAPTER THREE

THEORIES AND POLICY DEBATES ON THE REGULATION OF INSIDER TRADING

The chapter discusses the policy debates and theories on the regulation of insider trading. This chapter also discusses the arguments for the regulation of insider trading, arguments against the regulation of insider trading and the theories of insider trading to expose the objectives of regulating insider trading in the financial markets especially in Zimbabwe.

CHAPTER FOUR

SELECTED ROLE-PLAYERS IN THE ENFORCEMENT OF THE ZIMBABWEAN INSIDER TRADING LAWS

The chapter provides an overview of the role and effectiveness of the relevant role-players in the enforcement of the insider trading prohibition in Zimbabwe. The role and function of the SECZ, the ZSE, the courts and other relevant regulatory institutions is discussed to determine the adequacy and effectiveness of these role-players in enforcing insider trading provisions in Zimbabwe.

CHAPTER FIVE

THE FLAWS AND CHALLENGES IN THE ENFORCEMENT OF THE INSIDER TRADING PROHIBITION IN ZIMBABWE

This chapter discusses the challenges associated with the ineffective enforcement of the insider trading prohibition in Zimbabwe. This is mainly done to recommend the adoption of adequate insider trading enforcement mechanisms to curb insider trading activities in the Zimbabwe financial markets.

CHAPTER SIX

THE REGULATION OF INSIDER TRADING IN THE UNITED STATES OF AMERICA

The chapter provides a comparative analysis of the regulation of insider trading in USA. The USA was chosen because its insider trading regulatory and enforcement framework has been regarded by researchers and financial markets experts as one of the most effective and progressive anti-insider trading regulatory frameworks in the world.

CHAPTER SEVEN

THE REGULATION OF INSIDER TRADING IN SOUTH AFRICA

This chapter provides a comparative analysis of the regulation of insider trading in South Africa. South Africa was chosen because it was regarded by the World Economic Forum (WEF) as the most progressive country in SADC on the regulation of insider trading.[172] Furthermore, the DMA has successfully investigated many insider trading cases in South Africa.

---

[172] See related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 458, 491; It has been reported that the regulation of securities in South Africa has ranked first among 148 countries surveyed for the World Economic Forum Global Competitiveness Report for four consecutive years.

CHAPTER EIGHT

OVERALL COMPARATIVE ANALYSIS

This chapter provides a comparative evaluation and analysis of the regulation of insider trading in the USA at a federal level, South Africa and Zimbabwe. This is mainly done to investigate possible lessons that can be learnt from the SA and the USA's insider trading regulatory frameworks to enhance the regulation of insider trading in Zimbabwe.

CHAPTER NINE

CONCLUSIONS AND RECOMMENDATIONS

This chapter provides recommendations, guidelines and conclusions on the regulation of insider trading in Zimbabwe.

CHAPTER TWO

THE HISTORICAL DEVELOPMENT OF THE REGULATION OF INSIDER TRADING IN ZIMBABWE

2.1 Introduction

The integrity of the Zimbabwean financial markets needs to be maintained for foreign and local investors to have confidence and to increase investment in them.[173] The researcher submits that this could be achieved through proper regulation of insider trading in Zimbabwe. Proper regulation of insider trading could be achieved through the enactment of adequate insider trading provisions and the effective enforcement of the insider trading prohibition by the enforcement authorities.[174] The trading of shares and stocks in Zimbabwe started after the establishment of the S. Hyman brokerage.[175] However, insider trading was not regulated by any legislation applicable to the Zimbabwean financial markets until the enactment of the *Securities Act* in 2004.[176] This chapter provides a historical overview of the regulation of insider trading in Zimbabwe. For instance, this chapter examines how insider trading was regulated before 2004 under the *Rhodesia*

---

173 Section 4(1)(a),(c),(d),(e) and (f) of the *Securities Act* 17 [Chapter 24:25] of 2004 as amended (*Securities Act*); see related comments by Padilla A "Should The Government Regulate Insider Trading?" 2011 *Journal of Libertarian Studies* 379, 382-383; Saungweme PW, Peters R and Brijlal P "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630, 1633-1634.

174 See analysis in paragraphs 2.3 in Chapter Two and 4.2; 4.3 and 4.4 in Chapter Four of this thesis.

175 See related comments by Karekwaivenani G "A History of the Rhodesian Stock Exchange: The Formative Years, 1946-1952" 2003 *Journal of Humanities of the University of Zimbabwe* 9, 11-23; Muzamani JT "The Zimbabwe Stock Exchange" 1993 *African Review of Money Finance and Banking* 75, 76-77; Benston GJ "Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934" 1973 *The American Economic Review* 132, 133.

176 Section 88 of the *Securies Act*; see related discussion in paragraph 2.2 of this chapter.

Stock Exchange Act,[177] *the Zimbabwe Stock Exchange Act,*[178] *the Companies Act,*[179] *the Banking Act,*[180] *the ZSE Listing Requirements*[181] *and the Prevention of Corruption Act.*[182] Furthermore, this chapter examines the current regulation of insider trading under the *Securities Act*. Specifically, the researcher examines the conduct that amounts to insider trading, the defenses and insider trading penalties under the *Securities Act*. This is done to determine whether the *Securities Act* is robust and adequate enough to curb insider trading activities in the Zimbabwean financial markets.

2.2 *The Regulation of Insider Trading Prior to 2004*

2.2.1 The Regulation of Insider Trading under the Rhodesia Stock Exchange Act

The *Rhodesia Stock Exchange Act*[183] was enacted in 1974 to regulate the Rhodesia Stock Exchange (RSE) and the trading of securities in the Rhodesian financial markets. However, the *Rhodesia Stock Exchange Act* did not expressly prohibit insider trading or

---

177 Section 15(1) of the *Rhodesia Stock Exchange Act* [Chapter 24:18] of 1974 (*Rhodesia Stock Exchange Act*); Karekwaivenani 2003 *Journal of Humanities of the University of Zimbabwe* 9, 23; Muzamani 1993 *African Review of Money Finance and Banking* 75-77.

178 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act* [Chapter 24:18] of 1973 as amended (*Zimbabwe Stock Exchange Act*); see related comments Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1634 and 1637.

179 Section 82(1) of the *Companies Act* [Chapter 24:03] of 1951 as amended (*Companies Act*); Chitimira H A "Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 939, 942, 946-951; Osode PC "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 241.

180 Section 77(1) of the *Banking Act* [Chapter 24:20] of 1999 as amended (*Banking Act*); see related comments by Saungweme, Peters and Brijlal 2013 *African Journal of Business Management* 1635.

181 Section 3.69(i) of the Zimbabwe Stock Exchange Listing Requirements of 1992 as amended (ZSE Listing Requirements); see related comments by Fishman MJ and Hagerty KM "Insider Trading and the Efficiency of Stock Prices" 1992 *The Rand Journal of Economics* 106, 114-115; Grossman SJ "An Analysis of the Role of 'Insider Trading' on Futures Markets" 1986 *The Journal of Business* 129, 130.

182 Section (3)(1)(a) to (f) of the *Prevention of Corruption Act* [Chapter 9:16] of 2001(*Prevention of Corruption Act*) see related comments by Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 1, 4-17; Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 693-701.

183 *Rhodesian Stock Exchange Act* was later amended by the *Zimbabwe Stock Exchange Act* 27 of 1973; see related comments by Muzamani 1993 *African Review of Money Finance and Banking* 76-77; Lynton Edwards 2017 *History of the Zimbabwe Stock Exchange* HYPERLINK https://lynton- edwards.com/about-the-zimbabwe-stock-exchange/ accessed 21 June 2017 page number unknown.

any market abuse practices.[184] It is submitted that the policy makers could have failed to expressly prohibit insider trading because the Rhodesian financial markets were still in their early stages of development and insider trading activities were probably less prevalent at that time. The researcher submits that the *Rhodesia Stock Exchange Act* should have expressly prohibited market abuse practices such as insider trading to promote market efficiency and protect the integrity of the Rhodesian financial markets. This follows the fact that the *Rhodesia Stock Exchange Act* merely stated that the RSE committee had the responsibility to ensure fairness and efficiency in the trading of listed securities by all the relevant issuers of such securities.[185] It is not clear how the RSE committee ensured such fairness and efficiency in the Rhodesian financial markets.[186] The *Rhodesia Stock Exchange Act* did not provide guidelines on how the RSE committee had to ensure that there is fairness and efficiency in the Rhodesian financial markets. It suffices to conclude that the *Rhodesia Stock Exchange Act* was not sufficient to regulate insider trading in the Rhodesian financial markets because the Act did not prohibit insider trading practices.

2.2.2 The Regulation of Insider Trading under the Zimbabwe Stock Exchange Act

As earlier stated above, the *Rhodesia Stock Exchange Act* was amended by the *Zimbabwe Stock Exchange Act* in 1980.[187] The *Zimbabwe Stock Exchange Act* was

---

184 Section 15(1) of the *Rhodesia Stock Exchange Act;* see related discussion on the regulation of insider trading by Muzamani 1993 *African Review of Money Finance and Banking* 76-77; Botha 1991 *South African Mercantile Law Journal* 4-17; Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455, 459-462; Carlton DW and Fischel DR "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857, 884-888.

185 Section 15(1) of the *Rhodesia Stock Exchange Act*; see related comments by Tomasic R, Bottomley S, McQueen R *Corporations Law in Australia* 2nd Edition (The Federation Press Sydney 2002) 580-582.

186 Section 15(1) of the *Rhodesia Stock Exchange Act*; see related comments by Tuyon J and Ahmad Z "Behavioural Finance Perspectives on Malaysian Stock Market Efficiency" 2016 *Borsa Istanbul Review* 43, 46; Pilbeam K *Finance and Financial Markets* 4th Edition (Red Globe Press United Kingdom 1998) 228; Akbas F, Armstrong WJ, Sorescu S, and Subrahmanyam A "Capital Market Efficiency and Arbitrage Efficacy" 2016 *Journal of Financial and Quantitative Analysis* 387, 388 and 391.

187 See the long and short title of the *Zimbabwe Stock Exchange Act*; See related comments by Zimbabwe Stock Exchange 2017 *What is the Zimbabwe Stock Exchange?* HYPERLINK "http://myzimhustle.co.zw/wp-content/uploads/2017/09/About-the-Zimbabwe-Stock-" http://myzimhustle.co.zw/wp-content/uploads/2017/09/About-the-Zimbabwe-Stock-Exchange.pdf accessed 22 November 2018 page number unknown; Muzamani 1993 *African*

enacted to provide for the establishment of the ZSE and the ZSE Committee.[188] The *Rhodesia Stock Exchange Act* was amended to provide better regulation of the Zimbabwe financial markets and align the Zimbabwe financial markets with other international stock exchanges. The *Zimbabwe Stock Exchange Act* only regulated securities and required stockbrokers to register with the Registrar of the ZSE.[189] This was probably done to enable the ZSE to easily monitor the trading of securities in the Zimbabwean financial markets in order to isolate and detect illicit trading activities such as insider trading in listed securities. However, the ZSE did not provide for mechanisms to detect illicit trading activities such as electronic surveillance systems. Thus, it was difficult to detect insider trading activities.

Furthermore, the *Zimbabwe Stock Exchange Act* prohibited any person who traded with confidential information in listed securities of the company.[190] However, the *Zimbabwe Stock Exchange Act* did not define or describe which information will be regarded as confidential information but provided that such information must affect the purchase price of the listed securities of the company.[191] It is submitted that the description of what confidential information means by the Zimbabwean policy makers could have eliminated the vagueness of the term confidential information. In addition, the *Zimbabwean Stock Exchange Act* did not define the term "person". However, it provided that the person who

---

Review of Money Finance and Banking 76-77; Anderson JP "Anticipating A Sea Change For Insider Trading Law: From Trading Plan Crisis To Rational Reform" 2015 *Utah Law Review* 339, 341-344; Bewaji W *Insider Trading in Developing Jurisdictions Achieving an Effective Regulatory Regime* 1st ed (Routledge Publishers London 2012) 46-54.

188 Sections 3 and 4 of the *Zimbabwe Stock Exchange Act;* see related comments by Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 109-113; MyZimHastle 2017 *The Role Of Zimbabwe Stock Exchange As An Investment Platform* HYPERLINK "http://myzimhustle.co.zw/wp-%09content/uploads/2017/10/1-The-role-of-Zimbabwe-Stock-Exchange-as-an-investment-platform-%0928-June.pdf"http://myzimhustle.co.zw/wp-content/uploads/2017/10/1-The-role-of-Zimbabwe-Stock-Exchange-as-an-investment-platform-28-June.pdf accessed 22 November 2018 page number unknown.

189 Sections 25 and 29 of the *Zimbabwe Stock Exchange Act*; see related comments by Muzamani 1993 *African Review of Money Finance and Banking* 76-77; Chitimira 2014 *Speculum Juris* 109-113.

190 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* see related comments by Kiggundu J *Botswana Company Law Service* (Juta and Company Ltd Lansdowne 2005) 249; Khan MY *Indian Financial System* 8th Ed (McGraw Hill Education-India Private Limited New Delhi 2013) 39.

191 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* see related comments by Kiggundu *Botswana Company Law Service* 249; Khan *Indian Financial System* 8th Ed 39.

deals with such information must have access to or received such confidential information.[192] It is submitted that the *Zimbabwean Stock Exchange Act* could have been specific on who can be held liable for insider trading. Furthermore, the court could impose a fine not exceeding Zim $6000 and imprisonment term not exceeding three years or both such fine and imprisonment on any person found guilty of trading with confidential information in relevant listed securities.[193] It would seem as if the Zim $6000 fine and three years imprisonment term was not deterrent enough to discourage people from committing insider trading in the relevant securities[194] or from trading with confidential information. Although dealing with confidential information in relevant listed securities was prohibited by the *Zimbabwean Stock Exchange Act,* insider trading activities still continued to take place in the Zimbabwean financial markets because the *Zimbabwean Stock Exchange Act* was not specific on who is an insider. The ZSE did not have relevant resources to detect illicit trading activities in the Zimbawean financial markets.[195]

2.2.3 The Regulation of Insider Trading under the Companies Act

The *Companies Act* provides that were companies purchase shares, they must disclose particulars such as the number and nominal value of the shares, the date on which the shares were delivered to the company, the total amount paid by the company for the shares and the maximum and minimum prices paid in respect of shares of each class purchased to the Registrar of the ZSE.[196] The mandatory disclosure of inside information

---

192 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* see related comments by Kiggundu *Botswana Company Law Service* 249; Khan *Indian Financial System* 8th Ed 39.

193 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* Seyhun HN "The Effectiveness of the Insider-Trading Sanctions" 1992 *The Journal of Law and Economics* 149, 152-153; Giorgio E "Possession of Information in the Insider Trading Offence" 2017 *Western Australian Student Law Review* 7, 16.

194 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* see related comments by Osode 2000 *Journal of African Law* 245-246; Kawadza H "The Liability Regime For Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383, 291; Chitimira 2014 *PELJ* 960-961.

195 See related comments by Karekwaivenani 2003 *Journal of Humanities of the University of Zimbabwe* 11-23; Muzamani 1993 *African Review of Money Finance and Banking* 76-77.

196 Section 82(1) of *the Companies Act;* Popova T, Georgakopoulos G, Sotiropoulos L and Vasileiou KZ "Mandatory Disclosure and Its Impact on the Company Value" 2013 *International Business Research Journal* 1, 2; Ansah SO "The Impact of Corporate Attributes on the Extent of Mandatory Disclosure and Reporting by Listed Companies in Zimbabwe" 1998 *The International Journal of Accounting* 605, 608-610.

reduces asymmetry of information and improves the reputation of the company.[197] Although, the *Companies Act* does not prohibit insider trading, the purpose of mandatory disclosure requirements on the part of the companies or issuers of shares was to promote equal access to valuable information by all market participants and discourages insiders from taking an advantage of investors who do not have such information.[198] This policy goal for equal access to inside information helps enforcement authorities to combat insider trading.

2.2.4 The Regulation of Insider Trading under the Banking Act

The *Banking Act* regulates the registration, supervision and persons conducting banking business and financial activities in Zimbabwe.[199] In relation to insider trading, the *Banking Act* provides that any registrar, officer, employee of the reserve bank, supervisor, inspector, curator, or auditor of a banking institution is prohibited from dealing in relevant listed securities with any information of the banking institution acquired in the performance of his or her work.[200] It is submitted that although the *Banking Act* prohibits the use of any information for personal gain, it does not directly prohibit insider trading.[201] Furthermore, any person who uses such information for personal profit may be liable to pay a fine not exceeding Zim $200 000 or double the profit gained by the offender whichever is

197 See related comments by Popova T, Georgakopoulos G, Sotiropoulos L *et al* "Mandatory Disclosure and Its Impact on the Company Value" 2013 *International Business Research Journal* 1, 2-3; Ansah SO "The Impact of Corporate Attributes on the Extent of Mandatory Disclosure and Reporting by Listed Companies in Zimbabwe" 1998 *The International Journal of Accounting* 605, 608-610.

198 See related comments by Popova, Georgakopoulos, Sotiropoulos *et al* 2013 *International Business Research Journal* 2-3; Ansah 1998 *The International Journal of Accounting* 608-610.

199 See the long title of the *Banking Act;* Hopt KJ "Insider Trading on the Continent" 1982 *Journal of Comparative Corporate Law and Securities Regulation* 379, 380 and 383; Czirak P "Trading by Bank Insiders Before and During the 2007-2008 Financial Crisis" 2017 *Journal of Financial Intermediation* 1, 2, 12-14.

200 Section 77(1) of the *Banking Act;* Navickas JM "Swiss Banks and Insider Trading in the United States" 1984 *International Tax and Business Lawyer* 159, 173-180; Avci SB, Schipani CA and Seyhun HN "Eliminating Conflicts of Interests in Banks: The Significance of the Volcker Rule" 2018 *Yale Journal on Regulation* 343, 346.

201 Section 77(1) of the *Banking Act;* see related comments by Navickas 1984 *International Tax and Business Lawyer* 173-180; Avci, Schipani and Seyhun 2018 *Yale Journal on Regulation* 346.

greater.[202] In addition, the offender faced an imprisonment term not exceeding five years or both such fine and imprisonment.[203] It is submitted that the penalties stated above are not stringent enough to deter the affected persons from trading with non public price-sensitive confidential information in listed securities and/or commit insider trading activities. This follows the fact that the profits or money likely to be gained by the offenders outweighs the penalties imposed for such insider trading-related offences.

2.2.5 The Regulation of Insider Trading under the ZSE Listing Requirements

The ZSE listing requirements are rules adopted by the ZSE Committee which provide the powers of the ZSE Committee, rules and procedures on disclosure of information and the procedure that was supposed to be followed by issuers when dealing in securities.[204] In relation to insider trading, the ZSE listing requirements provide that directors may not deal with non public price-sensitive information in relevant securities.[205] The prohibition of insider trading by the ZSE listing requirements was to ensure that all market participants have equal access to valuable information related to securities. However, the ZSE listing requirements only prohibit directors from trading with non public price-sensitive information. Thus, other employees, consultants, lawyers, tippees and juristic persons are not expressly prohibited from committing insider trading offences.[206] Furthermore, the ZSE listing requirements do not provide the action to be taken by the ZSE against any

---

202 Section 77(1)(f)(i)-(ii) of the *Banking Act;* see related comments by Navickas 1984 *International Tax and Business Lawyer* 173-180; Avci, Schipani and Seyhun 2018 *Yale Journal on Regulation* 346.

203 Section 77(1) of the *Banking Act*; Navickas 1984 *International Tax and Business Lawyer* 173-180; Avci, Schipani and Seyhun 2018 *Yale Journal on Regulation* 346.

204 See the objectives of the ZSE listing requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

205 Rule 3.69(i) of the ZSE listing requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *.A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

206 Rule 3.69(i) of the ZSE listing requirements; See related comments by Botha 1991 *South African Mercantile Law Journal* 4; Kawadza H "The Liability Regime for Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383, 386.

person who commits insider trading.[207] The flaw in the ZSE listing requirements could negatively affect the curbing of illicit insider trading activities in the Zimbabwean financial markets

2.2.6 The Regulation of Insider Trading under the Prevention of Corruption Act

The *Prevention of Corruption Act* was, inter alia, enacted to prevent corruption in the private and public institutions and investigate claims arising from dishonesty or corrupt activities in Zimbabwe.[208] For instance, the *Prevention of Corruption Act* provides that any agent who commits dishonesty in a company for personal benefit and fails to disclose to his or her principal the full nature of any transaction carried out in connection with the company shall be guilty of an offence.[209] This implies that the company agent who traded with non public price-sensitive information in listed securities for personal benefit was considered as being dishonest to his principal, and thus could be held liable for his or her actions. However, the *Prevention of Corruption Act* does not expressly prohibit insider trading.[210] It is submitted that between 2000 and 2004, the ZSE relied on the *Prevention of Corruption Act* to investigate insider trading cases in the Zimbabwean financial markets.[211] Consequently, persons that were accused of committing insider trading were not effectively and easily investigated or convicted of insider trading because no specific provision dealt with conduct pertaining to insider trading.[212]

---

207 Rule 3.69(i) of the ZSE listing requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

208 Sections 3 and 4 of the *Prevention of Corruption Act;* Chanakira N 2004 *ZSE Insider Trading Set to Worsen* HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 22 November 2018 page number unknown; Kim SH "Insider Trading as Private Corruption" 2014 *UCLA Law Review* 931, 951-958*;* Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1633.

209 Sections 3 and 4 of the *Prevention of Corruption Act*; see related comments by Bainbridge 1985 *Virginia Law Review* 456-462.

210 Sections 3 and 4 of the *Prevention of Corruption Act;* see related comments by Bainbridge 1985 *Virginia Law Review* 456-462.

211 Sections 6-9 of the *Prevention of Corruption Act;* see related comments by Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 24 April 2017 page number unknown; Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; Bainbridge 1985 *Virginia Law Review* 456-462.

212 Section 6,7,8 and 9 of the *Prevention of Corruption Act;* see related comments by Chanakira 2004 HYPERLINK "https://www.thestandard.co.zw/2004/04/16/zse-%09insider-trading-set-to-

2.3 *The Current Regulation of Insider Trading*

2.3.1 *The Regulation of Insider Trading under the Securities Act*

The *Securities Act* was promulgated in 2004 and became effective in 2008. It was then amended in 2013.[213] The researcher examines the relevant insider trading provisions of the *Securities Act* below.

2.3.1.1 Definition of key concepts

The term "insider trading" is not expressly defined under the *Securities Act*.[214] However, the Act expressly prohibits practices that could amount to insider trading.[215] For instance, the *Securities Act* provides that any individual who knowingly deals directly or indirectly with non public price-sensitive information in listed securities for his or her account or for another may be held liable for insider trading in Zimbabwe.[216] In addition, any person who unlawfully discloses non public price-sensitive information, encourages or discourages any other person to deal with non public price-sensitive information in relevant securities is also prohibited.[217] These practices relate to the definition of insider trading because the person who commits insider trading must be an insider as described by the *Securities Act*. The term "individual" or "insider" is not expressly defined in the *Securities Act*.[218]

---

worsen/" https://www.thestandard.co.zw/2004/04/16/zse-insider-trading-set-to-worsen/ accessed 24 April 2017 page number unknown; Botha 1991 *South African Mercantile Law Journal* 7-11; Osode 1999 *African Journal of International Comparative Law* 696-697.

213 The *Securities Act* was amended by the section 1 of the *Securities Act* 2 [Chapter 24:25] of 2013; Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

214 Section 87 of the *Securities Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 383, 389; Jooste R "The Regulation of Insider Trading in South Africa Another Attempt" 2000 *South African Law Journal* 284, 293-294.

215 Sections 87 and 88 of the *Securities Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 389; Jooste 2000 *South African Law Journal* 293-294.

216 Section 88(1)(a) of the *Securities Act;* see related comments by Jooste 2000 *South African Law Journal* 293-294; Osode 2000 *Journal of African Law* 241-242; Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 31-32.

217 Section 88(1)(b) and (c) read with (2) of the *Securities Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 34-36; Osode 2000 *Journal of African Law* 242; Chitimira 2014 *PELJ* 955-958.

218 Sections 87 and 88 of the *Securities Act*; see related comments by Luiz SM "Insider Trading Regulation - If at First You Don't Succeed" 1999 *South African Mercantile Law Journal* 136, 143;

However, the Act names categories of individuals that can be held liable for committing insider trading.[219] Such individuals include a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates.[220] These individuals exclude juristic persons. The exclusion of juristic persons from the insider trading prohibition could enable individuals to trade in relevant listed securities with non public price-sensitive information through their companies and escape insider trading liability.[221] The researcher submits that juristic persons should be prohibited from trading with non public price-sensitive information to effectively curb insider trading activities in the Zimbabwean financial institutions and companies.

The *Securities Act* also prohibits tipping but does not define the term "tipping".[222] Tipping occurs when the insider tips the tippee or secondary insider with non public price-sensitive information, who continues to deal with such information in relevant securities. The researcher submits that it is necessary for policy makers to define tipping because the *Securities Act* does not provide circumstances in which the tippee will be liable for insider trading.[223]

Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437, 438.

219 Sections 87 and 88 of the *Securities Act*; see related comments by Jooste 2000 *South African Law Journal* 289-290; Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 700; Osode 2000 *Journal of African Law* 244-245.

220 Section 87 of the *Securities Act*; see related comments by Jooste 2006 *South African Law Journal* 438; Osode 2000 *Journal of African Law* 244; Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *South African Mercantile Law Journal* 44, 45.

221 Section 87 and 88 of the *Securities Act*; See related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294; Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 31-32.

222 Section 88(2) of the *Securities Act*; see related comments by Jooste 2006 *South African Law Journal* 443; Brodsky DM "Insider Trading and the Insider Trading Sanctions Act of 1984: New Wine Into New Bottles?" 1984 *Washington and Lee Law Review* 921, 928.

223 See sections 87 and 88 of the *Securities Act*; Rider BAK and Tajima Y Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law (kluwe law international Portland 1998) 209; Chitimira *The Regulation of Insider Trading in South Africa* 83.

The term “dealing” is not defined under the *Securities Act*.[224] However, the *Securities Act* prohibits the insider from dealing directly and indirectly with non public price-sensitive inside information in relevant listed securities.[225] It is not clear whether the term “dealing” under the *Securities Act* also includes subscribing for shares or it only means the selling and buying of shares.[226] The researcher submits that it could have been better for the legislature to provide a concise meaning of the term “dealing” to avoid the contravention of the *Securities Act* by *bona fide* persons that are ignorant of the actual meaning of this term.

Inside information is defined as information that is “specific or precise which has not been made public and which if it were made public would be likely to have a material effect on the price or value of a listed security”.[227] The researcher discusses the elements of inside information below:

(a) the information must be specific or precise

The *Securities Act* does not define what constitutes specific or precise information.[228] However, not all information is considered as inside information in the *Securities Act*.[229] For instance, transactions based on rumours, speculation or suspicions are excluded from information that is considered as specific or precise.[230] This implies that only confirmed and accurate information qualifies as inside information in terms of the

---

224 Sections 87 and 88 of the *Securities Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 138; Cassim 2007 *South African Mercantile Law Journal* 56-58.

225 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Deitz HJ “A Practical Look at Section 16(b) of the Securities Exchange Act” 1974 *Fordham Law Review* 1, 2.

226 Sections 87 and 88 of the *Securities Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 138; Cassim 2007 *South African Mercantile Law Journal* 56-58.

227 Section 87 of the *Securities Act*; Schipani CA and Seyhun HN “Defining ‘Material, Nonpublic:’ What Should Constitute Illegal Insider Information?” 2016 *Fordham Journal of Corporate and Financial Law* 327, 341-345; Devenish GE “What Constitutes ‘Inside Information’ for Purposes of Insider Trading?” 2017 *THRHR* 506, 511-512.

228 Sections 87 and 88 of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

229 Section 87 of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

230 Section 87 of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

Securities Act because unconfirmed information is sometimes not true.[231] Notwithstanding the fact that information that is specific or precise could eliminate vagueness and other related challenges, the courts normally treat each case based on its own circumstances and merits.[232] It is submitted that the duty to determine the degree of vagueness of such information should be left to the court because cases are different.

(b) the information must not have been made public

In terms of the *Securities Act,* inside information ceases to be inside information when it is published.[233] For instance, inside information is regarded as being made public when it is published in accordance with the rules of the Securities Exchange Commission of Zimbabwe (SECZ) with the purpose of informing investors and other market participants about financial markets related issues.[234] In addition, inside information will be regarded as being made public when it is held in the SECZ records that can be accessed by any person.[235] However, the *Securities Act* does not give a time frame or the actual time within which the non public price-sensitive information will be regarded as having been published.[236] The Act could have mandated insiders to disclose inside information to the public within specific time frames to avoid such insiders obtaining an unfair advantage over other market participants ignorant of its price-sensitive nature.[237] It is submitted that disclosure of information creates equal access to information for all participants in the

231 Section 87 of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

232 Section 87 of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

233 Section 87(1) and (2) of the *Securities Act*; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

234 Section 87(2)(a) of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

235 Section 87(2)(b) of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

236 Section 87(2) of the *Securities Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 51; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

237 Section 87(2) of the *Securities Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 51; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

securities markets. This could increase public investor confidence in the Zimbabwean financial markets.

(c) the information must be obtained or learned by an insider

The *Securities Act* provides that information must be obtained by an insider for it to be considered as inside information.[238]

(d) the information is likely to have an effect on the price or value of any security listed on a regulated market

The *Securities Act* provides that for information to be regarded as inside information there must be a likelihood that it will affect the price or value of relevant listed securities.[239] However, the *Securities Act* does not provide circumstances when information is "likely to have a material effect" on the price of relevant listed securities.[240] Furthermore, the *Securities Act* does not clearly state the person responsible for determining whether the inside information in question will likely have an effect on relevant listed securities and how such effect is determined.[241] It seems that the discretion to determine such effect and its likelihood to affect listed securities is left to the SECZ and the courts. Perhaps, the legislature should have included a provision in the *Securities Act* to expressly empower both SECZ and the courts to determine whether any such non public inside information is likely to have a negative material effect on the price or value of the relevant listed securities.

The *Securities Act* defines the term "affected security" as a listed security to which the inside information relates or a listed security whose price or value is likely to be affected

238 The analysis of the term "insider" has been discussed in paragraph 2.3.1.1 Sections 87 and 88 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

239 Section 87 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

240 Section 87 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

241 Section 87 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

if the non public price-sensitive information is made public.[242] This implies that insider trading is only regulated in respect of listed securities.

The *Securities Act* defines the term "securities exchange" as a person or entity that provides a market place or facility, including an electronic trading system which enables buyers and sellers of securities to trade.[243] Moreover, "regulated exchange" means a registered securities exchange or a securities exchange that conducts business lawfully oudside Zimbabwe.It is submitted that in Zimbabwe, the SECZ and the ZSE are responsible for supervising and monitoring trading in securities which is good. However, the government should support these institutions with adequate resources to effectively fulfill their responsibilities.

2.3.1.2 Insider Trading Offences

(a) Dealing for one's own account or for another person

Any person who knows that he or she has non public price-sensitive inside information and who deals directly or indirectly for his or her benefit or for another person in any relevant listed securities will incur liability for insider trading.[244] In terms of this provision, the person who deals with non public price-sensitive inside information in relevant securities must be a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates.[245] This implies that juristic persons are not prohibited from trading with non public price-sensitive information in relevant listed securities.[246] It is submitted that the policy makers should have also

---

242 Section 87 of the *Securities Act;* see related comments by Luiz S and Van Der Linde K 2013 *SA Merc LJ* 460; Luiz S "Aspects of the Cross-listing of Securities" 2009 *SA Merc LJ* 631, 636-637.
Section 87 of the *Securities Act*.

244 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92; Jooste 2006 *The South African Law Journal* 446.

245 Section 87 of the *Securities Act*; see related comments by Jooste 2000 *South African Law Journal* 289-290; Osode 1999 *African Journal of International and Comparative Law* 700; Osode 2000 *Journal of African Law* 244-245.

246 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South*

prohibited companies from trading with such information. Any person who trades with non public price-sensitive information through a company will escape insider trading liability.[247]

The insider must be aware that he or she is trading with non public price-sensitive information for him or her to incur insider trading liability.[248] However, the *Securities Act* does not require the authorities to prove that the insider intentionally exploited non public price-sensitive information.[249]

The insider must have dealt with non public price-sensitive inside information in relevant securities for personal benefit for him or her to incur liability for insider trading.[250] It is submitted that the insider will only incur insider trading liability if he or she trades with non public price-sensitive inside information in listed securities. Thus, unscrupulous persons that abuse non public inside information relating to securities that are not listed on the ZSE will evade insider trading liability.[251]

African Law Journal 293-294; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

247 Sections 87 and 88(1)(a) of the *Securities Act;* See related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

248 Section 88(1)(a) of the *Securities Act*; see related comments by Langevoort DC "What Were They Thinking? Insider Trading and the Scienter Requirement" in Bainbridge SM *Research Handbook on Insider Trading* (Edward Elgar Publishing Limited United Kingdom 2013) 59; Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294.

249 Section 88(1)(a) of the *Securities Act*; See related comments by Langevoort "What Were They Thinking? Insider Trading and the Scienter Requirement" 59; Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294.

250 Sections 87 and 88 of the *Securities Act;* see related comments by Karsch M "The Insider Trading Sanctions Act: Incorporating A Market Information Definition" 1984 *Journal of Comparative Business and Capital Market Law* 283, 288-289; Onele J "Insider Dealing Under Nigerian Law: Any New Lessons?" 2016 *The Gravitas Review of Business and Property Law* 1,4; Banoff BA "The Regulation of Insider Trading in the United States, United Kingdom, and Japan" 1988 *Michigan Journal of International Law* 145, 148 and 150.

251 Section 87 and 88 (1)(a) of the *Securities Act.*

(b) Encouraging or discouraging dealing by another person

The *Securities Act* prohibits an insider from encouraging or discouraging any person to deal in any relevant listed securities while in possession of non public price-sensitive information relating to securities.[252] This offence requires that the insider must be in possession of non public price-sensitive inside information that is likely to have a material effect on the price of relevant listed securities.[253] It is submitted that only insiders who are aware that they are in possession of inside information may be liable for insider trading in terms of the *Securities Act*. In addition, the Act prohibits any person from discouraging others from dealing with non public price-sensitive inside information relating to affected listed securities.[254] This offence discourages persons with non public price-sensitive inside information from influencing other persons to deal or refrain from dealing in relevant listed securities to the detriment of innocent investors who do not possess such information.[255] However, the *Securities Act* does not clearly state whether the recipient of such encouragement or discouragement will also incur insider trading liability.[256] The researcher submits that it is unfair for the insider to incur liability alone while the recipient escapes insider trading liability.

(e) Improper disclosure of inside information

Any person who knows or ought to know that he or she has non public price-sensitive inside information and discloses such information to other persons commits an insider

---

252 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Chitimira H "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 312 and 321; Jooste 2006 *The South African Law Journal* 451-452; Cox JD "Insider Trading and Contracting: A Critical Response to the Chicago School" 1986 *Duke Law Journal* 628, 629; Jooste 2000 *The South African Law Journal* 294-295.

253 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Chitimira 2014 *De Jure* 312 and 321; Jooste 2006 *The South African Law Journal* 451-452; Cox 1986 *Duke Law Journal* 629; Jooste 2000 *The South African Law Journal* 294-295.

254 See related comments by Luiz 1999 *South African Mercantile Law Journal* 139.

255 Section 88(1)(b)-(c) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 296.

256 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 296.

trading offence.[257] This offence is only extended to natural persons. Given this background, it is clear that improper disclosure of non public price-sensitive inside information by juristic persons is not expressly prohibited under the *Securities Act*.[258] It appears that the Act overlooked the possibility of ignorant disclosure of inside information by juristic persons because in many instances companies can act through natural persons.

2.3.1.3 Available Defences

Any person dealing in relevant securities with non public price-sensitive information for his or her own account or for another person, and any insider who, while in possession of inside information, encourages or discourages any other person from dealing in relevant listed securities could escape liability if he or she:[259]

(a) was acting on specific instructions from a client.[260] The researcher submits that the insider trading offender can only rely on this defence if he or she was aware of the inside information during the consultation with the client. Furthermore, if the insider was aware of the inside information he or she has the choice of rejecting the client's instructions. This implies that an insider who is aware of non public price-sensitive information and continues to trade with such information cannot rely on this defence.

---

257 Section 88(2) of the *Securities Act*; Luiz 1999 *South African Mercantile Law Journal* 139-140; Chitimira 2014 *De Jure* 321.

258 Section 88(2) of the *Securities Act*; Luiz 1999 *South African Mercantile Law Journal* 139-140; Chitimira 2014 *De Jure* 321.

259 Section 88(1)(a) and (b) read with section 89(1) of the *Securities Act*; see related comments by see related comments by Cassim 2007 *South African Mercantile Law Journal* 58-59; Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

260 Section 89(1)(a)-(c) of the *Securities Act* see related comments by Cassim 2007 *South African Mercantile Law Journal* 58-61; Osode 2000 *Journal of African Law* 251; Jooste *2000 The South African Law Journal* 296; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

(b) would have acted in the same way even without the non public price-sensitive inside information.[261] This defence protects the defendant who proves that inside information did not influence him or her to deal in relevant listed securities.[262] The defendant will have to produce a good track record of his or her buying and selling of shares in the relevant listed securities in order to rely on this defence.[263]

(c) was representing a government institution.[264] The insider must prove that he or she was pursuing matters relating to monetary policy, policies in respect of exchange rates and management of a public debt or foreign reserves.[265] This defence is intended to protect persons that deal in the relevant listed securities innocently without the intention of harming other investors through insider trading.[266]

(d) was trying to prevent the other person or a government institution from contravening the provisions of the *Securities Act*.[267] It is submitted that this defence is intended to protect insiders who discourage others not to trade with non public price-sensitive information for personal benefit. However, the courts will have to determine whether the insider had good intentions when he or she discouraged others from dealing in relevant securities.

---

261 Section 89(1)(b) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 61; Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

262 Section 89(1)(b) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 61; Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

263 Section 89(1)(b) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 61; Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

264 Section 89(1)(c) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 59 and 60; Osode 2000 *Journal of African Law* 25; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32; Jooste 2006 *Journal of African Law* 448.

265 Section 89(1)(c) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 59 and 60; Osode 2000 *Journal of African Law* 25; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

266 Section 89(1)(c) of the *Securities Act*; see related comments by Cassim 2007 *South African Mercantile Law Journal* 59 and 60; Osode 2000 *Journal of African Law* 25; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

267 Section 89(1)(d) of the *Securities Act*.

Moreover, any person who knows that he or she has non public price-sensitive inside information and discloses such information to another person will incur liability for insider trading unless it is proved that he or she:[268]

(a) believed on reasonable grounds that no one would trade or deal in any affected securities with non public price-sensitive information that was later disclosed.[269] It is submitted that there are circumstances where the insider needs to disclose inside information. For instance, the insider may disclose inside information to his colleagues during a meeting at work. Furthermore, liability for insider trading will depend on who he or she disclosed the information to. For instance, disclosing non public information to a friend is different from disclosing it to a colleague at work.

(b) disclosed the non public price-sensitive information in the proper performance of the functions of his or her employment, office or profession.[270] The *Securities Act* does not describe what "proper performance" is. However, proper performance may mean that the insider was fulfilling his or her employment duties. For instance, when the insider disclosed information about the company's finances during a meeting.

2.3.1.4 Criminal Penalties

Any person that is guilty of insider trading is liable to pay a fine not exceeding level ten which is about Zim $200 000 or imprisonment for a term not exceeding five years or both such fine and imprisonment.[271] It is submitted that these penalties are not stringent enough to deter all persons from committing insider trading because very often insiders

---

268 Section 89(2)(a) of the *Securities Act*; see related comments by Jooste 2000 *Journal of African Law* 296; Osode 2000 *Journal of African Law* 250-252.

269 Section 89(2)(a) of the *Securities Act*; see related comments by Jooste 2006 *Journal of African Law* 449; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 34.

270 Section 89(2)(b) of the *Securities Act*; see related comments by Jooste 2006 *Journal of African Law* 449; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 34.

271 Section 90 of the *Securities Act*; see related comments by Öberg J "Is it Essential to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 6-7; Botha 1991 *South African Mercantile Law Journal* 10-11 and 14; Luiz S "Market Abuse and the Enforcement Committee" 2011 *South African Mercantile Law Journal* 151, 154-155.

gain enormous profits.[272] Furthermore, the *Securities Act* does not provide separate penalties for natural and juristic persons.[273] Juristic persons tend to gain more profit than natural persons, hence separate penalties for natural and juristic persons would be a fair provision.[274] Moreover, the imprisonment term of five years is too low to discourage all persons from committing insider trading activities in Zimbabwe.[275] For instance, the insider can still continue to commit insider trading activities even after serving a five year imprisonment term because it is too low to deter insiders from committing insider trading. Consequently, the *Securities Act* should be amended to provide stringent criminal penalties for both natural and juristic persons in order to effectively combat insider trading activities in Zimbabwe. However, since the enactment of the *Securities Act,* no insider trading cases have been successfully prosecuted by the courts.[276]

2.3.1.5 Civil Penalties

Insider trading is treated as a delict against the SECZ, any person who issued any affected security, every holder of an affected security and any person who traded with

---

272 Cross F and Miller R *The Legal Environment of Business: Text and Cases-Ethical, Regulatory, Global, and E-Commerce Issues* (Cengage Learning Publishers United States of America 1980) 694; Bernhardt D, Hollifield B and Hughson E "Investment and Insider Trading" 1995 *The Review of Financial Studies* 501, 505; Beatty JF and Samuelson SS *Cengage Advantage Books: Essentials of Business Law* 5th Edition (Cengage Learning Publishers United States of America 2015) 738.

273 Section 90 of the *Securities Act*; see related comments by Öberg 2014 *Journal of Corporate Law Studies* 6-7; Botha 1991 *South African Mercantile Law Journal* 10-11 and 14; Luiz 2011 *South African Mercantile Law Journal* 154-155.

274 Section 90 of the *Securities Act*; see related comments by Öberg 2014 *Journal of Corporate Law Studies* 6-7; Botha 1991 *South African Mercantile Law Journal* 10-11 and 14; Luiz 2011 *South African Mercantile Law Journal* 154-155.

275 Section 90 of the *Securities Act*; see related comments by Onele 2016 *The Gravitas Review of Business And Property Law* 10; Chew M "The Adequacy And Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" 1998 *Singapore Journal of Legal Studies* 331, 332, 340 and 346; Silver CB "Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984" 1985 *Duke Law Journal* 960, 962-963 and 1011.

276 The lack of successful prosecutions of insider trading cases can be attributed to the high burden of proof required in criminal cases where the prosecution must prove its case beyond reasonable doubt. This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Chitimira 2014 *PELJ* 951; Osode 1999 *African Journal of International Comparative Law* 696; Botha 1991 *South African Mercantile Law Journal* 9.

inside information.[277] This means that the plaintiff (affected person) must prove the following delictual elements:

(a) Conduct

Conduct is defined as a voluntary human act or omission.[278] In relation to insider trading the plaintiff must prove that the defendant's conduct of trading with non public price-sensitive information was done voluntarily.[279] However, the offender may defend himself by arguing that he did not act voluntarily and thereby avoid insider trading liability.

(b) Wrongfulness

In terms of this element the plaintiff must prove that trading with non public price-sensitive information in listed securities is unlawful under the *Securities Act.*[280] However, the defendant may defend himself by arguing that he or she was acting on behalf of a public-sector body.[281]

---

277 Section 91(1) and (2) of the *Securities Act;* This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer) and Mahombera N (Surveillance and Risk Manager) on 29 June 2018.

278 See related comments by Ahmed R *The Explicit And Implicit Influence of Reasonableness on the Elements of Delictual Liability* (LLD-Thesis University of South Africa 2018) 39; Scott TJ "Revisiting The Elements Of Delict The Mashongwa Judgments" 2016 *THRHR* 551, 552; Neethling J and Potgieter JM "Wrongfulness and Delictual Liability For Rugby Injuries: Roux V Hattingh (SCA)" 2017 *The South African Law Journal* 244, 246.

279 See related comments by Ahmed *The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability* 39; Scott 2016 *THRHR* 552; Neethling and Potgieter 2017 *The South African Law Journal* 246.

280 See related comments by Ahmed *the Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability* 49; Scott J "A Decision on Exclusion Clauses Avoided by Recourse to Delictual Principles on Wrongfulness" 2016 *Journal of South African law* 754, 761-765; Scott 2016 *THRHR* 552; Neethling and Potgieter 2017 *The South African Law Journal* 247 and 250.

281 See related comments by Ahmed The Explicit And Implicit Influence of Reasonableness on the Elements of Delictual Liability 49; Scott 2016 *Journal of South African law* 761-765; Scott 2016 *THRHR* 552; Neethling and Potgieter 2017 *The South African Law Journal* 247 and 250.

(c) Fault

Fault means that the insider trading offender can be blamed for his conduct. However, the court must establish whether he can be held accountable.[282] This implies that the plaintiff must provide proof that the conduct of the defendant of trading with non public price-sensitive information was unlawful in terms of the *Securities Act*. However, the defendant may argue that he was not aware that he was in possession of inside information. It is submitted that awareness or knowledge of the defendant about the non public price-sensitive information is important in establishing insider trading liability.[283] Hence, if the court believes that the defendant was not aware of non public price-sensitive information he or she can escape insider trading liability.

(c) Causation

Causation implies that there must be a connection between the conduct of the insider and the insider trading activity.[284] Therefore, the court must determine whether the defendant caused damage as a result of committing insider trading. Furthermore, the victim must prove that he or she suffered patrimonial loss.[285]

The *Securities Act* provides that any person found guilty of insider trading may be liable to pay the SECZ and/or affected persons the profit which accrued to him or her,[286]

---

282 See related comments by Ahmed *The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability* 133-142; Scott 2016 *THRHR* 552; Neethling and Potgieter 2017 *The South African Law Journal* 246.

283 See related comments by Osode 2000 *Journal of African Law* 248; Adams BJ, Perry T and Mahoney C "The Challenges of Detection and Enforcement of Insider Trading" 2018 *Journal Business Ethics* 375, 377.

284 See related comments by Ahmed The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability 165-170; Scott 2016 *THRHR* 558; Neethling and Potgieter 2017 *The South African Law Journal* 246.

285 See related comments by Ahmed *The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability* 165-170; Coetzee LC "Legal liability for failure to prevent pregnancy (wrongful pregnancy)" 2017 *South African Medical Journal* 394, 395-396.

286 Section 91(2)(a) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman HM "The Insider Trading and Securities Fraud Enforcement Act of 1988" 1990 *North Carolina Law Review* 465, 476-479 and 480-481; Guin DJ and Donaldson DR "The Insider Trading and Securities

avoidance of loss[287] or reduction in the price or value of affected securities due to insider trading or any unlawful trading as contemplated in the same Act.[288] The researcher submits that the civil penalty does not provide a specific amount that the offender may be liable for and does not provide a separate civil penalty for both natural and juristic persons. Moreover, the *Securities Act* should provide other civil remedies such as punitive damages and compensatory damages to make the civil penalty more stringent.

The SECZ may also institute a class action against any person who trades in the affected securities with non public price-sensitive information.[289] Class action lawsuits are used when several people have been affected by the insider trading activity.[290] This is done to recover any profit that the offender has gained from illicit insider trading activities. The researcher submits that class actions ensure that all persons affected by insider trading activity recover their losses from the offender.[291] However, class actions have not been utilised in Zimbabwe.[292]

Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate for use in Private 10B-5 Actions?" 1990 *Washington and Lee Law Review* 541, 544, 575-584.

287 Section 91(2)(b) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

288 Section 91(2)(c) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

289 Section 92 of the *Securities Act;* see related comments by Zimmerman AS and Jaros DM "The Criminal Class Action" 2011 *University of Pennsylvania Law Review* 1387, 1410-1430; Porrini D and Ramello GB "Class Action and Financial Markets: Insights From Law and Economics" 2011 *Journal of Financial Economic Policy* 1, 11; Sahu GK "The Class Action Suit: A Challenge for Protection of Interest of Investors" 2016 *International Journal of Law* 12, 13-14.

290 Section 92 of the *Securities Act;* see related comments by Zimmerman and Jaros 2011 *University of Pennsylvania Law Review* 1410-1430; Porrini and Ramello 2011 *Journal of Financial Economic Policy* 11; Sahu 2016 *International Journal of Law* 13-14.

291 Section 92 of the *Securities Act;* see related comments by Zimmerman and Jaros 2011 *University of Pennsylvania Law Review* 1410-1430; Porrini and Ramello 2011 *Journal of Financial Economic Policy* 11; Sahu 2016 *International Journal of Law* 13-14.

292 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer) and Mahombera N (Surveillance and Risk Manager) on 29 June 2018.

In assessing any insider trading penalty the court will take into account any award previously made against the offender which arises from the same set of facts.[293] This enables the court to avoid prosecuting the offender twice for the same offence and/or challenges associated with double jeopardy.

2.3.1.6 Administrative Penalties

The *Securities Act* does not provide specific administrative penalties for insider trading.[294] However, the Act provides administrative penalties that could be imposed by the SECZ on the offender that commits any offence under the *Securities Act*.[295] It is submitted that it would have been better if the policy makers had adopted specific administrative penalties for insider trading. This follows the fact that the offences created by the *Securities Act* are different in nature. The researcher contends that it is unfair for insider trading penalties to be the same as penalties for any other offence contained in the *Securities Act*. These administrative penalties are briefly discussed below:

(a) Warning letters to the offender[296]

The SECZ may issue a warning letter to a person who is found guilty of insider trading.[297] However, a warning letter is often given to people who have committed minor offences such as misconduct in the workplace. The researcher submits that the warning letter is not stringent enough for deterring or punishing people who commits insider trading offences.

---

293 Section 93 of the *Securities Act*; see related comments by Wilkiea DCH and Johnson LW "The Existence of Double Jeopardy Within the Order of Entry Effect" 2017 *Journal of Strategic Marketing* 334, 339-340; Chitimira 2014 *De Jure* 313.

294 Sections 87-95 and 105(1) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Luiz 2011 *South African Mercantile Law Journal* 155-159; Chitimira and Lawack 2012 *Obiter* 551-552 and 556.

295 Sections 87-95 and 105(1) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Luiz 2011 *South African Mercantile Law Journal* 155-159; Chitimira and Lawack 2012 *Obiter* 551-552 and 556.

296 Section 105(1)(a) of the *Securities Act*; Pfaeltzer JJW "Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?" 2014 *Utrecht Law Review* 134, 134.

297 Section 105(1)(a) of the *Securities Act*; Pfaeltzer 2014 *Utrecht Law Review* 134; Luiz 2011 *South African Mercantile Law Journal* 155-159.

(b) Appointment of an expert who will advise the company that has violated the *Securities Act* on the proper performance of its business [298]

The SECZ may appoint an expert to give the insider trading offender guidance and advice on his or her business. The researcher submits that this administrative penalty is insufficient to combat insider trading activities. Furthermore, the insider deals with non public price-sensitive inside information knowingly for personal benefit. Consequently, the insider's conduct is not the result of not knowing how to run a business. Thus, it is submitted that this administrative penalty is not adequate for combating insider trading activities.

(c) instructing the offender to undertake remedial action[299]

The SECZ may instruct the offender to undertake remedial actions. The SECZ will determine what that remedial action should consist of. In Zimbabwe there is no insider trading case where the SECZ ordered the insider to undertake a remedial action. Thus, this administrative penalty is not compatible for insider trading cases.

(d) The SECZ may instruct the offender to comply with certain instructions issued by the SECZ.[300]

The purpose of the instructions is to assist the company to function properly. However, this administrative penalty has not been imposed in insider trading cases.

---

298 Section 105(1)(b) of the *Securities Act;* Dalko V and Wang MH "Why is Insider Trading Law Ineffective? Three Antitrust Suggestions" 2016 *Studies in Economics and Finance Journal* 704, 705; Kawadza 2015 *South African Mercantile Law Journal* 387 and 392.

299 Section 105(1)(c) of the *Securities Act*; Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Kawadza 2015 *South African Mercantile Law Journal* 387 and 392.

300 Section 105(1)(c) of the *Securities Act.*

(e) Imposing a monetary penalty not exceeding Zim $20 000 or level five against the offender for each day that the contravention has continued.[301]

The researcher submits that although imposing a monetary amount as an administrative penalty for each day the offence was committed is good, a fine not exceeding Zim $20 000 or level five is not stringent enough to deter insider trading offenders from committing insider trading activities in the Zimbabwean financial markets.

(f) The SECZ instructs the company or offender to suspend any of his or her officers or employees from his or her duties[302]

The SECZ may instruct the company to suspend any insider trading offender from his or her employment duties.[303] The researcher submits that although suspending the offender from his or her duties is good he or she may still commit insider trading after the suspension expires. Therefore, the SECZ should consider circumstances in which it can impose this administrative penalty.

---

301 Section 105(1)(d) of the *Securities Act*; see related comments by Chitimira 2014 *De Jure* 327; Deventer G "Harnessing Administrative Law in Encouraging Compliance" 2009 *Financial Services Board Monthly Bulletin* 3, 3-4; Mori A and Tomotsune 2014 *Amendments to the Regulations on Insider Trading* HYPERLINK "https://www.amt-law.com/pdf/bulletins2_pdf/140327.pdf%20accessed%2028%20March%202018" https://www.amt-law.com/pdf/bulletins2_pdf/140327.pdf accessed 28 March 2018 4.

302 Section 105(1)(e) of the *Securities Act;* see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen H "A Comparative Study of Insider Trading Regulation Enforcement in the US and China" 2008 *Journal of Business and Securities Law* 42, 66; Öberg 2014 *Journal of Corporate Law Studies* 22-25; Chitimira *The Regulation of Insider Trading in South Africa* 173.

303 Section 105(1)(e) of the *Securities Act;* see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 66; Öberg 2014 *Journal of Corporate Law Studies* 22-25; Chitimira *The Regulation of Insider Trading in South Africa* 173.

(f) cancellation of license or registration or amending their terms or conditions[304]

Securities Act does not describe circumstances in which the SECZ will cancel the company's license or registration or amend their terms or conditions.[305] However, cancellation of license or registration or amendment of the license or registration terms or conditions could deter insiders from committing insider trading since they will be afraid to lose their company and/or business.

2.4 Conclusion

This chapter examined how insider trading is regulated in Zimbabwe. It should be noted that insider trading was not regulated by any law in Zimbabwe until 2004. The *Banking Act*, the *ZSE listing requirements*, the *Companies Act* and the *Zimbabwe Stock Exchange Act* prohibit issuers from trading in the relevant securities with non public confidential inside information.[306] However, it should be noted that the provisions that prohibit dealing with confidential information under the *Banking Act*, the *ZSE listing requirements*, the *Companies Act* and the *Zimbabwe Stock Exchange Act* are not sufficient to combat illicit trading activities in the Zimbabwean financial markets as discussed in this chapter. The *Prevention of Corruption Act* did not prohibit insider trading. Thus, it was not sufficient to combat insider trading activities in the Zimbabwean financial markets.

Moreover, the prohibition of insider trading under the *Securities Act* is only restricted to natural persons.[307] This implies that juristic persons are not prohibited from trading with

---

304 Section 105(1)(i) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 65-66; Du Plessis JJ and Lyon G *The Law of Insider Trading in Australia* (Federation Press Sydney 2005) 140; Chitimira *The Regulation of Insider Trading in South Africa* 173.

305 Section 105(1)(i) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 65-66; Du Plessis and Lyon *The Law of Insider Trading in Australia* 140; Chitimira *The Regulation of Insider Trading in South Africa* 173.

306 See related discussion in paragraph 2.2 in Chapter Two of this thesis.

307 Section 88 of the *Securities Act*; see related comments by Jooste 2000 South African Law Journal 293-294; Osode 2000 *Journal of African Law* 241-242; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

non public price-sensitive inside information in relevant securities. The researcher submits that restricting the prohibition of insider trading to natural persons will perpetuate insider trading activities by juristic persons because they are not prohibited from dealing with non public price-sensitive inside information.

Moreover, the *Securities Act* does not provide administrative penalties for insider trading.[308] This could have negatively affected the combating of insider trading in Zimbabwe since administrative penalties are relatively easy to impose on the insider trading offenders owing to the lower burden of proof required in proceedings for administrative sanctions than that for criminal penalties. Although the enactment of the *Securities Act* should be welcomed, the legislature should amend the *Securities Act* to address the deficiencies identified in this chapter.

308 Sections 87-95 and 105(1) of the *Securities Act*; Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

CHAPTER THREE

THEORIES AND POLICY DEBATES ON THE REGULATION OF INSIDER TRADING

3.1 Introduction

The insider trading prohibition in Zimbabwe is aimed at preventing fraud and manipulation of inside information by the insider.[309] The policy goals underlying the prohibition of insider trading emphasize basic principles of fairness, market integrity, market efficiency and investor protection in Zimbabwe.[310] Furthermore, the regulation of insider trading is aimed at discouraging insiders from taking unfair informational advantages over investors. It is submitted that insider trading regulation levels the playing field between individuals who have access to non public price-sensitive information and those who do not have access to such information. This avoids the unfair use of inside information by insiders.[311] Moreover, it is submitted that this encourages equal access to inside information and promotes efficiency of the Zimbabwean financial markets.

On the other hand, opponents of insider trading regulation argue that insider trading is an efficient way to compensate entrepreneurs and encourage innovation.[312] The researcher

---

309 Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 937, 938 and 950; Anderson AG "Fraud, Fiduciaries, and Insider Trading" 1982 *Hofstra Law Review* 341, 347; Securities and Exchange Commission 2010 *Prohibition Against Fraud, Manipulation, and Deception in Connection with Security Based Swaps* HYPERLINK "https://www.sec.gov/rules/proposed/2010/34-63236.pdf" https://www.sec.gov/rules/proposed/2010/34-63236.pdf accessed 31 May 2018 1 and 21.

310 See related comments by Austin J "What Exactly Is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation" 2016 *William and Mary Business Law Review* 1, 6-10; Angel JJ and McCabe DM "Insider Trading 2.0? The Ethics of Information Sales" 2018 *Journal Business Ethics* 747, 751 and 757.

311 See related comments by Cox JD "Insider Trading and Contracting: A Critical Response to the "Chicago School" 1986 *Duke Law Journal* 628, 630; Chena X, Hodgsonb A and Linnenlueckec KM "Transferring and Trading on Insider Information in the United States and Australia: Just a Case of Happy Hour Drinks?" 2018 *Accounting and Finance Journal* 1, 2 and 10.

312 See related comments by Manne GH "In Defence of Insider Trading" 1966 *Harvard Bus Review* 113, 113; Dye "Inside Trading and Incentives" 1984 *Journal of Business* 295, 297; Carlton DW and Fischel DR "The Regulation of Insider Trading" 1983 *Stanford Law Review* 857, 860; Dent GW "Why Legalized Insider Trading Would Be a Disaster" 2013 *Delaware Journal of Corporate Law* 247, 257; Beny LN "Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate" 2007 *Journal of Corporation Law* 239, 242-243.

argues that it is not prudent to restrict trading in securities to persons that produce the relevant inside information since other persons could still trade on the basis of such information without having contributed to its production. Furthermore, opponents of insider trading regulation argue that insider trading legislation is ineffective and difficult to enforce.[313] It is submitted that insider trading laws are not difficult to enforce when the laws are adequately drafted and the enforcement authorities have adequate resources to effectively enforce the insider trading prohibition.[314] This chapter discusses the theories, debates and policy goals of insider trading regulation. The policy goals for regulating insider trading in Zimbabwe will also be examined and it will be shown that the regulation of insider trading is not only to combat insider trading activities but to protect investors and promote financial markets efficiency in Zimbabwe.

3.2 Theories on Insider Trading

3.2.1 Classical Theory

The classical theory entails an insider who trades in relevant securities with non public price-sensitive information.[315] Accordingly, the classical theory applies when an insider breaches his or her fiduciary duty owed to the company by dealing in relevant securities with material non public price-sensitive information.[316] Furthermore, in order for the insider to incur liability, he or she must have personally benefited from trading with inside

---

313 See related comments by Semaan L, Freeman MA and Adams M "Is Insider Trading a Necessary Evil for Efficient Markets?: An International Comparative Analysis" 1999 *Company and Securities Law Journal* 221, 229; Dent 2013 *Delaware Journal of Corporate Law* 256.

314 See paragraph 6.4 and paragraphs 7.2.3.2.5; 7.2.3.2.6; 7.2.3.2.7; 7.2.3.2.8; 7.2.3.2.9 in Chapters Chapter Six and Seven of this thesis respectively.

315 See related comments by Nagy DM "Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion" 1998 *Ohio State Law Journal* 1223, 1229-1230; Fisch JE "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation" 1991 *Georgia Law Review* 179, 187.

316 See related comments by Cichos T "The Misappropriation Theory of Insider Trading: Its Past, Present, and Future" 1995 *Seattle University Law Review* 389, 391; Salbu SR "The Misappropriation Theory of Insider Trading: A Legal, Economic, and Ethical Analysis" 1992 *Harvard Journal of Law and Public Policy* 223, 224-235; Klaw BW "Why Now is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory" 2016 *William and Mary Business Law Review* 275, 288-289.

information.[317] The insider breaches his or her fiduciary duty when he or she trades with non public price-sensitive information in relevant securities. The classical theory is restricted to primary insiders because they possess material inside information by virtue of their responsibilities or employment in the company. The term primary insider includes directors, employees or shareholders of companies.[318] On the other hand, secondary insider includes any individual who receives inside information through direct or indirect communication with a primary insider.[319] Under the classical theory, the term insider is only restricted to primary insiders because they owe a fiduciary duty to the company and its shareholders.[320] The restriction of the term insider to primary insiders under the classical theory implies that secondary insiders can unlawfully trade on non public price-sensitive information with impunity because they are not prohibited from trading with such information.[321] This theory contradicts the position in Zimbabwe where both primary and secondary insiders are prohibited from trading on non public price-sensitive information by the *Securities Act*.[322] The researcher submits that the classical theory cannot succeed in Zimbabwe because it only prohibits primary insiders from trading with inside information. Secondary insiders can have access to non public price-sensitive information through tipping by primary insiders. Moreover, the classical theory is not applied in the Zimbabwean financial markets because the *Securities Act* prohibits both the primary insider and secondary insider from engaging in insider trading.[323]

---

317 See related comments by Gubler JZ "A Unified Theory of Insider Trading Law" 2017 *The Georgetown Law Journal* 1, 5-8; Brodsky DM and Kramer DJ "A Critique of the Misappropriation Theory of Insider Trading" 1998 *Cardozo Law Review* 41, 73.

318 Sections 87 and 88 of the *Securities Act* 17 of 2004 [Chapter 24:25] as amended *(Securities Act)*; Bainbridge 2001 *University of California, Los Angeles Law Review* 45; Nagy 1998 *Ohio State law Journal* 1225,1228,1229,1233 and 1234.

319 Section 87 of the Securities Act; 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-Thesis University of Fort Hare 2008) 83.

320 See related comments by Bainbridge SM "The Law and Economics of Insider Trading: A Comprehensive Primer" 2001 *University of California, Los Angeles Law Review* 1, 45.

321 See related comments by Gubler 2017 *The Georgetown Law Journal* 12; Sung HK "Insider Trading as Private Corruption" 2014 *UCLA Law Review* 231, 938, 971, 980, 992-994.

322 Sections 88(1)(a) read with 88(2) of the *Securities Act*; see related comments by Brodsky DM "Insider Trading and the Insider Trading Sanctions Act of 1984: New Wine Into New Bottles?" 1984 *Washington and Lee Law Review* 921, 928.

323 Section 88 of the *Securities Act*; see related comments by Brodsky 1984 *Washington and Lee Law Review* 928.

3.2.2 *Misappropriation Theory*

The misappropriation theory posits that any person who trades with non public price-sensitive information in relevant securities commits insider trading.[324] Thus, the misappropriation theory applies where an insider breaches a fiduciary duty owed to the corporation or company by trading on non public price-sensitive information for personal gain.[325] Furthermore, the misappropriation theory is based on the fiduciary relationship between the insider and the corporation or company because an employee of the company has access to non public price-sensitive information as a result of his or her position.[326] The fiduciary relationship requires directors and any employee of the company to refrain from using non public price-sensitive information for personal gain.[327] In terms of the fiduciary principle, there is an expectation that any person in a position of responsibility should act in the best interest of the beneficiary. The Zimbabwean insider trading prohibition is based on the same notion that the insider cannot trade on the basis of non public price-sensitive information for personal gain.[328] This notion is based on the fact that the insider owes a duty of trust and loyalty to the shareholders and the company. Accordingly, the insider breaches his or her fiduciary relationship with the company if he or she trades on non public price-sensitive information for personal gain.[329] Furthermore,

---

324 See related comments by Cicho 1995 *Seattle University Law Review* 392; Simon KA "The Misappropriation Theory: A Valid Application of 10(B) to Protect Property Rights in Information" 1998 *Supreme Court Review* 1049, 1062.

325 See related comments by Bondi BJ and Lofchie DS "The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance" 2011 *NYU Journal of Law and Business* 2011 151, 158; Marra C "The Misappropriation Theory: A Practical Means of Imposing Rule 10b-5 Liability" 1990 *University of Richmond Law Review* 211, 212-213; Bankman J and Ayres I "Substitutes for Insider Trading" 2002 *Stanford Law Review* 235, 254-255.

326 See related comments by Cichos 1995 *Seattle University Law Review* 391; Sung 2014 *UCLA Law Review* 939 and 947.

327 See related comments by Dessi AM "The Misappropriation Theory and Securities Fraud Liability; Its Days are Numbered" 1998 *Journal of Civil Rights and Economic Development* 319, 324-328; Marra 1990 *University of Richmond Law Review* 212-213, 218-221; Brodsky DM and Kramer DJ "A Critique of the Misappropriation Theory of Insider Trading" 1998 *Cardozo Law Review* 41, 57-69.

328 Section 88 of the *Securities Act*; see related comments by Brodsky and Kramer 1998 *Cardozo Law Review* 57- 69.

329 Section 88 of the *Securities Act*; see related comments by Bainbridge MS "Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud" 1999 *SMU Law Review* 1589, 1591-1592; Morgan JR "Insider Trading and the Infringement of Property Rights" *Ohio State Law Journal* 79, 94-95; Macey JR "From Fairness to Contract: The New Direction of the Rules Against Insider Trading" 1984 *Hofstra Law Review* 9, 60.

under the misappropriation theory a party that does not have a fiduciary relationship with the corporation or companies may still commit insider trading such as secondary insiders.[330] For example, primary insiders may tip secondary insiders who owe no fiduciary duty to the offended company with inside information who then trade on inside information for their own benefit.[331] Both primary and secondary insiders are prohibited from dealing on non public inside information relating to listed securities in Zimbabwe.[332] The insider trading prohibition under the *Securities Act* is founded on the view that the use of non public price-sensitive information by the insider undermines investor expectations of fairness and equal opportunity in the Zimbabwean financial markets.[333]

3.2.3 Tipper-Tippee Theory

Tipper-tippee theory postulates that both the tipper and tippee may incur insider trading liability for trading with inside information in relevant securities.[334] The "tipper-tippee" theory imposes liability on the tipper or an insider who has breached his or her fiduciary duty by disclosing the non public price-sensitive information to the tippee or the secondary insider.[335] In terms of the tipper-tippee theory, the tippee may incur insider trading liability if he or she knew that the tipper breached a fiduciary duty by tipping the tippee while in possession of non public price-sensitive information for personal benefit.[336] The personal

---

330 See related comments by Cichos 1995 *Seattle University Law Review* 391; Marra 1990 *University of Richmond Law Review* 212-213, 218-221; Brodsky and Kramer 1998 *Cardozo Law Review* 57-69.

331 See related comments by Heminway JM "Tipper/Tippee Insider Trading as Unlawful Deceptive Conduct: Insider Gifts of Material Nonpublic Information to Strangers" 2018 *Washington University Journal of Law and Policy* 65, 67 and 76.

332 Sections 88(1)(a) and 88(2) of the *Securities Act*; see related comments by Cichos 1995 *Seattle University Law Review* 389, 391; Sung 2014 *UCLA Law Review* 939 and 947.

333 Sections 4(1)(c), (2)(d); 88 of the *Securities Act*; see related comments by Perino AM "The Lost History of Insider Trading" 2018 *University of Illinois Law Review* 1, 29; Mwenda KK "Redefining Insider Dealing Law For Emerging Markets: A Comparative Legal Study" 1997 *The Zimbabwe Law Review* 29, 42-43.

334 See related comments by Heminway 2018 *Washington University Journal of Law and Policy* 67 and 76.

335 Sections 88(1)(a) and (2) of the *Securities Act*; see related comments by Palk L "Ignorance Is Bliss: Should Lack of Personal Benefit Knowledge Immunize Insider Trading?" 2016 *Berkeley Business Law Journal* 101, 113-116; Klaw 2016 *William and Mary Business Law Review* 290-291; Bondi and Lofchie 2011 *NYU Journal of Law and Business* 157-158.

336 See related comments by Klaw 2016 *William and Mary Business Law Review* 290-291; Patel RV and Galloway TM "Tippee Insider Trading after Newman and Salman: Why Knowledge is Not

benefit received by the tipper may be in a form of a pecuniary gain, or a reputational benefit that will translate into future earnings.[337] The tipper-tippee theory is consistent with the *Securities Act* since the tipper is prohibited from disclosing non public price-sensitive information to the tippee.[338] However, the *Securities Act* does not state the elements that must be proved by the tipper in relation to insider trading.[339] This position is flawed since the courts will have difficulty determining whether both the tipper and /or the tippee are guilty. The researcher submits that the *Securities Act* must be amended to clearly state the elements that must be proven under the tipper-tippee prohibition in Zimbabwe.

3.2.4 Fiduciary duty theory

Fiduciary duty theory refers to a duty of loyalty of the insider that is owed to the company. This duty prohibits the insider from trading on relevant securities with non public price-sensitive information for personal gain.[340] The fiduciary duty theory requires a category of persons such as company directors and officers to refrain from trading on the basis of non public price-sensitive information which they possess at the expense of other investors.[341] The prohibition of insider trading is supported by the fiduciary duty theory because insider trading is inconsistent with the duty of loyalty owed to the company by its

---

Always Your Friend" 2017 *White Collar Crime Committee Newsletter* 1, 2-3; Langevoort CD "Insider Trading and the Fiduciary Principle: A Post Chiarella Restatement" 1982 *California Law Review* 1, 23-24.

337 See related comments by Cohen DT "Old Rule, New Theory: Revising the Personal Benefit Requirement for Tipper/Tippee Liability under the Misappropriation Theory of Insider Trading" 2006 *Boston College Law Review* 547, 569-570, 577-578.

338 Sections 88(1)(a) and 88(2) of the *Securities Act*; see related comments by Drummonds K "Resuscitating Dirks: How the Salman "Gift Theory" of Tipper-Tippee Personal Benefit Would Improve Insider Trading Law" 2016 *American Criminal Law Review* 833, 839-840.

339 Section 88(2) of the *Securities Act*; see related comments by Klaw 2016 *William and Mary Business Law Review* 290-297.

340 See related comments by Smith DG "The Critical Resource Theory of Fiduciary Duty" 2002 *Vanderbilt Law Review* 1399, 1406; Cohen JM, Dunning KM, and Shill GH "Erosion of the Fiduciary-Duty Requirement in Insider-Trading Actions" 2010 *Securities Litigation Journal* 1, 2-3; Langevoort 1982 *California Law Review* 5-7; Cooter R "Economic Model of the Fiduciary's Duty of Loyalty" 1990 *Tel Aviv University Studies in Law Review* 297, 309-310.

341 See related comments by Black A "Policies in the Regulation of Insider Trading and the Scope of Section 128 of the Securities Industry Code" 1988 *Melbourne University Law Review* 633, 642-643; Marra 1990 *University of Richmond Law Review* 216-218; *Robinson v Randfontein Estates Gold Mining* Co Ltd 1921 AD 168.

employees.[342] The concept of fiduciary duty plays a critical role in the regulation of insider trading in many jurisdictions such as the USA.[343] It is submitted that although it is not clear whether the fiduciary duty theory is applicable in Zimbabwe, insiders are expected to deal, in the relevant securities fairly. Under the fiduciary duty theory, inside information is generally regarded as property of the company. Therefore, insiders are expected to act in the best interest of the company.[344] Accordingly, the researcher submits that the fiduciary duty theory could be used to regulate insider trading in Zimbabwe because insiders should be loyal to the company and its shareholders.

3.2.5 Unified Theory

Unified theory is a combination of the classical theory and the misappropriation theory. These theories were discussed in detail in paragraphs 3.2.1 and 3.2.2 above. Classical theory entails that insider trading occurs when an insider deals with non public price-sensitive information in relevant securities in breach of a fiduciary duty owed to the shareholders and the company.[345] Under the classical theory, the insider is prohibited from dealing in securities with non public price-sensitive information for personal benefit.[346] It is submitted that the insider owes a fiduciary duty to the company and the shareholders. Classical theory is restricted to insiders such as directors, employees or shareholders of an issuer of securities to which the inside information relates because they owe a fiduciary duty to the company and shareholders.[347] However, tippees are

---

342 See related comments by Black 1988 *Melbourne University Law Review* 642-643; Marra 1990 University of Richmond Law Review 217.

343 See related comments by Perino 2018 *University of Illinois Law Review* 29; Bewaji W Insider Trading in Developing Jurisdictions Achieving an Effective Regulatory Regime (Routledge London and New York 2012) 41-43.

344 See related comments by Moore J "What Is Really Unethical about Insider Trading?" 1990 *Journal of Business Ethics* 171, 175; Nagy DM "Insider Trading and the Gradual Demise of Fiduciary Principles" 2009 *IOWA Law Review* 1315, 1358

345 See related comments by Nagy 1998 *Ohio State Law Journal* 1229-1230; Fisch JE "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation" 1991 *Georgia Law Review* 179, 187-188.

346 See related comments by Gubler 2017 *The Georgetown Law Journal* 4; Sung Hui Kim 2014 *UCLA Law Review* 971, 980, 992-994.

347 See related comments by Valory K "The Misappropriation Theory of Insider Trading: What Constitutes a Similar Relationship of Trust and Confidence" 1998 *Santa Clara Law Review* 287, 291; Bondi and Lofchie 2011 *NYU Journal of Law and Business* 157.

excluded from insider trading liability because they do not owe fiduciary duty to either the insider, company or shareholders of the company. The researcher submits that the classical theory is flawed because tippees are not prohibited from dealing in relevant securities with non public price-sensitive inside information yet they can acquire such information from the insiders.[348] The classical theory does not apply in Zimbabwe because the *Securities Act* prohibits both primary insiders and secondary insiders such as tippees.[349] The United States of America (USA) courts developed the misappropriation theory in a bid to resolve the weaknesses of the classical theory.

The misappropriation theory provides that both the insider and tippees who trade with non public price-sensitive information in the relevant securities commit insider trading.[350] Thus, a tippee assumes a fiduciary duty not to trade on non public price-sensitive information only when the insider has breached his fiduciary duty by disclosing such information to the tippee.[351] Furthermore, the misappropriation theory is intended to protect the financial markets from the offenders who misuse non public price-sensitive information for personal gain.[352] The researcher submits that the misappropriation is applied under the *Securities Act* because both the primary and secondary insiders are prohibited from trading with non public price-sensitive information in Zimbabwe.

---

348 Section 88(2) of the *Securities Act*; See related comments by Gubler 2017 *The Georgetown Law Journal* 1228; Salbu RS "Differentiated Perspectives on Insider Trading: The Effect of Paradigm Selection on Policy" 2012 *St John's Law Review* 373, 400.

349 Section 88 of the *Securities Act*; Anderson JP Poetic "Expansions of Insider Trading Liability" 2018 *The Journal of Corporation Law* 368, 370-372; Anderson JP "Solving The Paradox of Insider Trading Compliance" 2013 *Temple Law Review* 273, 279.

350 See related comments by Cicho 1995 *Seattle University Law Review* 392; Simon KA "The Misappropriation Theory: A Valid Application of 10(B) to Protect Property Rights in Information" 1998 *Supreme Court Review* 1049, 1062; Green J and Miner A "Mark Cuban defense verdict highlightsdifficulty of proving "misappropriation" theory of insider trading" 2014 *Journal of Investment Compliance* 38, 39.

351 See related comments by Haft RJ "The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation" 1892 *Michigan Law Review* 1051, 1052, 1064-1067; Bush A "A Friend in Need May Get You in Trouble for Insider Trading Indeed: An Argument for the Meaningfully Close Personal Relationship Definition of Friendship Under the Gift Theory" 2018 *The Georgetown Law Journal Online* 1, 4, 8, 14-16.

352 See related comments by Valory 1998 *Santa Clara Law Review* 296-297; Karmel RS "The Fiduciary Principle of Insider Trading Needs Revision" 2018 *Journal of Law and Policy* 121, 122-126; Nagy DM "Salman v. United States: Insider Trading's Tipping Point?" 2016 *Standford Law Review* 28, 29.

Gubler argues that the misappropriation theory was adopted to fill the gap between the classical and misappropriation theory.[353] Thus, the unified theory is the combination of the classical theory and misappropriation theory. The researcher argues that there is no need for the unified theory because the misappropriation theory prohibits both insiders and tippees from trading with non public price-sensitive information in relevant securities. Thus, in Zimbabwe the *Securities Act* prohibits both the insiders and tippees from trading with non public price-sensitive information in relevant securities.[354]

3.2.6 Social Contract Theory (Equal Access Theory)

The social contract theory sets the terms and conditions regarding behavior in the financial markets.[355] The social contract theory is also known as the equal access theory.[356] This theory serves only to coordinate and balance the behavior in relation of disclosure of non public price-sensitive information between individuals. In the context of the financial markets, there is a need for both the insider and the investor to have equal access to information in order to curb insider trading practices.[357] The opportunity to access relevant information helps investors to make informed judgments about investments.[358] Investors would probably prefer to refrain from investing in the affected financial markets if they do not have equal access to material inside information.[359] The researcher submits that the Zimbabwean insider trading prohibition is based on the theory

---

353 Section 88 of the *Securities Act*; see related comments by Gubler 2017 *The Georgetown Law Journal* 1229; Salbu 2012 *St John's Law Review* 400.

354 Sections 88(1)(a) and 88(2) of the *Securities Act*; see related comments by Bush A "A Friend in Need May Get You in Trouble for Insider Trading Indeed: An Argument for the Meaningfully Close Personal Relationship Definition of Friendship Under the Gift Theory" 2018 *The Georgetown Law Journal Online* 1, 8-15; Gevurtz FA "The Road Not Taken: A Comparison of the E.U. and U.S. Insider Trading Prohibitions" 2018 *Journal of Law and Policy* 31, 34-39.

355 See related comments by Dunfee TW "Business Ethics and Extant Social Contracts" 1991 *Journal Business Ethics* 23, 25; Popova T, Georgakopoulos G, Sotiropoulos L and Vasileiou KZ "Mandatory Disclosure and Its Impact on the Company Value" 2013 *International Business Research Journal* 1, 2-4.

356 See related comments by Dunfee 1991 *Journal Business Ethics* 25; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

357 See related comments by Klaw 2016 *William and Mary Business Law Review* 298-308; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

358 See related comments by Klaw 2016 *William and Mary Business Law Review* 298-308; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

359 See related comments by Klaw 2016 *William and Mary Business Law Review* 306; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

of equal access to information. In other words, the notion that both the investor and the insider must have access to equal information probably influenced the Zimbabwean legislature to regulate insider trading. It is submitted that the prohibition of insider trading in Zimbabwe is not only to combat insider trading but to create an efficient financial market. Furthermore, market efficiency is promoted by leveling the playing field for insiders and investors to have equal access to valuable information. Moreover, equal access to valuable information is promoted by limiting opportunities of the insider to make personal profit with inside information.[360]

3.2.7 Public Choice Theory

Public choice theory provides that the government should respond to any inefficiencies that affect the social and economic well-being of the country.[361] In this regard, the governments often respond through regulation. However, Bainbridge argues that the public interest theory is intended to promote the economic interest of interested groups and not the public at large.[362] It is submitted that the *Securities Act* strives to protect investors and the Zimbabwean financial markets through the regulation of insider trading.[363] The regulation of insider trading cannot be underestimated in developing countries where financial markets play a critical role in attracting investors. It is submitted that the rationale for regulating insider trading is to create efficient financial markets where investors can be confident that the market price accurately reflects the value of the securities and/or financial instruments.

360 See related comments by Klaw 2016 *William and Mary Business Law Review* 306; Anderson 1982 *Hofstra Law Review* 353 and 359; Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

361 See related comments by Bainbridge SM *Research Handbook on Insider Trading* (Edward Elgar Publishing Limited United Kingdom 2013) 272; Osode PC "Regulatory Theory, Private Interests and the Rationality of Insider Trading Regulation in the United States and Canada" 1998 *Journal of South African Law* 427', 428-429; Gubler ZJ "Public Choice Theory and the Private Securities Market" 2013 *North Carolina Law Review* 745, 748.

362 See related comments by Bainbridge Research Handbook on Insider Trading 272; Osode 1998 *Journal of South African Law* 428-429; Gubler 2013 *North Carolina Law Review* 748.

363 Sections 4(1)(c) and 88 of the *Securities Act*; Qing HE and Rui OM "Ownership Structure and Insider Trading: Evidence from China" 2016 *Journal of Business Ethics* 553, 555; Zhihang C, Yuan H, Yuanto K and Wei KCJ "The Real Effect of the Initial Enforcement of Insider Trading Laws" 2017 *Journal of Corporate Finance* 687, 689-691.

Although different theories have been discussed above, the researcher submits that the regulation of insider trading in Zimbabwe is mainly influenced by the equal access theory, misappropriation theory and public interest theory. It is submitted that all persons are prohibited from dealing with inside information for their personal benefit in accordance with the stated theories. The conduct between the individuals is regulated through the *Securities Act* to ensure equal access to inside information and the combating of insider trading.

3.3 The Pros and Cons of Insider Trading Regulation

Insider trading is illegal in most financial markets and jurisdictions, including Zimbabwe.[364] The rationale for regulating insider trading is to promote full and fair disclosure of the relevant information in order to create transparent financial markets.[365] Bollen asserts that the purpose of prohibiting insider trading in most international financial markets is to, *inter alia*, promote effective financial markets, market fairness and market integrity.[366] The researcher supports this view because where insider trading is not prohibited investors lose confidence and this affects the integrity of that financial market. However, those who oppose the regulation of insider trading argue that there is nothing wrong with it. Such persons claim that the overall impact of insider trading in business is positive. The various

---

364 Insider trading is illegal in many countries including South Africa, Australia, United States of America, Tanzania and many other countries. See related comments by Cox DJ "An Outsider's Perspective of Insider Trading Regulation in Australia" 1990 *Sydney Law Review* 455, 463; Linciano N "The Effectiveness of Insider Trading Regulation in Italy: Evidence from Stock-Price Run-Ups around Announcements of Corporate Control Transactions" 2003 *European Journal of Law and Economics* 199, 199-200.

365 See related comments by Golden J *The International Capital Markets Review* (Law Business Research Limited London 2011) 344-345; United States Securities Exchange Commission 2000 *Selective Disclosure and Insider Trading* HYPERLINK "https://www.sec.gov/rules/final/33-7881.htm accessed 24" https://www.sec.gov/rules/final/33-7881.htm accessed 24 March 2017 page number unknown; Guttentag M "Selective Disclosure and Insider Trading" 2017 *Florida Law Review* 519, 542.

366 See related comments by Bollen RS "Research Analysts and the Australian Insider Trading and Misleading or Deceptive Conduct Regimes" 2003 *Murdoch University Journal of Law* 430, 438; Golden *The International Capital Markets Review* 344-345; Osode CP "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 239-240; Austin J *What are the Challenges for Securities Regulators and How Can They Best Preserve the Integrity of The Markets*? (LLD-Thesis York University Toronto 2016) 3-5.

arguments raised by researchers and financial market experts in favour of the deregulation of insider trading are discussed below:

(a) insider trading is an efficient and legitimate means of compensation

Manne argues that insider trading does not harm investor confidence and can be an efficient way of compensating insiders.[367] Moreover, Dye[368] Carlton and Fischel[369] also argue that insider trading may be a way for firms to compensate insiders when they improve an issuer's stock price.[370] However, it is difficult to restrict trading to those who produced the information. Accordingly, insiders may trade with inside information without having contributed to its production. Ten Oever further argues that insider trading practice will provide the insiders with an incentive to innovate and develop new products or ideas to increase productivity.[371] The researcher argues that it is difficult to restrict trading of securities to those who produced the information. For instance, tippees can trade on inside information even though they have not contributed to its production.[372] The argument that insider trading provides a powerful incentive for corporate officers to engage in creative and entrepreneurial activity has been criticized as flawed by proponents of insider trading regulation since an insider is not necessarily the person

---

367 See related comments by Manne 1966 *Harvard Bus Review* 113, 113; Morgan 1987 *The Ohio State University* 82, 95-96, 98, 108-109; Dent 2013 *Delaware Journal of Corporate Law* 248; Richman S 2003 *The Fraud of Insider-Trading Law* HYPERLINK "https://www.fff.org/explore-freedom/article/fraud- insidertrading- law-part-2/"https://www.fff.org/explore-freedom/article/fraud- insidertrading- law-part-2/accessed 20 October 2017 page number unknown.

368 See related comments by Dye AR "Insider Trading and Incentives" 1984 *Journal of Business* 295, 307; Dent 2013 *Delaware Journal of Corporate Law* 249-273.

369 See related comments by Carlton DW and Fischel DR "The Regulation of Insider Trading" 1983 *Stanford Law Review* 857, 858; Dent 2013 *Delaware Journal of Corporate Law* 247, 257.

370 See related comments by Dye 1984 *Journal of Business* 297; Carlton and Fischel 1983 *Stanford Law Review* 860; Dent 2013 *Delaware Journal of Corporate Law* 247,257; Beny 2007 *The Journal of Corporation Law* 237, 242; Morgan 1987 *The Ohio State University* 82, 95, 96, 98, 108-109.

371 See related comments by Ten Oever H "Insider Trading and the Dual Role of Information" 1997 *Yale Law Journal* 1325, 1328-1329; Morgan 1987 *The Ohio State University* 82, 95-96, 98, 108-109.

372 See related comments by Ronen J "The Effect of Insider Trading Rules on Information Generation and Disclosure by Corporations" 1977 *The Accounting Review* 438, 440; see related comments by Nesche KL 'It's Just Not Right:' The Ethics of Insider Trading" 1993 *Law and Contemporary Problems Journal* 123, 131.

responsible for developing new ideas.[373] Insider trading does not reward an insider for his or her ideas but an insider makes profit from insider trading by gaining an unfair advantage at the expense of ignorant investors. Moreover, the possibility of insiders earning profits from insider trading activities may encourage insiders to withhold information from the investors so as to serve their own interests.[374] In this regard, it is argued that if insider trading is permitted, there will be a temptation for those responsible for disclosing price-sensitive information to delay its disclosure and manipulate it to their advantage before disclosing it to the public.[375] The researcher supports this view that insiders may manipulate non public price-sensitive information for personal gain.

The argument that insider trading is an efficient and legitimate means of compensation ignores the reality that insider trading decreases investor confidence in financial markets, which is an important factor for the proper functioning of the financial markets.[376] If insider trading is not regulated, investors will withdraw from the financial markets, and there would be no investors for *bona fide* market participants to sell to or buy from.[377] Consequently, the argument that insider trading is an efficient and legitimate means of compensation is not valid.

(b) insider trading laws are futile and difficult to enforce

Proponents for the deregulation of insider trading argue that insider trading legislation is ineffective and difficult to enforce.[378] Semaan, Freeman and Adams argued that

---

373 See related comments by Black A "The Reform of Insider Trading Law in Australia" 1992 *UNSW Law Journal* 214, 219-220; Dent 2013 *Delaware Journal of Corporate Law* 247, 249 and 259; Beny 2007 *Corporate Law Journal* 237, 241.

374 See related comments by Dye 1984 *The Journal of Business* 296-297; Dent 2013 *Delaware Journal of Corporate Law* 248; Black 1992 *UNSW Law Journal* 219.

375 See related comments by Dye 1984 *The Journal of Business* 296-297; Dent 2013 *Delaware Journal of Corporate Law* 257; Black 1992 *UNSW Law Journal* 214, 219.

376 See related comments by Semaan, Freeman and Adams 1999 *Company and Securities Law Journal* 227; Ayres I and Bankman J "Substitutes for Insider Trading" 2001 *Stanford Law Review* 1, 50;

377 See related comments by Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 151; Austin *What are the Challenges for Securities Regulators* 77. .

378 See related comments by Semaan, Freeman and Adams 1999 *Company and Securities Law Journal* 229; Dent 2013 *Delaware Journal of Corporate Law* 256.

regulation of insider trading has had little impact on curbing insider trading in many jurisdictions such as the USA.[379] The researcher submits that insider trading regulation has had a positive impact in the financial markets by combating insider trading activities.[380] Furthermore, the regulation of insider trading has enabled many victims to recover the losses they incurred as a result of the insider trading practices in many countries. For instance in South Africa, the DMA instructed two respondents to pay an administrative fine of R3 000 000 for committing insider trading in 2011.[381] It is argued that insider trading cases are difficult to investigate and to prove during prosecution and litigation of such cases.[382] However, while this is true, what makes insider trading cases more difficult to investigate in Zimbabwe is the lack of resources on the part of the Securities and Exchange Commission of Zimbabwe (SECZ) and the Zimbabwe Stock Exchange (ZSE).[383] As a result, a significant amount of illegal insider trading activity goes undetected or unpunished.[384] The researcher submits that insider trading goes undetected because the SECZ and the ZSE have inadequate surveillance systems that are used detect insider trading activities in the financial markets.[385] Furthermore, various

---

379 See related comments by Semaan, Freeman and Adams 1999 *Company and Securities Law Journal* 230; Presto C "Illegal Insider Trading" 2017 *Economic Crime Forensics Capstones* 1, 8-9. Financial Services Board 2017 *Annual Report* HYPERLINK "https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf" ttps://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 17 September 2018 60-61; see statistics in paragraph 7.2.3.2.6 in Chapter Seven of this thesis.

381 See insider trading statistics on Financial Services Board 2017 *Enforcement Actions* HYPERLINK "https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx%20accessed%2029" https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx accessed 29 September 2017 page number unknown; see statistics in paragraph 7.2.3.2.6 in Chapter Seven of this thesis.

382 See related comments by Huang H *International Securities Markets: Insider Trading Law in China* (Kluwer Law International Netherlands 2006) 83-84.

383 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018; See paragraph 5.6 in Chapter Five of this thesis.

384 See related comments by Presto 2017 *Economic Crime Forensics Capstones* 30-38; Van Osselaer AP "Insider Trading Enforcement and Link Prediction" 2017 *Texas Law Review* 399, 407; Newkirk CT and Robertson MA 1998 *Insider Trading – A US Perspective* HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 Page number unknown" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 Page number unknown.

385 See related comments by Saungweme P, Ricardo P and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630, 1636. This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T

factors have made the regulation of insider trading ineffective in Zimbabwe.[386] For example, the lack of training on insider trading practices for members of the SECZ and Prosecutors, magistrates and judges has contributed to the poor detection, investigation and prosecution of insider trading offences in Zimbabwe.[387]

The penalties and remedies for insider trading are inadequate. For example, an insider may be liable to pay a fine not exceeding Zim $200 000 and imprisonment for a period not exceeding five years.[388] It is submitted that the criminal sanctions are not deterrent enough to curb insider trading activities in the Zimbabwean financial markets because they are too low for deterrence purposes. Furthermore, any person found guilty of insider trading may be liable to pay back the profit which accrued to him or her, amount of loss avoided or reduction in the price or value of an affected security.[389] It is submitted that the civil penalty is also low for deterrence purposes especially considering that insiders gain a lot of money in insider trading activities. There are no specific administrative sanctions for insider trading under the *Securities Act*.[390] The lack of administrative penalties may have contributed to the minimal cases that have been settled by the SECZ and prosecuted by the courts. However, the *Securities Act* provides administrative sanctions that apply generally to all offences that are committed under the *Securities Act*.[391] The administrative sanctions include the issuing of a warning to the offender; instructing the

---

(Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

386 See related comments by Tsaurai and Odhiambo2012 *Corporate Ownership and Control Journal* 362; Saungweme P, Ricardo P and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630, 1635-1636; Austin *What are the Challenges for Securities Regulators* 77-79; Linciano "The Effectiveness of Insider Trading Regulation in Italy: Evidence from Stock-Price Run-Ups around Announcements of Corporate Control Transactions" 2003 *European Journal of Law and Economics* 119, 212-213.

387 See paragraph 5.4 in Chapter Five of this thesis; see related comments by Presto 2017 *Economic Crime Forensics Capstones* 39-30.

388 Section 90 of the *Securities Act*; see related comments by Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1, 10-11 and 14; Luiz 2011 *SA Merc LJ* 154-155.

389 Section 91(1)(a)-(c) of the *Securities Act*; see related comments by Botha 1991 *SA Merc LJ* 10-11 and 14; Luiz 2011 *SA Merc LJ* 154-155.

390 Sections 87-95 of the *Securities Act*; see related comments by Jooste R "The Regulation of Insider Trading in South Africa another Attempt" 2000 *The South African Law Journal* 284, 297-298 and 300-30.

391 Section 105(1) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-30.

offender to comply with the required code of conduct of his or her business; written instructions to the offender to undertake remedial action (correct their wrongful conduct);[392] imposing a monetary penalty not exceeding Zim $20 000 for each day that the contravention has continued;[393] instructing the offender to suspend any of his or her officers or employees from his or her duties[394] and cancellation of an offender's license or registration or amendment of any of its terms or conditions.[395] These administrative sanctions are not robust enough to curb insider trading activities in the Zimbabwean financial markets. For instance, an insider may gain Zim $20 000 from insider trading activity yet the SECZ may impose an amount not exceeding Zim $20 000 as a monetary sanction. The researcher submits that the monetary sanction of Zim $20 000 is not adequate to curb insider trading in Zimbabwe. More discussion about the insider trading sanctions in the *Securities Act* is done in paragraph 5.3 of Chapter Five of this thesis.

---

392 Section 105(1)(a)-(c) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207.

393 Section 105(1)(d) of the *Securities Act*; see related comments by Chitimira "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 327; Deventer G "Harnessing Administrative Law in Encouraging Compliance" 2009 *Financial Services Board Monthly Bulletin* 3, 3-4; Financial Services Board 2018 *Enforcement Actions* HYPERLINK "https://www.fsb.co.za/Departments/marketAbuse/Pages/enforcementActions.aspx%20accessed%20%0928" https://www.fsb.co.za/Departments/marketAbuse/Pages/enforcementActions.aspx accessed 28 March 2018 1.

394 Sections 105(1)(e) and (f) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 66; Öberg J "Is It 'Essential' to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 22-25; Chitimira *The Regulation of Insider Trading in South Africa* 173; International Organization of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 18.

395 Section 105(1)(i) of the *Securities Act;* see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 65-66; Du Plessis JJ and Lyon G *The Law of Insider Trading in Australia* (Federation Press Sydney 2005) 140; Chitimira *The Regulation of Insider Trading in South Africa* 173; International Organization of Securities Commissions 2003 HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 18.

(c) insider trading is a victimless practice

Proponents of insider trading deregulation argue that insider trading is a victimless practice.[396] They also argue that enforcing insider trading prohibitions is simply not cost effective.[397] Newkirk and Robertson argue that sometimes the amount of money that is recovered does not justify the money spent on investigating and prosecuting the offenders.[398] The researcher submits that the purpose of regulating insider trading is to protect investors from insider trading and the integrity of the Zimbabwean financial markets by curbing illicit insider trading activities. To achieve that, the state must spend money on the relevant resources. In relation to this, it is argued that the buying and selling of securities is an agreement which both parties make to trade with no prior contract to have access to relevant equal information nor which require a party to refrain from trading if equal knowledge and access to such information is not possessed.[399] Consequently, unequal access to information should not be a basis of illegality in a trade involving a willing buyer and a willing seller.[400] However, if the insider is an employee of a certain company and he or she commits insider trading then that company's reputation and its

396 See related comments by Manne 1966 *Harvard Bus Review* 113, 114; Cox 1990 *Sydney Law Review* 456-463; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 10.

397 See related comments by Cox 1990 *Sydney Law Review* 456-463; Presto 2017 *Economic Crime Forensics Capstones* 7; Newkirk and Robertson 1998 HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 page number unknown" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 7.

398 See related comments by Newkirk and Robertson 1998 https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm 01 July 2017 page number unknown; Presto 2017 *Economic Crime Forensics Capstones* 8; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 10.

399 See related comments by Cox 1990 *Sydney Law Review* 456; Newkirk and Robertson 1998 HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm%20accessed%2001%20July%202017" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 page number unknown.

400 See related comments by O'Hara AP "Insider Trading in Financial Markets: Legality, Ethics, Efficiency" 2001 *International Journal of Social Economics* 1046; 1053; Newkirk and Robertson HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 page number unknown.

ability to attract investors can be reduced.[401] The researcher also argues that insider trading affects the integrity of the financial markets and also robs investors who do not have non-public information of receiving the full value for their securities.[402] It is further unfair for an insider to make profit from insider trading while the integrity of the Zimbabwean financial markets is diminishing. Therefore, the argument that insider trading is a victimless practice neglects the external costs that result from a perception that insider trading is unregulated.[403] In fact, the SECZ has realised that it cannot afford to turn a blind eye to insider trading if it wants to promote reputable active and reliable financial markets and attract investors in Zimbabwe.[404] The researcher supports the step Zimbabwe has taken of enacting legislation that prohibits insider trading. However, factors like hyperinflation and political instability have already affected the economy of the country negatively.[405] Therefore, insider trading must be regulated to protect and attract more investors in the Zimbabwean financial markets.[406] The financial markets are also a victim of insider trading.[407] If investors believe that insiders are favoured more and that only insiders can profit from trading, they may lose confidence in the integrity of the relevant

---

401 See related comments by Sternberg E *Just Business: Business Ethics in Action* (Oxford University Press New York 2000) 50; O'Hara 2001 *International Journal of Social Economics* 1053-1054.

402 See related comments by Osode 2000 *Journal of African Law* 239, 239-240; Chitimira *The Regulation of Insider Trading in South Africa* 10; Sebastian A 2016 *Why Insider Trading Is Bad for Financial Markets* HYPERLINK "http://www.investopedia.com/articles/markets-economy/092216/why-insider- trading- bad-financial-markets.asp" http://www.investopedia.com/articles/markets-economy/092216/why-insider-trading-bad-financial-markets.asp accessed 31 July 2017 1.

403 See related comments by Sternberg *Just Business: Business Ethics in Action* 50; Saungweme, Peters and Pradeep 2012 *African Journal of Business Management* 1635; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12; also see Newkirk and Robertson 1998 HYPERLINK "https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm%20accessed%2001%20%09July%202017" https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017 page number unknown.

404 See sections 3; 4, 87-95 of the *Securities Act*; see related comments by Saungweme, Peters and Pradeep 2012 *African Journal of Business Management* 1635; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

405 See related comments by Saungweme, Peters and Pradeep 2012 *African Journal of Business Management* 1635.

406 See related comments by Munangagwa CL "The Economic Decline of Zimbabwe" 2009 *Gettysburg Economic Review* 110,122; Jain A, Bhandari S and Kushwah A "An Analysis of Hyperinflation in Zimbabwe" 2016 *International Journal of Research in Humanities, Arts and Literature* 1, 2-8; Coomer J *Zimbabwe's Economic Crisis and Hyperinflation 1997 – 2009* (Masters Dissertation in Financial Management University of Cape Town) 34-37.

407 See related comments by Karsch M "The Insider Trading Sanctions Act: Incorporating a Market Information Definition" 1984 *Journal of Comparative Business and Capital Market Law* 283, 294.

financial markets.[408] Consequently, investors will be more likely to withdraw their investment from the affected financial markets.[409]

As it has been indicated above, insider trading activities are still occurring in the Zimbabwean financial markets. Nonetheless, very few cases of insider trading have been settled or prosecuted by the courts in Zimbabwe. The lack of prosecution of insider trading is the result of lack of resources in the enforcement bodies, the burden of proof in criminal penalties and other challenges discussed in Chapter Five of this thesis. The SECZ, the ZSE and the courts should source adequate resources to prevent, detect, investigate and prosecute insider trading activities in Zimbabwe. Furthermore the Zimbabwean policy makers should support these institutions by amending the *Securities Act* to enact adequate insider trading regulation in Zimbabwe.

On the other hand, the arguments of the proponents for insider trading regulation can be summarised as follows:

(a) insider trading regulation promotes market efficiency

Proponents of insider trading regulation argue that insider trading undermines the integrity and efficiency of the financial markets.[410] It is submitted that through effective regulation and enforcement, insider trading activities can be curbed to promote market efficiency and protect the integrity of the financial markets. Furthermore, proponents for insider trading regulation argue that insider trading raises the cost of capital for issuers of

---

408 See related comments by Karsch 1984 *Journal of Comparative Business and Capital Market Law* 294.

409 See related comments by Karsch 1984 *Journal of Comparative Business and Capital Market Law* 295; Massawe HT and Kadilu M "Combatting Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa* 52, 53-54; Osode 2000 *Journal of African Law* 240.

410 See related comments by Perino 2018 *University of Illinois Law Review* 29; Schotland AR "Unsafe at any Price: A Reply to Manne, Insider Trading and the Stock Market" 1967 *Virginia Law Review* 1425, 1426; Fox BM "Insider Trading in a Globalizing Market: Who Should Regulate What?" 1992 *Law and Contemporary Problems* 263, 267-269; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 9; Austin *What are the Challenges for Securities Regulators* 15-22.

securities and decreases the growth of the economy in any country.[411] In this regard, the researcher submits that regulation of insider trading increases investor confidence and as a result potential investors may start investing in a country where insider trading is regulated. Moreover, Botha submits that an insider harms the efficiency of the market by dealing in shares or securities while in possession of non public price-sensitive inside information which has not been made public.[412] Such dealing could have a negative effect on the price of the affected shares or securities. The researcher supports this view because insider trading serves as a means of communicating market information, which makes markets more efficient. Proponents of insider trading regulation also argue that insider trading decreases public investor confidence in the financial markets. For instance, if investors fear that insiders will regularly profit at their expense, they will be reluctant to invest in such financial markets.[413] This makes it harder for companies to attract investors.[414] The researcher supports this view and argues further that insider trading must be regulated to enhance the competitiveness of companies and financial markets. Insider trading could also give rise to poor public investor confidence and poor investor protection in Zimbabwe. The SECZ seeks to prevent insider trading activities.[415] For instance, the SECZ has authority to investigate and institute a civil case in the

---

411 See related comments by Pillai D, Rutvika S and Shayan K "Impact of Insider Trading on Investment Decision by Investors" 2014 *International Journal of Advance Research in Computer Science and Management Studies* 249, 249; Montagano 2012 *Indiana Journal of Global Legal Studies* 575-577; Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Fischel and Carlton 982 *Stanford Law Review* 857-858.

412 See related comments by Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1, 4; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12; Sandeep P 2003 *Prevention of Insider Trading and Corporate Good Governance* HYPERLINK http://www.iimahd.ernet.in/publications/data/2003-01-03SandeepParekh.pdf http://www.iimahd.ernet.in/publications/data/2003-01-03SandeepParekh.pdf accessed 31 July 2017 3.

413 See related comments by Karsch 1984 *Journal of Comparative Business and Capital Market Law* 295; Massawe and Kadilu 2014 *Law in Africa* 53-54; Osode 2000 *Journal of African Law* 239; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 10; Kruger *The Regulation of Insider Trading on the JSE* 9-10; Stefan P and Stockl T "When Chasing the Offender Hurts the Victim: The Case of Insider Legislation" 2017 *Journal of Financial Market* 104, 105; Macey JR *Insider Trading: Economics, Politics, and Policy* (The AEI Press London 1991) 41.

414 See related comments by Karsch 1984 *Journal of Comparative Business and Capital Market Law* 295; Massawe and Kadilu 2014 *Law in Africa* 53-54; Osode 2000 *Journal of African Law* 239; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 10, 256 and 537.

415 Section 4(1) read with 88 of the *Securities Act*; see related comments by Massawe and Mwajuma 2014 *Law in Africa Journal* 53.

Zimbabwean courts. Furthermore, an efficient financial market attracts more investors which results in economic growth in any country.[416] Accordingly, the SECZ, the ZSE and the courts should effectively enforce the insider trading provisions which will promote fair and efficient financial markets in Zimbabwe.

If insider trading is not regulated, insiders could misuse non-public price-sensitive inside information at the expense of ignorant shareholders or investors to gain profit.[417] Furthermore, if investors know that insiders have informational advantage over them, this could affect their confidence to invest in the Zimbabwean financial markets.[418] Investors choose to invest in financial markets where their financial interest is protected. Local and foreign investors may not participate in the Zimbabwean financial markets and this may have a negative effect on the Zimbabwean financial markets.[419] Moreover, the researcher submits that insider trading should be adequately regulated in Zimbabwe to prevent and combat insider trading in its financial markets.

(b) insider trading regulation enhances the fiduciary duties of the directors

In terms of common law, directors owe a fiduciary duty to their company.[420] Therefore, directors are under an obligation not to trade using confidential non-public inside

---

416 See related comments by Montagano CP "The Global Crackdown on Insider Trading: A Silver Lining to the Great Recession" 2012 *Indiana Journal of Global Legal Studies* 575, 577; Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Fischel and Carlton 982 *Stanford Law Review* 857-858; McDowell J and Novis G "The Consequences of Money Laundering and Financial Crime" 2001 *Electronic Journal of the US Department of State* 6, 8; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

417 See related comments by Zekos JI "Is the Law Effective in Protecting Markets from Insider Trading?" 2017 *Hertfordshire Law Journal* 2, 3.

418 See related comments by Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Zekos 2017 *Hertfordshire Law Journal* 3.

419 See related comments by Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Zekos 2017 *Hertfordshire Law Journal* 3.

420 See related comments by Chuang YC "A Critique of US Insider Trading Regulation Theory" 2001 *Zhongyuan Finance and Economics Law Journal* 1, 9-10; Cohen JM, Dunning KM and Shill GM "Erosion of the Fiduciary-Duty Requirement in Insider-Trading Actions" 2010 *Securities Litigation Journal* 12, 12-17; Kruger *The regulation of insider trading on the JSE: A comparative study with Hong Kong* 12; Choruma A 2016 *Behaviour Expected of Company Directors* HYPERLINK "http://www.financialgazette.co.zw/behaviour-expected-of-company-direcotors/" http://www.financialgazette.co.zw/behaviour-expected-of-company-direcotors/ accessed 20 October 2017 page number unknown.

information of the company's securities for their own benefit.[421] The use of non public price-sensitive information by a director for his or her own benefit is a breach of his or her duty to act in good faith. The fiduciary duty theory entails that where a director, or employee of a company has breached his or her fiduciary duties by using non public confidential, inside information he or she should account for the profits made or losses avoided.[422] The company is entitled to institute legal action against the director, or employee for their breach of fiduciary duties.[423] It is against this background that proponents of insider trading regulation contend that practices that amount to breach of fiduciary duties must be strongly discouraged in all the financial markets.[424] The researcher supports this view because the insiders are expected to act in the best interest of the company. There are different views on this fiduciary duty theory.[425] Su and Berkahn argue that insiders owe a fiduciary duty only to the corporation or company.[426] The researcher submits that insiders owe a fiduciary duty not only to the company but to both the corporation and the shareholders. The obligation imposed by the fiduciary duty theory is necessary to ensure that insiders do not abuse their position of trust for their personal enrichment to the detriment of innocent and ignorant investors.[427] Breach of a fiduciary duty by the director to trade for his or her own benefit is prohibited by the *Securities Act*.[428]

---

421 See related comments by Hazen TL "Corporate Insider Trading: Reawakening The Common Law" 1982 *Washington and Lee Law Review* 845, 846-848; Dalley PJ "From Horse Trading to Insider Trading: The Historical Antecedents of the Insider Trading Debate" 1998 *William And Mary Law Review* 1289, 1291 and 1294.

422 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 198; Moore 1990 *Journal of Business Ethics* 173 and 177.

423 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 198; Moore 1990 *Journal of Business Ethics* 173 and 177.

424 See related comments by Black 1988 *Melbourne University Law Review* 642-643; Marra 1990 *University of Richmond Law Review* 216-218; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

425 See related comments by Marra 1990 *University of Richmond Law Review* 216-218; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

426 See related comments by Su Z and Berkahn MA "The Definition of Insider in Section 3 of the Securities Markets Act 1988: A Review and Comparison with other Jurisdictions" 2003 *Massey University Journal* 1, 2; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

427 See related comments by Black 1988 *Melbourne University Law Review* 642-643.

428 Sections 88, 90 and 91 of the *Securities Act*; see related comments by Atkins *The Alleged Transnational Criminal: The Second Biennial International* 254; Chikomwe J 2012 *Legal Tools for Regulating Self-Dealing* HYPERLINK "https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self-dealing/" https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self- dealing/ accessed 07 July 2017 page number unknown.

A director can be held criminally and civilly liable for trading on non public price-sensitive information for personal benefit in Zimbabwe.[429] In terms of the common law, a director owes the company a duty to act with care and skill in Zimbabwe.[430] Thus, if a director is involved in an unfair self-dealing transaction he or she will be held liable.[431] Therefore, directors should observe a high standard of integrity which will increase investor confidence in the Zimbabwean financial markets.[432]

(c) the regulation of insider trading promotes fairness in the financial markets

Proponents for the regulation of insider trading argue that all market participants must have equal access to the relevant information to enable them to evaluate the relevant information in respect of their trading decisions.[433] The concept of financial markets fairness is subjective and there is no agreement on what the term really means.[434] Bainbridge defines market fairness in three principal ways: (a) the trader is required not to breach the duty not to make a secret profit; (b) the trader must not trade on non public price-sensitive information; and (c) the trader must not trade at the expense of other investors.[435] The researcher supports this view. Moore argues that market fairness forbids the inequality of access to information between the two parties to a transaction. Therefore, parties should have equal access to the relevant information in order to trade on the same

---

429 Sections 88, 90 and 91 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

430 See section 318(1) of the *Companies Act* 47 of 2003 [Chapter 24:03] as amended (*Companies Act)*; see related comments by Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 9-10; Cohen, Dunning and Shill 2010 *Securities Litigation Journal* 12-17; Chikomwe 2012 HYPERLINK "https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self-" https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self- dealing/ accessed 07 July 2017 page number unknown; Kanamugire CJ and Chimuka TV "The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule" 2014 *Mediterranean Journal of Social Sciences* 70, 71.

431 See related comments by Chuang 2001 *Zhongyuan Finance and Economics Law Journal* 9-10; Cohen, Dunning and Shill 2010 *Securities Litigation Journal* 12-17; Chikomwe 2012 HYPERLINK "https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self-dealing/" https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self-dealing/ accessed 07 July 2017 page number unknown.

432 Section 318(1) of the *Companies Act*; section 88 of the *Securities Act*; also see Simon J *The Law of Derivatives* (Informa Law United States of America 2013) 152.

433 See related comments by Presto 2017 *Economic Crime Forensics Capstones* 3; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 11.

434 See related comments by Presto 2017 *Economic Crime Forensics Capstones* 3.

435 See related comments by Bainbridge 1986 *University of Florida Law Review* 21.

level.[436] The researcher agrees with this view because it is unfair for an insider to take an informational advantage for personal benefit. Proponents of insider trading also argue that the prohibition of insider trading removes information irregularities and disparities in the financial markets. The financial markets fairness theory seeks to increase the public investor confidence in such markets by imposing sanctions on individuals who misuse non-public price-sensitive information to gain an unfair advantage over others who do not have equal access to such information.[437] Accordingly, the *Securities Act* and the Zimbabwe Securities Exchange listing requirements should be amended to enact provisions that adequately enhance the curbing of insider trading in the Zimbabwean financial markets.

Despite the arguments raised above on whether insider trading should be regulated, Zimbabwe prohibits insider trading in the *Securities Act*.[438] The researcher argues that insider trading must be regulated. Moreover, the anti-insider trading framework regulating insider trading practices should be adequate and robust enough to prevent and combat such practices. This approach could protect all investors in the Zimbabwean financial markets.[439] It is submitted that although the *Securities Act* provides for markets fairness, the poor and inconsistent enforcement of insider trading provisions has impeded the objectives of market fairness in Zimbabwe.

436 See related comments by Moore 1990 *Journal of Business Ethics* 172; Klaw 2016 *William and Mary Business Law Review* 298.

437 See related comments by Figueroa D "Insider Trading and Other Securities Frauds in the United States: Lessons for Chile" 2014 *Michigan Journal of Private Equity and Venture Capital Law* 165, 168-169; My Bulawayo Newspaper 2016 *The Role of the Zimbabwe Stock Exchange* HYPERLINK "http://www.mybulawayo.com/zimbabwe-stock-exchange/" http://www.mybulawayo.com/zimbabwe-stock-exchange/ accessed 16 May 2017 page number unknown.

438 Sections 88, 90 and 91 of the *Securities Act;* see related comments by Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1631.

439 See related comments by Perino 2018 *University of Illinois Law Review* 29; Schotland 1967 *Virginia Law Review* 1426; Fox 1992 *Law and Contemporary Problems* 267-269; Ghati 2015 *Critical Analysis of the Insider Trading Framework of Tanzania* 6-7; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 12.

3.4 Policy Implications

3.4.1 Market efficiency

The concept of efficiency and fairness in the financial markets is broad and may include the promotion of disclosure of inside information, transparency and equal access to inside information in the financial markets.[440] Precisely, it is unfair for insiders to have an informational advantage over other investors that do not have access to material corporate secrets or price-sensitive information.[441] It is submitted that investors often lose confidence in investing when insiders unfairly engage in securities trading. The fairness principle is intended to protect investors and shareholders of the company by promoting the disclosure of inside information, transparency and equal access to inside information in the financial markets. Consequently, policymakers in many jurisdictions, including Zimbabwe argue that it is unfair for insiders to trade on non public price-sensitive information for personal gain, since it is the property of the company.[442] Material inside information is the property of the company which has invested resources into developing the valuable information.[443] Therefore, the *Securities Act* prohibits the improper use of material inside information by insiders in order to promote fairness and efficiency in the financial markets.[444] This implies that investors and insiders must have equal access to inside information and such information should be efficiently disseminated to all market participants in the Zimbabwean financial markets. It is submitted that this will promote efficiency in the Zimbabwean financial markets.

---

440 See related comments by Krawiec KD "Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age" 2001 *North Western University Law Review* 443, 444; Anderson 1982 *Hofstra Law Review* 347, 353 and 359.

441 See related comments by Krawiec 2001 *North Western University Law Review* 444; Anderson 1982 *Hofstra Law Review* 347, 353 and 359.

442 See section 88 of the *Securities Act*; see related comments by Morgan 1987 *Ohio State Law Journal* 94-95.

443 See related comments by Bainbridge 1999 *SMU Law Review* 1591-1592; Morgan 1987 *Ohio State Law Journal* 94-95; Macey JR "From Fairness to Contract: The New Direction of the Rules Against Insider Trading" 1984 *Hofstra Law Review* 9, 11 and 12.

444 Sections 4(2)(d), 88, 90 and 91 of the *Securities Act*.

3.4.2 *Market Integrity*

The concept of market integrity is rarely defined and/or given a specific definition by researchers and financial markets experts.[445] Although, there is no definition of market integrity, Austin submits that the concept of market integrity can be confined to ensuring that financial markets are unimpaired and uncorrupted.[446] Notably, market integrity is linked with the policy goal of market efficiency. For instance, a market that has integrity is also likely to be efficient as prices will reflect their fundamental value.[447] When insider trading is not adequately regulated, the integrity of the financial market is negatively affected as a result of the illicit insider trading practices that are not effectively curbed by the relevant institutions. This is due to the fact that any increase in unfair trading practices may cause a decrease in market integrity and low investor confidence in any financial market.[448] Consequently, the flow of capital into those financial markets will be reduced. However, it is important to note that the negative effects of market integrity and insider trading are not limited to investors and listed entities only. Insider trading also affects the economic and social development of the country as financial markets are important mechanisms by which companies can access finance to grow and develop.[449] The policy goal of market integrity is entrenched in the *Securities Act.*[450] Therefore, it is important for SECZ and other relevant securities to maintain the integrity of the Zimbabwean financial markets by adequately regulating insider trading.[451] However, there are very few insider trading cases that have been successfully investigated by the SECZ and/or prosecuted

---

445 Sections 4, 88, 90 and 91 of the *Securities Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

446 See related comments by Austin 2016 *William and Mary Business Law Review* 6-10; Austin *What are the Challenges for Securities Regulators* 21.

447 See related comments by Austin 2016 *William and Mary Business Law Review* 6-10; Austin *What are the Challenges for Securities Regulators* 21; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

448 See related comments by Mwenda 1997 *The Zimbabwe Law Review* 42-43; Chitimira *The Regulation of Insider Trading in South Africa* 10, 11, 12 and 15.

449 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1630 and 1637; McDowell and Novis 2001 *Electronic Journal of the US Department of State* 6, 8.

450 Section 4(1)(c) of the *Securities Act*; see related comments by Montagano 2012 *Indiana Journal of Global Legal Studies* 575-577; Massawe and Mwajuma 2014 *Law in Africa Journal* 53; Fischel and Carlton 982 *Stanford Law Review* 857-858.

451 Sections 4(1)(c), (f), 88, 90 and 91 of the *Securities Act*; see related comments by Stander R "Market Integrity and Twin Peaks" 2016 *Financial Services Board Newsletter* 1, 20.

in the courts.[452] Furthermore, the SECZ and other enforcement institutions do not have adequate resources to combat insider trading practices in the Zimbabwean financial markets.[453] Accordingly it is submitted that the SECZ, the ZSE and the courts are not doing enough to promote market integrity in the Zimbabwean financial markets.

3.4.3 Investor Protection

Most companies and governments would want to attract investors to finance their business ideas and grow the economy.[454] The problem only arises when insiders take advantage of material inside information that has not been made public to the detriment of the investors.[455] These circumstances often make investors reluctant to invest in financial markets of a country that do not adequately prohibit insider trading to protect investors.[456] Therefore, the regulation of insider trading in Zimbabwe should continue to promote investor protection by prohibiting the misuse of material non-public inside information by insiders at the expense of innocent investors. Moreover, there is a need for the SECZ to establish mandatory rules that deal with the disclosure of price-sensitive

This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

453 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

454 Sections 4(1)(c), (f), 88, 90 and 91 of the *Securities Act;* see related comments by Bricker R and Markarian G "Institutional Investors and Insider Trading Profitability" 2015 European Accounting Review 495, 496; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

455 Price-sensitive inside information includes information on the firm activities, management competences, earning forecasts and investment opportunities; see related comments by Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1631; Maha KJ and Hamadi M Year unknown *Investor Protection, Disclosure Regulation and Financial Market: InternationalEvidence*HYPERLINK "https://www.virtusinterpress.org/IMG/pdf/Maha_Khemakhem_Jardak_Hamadi_ Matoussi_pap er.pdf" https://www.virtusinterpress.org/IMG/pdf/Maha_Khemakhem_Jardak_Hamadi_ Matoussi_pap er.pdf accessed 09 September 2018 4.

456 See related comments by Anderson JP "Insider Trading and the Myth of Market Confidence" 2017 *Washington University Journal of Law and Policy* 1, 2; Huang H *International Securities Markets: Insider Trading Law in China* (Kluwer Law International Netherlands 2006) 106-107; Levmore S "In Defense of the Regulation of Insider Trading" *Harvard Journal of Law and Public Policy* 101, 101-102.

inside information.[457] Since company employees, directors and shareholders come into contact with non public price-sensitive inside information relating to publicly traded securities from time to time, the disclosure of that information must be properly regulated to protect investors in Zimbabwe.[458] The *Securities Act* must be amended to empower the SECZ to establish its own mandatory disclosure rules on the disclosure of price-sensitive inside information.[459] Such mandatory disclosure rules require issuers of securities to promote equal opportunities and this will enhance the efficiency of the Zimbabwean financial markets by increasing information available on the market which analysts can draw upon. These rules must include disclosure requirements, describing procedures for handling inside information, restrictions concerning trading by insiders and must limit the possibilities of trading based on inside information.[460] It is submitted that informational efficiency in the financial markets increases the possibilities of high investment due to the protection of investors and transparency in the markets.[461]

3.4.4 Deterrence

Legislatures in many jurisdictions have enacted stringent criminal, civil and administrative sanctions to deter people from committing insider trading in their respective financial

---

457 Although the ZSE has rules on disclosure of price-sensitive inside information, there is a need for the SECZ to have mandatory disclosure rules on insider trading as a regulatory body; also see section 3.1-3.9 of the ZSE Listing Requirements.

458 See ZSE Listing Requirements; Devenish GE "What Constitutes 'Inside Information' For Purposes of Insider Trading?" 2017 *THRHR* 506, 521; Chitimira *The Regulation of Insider Trading in South Africa* 50; Osode 2000 *Journal of African Law* 256-257; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-92; The International Organisation of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf%20accessed%2002%20April%202018" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 20-23.

459 See related comments by Walter N "Prioritizing Enforcement in Insider Trading" 2011 *Yale Law and Policy Review* 521, 522 and 528; Fishman JM and Hagerty KM "The Mandatory Disclosure of Trades and Market Liquidity" 1995 *Review of Financial Studies* 637, 637-638.

460 See section 3.1-3.9 of the ZSE Listing Requirements; see related comments by Walter 2011 *Yale Law and Policy Review* 522 and 528; Fishman and Hagerty 1995 *Review of Financial Studies* 637-638.

461 See related comments by Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4; Karmel RS "The Law on Insider Trading Lacks Needed Definition" 2015 *SMU Law Review* 757, 761.

markets.[462] In Zimbabwe, the *Securities Act* prohibits insider trading by imposing criminal, civil and administrative sanctions on individuals who commit insider trading.[463] Thus, any person who is found guilty of any insider trading offence may be liable to pay any profit which accrued to him or her as a result of insider trading.[464] The researcher submits that the civil sanction is less dissuasive to deter people from committing insider trading activities in Zimbabwe.

Furthermore, any person who is found guilty of any insider trading offence may be liable to pay a criminal sanction of Zim $200 000 or imprisonment for a period not exceeding five years.[465] It is submitted that criminal sanctions are very light for discouraging people from insider trading. Moreover, the SECZ may also impose administrative sanctions such as issuing a warning to the offender,[466] instructing the offender to comply with the required code of conduct for his or her business[467] and a monetary penalty not exceeding Zim $100 000 for each day that the contravention has continued.[468] However, the *Securities Act* does not specifically provide insider trading administrative sanctions. Thus, the above listed administrative sanctions apply to all offences committed under the *Securities Act.*[469] The administrative sanctions under the *Securities Act* are not deterrent enough to combat insider trading practices in the Zimbabwean financial markets. For instance, a mere

---

462 See related comments by Kaishen Lin *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience* (LLM-Thesis Tilburg University 2013) 25; Conyers S "Insider Trading" 1973 *International Business Law* 19, 19-25.

463 Sections 90, 91 and 105 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635.

464 Section 91(1)(a) of the *Securities Act.*

465 Section 90 of the *Securities Act*; see related comments by Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 62-64; also see Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 1 10-11 and 14; Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 154-155.

466 Section 105(1)(a) of the *Securities Act.*

467 Section 105(1)(b) of the *Securities Act*; see related comments by Walter N *"Prioritizing Enforcement in Insider Trading"* 2011 *Yale Law and Policy Review* 521, 522 and 528; Fishman JM and Hagerty KM "The Mandatory Disclosure of Trades and Market Liquidity" 1995 *Oxford University Press* 637, 637-638.

468 Section 105(1)(d) of the *Securities Act*; see related comments by Chitimira "A Historical Overview of the Regulation of Market Abuse Under the *Securities Services Act* 36 of 2004" 2014 *De Jure* 310, 327; Deventer G "Harnessing Administrative Law in Encouraging Compliance" 2009 *Financial Services Board Monthly Bulletin* 3, 3-4.

469 Sections 105(1) and 87-95 of the *Securities Act*; see comments in *Pather and another v Financial Services Board and Others* (57617/10) [2014] ZAGPPHC 303 para 45-48.

warning is not adequate to deter an individual who has gained Zim $300 000 from insider trading practices. The researcher presents more discussion on the adequacy of these sanctions in paragraph 5.4 of Chapter Five of this thesis. It is submitted that Zimbabwe uses deterrence as a policy goal of the regulation of insider trading because insider trading is regarded as a civil and criminal offence.

3.4.5 Financial exclusion

Financial exclusion occurs when most people encounter difficulties in accessing or using financial services in Zimbabwe.[470] This implies that certain persons are discriminated against by the government and the private sector regarding access to financial services in Zimbabwe.[471] Financial exclusion occurs in both rural and urban areas in Zimbabwe. Furthermore, financial exclusion is caused by the high cost of accessing financial products and services, and poor infrastructure in Zimbabwe.[472]

In relation to insider trading, investors often exclude themselves from investing in a country due to lack of trust in the financial markets.[473] For instance, the lack of effective enforcement of the *Securities Act* affects the confidence of investors to invest in the Zimbabwean financial markets. There are few cases that have been settled by the SECZ to date.[474] This could be caused by the lack of resources to detect and investigate insider

---

470 See related comments by Fuller D "Credit Union Development: Financial Inclusion and Exclusion" *Geofonm Law Review* 145, 147; European Commission 2008 *Financial Services Provision and Prevention of Financial Exclusion* http://Ec.europa.eu/employment_social/spsi accessed 01 June 2018 9; Blake S and De Jong E *Financial Exclusion A Guide for Donors and Funders* (New Philanthropy Capital London 2008) 9; Makoni PL "From Financial Exclusion to Financial Inclusion Through Microfinance: The Case of Rural Zimbabwe" 2014 *Corporate Ownership and Control Journal* 447, 448.

471 See related comments by Makoni 2014 *Corporate Ownership and Control Journal* 448.

472 See related comments by Researve Bank of Zimbabwe 2016 *Zimbabwe National Financial Inclusion Strategy 2016-2020* HYPERLINK "http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-strategy-2016---2020.pdf" http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-strategy-2016---2020.pdf accessed 01 June 2018 29; Blake and De Jong *Financial Exclusion A Guide for Donors and Funders* 9.

473 See related comments by Makoni 2014 *Corporate Ownership and Control Journal* 448.

This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager) on 29 June 2018.

trading cases and inadequate insider trading sanctions in the *Securities Act*.[475] As a result, investors may be reluctant to invest in Zimbabwe because the current regulation of insider trading is not robust enough to curb insider trading activities in the Zimbabwean financial markets. Furthermore, it is submitted that the policy goals of financial markets and insider trading regulation should promote an investor friendly environment as well as fair and efficient financial markets in Zimbabwe.

3.4.6 *Financial inclusion*

Financial inclusion includes the effective use of quality, affordable and accessible financial services, provided in a fair and transparent manner through regulated institutions.[476] It is submitted that the Zimbabwean policy makers must seriously consider enhancing the insider trading prohibition so as to create viable financial markets. Viable financial markets could in turn enhance financial inclusion in Zimbabwe.[477] Furthermore, there is need for the financial market regulators and stakeholders to come up with consumer education programs to raise awareness of capital market products and financial market crimes in Zimbabwe.[478] The objective of the *Securities Act* is to create fair and efficient financial markets through the regulation of insider trading. However, the SECZ is not doing enough to enhance the objective of fairness in the Zimbabwean

---

475 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635-1636.

476 See related comments by Rayghana A "Financial Inclusion in South Africa: A Review of the Literature" 2017 *Southern African Accounting Association Journal* 632, 635; Makoni 2014 *Corporate Ownership and Control Journal* 447-448; Zhang M *Financial Inclusion from the Perspective of Basic Banking Services and Consumer Credit* (PhD in Law University of Glasgow 2015) 20-26.

477 See related comments by Rayghana 2017 *Southern African Accounting Association Journal* 635; Researve Bank of Zimbabwe 2016 HYPERLINK "http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-" http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-strategy-2016---2020.pdf 01 June 2018 29-30; Zhang *Financial Inclusion from the Perspective of Basic Banking Services and Consumer Credit* 20-26.

478 See related comments by Researve Bank of Zimbabwe 2016 HYPERLINK "http://rbz.co.zw/assets/zimbabwe-national-financial-" http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-strategy-2016---2020.pdf accessed 01 June 2018 28; Saungweme, Peters and Pradeep 2012 *African Journal of Business Management* 1636.

financial markets.[479] For instance, the SECZ does not have rules that regulate the disclosure of inside information and it is also struggling to obtain settlement of insider trading cases. The current state of affairs in the Zimbabwean financial sector does not seem to be promoting financial inclusion. It is submitted that the regulation of insider trading in Zimbabwe does not promote financial inclusion enough because investors are reluctant to invest in Zimbabwe since they fear that their economic interests are not protected by the legislation and enforcement authorities.[480]

3.5 Conclusion

The policy goals of market fairness and market integrity are intended to protect investors, shareholders, companies and the Zimbabwean economy.[481] Both market fairness and market efficiency are connected and their focus is on the effect of the misuse of inside information by the insiders on the Zimbabwean financial markets.[482] Insider trading is prohibited because it is unfair and has a negative effect on investor confidence in the Zimbabwean financial markets. Furthermore, insider trading regulation is aimed at discouraging persons from taking unfair informational advantages at the detriment of other investors or interested persons.[483] The policy goals of market fairness, market integrity and investor protection are also recognised in the regulation of insider trading

---

479 Section 4(2)(d) of the *Securities Act*; see related comments by Rayghana 2017 *Southern African Accounting Association Journal* 635; Makoni 2014 *Corporate Ownership and Control Journal* 447-448.

480 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

481 See related comments by Austin 2016 *William and Mary Business Law Review* 6-10; Curtis MJ "Kantian Fairness and the Law of Insider Trading" 2016 North Western Interdisciplinary Law Review 495, 496; Commodity Futures Trading Commission 2014 *Strategic Plan 2014-2018 Fiscal Year* HYPERLINK "https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/2018strate%09gicplan.pdf" https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/2018strate gicplan.pdf accessed 31 May 2018 8, 10-12.

482 See related comments by Austin 2016 *William and Mary Business Law Review* 6-10; Austin J *What are the Challenges for Securities Regulators* 21; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 72-78.

483 See related comments by Cox and Fogarty 1988 *Ohio State Law Journal* 353-354, 362; Cox 1986 *Duke Law Journal* 630; Adams 2007 *Themes and Theories of the Insider Trading Provisions* 23.

under the *Securities Act.*[484] However, it is submitted that the SECZ, the ZSE and the courts are not doing enough to promote market fairness, market integrity, investor protection and financial inclusion in the Zimbabwean financial markets. Accordingly, the fact that there are very few insider trading cases that have been settled by the SECZ is proof that the *Securities Act* is ineffectively enforced to curb insider trading activities in the Zimbabwean financial markets.

As discussed above, the theories of insider trading were developed to regulate the use of material inside information in many jurisdictions.[485] Insider trading regulation in Zimbabwe is based on the equal access to information, misappropriation and public interest theories.[486] The *Securities Act* prohibits both primary and secondary insiders from trading with non public price-sensitive information for personal benefit.[487] Furthermore, the aim of the prohibition of insider trading is to *inter alia* promote equal access to information for all market participants. Furthermore it is unfair for the insiders to trade on the basis of non-public material inside information at the expense of ignorant investors.[488] Market participants must have equal access to information in order to make informed judgments before investing in the Zimbabwean financial markets.[489] In this regard, the *Securities Act* should be amended to introduce stringent civil, criminal and administrative sanctions to curb insider trading activities. Furthermore, it is submitted that the enforcement agencies should have access to resources in order to effectively enforce insider trading provisions in the *Securities Act*.

---

484 See sections 4(1)(a), (c) and 4(2)(d) of the *Securities Act;* see analysis in paragraph 3.4 in Chapter Three of this thesis.

485 See related comments by Klaw 2016 *William and Mary Business Law Review* 298-308; Nagy DM "Beyond Dirks: Gratuitous Tipping and Insider Trading" 2016 *The Journal of Corporation Law* 1, 55-56.

486 See section 88 of the *Securities Act*; see related comments by Popova, Georgakopoulos, Sotiropoulos and Vasileiou 2013 *International Business Research Journal* 2-4.

487 Section 88 of the *Securities Act*; see related comments by Pritchard AC "United States V O'hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading" 1998 *Boston University Law Review* 13, 48-49.

488 See related comments by Anderson 2017 *Washington University Journal of Law and Policy* 1, 3; Huang H *International Securities Markets: Insider Trading Law in China* 106-107; Levmore S "In Defense of the Regulation of Insider Trading" 1988 *Harvard Journal of Law and Public Policy* 101, 101-102.

489 See related comments by Klaw 2016 *William and Mary Business Law Review* 298-308; Gubler 2017 *The Georgetown Law Journal* 4-7; Salbu 2012 *St John's Law Review* 400.

Although, the Zimbabwean policy makers recognize the importance of financial inclusion policy, stakeholders should work together to implement this policy to promote financial inclusion in the Zimbabwean financial markets. Furthermore, the SECZ, the ZSE and the courts should have the necessary resources to combat insider trading activities. Having access to sufficient resources will assist the enforcement authorities to effectively enforce the insider trading prohibition. Moreover, consumer education programs must be organised by different stakeholders to raise awareness on capital market products and financial crimes such as insider trading.

CHAPTER FOUR

SELECTED ROLE-PLAYERS IN THE ENFORCEMENT OF THE ZIMBABWEAN INSIDER TRADING LAWS

4.1 Introduction

Although insider trading is regulated in Zimbabwe, there are still challenges in the enforcement of the anti-insider trading provisions under the *Securities Act*.[490] For instance, there are challenges regarding the inadequacy of insider trading provisions in the *Securities Act* and inadequate resources to detect, investigate and prosecute insider trading activities in the Zimbabwean financial markets.[491] Furthermore, the challenge of curbing insider trading practices is also caused by the lack of cooperation between enforcement authorities and institutions that are responsible for enforcing the prohibition of insider trading.[492] The authorities and institutions involved in the enforcement of insider trading provisions in Zimbabwe, include the Securities and Exchange Commission of Zimbabwe (SECZ),[493] the Zimbabwe Stock Exchange (ZSE) and the courts.[494] In order to curb insider trading practices in Zimbabwe, the relevant enforcement authorities should

---

490 Sections 88, 90 and 91 of the *Securities Act* 17 [Chapter 24:25] of 2004 as amended (*Securities Act*).

491 See related comments by Saungweme P, Ricardo P and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630, 1635-1636; Carvajal A and Elliott J "The Challenge of Enforcement in Securities Markets: Mission Impossible?" 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 19-20, 26-27 and 28.

492 See related comments by Chitimira H and Lawack VA "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 2)" 2013 *Obiter* 64, 65; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 29-30.

493 Section 3 of the *Securities Act*; see related comments by Bromberg L, Gilligan G and Ramsay I "Insider Trading and Market Manipulation: The SEC'S Enforcement Outcomes" 2017 *Securities Regulation Law Journal* 1, 5; Qing HE and Rui OM "Ownership Structure and Insider Trading: Evidence from China" 2016 *Journal of Business Ethics* 553, 555.

494 Sections 90 and 91 of the *Securities Act*; see related comments by Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 107, 108-113, 118-120.

have adequate resources and cooperate well. There are very few insider trading cases that have been successfully investigated, settled or prosecuted in Zimbabwe to date.[495] This challenge is caused by the ineffectiveness of the enforcement institutions such as the SECZ, ZSE and the courts in detecting, investigating and prosecuting insider trading activities in the Zimbabwean financial markets.[496]

This chapter examines whether the insider trading provisions in the *Securities Act* are adequately implemented by the relevant enforcement authorities in Zimbabwe. It is submitted that in order to determine whether the insider trading provisions are effectively implemented by the SECZ, ZSE and the courts, one has to examine whether there are sufficient enforcement authorities to enforce insider trading provisions in the Zimbabwean financial markets.[497] Accordingly, legislation is measured by its effective enforcement.[498] Enforcement institutions have a significant role in curbing the illicit practices in the financial markets in many countries, including Zimbabwe.[499] Moreover, one has to determine whether relevant enforcement authorities are statutorily empowered to prevent, detect, investigate and prosecute insider trading activities in the Zimbabwean financial markets. It is submitted that the poor enforcement of insider trading laws by the enforcement authorities affects the regulation of insider trading in the Zimbabwean financial markets. Accordingly, the SECZ, the ZSE and the courts should be statutorily

---

495 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Franke T "Insider Trading" 2018 *SMU Law Review* 783, 790-791.

496 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. Spitz MA "Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain" 1989 *Boston College International and Comparative Law Review* 265, 271-274.

497 See related comments by Chitimira 2014 *Speculum Juris* 120-121; Dooley MP "Enforcement of Insider Trading Restrictions" 1980 *Virginia Law Review* 1, 7-8.

498 See related comments by Allot A "The Effectiveness of Laws" 1981 *Valparaiso University Law Review* 229, 234; Spitz 1989 *Boston College International and Comparative Law Review* 267; Manne HG "Insider Trading And Property Rights in New Information" 1985 *Cato Journal* 933, 941.

499 See related comments by Luiz SM "Insider Trading Regulation-If at First You Don't Succeed" 1999 *SA Merc LJ* 136, 136; Osode PC "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 252-254; Bromberg L, Gilligan G and Ramsay I "Financial Market Manipulation and Insider Trading: An International Study of Enforcement Approaches" 2017 *Journal of Business Law* 1, 5-8.

empowered on their roles in promoting investor confidence, market integrity and fair financial markets.[500]

This chapter also examines whether relevant enforcement authorities have adequate resources to curb insider trading activities in the Zimbabwean financial markets. It is submitted that lack of resources hampers the enforcement of insider trading provisions in the Zimbabwean financial markets.[501] Furthermore, lack of resources in SECZ, the ZSE and the courts to combat insider trading activities renders the respective bodies ineffective. Consequently, this chapter discusses the functions and powers of the SECZ, the ZSE and the courts in preventing, detecting, investigating and prosecuting insider trading offences in Zimbabwe. The functions and powers of stated institutions are discussed to determine whether they are fulfilling their functions in relation to the curbing of insider trading activities and promotion of market efficiency and market integrity in the Zimbabwean financial markets.

4.2 The Functions and Historical Establishment of the SECZ

4.2.1 Historical Aspects of the SECZ

It appears that prior to 1946, there was no regulatory body that regulated securities and financial markets in Zimbabwe.[502] However, after the establishment of the Rhodesian Stock Exchange (RSE) in 1946, the regulation of trading in securities was introduced by

---

500 See related comments by Bromberg, Gilligan and Ramsay 2017 *Journal of Business Law* 5-8; Luiz 1999 *SA Merc LJ* 136; Osode 2000 *Journal of African Law* 252-254.

501 See related comments by Dooley 1980 *Virginia Law Review* 18; Jackson HE and Roe MK "Public and Private Enforcement of Securities Laws: Resource-based Evidence" 2009 *Journal of Financial Economics* 207, 210 and 230; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 26-27.

502 See related comments by Karekwaivenani G "A History of the Rhodesian Stock Exchange: The Formative Years, 1946- 1952" 2003 *The Journal of Humanities of the University of Zimbabwe* 9, 11-20; Muzamani JT "The Zimbabwe Stock Exchange" 1993 *African Review of Money Finance and Banking* 75, 76-77.

the *Rhodesia Stock Exchange Act* in 1974.[503] For instance, the *Rhodesia Stock Exchange Act* prohibited market participants from practicing any dishonesty when trading in Rhodesian financial markets.[504] However, the *Rhodesia Stock Exchange Act* did not describe the term dishonesty nor prohibit insider trading thus insiders could not be held liable for insider trading under the *Rhodesia Stock Exchange Act*. However, the RSE committee was empowered by the RSE rules to supervise the national stock exchange.[505] The RSE rules also empowered the RSE committee to investigate any practice of dishonesty by brokers in the Rhodesian financial markets.[506] This was done to combat illicit trading activities in the Rhodesian financial markets by market participants. It should be noted that if there was any dishonesty in relation to trading of securities, the RSE committee could take disciplinary measures against the perpetrator.[507] In relation to insider trading, the RSE rules were silent. Consequently, insider trading was not regulated by any legislation until the enactment of the *Securities Act*.

In 2013, the *Securities Act* established the SECZ as an institution that regulates trading and dealing in securities in Zimbabwe.[508] Previously, the SECZ was known as the

503 *Rhodesia Stock Exchange Act* [Chapter 24:18] of 1974 (*Rhodesia Stock Exchange Act*); Karekwaivenani 2003 *Journal of Humanities of the University of Zimbabwe* 21; Muzamani 1993 *African Review of Money Finance and Banking* 76.

504 Section 15(1) of the *Rhodesia Stock Exchange Act*; see related comments by Tomasic R, Bottomley S, McQueen R *Corporations Law in Australia* 2nd Edition (The Federation Press Sydney 2002) 580-582; Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21.

505 See paragraph 27 of the RSE rules; see related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; Aitken M, Cumming BD and Zhan F "Exchange Trading Rules, Surveillance and Suspected Insider Trading" 2013 *Journal of Corporate Finance* 311, 313-314; Chinamo T 2014 *Capital Markets Development: A Journey That Never Ends* HYPERLINK "http://www.herald.co.zw/capital-%09markets-developments-a-journey-that-%09never-%09ends/" http://www.herald.co.zw/capital- markets-developments-a-journey-that-never- ends/ accessed 24 May 2017 page number unknown.

506 See related comments by Aitken, Cumming and Zhan 2013 *Journal of Corporate Finance* 313-314; Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21;Chinamo 2014 HYPERLINK "http://www.herald.co.zw/capital-markets-developments-a-journey-that-never-ends/" http://www.herald.co.zw/capital-markets-developments-a-journey-that-never-ends/ accessed 24 May 2017 page number unknown.

507 See related comments by Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe* 21; Aitken, Cumming and Zhan 2013 *Journal of Corporate Finance* 313-314; Cumminga D, Houb W and Wu E "Exchange Trading Rules, Governance, and Trading Location of Cross-Listed Stocks" 2018 *The European Journal of Finance* 1453, 1455-1456.

508 Sections 3 and 4 of the *Securities Act*; see related comments by Mumbengegwi C Macroeconomic and Structural Adjustment Policies in Zimbabwe (Palgrave Publishers New York 2002) 127; Spitz 1989 *Boston College International and Comparative Law Review* 271-273; Chen

Securities Commission in 2004.[509] The name of the Securities Commission was changed to the Securities and Exchange Commission of Zimbabwe through the amendment of the *Securities Act* in 2013.[510] Furthermore, the SECZ is an independent regulatory body with the authority to supervise the securities and capital markets in Zimbabwe.[511]

4.2.2 Functions and Powers of the SECZ

In order to ensure proper supervision and enforcement of the insider trading provisions under the *Securities Act*, the SECZ is statutorily empowered to:

(a) regulate trading and dealing in securities.[512] It is submitted that the SECZ oversees the regulation of trading in securities by enforcing the provisions of the *Securities Act*.[513] For instance, the SECZ enforces insider trading provisions by investigating any illicit insider trading activities in the Zimbabwean financial markets in order to prevent the occurrence of such activities.[514] Although the SECZ has authority to investigate insider trading activities, very few insider trading cases have been successfully investigated by

---

G, Firth M, Gao DN and Rui OM "Is China's Securities Regulatory Agency A Toothless Tiger? Evidence from Enforcement Actions" 2005 *Journal of Accounting and Public Policy* 451, 457-461.

509 See section 3 of the *Securities Act* as amendment; see related comments by Spitz 1989 *Boston College International and Comparative Law Review* 271-273; Chen, Firth, Gao and Rui 2005 *Journal of Accounting and Public Policy* 457-461.

510 Section 3 of the *Securities Act* as amendment.

511 Section 3 of the *Securities Act*; see related comments by Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1635; Spitz 1989 *Boston College International and Comparative Law Review* 271-273; Chen, Firth, Gao and Rui 2005 *Journal of Accounting and Public Policy* 457-461.

512 Section 4(2)(a) of the *Securities Act*; Qureshi MI "Regulatory Mechanisms of Securities Trading in Malaysia (With Special Reference to Insider Trading)" 1995 *Pacific Rim Law and Policy Journal* 649, 651.

513 Sections 4, 88, 90 and 91 of the *Securities Act*; see related comments by Chen, Firth, Gao and Rui 2005 *Journal of Accounting and Public Policy* 457-461; Lin CC and Hung E "U.S. Insider Trading Law Enforcement: Issues and Survey of SEC Actions from 2009 to 2013" 2016 *National Taiwan University Law Review* 37, 40-42.

514 Sections 4, 88, 90 and 91 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1635; Chen, Firth, Gao and Rui 2005 *Journal of Accounting and Public Policy* 457-461; Lin and Hung 2016 *National Taiwan University Law Review* 40-42.

the SECZ.[515] The challenge of the SECZ in investigating insider trading cases is the lack of electronic surveillance systems that can enable the SECZ to receive insider trading alerts.[516] As a result, the SECZ receives few insider trading cases to investigate from the police and other market participants. Furthermore, the SECZ does not have sufficient resources to effectively investigate insider trading cases in the financial markets. Consequently, lack of resources has negatively affected how the SECZ investigates insider trading activities.

(b) Register, supervise and regulate securities exchanges.[517] For instance, in terms of the *Securities Act* securities should be registered with the SECZ in order to be traded in the Zimbabwean financial markets.[518] Securities are registered to provide adequate information to investors and to empower the investors to make an informed investment decision. Accordingly, all issuers of securities that have registered with the SECZ are obliged to adhere to the insider trading provisions in the *Securities Act*. However, contravention of the *Securities Act* or where the registration was obtained through fraud or misrepresentation of a material fact may lead to cancelation of the registration by the SECZ.[519]

(c) Encourage the development of free, fair and orderly capital and securities markets in Zimbabwe.[520] In relation to insider trading, the SECZ promotes market fairness and

---

515 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

516 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

517 Section 4(2)(b) of the *Securities Act*; see related comments by Pillai PN "Securities Regulation in Malaysia: Emerging Norms of Governmental Regulation" 1986 *Journal of Comparative Business and Capital Market Law* 39, 43 and 53.

518 Section 30(2) of the *Securities Act*; see related comments by Pillai 1986 *Journal of Comparative Business and Capital Market Law* 43 and 53.

519 Section 36 of the *Securities Act;* see related comments by Campbell RB "The Role of Blue Sky Laws After NSMIA and the Jobs Act" 2016 *Duke Law Journal* 605, 627-630; Lager GM "The Route to Capitalization: The Transcendent Registration Exemptions for Securities Offerings as a Means to Small Business Capital Formation" 2016 *Texas Law Review* 568, 573.

520 Section 4(2)(d) of the *Securities Act*; Wei Y "The Development of the Securities Market and Regulation in China" 2005 *Loyola of Los Angeles International and Comparative Law Review* 479, 484 and 487.

efficiency by preventing, investigating and referring the insider trading cases to court.[521] This is done to promote fairness and efficiency in the Zimbabwean financial markets in order to preserve the integrity of the markets.

4.2.3 *The Role of the SECZ*

The SECZ has the authority to investigate any suspected insider trading offences under the *Securities Act*.[522] When investigating the alleged insider trading offences, the SECZ may appoint inspectors to investigate the insider trading case.[523] The *Securities Act* provides that the SECZ inspectors should consist of its employees and public service employees such as police officers.[524] It is submitted that some inspectors do not have relevant expertise in financial crimes, therefore the SECZ should appoint inspectors who investigate insider trading activities on the basis of their expertise in the financial markets.[525] Therefore, persons who have expertise in financial market crimes may effectively investigate insider trading cases in Zimbabwe.

Inspectors have the power to enter and search any premises with the consent of the person in charge of the premises concerned to seize any document or examine information that will assist them in the investigation of insider trading cases.[526] However, inspectors can enter and search premises without the consent of the person in charge of

---

521 Sections 88, 90 and 91 of the *Securities Act*; see related comments in paragraph 3.4.1, 3.4.2 and 3.4.3 of this thesis.

522 Section 103(1)(e) of the *Securities Act*; see related comments by Clacher I, Hillier D and Lhaopadchan S "Corporate Insider Trading: A Literature Review" 2009 *Spanish Journal of Finance and Accounting* 373, 379.

523 Section 101(1)-(2) of the *Securities Act*. Inspectors consist of one or more employees of the SECZ and members of the public service such as the police.

524 Section 101(1)-(2) of the *Securities Act*; see related comments by Spitz 1981 *Boston College International and Comparative Law Review* 271-273; Anderson JP "Anticipating A Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform" 2015 *UTAH Law Review* 339, 370 and 340.

525 Section 103(1) of the *Securities Act*; Carvajal and Elliott 2009 *International Monetary Fund WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 25 September 2018" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 25 September 2018 26.

526 Sections 102(1) and (2) of the *Securities Act*; Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-Thesis University of Fort Hare 2008) 99.

the premises concerned where it is believed on reasonable grounds that it is necessary to obtain evidence relating to an offence.[527] It is submitted that this approach is fair for inspectors to be able to lawfully enter premises without consent for purposes of searching for documents or evidence relating to the insider trading offence. Furthermore, the inspectors must be convinced that the searching of premises is necessary to obtain the evidence relating to an offence. It is submitted that this provision is not unconstitutional because the alleged person's rights to privacy,[528] property[529] and dignity[530] can be limited in terms of the Constitution of Zimbabwe as long as the infringement can be justified.[531] Moreover, the inspectors may request documents or information from the suspected person where they considers that such person is or may be able to give information which is relevant to the insider trading investigation.[532] It is submitted that the authority of inspectors to enter premises without consent has not been challenged in Zimbabwe thus no person considers it as an infringement of the constitutional rights.

The SECZ can also conduct a hearing into any alleged infringement of the *Securities Act,* including insider trading.[533] During an insider trading hearing, inspectors may summon and interrogate any person whom they consider to be in a position to give relevant information on the alleged insider trading violation.[534] However, the SECZ does not have the power to order an insider trading offender to be detained in custody.[535] The researcher submits that there is no need for the SECZ to have authority to order the detention of an offender in custody because it is the responsibility of the courts to impose criminal

527 Section 102(2) of the *Securities Act*; Van Osselaer A "Insider Trading Enforcement and Link Prediction" 2017 *Texas Law Review* 309, 402-403.

528 Section 57 of the *Constitution of Zimbabwe Amendment* 20 of 2013 (*Constitution of Zimbabwe*); Basdeo V "The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure" 2009 *PELJ* 307, 315.

529 Section 71 of the *Constitution of Zimbabwe*; Basdeo 2009 *PELJ* 309.

530 Section 51 of the *Constitution of Zimbabwe*; Basdeo 2009 *PELJ* 309 and 313.

531 Sections 86(2) read with 87(1) of the *Constitution of Zimbabwe*; Basdeo 2009 *PELJ* 309.

532 Section 102(1)(b) of the *Securities Act*; Van Osselaer 2017 *Texas Law Review* 402.

533 Section 103(1) of the *Securities Act*; Choi SJ and Pritchard AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 6, 10-12.

534 Section 103(3)(b) of the *Securities Act*; Van Osselaer 2017 *Texas Law Review* 402.

535 Section 103(5) of the *Securities Act*; see related comments by Agrawal A and Cooper T "Insider Trading before Accounting Scandals" 2015 *Journal of Corporate Finance* 169, 171-172.

penalties.[536] Furthermore, court officials such as magistrates and judges have relevant expertise and experience in adjudicating criminal cases than the SECZ employees.

During the insider trading hearing, the accused is entitled to have his or her legal representative present.[537] Legal representatives are important during the hearing because any party to a dispute is entitled to give evidence and to address the commissioner and that is the kind of work that an attorney is trained to do.[538] Furthermore, the respondent may be requested to produce documents related to the alleged insider trading case during the hearing which inspectors may make a copy of and ask questions based on such documents.[539] It is submitted that it is important for inspectors to request documents from the alleged insider trading offender to determine a proper punishment after going through evidence.

However, the *Securities Act* does not outline the rules and procedure of the hearing. The *Securities Act* merely states that the rules and procedure of the hearing must be regulated by the *Commissions of Inquiry Act*.[540] However, the *Commissions of Inquiry Act* is not sufficient to regulate insider trading hearings. For instance, the *Commissions of Inquiry Act* applies only to matters where the president of Zimbabwe has ordered investigation by any relevant institution.[541] However, insider trading cases are not instituted by the president, but by the SECZ or any person affected by the insider trading activity.[542]

---

536 Section 90 of the *Securities Act*; see related comments by Spitz 1989 *Boston College International and Comparative Law Review* 273-274; Agrawal and Cooper 2015 *Journal of Corporate Finance* 171.

537 Section 103(3)(b)(i)-(ii) of the *Securities Act*; see related comments by Rhode DL "Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms" 2016 *Hastings International and Comparative Law Review* 111, 113.

538 See related comments by Rhode 2016 *Hastings International and Comparative Law Review* 113; Kruger W *Legal Representation at Disciplinary Hearings and Before the CCMA* (LLM Dissertation University of Pretoria 2012) 54; Van Eck J and Jordaan R "Administrative, Labour and Constitutional Law — A Jurisdictional Labyrinth" 2006 *Industrial Law Journal* 1987, 1991.

539 Section 103(3)(a) of the *Securities Act*; see related comments by Spitz 1989 *Boston College International and Comparative Law Review* 271-273.

540 Section 2 of the *Commissions of Inquiry Act* 22 [Chapter 10:07] of 2001 (*Commissions of Inquiry Act*); also see section 103(5) of the *Securities Act*.

541 Section 2(1) of the *Commissions of Inquiry Act*; see related comments by Rowe M and McAllister L "The Roles of Commissions of Inquiry in the Policy Process" 2006 *Public Policy and Administration Journal* 99, 104-105.

542 Section 2 of the *Commissions of Inquiry Act;* see sections 90 and 91 of the *Securities Act*.

Furthermore, in terms of the *Securities Act* insider trading procedures are instituted by the SECZ and or any affected persons.[543] As a result, the *Commissions of Inquiry Act* does not adequately complement the *Securities Act* in regulating the procedure of insider trading hearings. The researcher submits that the SECZ should enact rules that state proper insider trading hearings procedures that will provide directions to all parties in the insider trading cases.

After the insider trading hearing, the SECZ has the authority to impose general administrative sanctions on the offenders. Such administrative sanctions can also be imposed for all offences committed under the *Securities Act*. It is submitted that the *Securities Act* prohibits different offences such as market manipulation and insider trading, therefore it is unfair to impose the same penalty for those offences. Furthermore, the nature of the offences differ therefore imposing the same administrative penalties for the different offences is not good. The researcher discusses the adequacy of the available administrative sanctions below:

(a) The SECZ may issue a warning letter to the insider trading offender.[544] The *Securities Act* does not provide more information on the issuing of a warning. Usually a warning letter is issued in respect of minor offences, for instance, misconduct by employees.[545] However, it is submitted that where a warning is warranted in insider trading cases, the warning should be imposed along with a monetary sanction to make the penalty severe. The rationale for the monetary sanction is to restore the insider trading victim to the position he or she was before the insider trading was committed.[546] Furthermore, monetary penalties deter people from committing insider trading offences.

---

543 Section 91(1) of the *Securities Act.*

544 Section 105(1)(a) of the *Securities Act*; see related comments by Pfaeltzer JJW "Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?" 2014 *Utrecht Law Review* 134, 134.

545 Section 105(1)(a) of the *Securities Act;* see related comments by Drahos P *Regulatory Theory Foundations And Applications (* ANU Press Australia 2017) 136.

546 See related comments by Kawadza H "Extra-Judicial Enforcement of Securities Regulation and the Public Interest Theory: A South African Perspective" 2015 *Speculum Juris* 49, 61.

(b) The SECZ may instruct the insider trading offender to comply with the policy of his or her business.[547] The *Securities Act* does not give a clear description of what the offender is instructed to comply with or what the employment policy entails.[548] Furthermore, it is not clear whether the company's policy includes rules on how employees should deal with price-sensitive inside information to curb insider trading. However, the *Companies Act* provides that companies must disclose to the registrar information regarding the shares they purchased. The disclosure of such information is requested to protect investors from being taken advantage of by issuers.

(c) The SECZ may instruct the insider trading offender to undertake remedial action.[549] The *Securities Act* does not explain what it means to instruct the offender to undertake remedial action.[550] Furthermore, it is not clear how instructing the offender to undertake remedial action assists the SECZ in combating insider trading activities in the Zimbabwean financial markets. It is submitted that instructing the insider trading offender to undertake remedial action is not stringent enough to discourage people who commit insider trading activities.

(d) The SECZ may impose a monetary penalty not exceeding Zim $200 000 for each day that the insider trading has continued.[551] A monetary sanction is normally imposed on an insider as a means to recover money that the insider has gained through insider trading.[552] It is submitted that the Zim $200 000 is not deterrent enough to discourage market participants from committing insider trading in Zimbabwe. Insiders gain a lot of

---

547 Section 105(1)(b) of the *Securities Act*; see related comments by Dalko V and Wang MH "Why is Insider Trading Law Ineffective? Three Antitrust Suggestions" 2016 *Studies in Economics and Finance Journal* 704, 705.

548 Section 105(1)(b) of the *Securities Act*.

549 Section 105(1)(c) of the *Securities Act*; see related comments by Luchtman M and Vervaele J "Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?" 2014 *New Journal of European Criminal Law* 192, 206-207.

550 Section 105(1)(c) of the *Securities Act*; see related comments by Eisenbach T, Haughwout A, Hirtle B, Kovner A, Lucca D, and Plosser M "Supervising Large, Complex Financial Institutions: What Do Supervisors Do?" 2017 *FRBNY Economic Policy Review* 57, 59.

551 Section 105(1)(d) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206.

552 Thanitcul S and Srinopnikom T "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions" 2018 *Kasetsart Journal of Social Sciences* 1, 3.

profit from insider trading activities, therefore a more stringent monetary sanction will assist the SECZ to discourage insiders from committing or attempting to commit insider trading activities in the Zimbabwean financial markets.[553] The SECZ can adopt other administrative penalties such as disgorgement of illicit profits or injunctions orders to recover and discourage people from engaging in insider trading activities.

(e) The SECZ may instruct the insider trading offender to suspend any of his or her officers or employees from his or her duties for committing insider trading.[554] The *Securities Act* does not explain how suspension of the offenders will help to curb insider trading.[555] However, suspending the insider trading offender from his or her duties is not deterrent enough for insider trading purposes. For instance, the insider trading offender may still commit insider trading activities after the expiry of the suspension because suspension is not deterrent enough.

(f) the SECZ may cancel a license, registration or amend any terms or conditions of the insider trading offenders' license and registration of a company.[556] This administrative penalty may be imposed on any person who contravenes the *Securities Act*. Cancellation of a license or registration affects the reputation of the offender or the company involved in insider trading activities.[557] As a result, some investors may be reluctant to invest in the company because it is known for violating the insider trading prohibition. The researcher submits that cancellation of a license or the offender's registration could help to curb insider trading activities in Zimbabwe.

---

553 Linnertová D and Oleg Deev O "Insider Trading Activities and Returns of German Blue Chips" 2015 *The European Journal of Finance* 1995, 1998.

554 Sections 105(1)(e) and (f) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206.

555 Sections 105(1)(e) and (f) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206.

556 Section 105(1)(i) of the *Securities Act*; Du Plessis JJ and Lyon G *The Law of Insider Trading in Australia* (Federation Press Sydney 2005) 140; Chitimira *The Regulation of Insider Trading in South Africa* 173.

557 See related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206; Chitimira *The Regulation of Insider Trading in South Africa* 173.

The researcher further submits that the *Securities Act* should be amended to include other insider trading administrative sanctions that are robust and effective to deter people from practising insider trading in the Zimbabwean financial markets. For example, the SECZ should be authorised by the *Securities Act* to publish the names of suspected insider trading offenders in appropriate public media or their website when it is in the interest of the public.[558] Publication of insider trading cases on the SECZ website and public media could discourage market participants from committing insider trading offences.[559] Issuers of securities and companies could be discouraged from committing insider trading due to fears that their reputation will be affected when their cases are published on the SECZ website and public media.[560]

After the insider trading hearing, the SECZ compiles a report of the investigations and sends it to the accused to mitigate the recommendations set out in the report.[561] Thereafter, the SECZ summons the insider trading offender to mitigate the administrative sanction imposed.[562] It is fair for the accused to be given a chance to mitigate the sanctions imposed on him or her. Moreover, the *Securities Act* states that the offender or any person, who is not satisfied with the decision of the SECZ may appeal against the decision in the administrative court.[563] It is submitted that the fact that the offender is given a chance to appeal the decision to the administrative court is good because sometimes judges make errors in their judgements. However, it is not clear from the *Securities Act*

558 See related comments by Van Erp J "The Impact of 'Naming and Shaming' on Business Reputations an Empirical Study in the Field of Financial Regulation" 2008 *Utrecht Law Review* 1, 9, 11-12; Pfaeltzer 2014 *Utrecht Law Review* 138; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253.

559 See related comments by Van Erp 2008 *Utrecht Law Review* 9, 11-12; Pfaeltzer 2014 *Utrecht Law Review* 138.

560 See related comments by Van Erp 2008 *Utrecht Law Review* 9, 11-12; Pfaeltzer 2014 *Utrecht Law Review* 138; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253.

561 Section 104(2)(a) of the *Securities Act*; see related comments by Chitimira and Lawack 2013 *Obiter* 209-212.

562 Section 105(2)(b) of the *Securities Act*; see related comments by Chitimira and Lawack 2013 *Obiter* 209-212; Bromberg, Gilligan and Ramsay 2017 *Securities Regulation Law Journal* 2, 4 and 6.

563 Section 108(5) of the *Securities Act*; see related comments by Chitimira and Lawack 2013 *Obiter* 212.

whether the remedial actions have legal force as if it was made by the court.[564] For instance, when the administrative sanctions do not have legal force, the insider trading offender can refuse to comply because no legal action will be taken against him or her.[565] It is submitted that the *Securities Act* should be amended to expressly state that administrative sanctions have the same effect as those made by a competent court. Furthermore, the court must take into account any administrative sanction imposed by the SECZ when dealing with a matter that arises from the same facts.[566] Taking into account any administrative sanction that has been imposed reduces the risk of double jeopardy and protects the offender against prosecution for the same offence. The SECZ may also recover any of its expenses incurred during the investigation from the perpetrator.[567] However, the SECZ should first submit a certificate signed by the SECZ Chief Executive Officer (CEO) to the court to recover money spent during the investigation from the insider trading offender.[568]

The SECZ must draft rules or policies to deal with the manner in which inside information should be disclosed and how directors, employees and other insiders are expected to conduct themselves with regard to such information.[569] These rules may assist the SECZ to create and promote an efficient financial market in Zimbabwe. Furthermore, the policy goal of the regulation of insider trading should not only be deterrence but other policy goals such as market efficiency should be considered.

---

564 Sections 105(1)(a)-(j) of the *Securities Act*; see related comments by Wolf L "The Remedial Action of the 'State of Capture' Report in Perspective" 2017 *PELJ* 1, 5-35.

565 Sections 105(1)(a)-(j) of the *Securities Act*; see related comments by Wolf 2017 *PELJ* 5-35.

566 Section 93 of the *Securities Act*; Fitzgerald M 2018 *Double Jeopardy and Administrative Sanctions* HYPERLINK "https://www.lexology.com/library/detail.aspx?g=dadb2c3a-acd6-4a93-ae6f-%0962ddfe7ef8db" https://www.lexology.com/library/detail.aspx?g=dadb2c3a-acd6-4a93-ae6f- 62ddfe7ef8db accessed 25 September 2018 page number unknown.

567 Section 106(1) of the *Securities Act*; see related comments by Luiz 2011 *SA Merc LJ* 157; Osode 2000 *Journal of African Law* 249.

568 Section 106(2) of the *Securities Act*; see related comments by Luiz 2011 *SA Merc LJ* 157; Osode 2000 *Journal of African Law* 249.

569 Section 105(1)(b) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 256-257; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 544.

The *Securities Act* does not expressly provide the aggrieved persons with the right to institute their own claims for insider trading damages (private rights of action).[570] It is submitted that a private right of action gives insider trading victims the right to claim damages directly from the guilty party.[571] Furthermore, through private rights of action, victims of insider trading can claim compensation from insider trading offenders in court.

The *Securities Act* does not provide statutory guidelines on how successful claimants may claim their damages from the SECZ.[572] Furthermore, the *Securities Act* does not provide the role of the SECZ in relation to actual calculable damages for insider trading.[573] As a result, persons affected by insider trading activity may be delayed in recovering their damages from the SECZ because of lack of information on how he or she should claim damages.[574] It is submitted that the *Securities Act* should provide statutory guidelines on how claimants can claim their damages from the SECZ to provide directions.

Since 2016, the SECZ has been investigating the CFI Holdings Limited which allegedly sold shares to Messina Investments (Private) Limited during its closed period.[575] The alleged insider trading involves CFI Holdings stock worth US$189 529,45 and Messina Investments Limited bought 3 313 452 CFI shares at US$0,0572 each. The ZSE has

---

570 Section 91 of the *Securities Act*; see related comments by Durnev AA and Nain AS "Does Insider Trading Regulation Deter Private Information Trading? International Evidence" 2007 *Pacific-Basin Finance Journal* 409, 415; Frankel T "Implied Rights of Action" 1981 *Virginia Law Review* 553, 557-559.

571 See related comments by Durnev and Nain 2007 *Pacific-Basin Finance Journal* 415; Frankel 1981 *Virginia Law Review* 557-559; Chitimira *The Regulation of Insider Trading in South Africa* 171.

572 Sections 87-95 of the *Securities Act*; Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012" 2014 *Mediterranean Journal of Social Sciences* 124, 131.

573 Sections 87-95 of the *Securities Act*; see related comments by Chitimira H "An Analysis of the Market Abuse Prohibition Enforcement in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 188, 131.

574 Sections 87-95 of the *Securities Act*; see related comments by Chitimira 2014 *Mediterranean Journal of Social Sciences* 131.

575 See related comments by Mpofu M 2017 *ZSE Investigates Toxic CFI Deal* HYPERLINK "https://www.theindependent.co.zw/2017/08/08/zse-investigates-toxic-cfi-deal/" https://www.theindependent.co.zw/2017/08/08/zse-investigates-toxic-cfi-deal/ accessed 01 October 2018 page number unknown; Hawes DW A "Development in Insider Trading Law in the United States: A Case Note on Chiarella v United States" 1981 *Journal of Comparative Corporate Law and Securities Regulation* 193, 194-196; Ahern KR "Information Networks: Evidence from Illegal Insider Trading Tips" 2017 *Journal of Finance Economics* 26, 30.

suspended CFI Holdings from trading its shares. However, since the investigation was initiated, the SECZ has not finalised the case.[576] This shows that the SECZ struggles to investigate insider trading cases in Zimbabwe.[577]

There are few staff members of the SECZ surveillance department who have relevant expertise in the financial markets. For instance, there are only five members in the SECZ surveillance department.[578] Furthermore, the SECZ has limited resources such as people who have relevant expertise and experience in financial crimes and electronic surveillance system that detects insider trading activities.[579] It is submitted that the lack of resources by the SECZ negatively affects the objective of the SECZ to effectively curb insider trading activities. Therefore, government should assist the SECZ financially to be able to access adequate resources to detect and investigate insider trading practices in the Zimbabwean financial markets. Moreover, the resources will assist the SECZ to effectively enforce the insider trading prohibition.

4.3 The Role of the ZSE in Detecting and Preventing Insider Trading

The role of the ZSE in preventing, detecting and investigating insider trading activities is not expressly stated in the *Securities Act*. However, the ZSE oversees the trading of securities and financial markets in Zimbabwe. Therefore, the ZSE should play a significant role in preventing and detecting insider trading activities. Furthermore, the ZSE

---

576 See related comments by Mazwi G 2017 *ZSE Should Foster Confidence* HYPERLINK "http://www.financialgazette.co.zw/editorial-comment-zse-should-" http://www.financialgazette.co.zw/editorial-comment-zse-should- foster-confidence/ accessed 12 June 2017 page number unknown; Flynn RC "SEC Distribution Plans in Insider Trading Cases" 1992 *The Business Lawyer* 107, 111; barasa L, knoben J and Vermeulen P *et al* "Institutions, Resources and Inspectors Innovation in East Africa: A Firm Level Approach" 2017 *Research Policy Journal* 280, 283.

577 See related comments by Mazwi 2017 HYPERLINK "http://www.financialgazette.co.zw/editorial-comment-zse-" http://www.financialgazette.co.zw/editorial-comment-zse- should- foster-confidence/ accessed 12 June 2017 page number unknown; Flynn 1992 *The Business Lawyer* 111.

578 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

579 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

should have electronic surveillance systems to detect insider trading activities in the Zimbabwean financial markets. It is submitted that the ZSE prevents and detects insider trading practices in the Zimbabwean financial markets by monitoring the trading of listed securities. However, Mahombera alluded that the ZSE does not have an adequate electronic surveillance system and that the SECZ receives information on insider trading activities from the police and other market participants.[580] It is submitted that the lack of electronic surveillance system by the ZSE makes it difficult for the SECZ to effectively combat insider trading activities in the Zimbabwean financial markets. Consequently, it is submitted that the ZSE should establish adequate electronic surveillance systems to detect fraudulent patterns and analyse trades in the Zimbabwean financial markets.

The ZSE listing requirements came into effect in 2002 to assist the ZSE to regulate insider trading.[581] It is submitted that before the enactment of the ZSE listing requirements, insider trading was not an offence and the ZSE could not prosecute insider trading cases because it was not prohibited. The ZSE listing requirements contain few rules that indirectly prohibit insider trading practices. For example, rule 3.69(i) prohibits directors from dealing in listed securities when they are in possession of non public price-sensitive information.[582] The purpose of rule 3.69(i) is to deter insiders from practicing insider trading in the Zimbabwean financial markets because insider trading decreases market efficiency and investor confidence. The ZSE is obliged to ensure that there is transparency between directors and shareholders when dealing with inside information in

---

580 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Mawire W 2015 *Launch of the Zimbabwe Stock Exchange's Automated Trading System* HYPERLINK https://www.african-markets.com/en/stock-markets/zse/launch-of-the-zimbabwe-stock-exchange-s-automated-trading-system accessed 01 September 2017 page number unknown.

581 The ZSE Listing Requirements published on the 1st May 1998 amended 8th February 2002; see related comments by Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 937, 942-943 and 946; Chitimira 2014 *Speculum Juris* 109-112.

582 Rule 3.69(i) of the ZSE Listing Rules. See related comments by Bhana N "Take-over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198, 202-203; Chitimira 2014 *Speculum Juris* 109-112.

relevant securities for purposes of promoting an efficient financial market.[583] However, the ZSE listing requirements do not state the consequences for insiders who trade with non public price-sensitive inside information.[584] As a result, the ZSE should consider amending the ZSE listing requirements to include stringent rules on how issuers and companies should disclose non public price-sensitive inside information.[585] However, the lack of adequate surveillance systems and robust ZSE listing requirements negatively affects the effective enforcement of the insider trading prohibitions in Zimbabwe. As a result, the role of the ZSE in preventing and detecting insider trading activities is somewhat ineffective in the Zimbabwean financial markets because of lack of resources.[586]

4.4 The Role of the Courts in Adjudicating Insider Trading Cases

Effective enforcement of the *Securities Act* cannot be scrutinized without examining whether the Zimbabwean courts are consistent in adjudicating insider trading cases.[587] The courts have the authority to enforce civil and criminal sanctions for insider trading under the *Securities Act*.[588] Notably, the magistrate courts and the high courts are the only courts that have jurisdiction on insider trading criminal and civil cases.[589] As a result, many cases, including insider trading cases are often delayed due to the backlog of cases

583 Rule 3.69(i) read with 7.B.15 of the ZSE Listing Requirements; see related comments by Bhana *South African Journal of Business Management* 202-203; Chitimira 2014 *Speculum Juris* 109-112.

584 Rule 3.69(i)-3.71 of the ZSE Listing Requirements; see related comments by Bhana *South African Journal of Business Management* 202-203; Chitimira 2014 *Speculum Juris* 109-112.

585 Rule 3.69(i)-3.71 of the ZSE Listing Requirements; see related comments by Bhana *South African Journal of Business Management* 202-203; Chitimira 2014 *Speculum Juris* 109-112.

586 Rule 3.69(i)-3.71 of the ZSE Listing Requirements; see related comments by Bhana *South African Journal of Business Management* 202-203; Chitimira 2014 *Speculum Juris* 109-112.

587 Sections 88, 90 and 91 of the *Securities Act*; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 20 September 2018 28.

588 Sections 90-91 of the *Securities Act*; see related comments by Chitimira 2014 *Speculum Juris* 119-121; Kawadza 2015 *South African Mercantile Law Journal* 394; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 93.

589 Section 117 of the *Securities Act*; see related comments by Chitimira 2014 *Speculum Juris* 119-121; Kawadza 2015 *South African Mercantile Law Journal* 394;Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 93.

that judges and magistrates adjudicate in the courts.[590] Accordingly, these delays in the Zimbabwean court system may negatively affect the effective enforcement of the insider trading criminal and civil penalties. In addition, the delay in finalising insider trading cases infringes the accused person's right to liberty, and to a free and fair trial within a reasonable time.[591] In response to this challenge, the *Magistrates Court Act*[592] established a commercial court to speed up and facilitate the settlement of disputes particularly of a commercial nature such as insider trading cases.[593] It is submitted that the establishment of the commercial court is an important step which could assist the effective prosecution of insider trading cases and speed up the litigation of insider trading cases in Zimbabwe.[594] Furthermore, the establishment of the commercial court may increase investor confidence in the Zimbabwean legal system to protect investors when their rights have been violated. However, the commercial court is not yet operating because the Judicial Services Commission is still finalising administrative mechanisms to ensure that it becomes operational.[595] The researcher submits that the operation of the commercial court is long overdue. Therefore, the Judicial Services Commission should speed up the process of enabling the commercial court to operate in Zimbabwe.

---

590 See related comments by Gona S, Gwanzura S and Matsa CL "Delays in Finalising Criminal Trials" 2014 *International Journal of Innovative Research and Development* 177, 183-184.

591 Sections 49 and 69 of the Constitution of Zimbabwe; Gona, Gwanzura and Matsa 2014 *International Journal of Innovative Research and Development* 183-184.

592 Section 6 of the *Magistrates Court Act* (Chapter 7:1] 18 of 1932 (*Magistrates Court Act*) as amended by the *Judicial Laws Amendment Act* (Ease of Settling Commercial and Other Disputes) of 2017.

593 Section 6 of the *Magistrate Act*; see related comments by Chikono M 2016 *Commercial Court Almost Ready* HYPERLINK "http://www.financialgazette.co.zw/commercial-court-almost-ready/" http://www.financialgazette.co.zw/commercial-court-almost-ready/ accessed 08 June 2017 page number unknown; Mohammed AL and Imad AK "Establishment of Specialist Commercial Courts in the State of Qatar: A Comparative Study" 2016 *International Review of Law* 1, 3-4.

594 See related comments by Mohammed and Imad 2016 *International Review of Law* 15; Chikono 2016 HYPERLINK "http://www.financialgazette.co.zw/commercial-court-almost-ready/accessed" http://www.financialgazette.co.zw/commercial-court-almost-ready/accessed 08 June 2017 page number unknown.

595 See related comments by Nkala S 2018 *Bulawayo High Court to be Expanded* HYPERLINK "https://www.newsday.co.zw/2018/01/bulawayo-high-court-expanded/" https://www.newsday.co.zw/2018/01/bulawayo-high-court-expanded/ accessed 27 September 2018 page number unknown; Chikono M 2018 *Government to Set Up Commercial Court to Prosecute Money Changers: Mangudya* HYPERLINK "http://www.thezimbabwemail.com/banking/govt-to-set- up-commercial-court-to-prosecute-money-changers-mangudya/" http://www.thezimbabwemail.com/banking/govt- to-set- up-commercial-court-to-prosecute- money-changers-mangudya/ accessed 27 September 2018 page number unknown; Mohammed and Imad 2016 *International Review of Law* 3-4.

The courts are also faced with the challenge of court officials who do not have adequate skills to adjudicate insider trading cases in Zimbabwe.[596] As a result, there has been no insider trading case that has been successfully prosecuted in Zimbabwe to date.[597] Therefore, the SECZ should organise workshops to train magistrates, judges, prosecutors and police on insider trading practices.[598] Furthermore, the courts and the SECZ should cooperate and assist each other with information during insider trading investigations. The cooperation between the SECZ and the courts could enable these bodies to effectively enforce insider trading provisions in Zimbabwe.

Furthermore, insider trading is a criminal offence under the *Securities Act* hence the onus is on the prosecution to prove the insider trading case beyond reasonable doubt.[599] Accordingly, the prosecution must prove beyond reasonable doubt that the insider was aware that the information he or she possessed was price-sensitive inside information before he or she is convicted.[600] It is submitted that proving that the insider was aware of non public price-sensitive information without a doubt can be difficult or may delay the finalisation of insider trading cases.

4.6 Conclusion

Although the SECZ, the ZSE and the courts have the authority to detect, investigate and prosecute insider trading activities in Zimbabwe, there are still some challenges faced by

596 See related comments by Padilla A "Should The Government Regulate Insider Trading?" 2011 *Journal of Libertarian Studies* 379, 391; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 28.

597 See related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1631; McLucas, Walsh and Fountain 1992 *The Business Lawyer Journal* 87.

598 See related comments by Padilla 2011 *Journal of Libertarian Studies* 391; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 28.

599 Section 90 of the *Securities Act*; Öberg, J "Is it 'Essential' to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 14.

600 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

these bodies in relation to the curbing of insider trading activities in Zimbabwe. For instance, the SECZ and the ZSE do not have adequate electronic surveillance systems to detect alleged insider trading practices in the Zimbabwean financial markets[601] which defies the purpose of regulating insider trading in Zimbabwe. Accordingly, the SECZ and the ZSE should adopt adequate electronic surveillance systems to detect and prevent insider trading in the Zimbabwean financial markets. Furthermore, the SECZ, the ZSE and the courts have minimal employees who have relevant expertise in detecting, investigating and prosecuting insider trading activities in Zimbabwe.[602] It is submitted that the SECZ, the ZSE and the courts should employ people who have relevant expertise in the financial markets to effectively curb insider trading in Zimbabwe.[603]

The lack of cooperation between the SECZ and the courts has also impeded the regulation of insider trading in Zimbabwe. As a result of the lack of cooperation and lack of expertise by court officials there has not been a successful insider trading case prosecuted by the courts in Zimbabwe. Therefore, the SECZ must strengthen its cooperation with the courts to curb illicit trading activities in the Zimbabwe financial markets.[604] The SECZ and court officials should assist each other with documents and

---

601 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

602 See related comments by Securities and Exchange Commission of Zimbabwe 2017 *Management and Departments* HYPERLINK "http://www.seczim.co.zw/about-secz/management accessed 01 October 2018" http://www.seczim.co.zw/about-secz/management accessed 01 October 2018 page number unknown.

603 See related comments by Padilla 2011 *Journal of Libertarian Studies* 391-392; International Organization of Securities Commissions 2009 *Approaches to Market Surveillance in Emerging Markets* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD313.pdf%2018%20accessed%2020" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD313.pdf 18 accessed 20 September 2018 page number unknown.

604 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Doty JR "The Role of Securities and Exchange Commission in an Internationalized Marketplace" 1992 *Fordham Law Review* 77, 81; Chinamo 2013 HYPERLINK "http://www.seczim.co.zw/.../concept-papers?...critical-analysis-of-challenges-and- successes" www.seczim.co.zw/.../concept-papers?...critical-analysis-of-challenges-and- successes accessed 01 September 2017 page number unknown; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf%20accessed%2023" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 28.

expertise during the investigations. The cooperation between the SECZ and the court officials will ease the difficulty of gathering evidence during the insider trading prosecution.[605] Furthermore, the SECZ should organize workshop sessions relating to insider trading and other financial crimes for court officials, the SECZ, the ZSE and companies to learn about the regulation of the insider trading offences.

In 2016, the *Magistrates Court Act*[606] established a commercial court to speed up and facilitate the settlement of commercial disputes, including insider trading.[607] As discussed above, the commercial court will also facilitate the adjudication of insider trading cases. Although the commercial court has been established, it is imperative for the Judicial Service Commission to speed up the process of allowing the commercial court to start functioning. It is submitted that the establishment of a commercial court by the judicial services commission is a good step to speed up resolution of commercial cases, including insider trading cases.

Accordingly, companies in Zimbabwe should introduce internal measures that prohibit their employees and other issuers of securities from dealing in listed securities with price-sensitive inside information.[608] Disclosure of inside information by companies and other issuers of securities could reduce insider trading activities by company employees.[609] Furthermore, the disclosure of inside information by issuers of securities could enhance

---

605 See related comments by Doty 1992 *Fordham Law Review* 81; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 28.

606 Section 6 *Magistrates Court Act*.

607 Section 6 of the *Magistrate Act*; see related comments by Chikono 2016 HYPERLINK "http://www.financialgazette.co.zw/commercial-court-almost-%09ready/" http://www.financialgazette.co.zw/commercial-court-almost-ready/ accessed 08 June 2017 page number unknown.

608 See related comments by Hanifa TM and Mwajuma K "Combatting Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa Journal* 52, 52-62; Ochs BA "The SEC's Enforcement of Procedures to Prevent Insider Trading" 2007 *Journal of Investment Compliance* 1, 9.

609 See related comments by Ochs 2007 *Journal of Investment Compliance* 9; Sebastian A *How Insider Trading Is Prevented in Corporations* HYPERLINK "https://www.investopedia.com/articles/investing/092616/how- insider-trading- preventedl-corporations.asp accessed" https://www.investopedia.com/articles/investing/092616/how-insider-trading- prevented-corporations.asp accessed 25 September 25, 2018 page number unknown.

the efficiency of the Zimbabwean financial markets by increasing information on which market analysts can draw. In the next chapter the researcher examines the challenges in the enforcement of the insider trading prohibition in Zimbabwe.

CHAPTER FIVE

THE FLAWS AND CHALLENGES IN THE ENFORCEMENT OF THE INSIDER TRADING PROHIBITION IN ZIMBABWE

5.1 Introduction

Insider trading is one of the major practices that can negatively affect the growth and integrity of the Zimbabwean financial markets if not effectively regulated.[610] It is submitted that an increase in unfair trading practices such as insider trading may decrease market integrity and negatively affect public investor confidence in Zimbabwe.[611] The Zimbabwe Stock Exchange (ZSE) and the Securities and Exchange Commission of Zimbabwe (SECZ) have received alleged insider trading cases yet there is no insider trading case that has been successfully settled by the SECZ, or adjudicated by the courts in Zimbabwe since 1980 to date.[612] The ineffective regulation of insider trading in Zimbabwe can be attributed to the lack of a strong and effective insider trading statutory regulatory framework, lack of resources and cooperation among the SECZ, the ZSE and the

610 See related comments by Massawe HT and Kadilu M "Combating Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa* 52, 53-54; Cinar M "The Issue of Insider Trading in Law and Economics: Lessons for Emerging Financial Markets in the World" 1999 *Journal of Business Ethics* 345, 347; Osode CP "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000*Journal of African Law* 239, 239; Tomasic R and Pentony B 'Insider Trading" 1989 *Legal Service Bulletin* 3, 4.

611 See related comments by Mwenda KK "Redefining Insider Dealing Law for Emerging Markets: A Comparative Legal Study" 1997 *The Zimbabwe Law Review* 29, 42-43; Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-Thesis University of Fort Hare 2008) 10, 11, 12 and 15.

612 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018; see related comments by Saungweme P, Ricardo P and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630,1631; Magaisa AT 2006 *Regulating Insider Trading* HYPERLINK "https://www.theindependent.co.zw/2006/06/16/regulating-insider-%09trading/" https://www.theindependent.co.zw/2006/06/16/regulating-insider-trading/ accessed 20 October 2017 page number unknown.

courts.[613] Accordingly, the ineffective regulation of insider trading in Zimbabwe defies the objectives of the *Securities Act*[614] to promote investor confidence, fairness and efficiency in the Zimbabwean financial markets.[615] It is submitted that investors may be reluctant to invest in financial markets where the laws that protect them are not enforced effectively by relevant enforcement authorities. This chapter examines the challenges associated with the enforcement of the prohibition of insider trading in Zimbabwe. In addition, the chapter examines the adequacy of the *Securities Act* in regulating insider trading in Zimbabwe.[616] It is imperative to examine the adequacy of the *Securities Act* because legislation that adequately prohibits insider trading contributes to the effective combating of insider trading practices.[617] Furthermore, the adequacy and effectiveness of the relevant enforcement authorities, namely, the SECZ, the ZSE and the courts is examined in this chapter. This is done to examine if the SECZ, the ZSE and the courts are effectively exercising their statutory authority to detect, investigate and prosecute insider trading activities in Zimbabwe.[618] Finally, the lack and/or inconsistent co-operation of the relevant enforcement authorities in detecting, investigating and prosecuting insider trading practices is also discussed. The researcher submits that good cooperation by the enforcement authorities could enhance the regulation of insider trading in Zimbabwe.

---

613 See related comments by Mwenda KK "Insider Dealing Law in Zambia: A Flawed Concept" 1996-1999 *Ghana Law Journal* 137, 137-139; Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012) 101.

614 Section 4(1)(a)-(f) of the *Securities Act* 17 [Chapter 24:25] of 2004 as amended (*Securities Act*).

615 Section 4(1)(a)-(f) of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management* 1632; Karjala DS "Statutory Regulation of Insider Trading in Impersonal Markets" 1982 *Duke Law Journal* 627, 629-633.

616 Sections 87-95 of the *Securities Act*; see related comments by Saungweme, Ricardo and Pradeep 2012 *African Journal of Business Management* 1631.

617 See related comments by Arshadi N "Insider Trading Liability and Enforcement Strategy" 1998 *Financial Management Journal* 70, 76; Spitz MA "Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain" 1989 *Boston College International and Comparative Law Review* 265, 272 and 276.

618 See related comments by Spitz 1989 *Boston College International and Comparative Law Review* 272 and 276; Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1630; 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* 200, 201-213.

5.2 *The Absence and Inadequacy of Key Definitions*

The term "insider trading" is not expressly defined under the *Securities Act*.[619] However, the *Securities Act* merely provides practices that could amount to insider trading.[620] For instance, the *Securities Act* provides that an individual is liable for insider trading when he or she deals in relevant listed securities with non public inside information that is likely to have a material effect on the price or value of such listed securities.[621] This prohibition seeks to promote efficient financial markets in Zimbabwe. Although, there is not so much difference between the definition of insider trading and its elements, the *Securities Act* should have defined the concept of insider trading. The absence of the insider trading definition in the *Securities Act* could negatively affect the combating of insider trading offences in Zimbabwe. The researcher discusses the elements of insider trading below:

(a) The *Securities Act* provides that the person who can incur insider trading liability must be an insider.[622] However, the term "insider" is not defined under the *Securities Act*.[623] However, the *Securities Act* lists persons that can be held liable for committing insider trading in Zimbabwe.[624] Such persons include a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates.[625] These persons are also known as primary insiders. Primary insiders possess inside

619 Sections 87 and 88 of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 244; Mwenda 1997 *The Zimbabwe Law Review* 32.

620 Sections 87(1) and 88 of the *Securities Act*; see related comments by Jooste R "The Regulation of Insider Trading in South Africa another Attempt" 2000 *The South African Law Journal* 284; 288-290; also see Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 937, 953-954.

621 Section 88 of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 288-290; Chitimira 2014 *PELJ* 953-954.

622 Section 88 of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 288-290; Chitimira 2014 *PELJ* 953-954.

623 Sections 87 and 88 of the *Securities Act;* see related comments by Jooste 2000 *The South African Law Journal* 284 and 438; 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, 459-460.

624 Sections 87 and 88 of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 244*;* Luiz and Van Der Linde 2013 *SA Merc LJ* 459-460.

625 Sections 87 and 88 of the *Securities Act*; see related comments by Garba A "Impediments to Effective Enforcement of Insider Trading Regulations in Nigeria" 2013 *International Journal of Management* 13, 14-15; Luiz and Van Der Linde 2013 *SA Merc LJ* 459-460.

information by virtue of their position, employment or responsibilities in the company.[626] Secondary insiders also fall under the category of insiders under the *Securities Act*.[627] A secondary insider is a person who receives inside information through direct or indirect communication from a primary insider.[628] Secondary insiders are commonly known as tippees because they trade on inside information received in the form of tips from primary insiders.[629] The researcher submits that the *Securities Act* should have included attorneys, underwriters and consultants as insiders[630] as they may have access to price-sensitive inside information because they sometimes have a close relationship with the company or company employees through their responsibilities towards the company.[631]

The term "individual" is not expressly defined in the *Securities Act*.[632] However, it appears that the term individual excludes individual's liability when dealing through legal

---

626 Section 87 of of the *Securities Act*; see related comments by Feldman J and Logan S "Insider Trading: An Evaluation of the South African Position" 1995 *Juta's Business Law* 55, 55; Thompson HJ "A Global Comparison of Insider Trading Regulations" 2013 *International Journal of Accounting and Financial* 1, 11-12; Warren III GM "The Regulation of Insider Trading in The European Community" 1991 *Washington and Lee Law Review* 1037, 1064-1066.

627 Sections 87 and 88 of the *Securities Act;* see related comments by Hazen TL "Defining Illegal Insider Trading Lessons from the European Community Directive on Insider Trading" 1992 *Law and Contemporary Problems Journal* 231, 236.

628 Section 87 of *Securities Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 83; Rider, Alexander, Linklater and Bazley *Market Abuse and Insider Dealing* 5; Feldman and Logan 1995 *Juta's Business Law* 55,55; Thompson 2013 *International Journal of Accounting and Financial* 11-12; Warren III 1991 *Washington and Lee Law Review* 1064-1066.

629 See related comments by Jooste 2000 *The South African Law Journal* 284 and 288; Rider, Alexander, Linklater and Bazley *Market Abuse and Insider Dealing* 5; The Financial Supervisory Authority 2010 *Who is an Insider?* HYPERLINK "http://www.finanssivalvonta.fi/en/Listed_companies/Insiders/Who_insider/Pages/Default.a%09spx" http://www.finanssivalvonta.fi/en/Listed_companies/Insiders/Who_insider/Pages/Default.aspx accessed 24 February 2018 page number unknown; Kramer G 2013 *Insider Trading: Examining Tipper and Tippee Liability* HYPERLINK "http://gcnewyork.com/columns13/050913kramer.html" http://gcnewyork.com/columns13/050913kramer.html accessed 24 February 2018 1-2.

630 Huang H "Insider Trading and the Regulation on China's Securities Market: Where Are We Now and Where Do We Go from Here?" 2012 *Journal of Business Law* 379, 384; Zacks L *The Handbook of Equity Market Anomalies* (John Wiley and Sons Incorporated Canada 2011) page number unknown.

631 See related comments by Jooste 2000 *The South African Law Journal* 288; Chitimira *The Regulation of Insider Trading in South Africa* 42-43; Zacks *The Handbook of Equity Market Anomalies* 200.

632 Section 87 of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 288-290; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 46.

entities.[633] The researcher submits that individuals could trade in relevant listed securities through companies and escape insider trading liability because juristic persons are not expressly prohibited from committing insider trading.[634] The *Securities Act* should be amended to provide a better definition of the term "individual" that prohibits individuals from committing insider trading through their companies.

(b) The *Securities Act* provides that the insider will incur insider trading liability when he or she trades with non public price-sensitive information in listed securities.[635] In terms of the *Securities Act,* inside information is defined as "any specific or precise information obtained or learnt by an insider which has not been made public and which if it were made public would be likely to have a material effect on the price or value of a listed security".[636] The researcher analyses the definition of inside information below:

(i) the information must be specific or precise

The *Securities Act* does not define or describe what constitutes specific or precise information in Zimbabwe.[637] It is submitted that it would have been better for policy makers in Zimbabwe to have described what constitutes specific or precise information to eliminate the vagueness associated with the concept of inside information.

(ii) the information must not have been made public

The *Securities Act* provides that inside information seizes to be inside information when it is published in accordance with the rules of the SECZ for purposes of giving investors

---

633 Section 87 of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 288-290; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 46.
Chitimira 2008 *The Regulation of Insider Trading in South Africa* 46.

635 Section 88 of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Jooste 2000 *The South African Law Journal 293-294.*

636 Section 87 of the *Securities Act*; see related comments by Schipani CA and Seyhun HN "Defining 'Material, Nonpublic:' What Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327, 341-345; Devenish GE "What Constitutes 'Inside Information' for Purposes of Insider Trading?" 2017 *THRHR* 506, 511-512.

637 Sections 87 and 88 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

and market participants market related information.[638] In addition, such inside information must be contained in SECZ records where they can be accessed by any person.[639] However, the *Securities Act* does not give a time frame or the actual time when non public price-sensitive information will be regarded as having been published.[640] It is submitted that insiders may escape liability by arguing that there is no time frame within which non public price-sensitive information will be regarded as having been published.

(iii) the information must be obtained or learned by an insider

The *Securities Act* provides that inside information should be obtained by an insider for it to be considered as inside information.[641] An insider in terms of the *Securities Act* includes "any director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates".[642] However, the *Securities Act* excludes juristic persons from incurring insider trading liability. More analysis of the term "insider" is presented in paragraph 5.2 of this thesis.

(iv) the information is likely to have an effect on the price or value of any security on a regulated market

The *Securities Act* provides that for information to be regarded as inside information there must be likelihood that it will affect the price or value of relevant listed securities.[643]

---

638 Section 87(1) and (2) of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

639 Section 87(2) of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

640 Section 87(2) of the *Securities Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 51; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

641 Sections 87 and 88 of the *Securities Act*; see related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-345; Devenish 2017 *THRHR* 511-512.

642 Section 87 of the *Securities Act*; see related comments by Jooste 2006 *South African Law Journal* 438; Osode 2000 *Journal of African Law* 244; Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *South African Mercantile Law Journal* 44, 45.

643 Section 87 of the *Securities Act;* 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* 458, 459, 461-463; Schipani CA and Seyhun HN "Defining 'Material, Nonpublic': What

However, the *Securities Act* does not provide the magnitude of the effect that inside information must have on the price or value of the relevant listed securities. It seems that the magnitude of the effect that inside information must have on price or value of the relevant listed securities is determined by the courts on a case by case basis.[644] The researcher submits that the policy makers in Zimbabwe could have included a provision that states which type of inside information may affect the price or value of the relevant listed securities.

(c) the insider must deal with non public price-sensitive information pertaining to relevant securities or "affected security".[645] However, the *Securities Act* defines the term "affected security" as "a listed security to which the inside information relates or a listed security whose price or value is likely to be affected if the non public price-sensitive information is made public".[646] This implies that insider trading is regulated in respect of listed securities only not in unlisted securities.

5.3 The Adequacy of Prohibited Offences

(a) Dealing for one's own account or for another person

The *Securities Act* prohibits any person who knows that he or she has non public price-sensitive inside information and who deals directly or indirectly for his or her benefit or for another person in any relevant listed securities as he or she will incur liability.[647] Although,

---

Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327,341-346; Jooste 2000 *South African Law Journal* 291-293.

644 Section 87 of the *Securities Act;* see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459, 461-463; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-346; Jooste 2000 *South African Law Journal* 291-293.

645 Section 87 of the *Securities Act;* see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 459, 461-463; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 341-346; Jooste 2000 *South African Law Journal* 291-293.

646 Section 87 of the *Securities Act;* see related comments by Luiz S and Van Der Linde K 2013 *SA Merc LJ* 460; Luiz S "Aspects of the Cross-listing of Securities" 2009 *SA Merc LJ* 631, 636-637.

647 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92; Jooste 2006 *The South African Law Journal* 446.

primary and secondary insiders are prohibited from trading with non public price-sensitive information, juristic persons are not prohibited. It is submitted that juristic persons should also be prohibited from trading with non public price-sensitive information because natural persons can trade with such information through companies.

(b) encouraging or discouraging dealing by another person

The *Securities Act* prohibits an insider from encouraging or discouraging any person to deal in any relevant listed securities while in possession of non public price-sensitive information relating to securities.[648] However, the *Securities Act* is not clear whether the recipient of such encouragement or discouragement will also incur insider trading liability.[649] The researcher submits that both the insider and recipient must be jointly liable for encouraging or discouraging any person from dealing with non public price-sensitive information.

(e) improper disclosure of inside information

The *Securities Act* prohibits any insider who knows that he or she has non public price-sensitive inside information and discloses such information to other persons.[650] It is submitted that this offence is only restricted to natural persons. It appears that the *Securities Act* yet again over looked the possibility of ignorant disclosure of inside information by juristic persons.

---

648 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Chitimira H "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 312 and 321; Jooste 2006 *The South African Law Journal* 451-452; Cox JD "Insider Trading and Contracting: A Critical Response to the Chicago School" 1986 *Duke Law Journal* 628, 629; Jooste 2000 *The South African Law Journal* 294-295.

649 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 296.

650 Section 88(2) of the *Securities Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 139-140; Chitimira 2014 *De Jure* 321.

5.4 *The Adequacy of Available Penalties and Remedies*

5.4.1 Criminal Sanctions

The Zimbabwean courts have the authority to adjudicate insider trading cases and enforce the criminal penalties under the *Securities Act*.[651] Thus, any person who is found guilty of any insider trading offence may be liable to pay a fine not exceeding level ten (Zim $200 000) or imprisonment for a period not exceeding five years or both such fine and imprisonment.[652] The researcher submits that the criminal sanction of Zim $20 000 is not deterrent enough considering that insiders often make a lot of profit out of insider trading activities.[653] For instance, an insider may gain Zim $30 000 from trading in securities with non public price-sensitive information and avoid to pay the fine while gaining a profit of Zim $30 000. The researcher submits that the five year period under the *Securities Act* is also not stringent enough to deter prospective wrongdoers from committing insider trading offences.[654] For instance, after serving five years' imprisonment an insider trading offender may still commit insider trading activities. Again insider trading is a serious offence that can damage investor confidence.[655] Therefore, the *Securities Act* should be amended to include more stringent criminal sanctions to curb insider trading in Zimbabwe.[656]

---

651 Sections 88 and 90 of the *Securities Act;* see related comments by Chitimira H and Lawack AV "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 1)" 2012 *Obiter* 548,549-550; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 60-62.

652 Section 90 of the *Securities Act*; see related comments by Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 62-64; Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1, 10-11 and 14; Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 154-155.

653 Section 90 of the *Securities Act*; see related comments by Blumberg JA "Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy" 1985 *North Carolina Law Review* 117, 125.

654 Section 90 of the *Securities Act;* also see related comments by Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf%20accessed%2005" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 05 October 2018 21-22.

655 Section 4(1)(c) of the *Securities Act*; see related comments by Chew M "The Adequacy and Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" 1998 *Singapore Journal of Legal Studies* 331, 338.

656 Section 90 read with 4(1)(c) of the *Securities Act*; see related comments by Chew M "The Adequacy and Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" 1998 *Singapore Journal of Legal Studies* 331, 338.

Since the enactment of the *Securities Act,* there is no insider trading case that has been successfully adjudicated by the courts.[657] It is submitted that the challenge of obtaining a successful criminal conviction is as a result of the higher burden of proof that the prosecution must discharge in criminal cases.[658] In criminal cases, the prosecution must prove that the reasonable person would have been aware that he or she was in possession of the non public price-sensitive information.[659] In light of the above, the researcher submits that it is difficult to prove insider trading in criminal cases.

Furthermore, the lack of skilled court officials to adjudicate insider trading cases in Zimbabwe has contributed to the lack of prosecution of insider trading cases.[660] Prosecution of insider trading cases requires skilled persons to investigate and prosecute them in the Zimbabwean courts.[661] Thus, it is important for the Judicial Service Commission to employ people who have relevant skills in financial markets to adjudicate on insider trading cases in Zimbabwe. It is submitted that employing people who have

---

657 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Silver CB "Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984" 1985 *Duke Law Journal* 960, 963.

658 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. Öberg J "Is it 'Essential' to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 14.

659 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Chitimira *The Regulation of Insider Trading in South Africa* 54 and 59; Carr BJ "Culpable Intent Required for all Criminal Insider Trading Convictions after United States v O'Hagan" 1999 *Boston College Law Review* 1187, 1202-1203.

660 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Carr 1999 *Boston College Law Review* 1187, 1202-1203; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf%20accessed%205" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 5 October 2018 26-27.

661 See related comments by Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf%20accessed%205%20October%202018" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 5 October 2018 26-27; Chitimira and Lawack 2013 *Obiter* 214.

relevant skills in financial markets will assist the courts to effectively adjudicate insider trading cases.

5.4.2 Civil Sanctions

Insider trading is treated as a delict against the SECZ, any person who issued any affected security, every holder of an affected security and any person who traded with inside information.[662] This implies that any person affected by insider trading should prove the following elements in court conduct, wrongfulness, fault and causation.
Any person found guilty of insider trading may be liable to pay profit which accrued to him or her,[663] loss avoided[664] or reduction in the price or value of affected securities in terms of the *Securities Act*.[665] The researcher submits that the civil sanction is flawed and not deterrent enough because it does not specify a specific amount that an insider may be liable for. Furthermore, the civil sanction does not distinguish the minimum amount that the juristic persons and natural person will be liable to pay. In most cases juristic persons gain more profit than natural persons therefore, the researcher submits that the policy makers should have provided a separate civil penalty for both natural and juristic persons.

Other civil remedies such as private right of action, punitive damages and compensatory damages must be expressly provided in the *Securities Act*.[666] It is submitted that punitive

---

662 Sections 91(1) and (2) of the *Securities Act;* This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

663 Section 91 of the *Securities Act*; see related comment by Jooste 2000 *The South African LawJournal* 297-298 and 300-301; Anderson 2018 *Journal of Law and Policy* 13 and 15.

664 Section 91 of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Anderson 2018 *Journal of Law and Policy* 13 and 15.

665 Section 91 of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Anderson 2018 *Journal of Law and Policy* 13 and 15.

666 Section 91 of the *Securities Act*; see related comments by Chitimira and Lawack 2012 *Obiter* 553; Bromberg L, Gilligan G, Hedges J and Ramsay I "Sanctions Imposed for Insider Trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom and the United States: An Empirical Study" 2016 *Centre for International Finance and Regulation Working Paper No. 5* HYPERLINK "../../posode/AppData/Local/Microsoft/Windows/NWUUser/Downloads/SSRN-id2817172.pdf"file:///C:/Users/NWUUser/Downloads/SSRN-id2817172.pdf accessed 08 October 2018 1-49; Chew 1998 *Singapore Journal of Legal Studies* 340; Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law* 355-359.

and compensatory damages are damages ordered by the courts where the offender is required to pay the victim for the loss he or she incurred as a result of the insider trading activity.[667] The amount awarded by the courts is intended to put the affected party to the position she or he was before the insider trading was committed.[668]

The *Securities Act* provides that the SECZ or any person affected by the insider trading activity may institute class action.[669] Class action is a type of lawsuit where several claims are put into one lawsuit.[670] The advantage of class action lawsuit is that it saves time and resources. However, in Zimbabwe class actions have not been effectively instituted by persons affected by insider trading.

In assessing any insider trading penalty the court will take into account any award previously made against the offender which arises from the same set of facts.[671] The researcher submits that this is good because the court will avoid adjudicate the offender twice for the same offence.

---

667 Section 91 of the *Securities Act*; see related comments by Chitimira 2014 *Mediterranean Journal of Social Sciences* 128; The Gale Group Incorporated 2008 *West's Encyclopedia of American Law* <http://legal-dictionary.thefreedictionary.com /remedy> accessed 22 March 2018 page number unknown.

668 See related comments by Griffith S, Erickson J, Webber DH and Winship V *Research Handbook on Representative Shareholder Litigation* (Edward Elgar Publishing United Kingdom 2018) 12; Fisch JE "Federal Securities Fraud Litigation As A Lawmaking Partnership" 2015 *Washington University Law Review* 453, 459 and 464; Judicial Educator Centre 2018 *Remedies for Breach of Contract* HYPERLINK "http://jec.unm.edu/education/online-training/contract-law-tutorial/remedies-for-breach-of-contract" http://jec.unm.edu/education/online-training/contract-law-tutorial/remedies-for-breach-of-contract accessed 21 February 2018 1-2; Chitimira 2014 *Mediterranean Journal of Social Sciences* 128.

669 Section 92 of the *Securities Act;* see related comments by Amiram D, Bozanic Z, Cox JD *et al* "Financial Reporting Fraud and other Forms of Misconduct: A Multidisciplinary Review of the Literature"2018 *Review of Accounting Studies* 772, 748; Banerjee S, Humphery M and Nanda V *et al* "Executive Overconfidence and Securities Class Actions" 2016 *Journal of Financial and Quantitative Analysis* 2.

670 See related comments by Amiram, Bozanic, Cox *et al* 2018 *Review of Accounting Studies* 772, 748; Banerjee, Humphery and Nanda *et al* 2016 *Journal of Financial and Quantitative Analysis* 2.

671 Section 93 of the *Securities Act*; see related comments by Wilkiea DCH and Johnson LW "The Existence of Double Jeopardy Within the Order of Entry Effect" 2017 *Journal of Strategic Marketing* 334, 339-340; Chitimira 2014 *De Jure* 313.

5.4.3 Administrative Sanctions

There are no specific administrative sanctions for insider trading under the *Securities Act*.[672] The fact that the *Securities Act* does not include specific administrative sanctions for insider trading could have contributed to the low number of settlements that have been successfully obtained in insider trading cases by the SECZ and the courts to date.[673] Notably, administrative sanctions are usually easily imposed on insider trading offenders because the burden of proof required for administrative sanctions is lower than that of criminal penalties.[674]

The *Securities Act* should be amended, to grant the SECZ direct authority to impose administrative sanctions that are enough to discourage people from committing insider trading activities in Zimbabwe. Thus, the SECZ will complement the courts to ensure the speedy settlement of insider trading cases in Zimbabwe. The researcher submits that the administrative sanctions could enable the SECZ and the courts to combat the backlog and delays that currently affect insider trading cases settlements and prosecutions in Zimbabwe. Moreover, the researcher submits that other administrative sanctions such as cease and desist orders, seizure and forfeiture order, freezing of assets against the offenders, disgorgement and monetary sanctions should be introduced in the *Securities Act*.[675] The stated administrative sanctions could deter unscrupulous people from

---

672 Sections 87-95 and 105(1) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

673 Section 90 of the *Securities Act*; see related comments by Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 05 October 2018 19-20; Chitimira and Lawack 2012 *Obiter* 551-552 and 556.

674 See related comments by Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 05 October 2018 19; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 54.

675 See related comments by Lyon G and Du Plessis JJ *The Law of Insider Trading in Australia* (The Federation Press Australia 2005) 113; Carvajal and Elliott 2006 *International Monetary Fund* 19-21; Cheng H *A Comparison of Illegal Insider Trading in Canada: Globalised Market Economy and the Role of Law* (LLD Simon Fraser University 2004); Chitimira and Lawack 2012 *Obiter* 556 and 557; Bromberg L, Gilligan G and Ramsay I "The Extent and Intensity of Insider Trading Enforcement – An International Comparison" 2017 *Journal of Corporate Law Studies* 73, 76 and 82.

committing insider trading activities in the Zimbabwean financial markets. For instance, the seizure and forfeiture order allows the securities regulator or the SECZ to confiscate assets that could potentially have been beneficial to the insider.[676] This could discourage prospective insiders from committing insider trading activities in the Zimbabwean financial markets.[677]

The SECZ may impose any one or more of the following insider trading administrative sanctions on the offender:

(a) Warning letters to the offender[678]

The *Securities Act* does not describe circumstances where the SECZ may issue a warning to the offender.[679] The researcher submits that a mere warning letter is not stringent enough for purposes of deterring insider trading. This follows the fact that warning letters are often issued for minor offences.[680] Thus, the policy makers overlooked the fact that insider trading is a serious offence that may affect investor confidence in the Zimbabwean financial markets.[681] Consequently, a more stringent administrative sanction other than mere warning letters should be introduced in the *Securities Act* to discourage people from committing insider trading activities in the Zimbabwean financial markets.

---

676 See related comments by Basdeo V "The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma" 2014 *PELJ* 1048, 1061.

677 See related comments by Chitimira H 2015 "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86,100.

678 Section 105(1)(a) of the *Securities Act*; Pfaeltzer JJW "Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?" 2014 *Utrecht Law Review* 134, 134.

679 Section 105(1)(a) of the *Securities Act*; Pfaeltzer 2014 *Utrecht Law Review* 134.

680 See related comments by Sharpley D *Criminal Litigation Practice and Procedure 2017/18* (College of Law Publishing Braboeuf Manor 2017) page number unknown.

681 Section 4(1)(c) of the *Securities Act;* see related comments by Smith T and Block WE "The Economics of Insider Trading: A Free Market Perspective" 2016 *Journal of Business Ethics* 47, 48.

(b) Instructing the offender to comply with the policy of his or her company[682]

The *Securities Act* does not give a clear description of what this administrative sanction entails.[683] The description of this administrative penalty by the policy maker may increase vagueness. Furthermore, it is not clear whether the policy of companies in Zimbabwe prohibit insider trading or the unlawful disclosure of non public price-sensitive information.[684] The researcher submits that companies in Zimbabwe that do not have internal regulatory measures dealing with the disclosure of non public price-sensitive information should adopt them to improve the reputation of the company in the market and enhance stock liquidity.[685] Furthermore, the researcher submits that such internal regulatory measures could enhance the disclosure of non public price-sensitive information.

(c) Instructing the offender to undertake remedial action[686]

The *Securities Act* does not expressly provide for this administrative sanction in detail and how it could help combat insider trading in Zimbabwe.[687] Instructing the offender to undertake remedial action is a disciplinary administrative sanction where the offender is given a chance to correct the wrongful conduct that he or she committed by the regulatory authority (SECZ). However, the researcher submits that this sanction is flawed because it does not state the exact period that the insider trading offender has to take to provide the remedial action. Furthermore, the *Securities Act* does not provide the consequences

682 Section 105(1)(b) of the *Securities Act;* see related comments by Dalko V and Wang MH "Why is Insider Trading Law Ineffective? Three Antitrust Suggestions" 2016 *Studies in Economics and Finance Journal* 704, 705.

683 Section 105(1)(b) of the *Securities Act;* see related comments by Dalko and Wang 2016 *Studies in Economics and Finance Journal* 705.

684 See related comments by Walter N "Prioritizing Enforcement in Insider Trading" 2011 *Yale Law and Policy Review* 521, 522 and 528; Fishman JM and Hagerty KM "The Mandatory Disclosure of Trades and Market Liquidity" 1995 *The Review of Financial Studies* 637, 637-638.

685 See related comments by Walter 2011 *Yale Law and Policy Review* 522 and 528; Fishman and Hagerty 1995 *The Review of Financial Studies* 637-638.

686 Section 105(1)(c) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207.

687 Section 105(1)(c) of the *Securities Act;* see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207.

for not undertaking the remedial action on the part of the offender. This could enable the insider trading offenders to ignore or fail to correct their wrongful conduct timeously.

(d) Imposing a monetary penalty not exceeding Zim $20 000 or level five against the offender for each day that the contravention has continued[688]

The SECZ may impose a monetary sanction not exceeding Zim $20 000 as a means to recover money that was lost by the affected party and gained by the offender.[689] The researcher submits that Zim $20 000 is not stringent enough to discourage people from committing insider trading in the Zimbabwean financial markets. For instance, an insider can accumulate more than Zim $20 000 from insider trading and a penalty of Zim $20 000 will not discourage him or her from committing insider trading.

(e) Instructing the offender to suspend any of his or her officers or employees from his or her duties[690]

The researcher submits that mere suspension of the insider trading offender from his or her employment is not stringent enough to deter insiders from committing insider trading activities in Zimbabwe. For instance, the offender can resign and look for a job in another company and still commit insider trading.[691] A more stringent sanction is disqualifying the

---

688 Section 105(1)(d) of the *Securities Act*; see related comments by Chitimira "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 327; Deventer G "Harnessing Administrative Law in Encouraging Compliance" 2009 *Financial Services Board Monthly Bulletin* 3, 3-4.

689 Section 105(1)(d) of the *Securities Act*; *Pather v Financial Services Board* [2014] 3 All SA 208 (GP); Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Deventer 2009 *Financial Services Board Monthly Bulletin* 3-4; Luiz 2011 *SA Merc LJ* 155-159; Luiz and Van Der Linde 2013 *SA Merc LJ* 472-475.

690 Section 105(1)(e) and (f) of the *Securities Act;* see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen H "A Comparative Study of Insider Trading Regulation Enforcement in the U.S. and China" 2008 *Journal of Business and Securities Law* 42, 66; Öberg 2014 *Journal of Corporate Law Studies* 22-25; Chitimira *The Regulation of Insider Trading in South Africa* 173; International Organization of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 18.

691 Öberg 2014 *Journal of Corporate Law Studies* 22-25.

insider or offender from his or her profession. This could discourage offenders from committing insider trading practices in the Zimbabwean financial markets.

(g) cancellation of license or registration or amending their terms or conditions[692]

The *Securities Act* does not explain this administrative sanction in detail and how it will combat insider trading in Zimbabwe.[693] However, the researcher submits that cancellation of license or registration could enable the SECZ to effectively curb insider trading in Zimbabwe. For instance, when the license or registration of the offender is canceled the insider or his or her business will be prohibited from trading in relevant securities and this could deter them from committing insider trading offences.

5.5 The Adequacy of the SECZ

The SECZ is obliged to protect investors and promote market integrity in Zimbabwe.[694] However, the role of the SECZ in curbing insider trading is not clearly provided in the *Securities Act.*[695] For instance, the *Securities Act* does not expressly provide how an insider trading hearing should be conducted by the SECZ as well as the courts.[696] Accordingly, the *Securities Act* merely provides that the rules and procedure of the hearing must be regulated by the *Commissions of Inquiry Act.*[697] It should be noted that

---

692 Section 105(1)(i) of the *Securities Act*; see related comments by Luchtman and Vervaele 2014 *New Journal of European Criminal Law* 206-207; Shen 2008 *Journal of Business and Securities Law* 65-66; Du Plessis JJ and Lyon G *The Law of Insider Trading in Australia* (Federation Press Sydney 2005) 140; Chitimira *The Regulation of Insider Trading in South Africa* 173.

693 Section 105(1)(i) of the *Securities Act.*

694 Section 4(1)(a) and (c) of the *Securities Act;* see related comments by Li Z *Securities Regulation in the International Environment* (LLD Thesis University of Glasgow 2008) 51-52.

695 Sections 4, 87-95 of the *Securities Act;* The legislator must adequately describe the responsibility of the financial regulator in relation to among others the regulation of insider trading; see related comments by Unknown author *2003 The Role of Securities Regulators and Regulatory Bodies* HYPERLINK "https://www.gasci.com/The%20Role%20of%20Securities%20Re" https://www.gasci.com/The%20Role%20of%20Securities%20Re... accessed 28 March 2018 4.

696 Section 103(5) of the *Securities Act;* see related comments by Grundfest JA "Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation" 2016 *Fordham Law Review* 1143, 1156-1168.

697 Section 103(5) of the *Commissions of Inquiry Act* 22 of 2001 [Chapter 10:07] (*Commissions of Inquiry Act*).

the *Commissions of Inquiry Act* regulates the commissions of inquiries established by the government into matters of public importance.[698] However, this position is different from insider trading cases because insider trading cases are instituted by the SECZ or any insider trading victim.[699] Matters investigated under the *Commissions of Inquiry Act* are misconduct of employees in the public service not the private sector.[700] Accordingly, the *Commissions of Inquiry Act* does not expressly regulate insider trading hearings since the matters adjudicated by the commissions of inquiry are matters concerning the public welfare. The researcher submits that the *Securities Act* should be amended to expressly outline the rules and procedure applicable to insider trading hearings conducted in Zimbabwe. Clear rules and procedures for insider trading proceedings will assist the victims and the alleged insider trading offenders to understand their rights and responsibilities during the hearings and to avoid inequality and unfairness by the SECZ. Furthermore, the researcher submits that insider trading hearings should be conducted by adjudicators who have expertise in financial markets crimes or market abuse activities. Accordingly, lack of competent people to adjudicate on insider trading cases will result in adjudicators imposing inappropriate insider trading sanctions on the offenders.[701]

The SECZ does not have mandatory rules that guide companies, directors and shareholders on the disclosure of non public price-sensitive inside information.[702] Issuers of securities from time to time come into possession of price-sensitive inside information.

---

698 Section 2 of the *Commissions of Inquiry Act*; see related comments by Rowe M and McAllister L "The Roles of Commissions of Inquiry in the Policy Process" 2006 *Public Policy and Administration Journal* 99, 102.

699 Sections 88, 90 and 91 of the *Securities Act*.

700 Section 2 of the *Commissions of Inquiry Act*; see related comments by Rowe and McAllister 2006 *Public Policy and Administration Journal* 102.

701 See related comments by Nelen H and Lankhorst F 2016 *Organized Crime: Culture, Markets and Policies; Facilitating Organized Crime: The Role of Lawyers and Notaries* HYPERLINK "https://www.researchgate.net/publication/226565960_Facilitating_Organized_Crime_The_Role_o" https://www.researchgate.net/publication/226565960_Facilitating_Organized_Crime_The_Role_of_Lawyers_and_Notaries accessed 20 April 2018 129.

702 Sections 87-95 of the *Securities Act;* see related comments by Osode 2000 *Journal of African Law* 256-257; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-92; International Organization of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 20-23.

Therefore, the disclosure of that information must be properly regulated.[703] Disclosure of inside information by companies and other issuers of securities gives equal opportunities to all persons to trade on valuable information.[704] Furthermore, disclosure of inside information also enhances financial markets' efficiency by increasing the pool of the relevant information for market analysts in Zimbabwe.[705] The researcher submits that the *Securities Act* 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 value of securities to enhance the disclosure of inside information in Zimbabwe. The failure by financial institutions, companies or issuers of securities to timeously disclose inside information should be expressly prohibited under the *Companies Act*[706] and/or the *Securities Act*.

The *Securities Act* does not expressly provide aggrieved persons with the right to institute their own claims for damages (private rights of action).[707] A private right of action gives the affected party the right to claim damages directly from the guilty party.[708] It is submitted that the affected party should have the right to claim damages from the offender, if no civil proceedings have been instituted by the SECZ.[709]

---

703 See related comments by Osode 2000 *Journal of African Law* 256-257; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-92; International Organization of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* HYPERLINK "https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf%20accessed%2002%20April%202018" https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018 20-23.

704 See related comments by Osode 2000 Journal of African Law 256-257; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-92.

705 Organisation for Economic Co-operation and Development *Public Enforcement and Corporate Governance in Asia Guidance and Good Practices* (Organisation for Economic Co-operation and Development publishers place unknown 2014) 43.

706 *Companies Act* 47 [Chapter 24:03] of 1951 as amended *Companies Act*.

707 Section 91 of the *Securities Act*; see related comments by Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 103-104.

708 Loke AFH "The Protected Interests in the Private Right of Action for Insider Trading: A Comparative Perspective" 2007 *Journal of Corporate Law Studies* 307, 307-310; Chitimira *The Regulation of Insider Trading in South Africa* 171; Chitimira 2015 *Speculum Juris* 86, 103-104.

709 See related comments by Loke 2007 *Journal of Corporate Law Studies* 307-310; Chitimira 2015 *Speculum Juris* 103-104.

Furthermore, the *Securities Act* does not provide statutory guidelines on how successful claimants recover their damages from the SECZ.[710] Guidelines are important because after the order of the court the victim needs to follow the correct procedure on how he or she will claim damages from the offender through the SECZ.[711] It should be noted that the absence of a proper guideline on how the victims can claim their damages from the SECZ can result in a more complicated administrative procedure for both the SECZ and the victims.[712] The researcher submits that guidelines on how claimants can claim their damages from the SECZ must be expressly provided in the *Securities Act*.[713] Furthermore, the role of the SECZ in relation to actual calculable damages for insider trading is also not expressly provided under the *Securities Act*.[714] The Act does not expressly state how the SECZ is to calculate damages that are awarded to the insider trading victims after the order by the court.[715] Consequently, the researcher submits that the SECZ should have a bigger role in the calculation and imposition of actual calculable damages for insider trading in Zimbabwe.

Very few employees in the SECZ surveillance department have the relevant expertise in financial markets. This has adversely affected the effective enforcement of insider trading prohibition in Zimbabwe.[716] Since 2016, the SECZ has been investigating Messina Investments (Private) Limited who allegedly bought shares in CFI Holdings during its

710 See sections 91-93 of the *Securities Act;* see related comments by Osode 2000 *Journal of African Law* 249-250.

711 See related comments by Osode 2000 *Journal of African Law* 249-250; Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012" 2014 *Mediterranean Journal of Social Sciences* 124, 131; Hopt KJ "The German Insider Trading Guidelines - Spring-Gun or Scarecrow?" 1987 *Journal of Comparative Business and Capital Market Law* 381, 388-389.

712 See related comments by Osode 2000 *Journal of African Law* 249-250; Chitimira 2014 *Mediterranean Journal of Social Sciences* 131; Hopt 1987 *Journal of Comparative Business and Capital Market Law* 388-389.

713 There is no section in the *Securities Act* that provides guidelines on how claimants can claim their damages from the SECZ.

714 Sections 91-93 of the *Securities Act;* Chitimira 2014 *Mediterranean Journal of Social Sciences* 130 and 132; Wang WKS "Measuring Insider Trading Damages for a Private Plaintiff" 2009 *University of California at Davis Business Law Journal* 1, 3.

715 Sections 87-95 of the *Securities Act.*

716 Madende LT *An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe* (2009-2014) (MBA Dissertation University of Zimbabwe 2015) 50.

closed period in July 2015.[717] Nonetheless, the SECZ has not yet completed the investigation because they lack resources.[718] The researcher submits that the delays in the investigation may affect public investor confidence in the Zimbabwean justice system and financial markets. It is imperative for the SECZ to employ people that have relevant expertise in the financial markets. This could curb insider trading activities and promote efficient financial markets in Zimbabwe.[719] Furthermore, the SECZ surveillance department has the responsibility to investigate insider trading cases and other contraventions of the *Securities Act*.[720] The researcher submits that perhaps the SECZ should establish a market abuse department that will focus on preventing and investigating market abuse cases including insider trading cases. It is submitted that the market abuse department may assist the SECZ to effectively combat insider trading activities.

5.6 The Adequacy of the ZSE

The ZSE plays an important role of detecting insider trading practices in the Zimbabwean financial markets.[721] Although, the ZSE has authority to detect illicit trading activities in the Zimbabwean financial markets, the ZSE does not have electronic surveillance

---

717 See related comments by Flynn RC "SEC Distribution Plans in Insider Trading Cases" 1992 *The Business Lawyer* 107, 111; Financial Gazette 2017 *ZSE Should Foster Confidence* HYPERLINK"http://www.financialgazette.co.zw/editorial-comment-zse-should-" http://www.financialgazette.co.zw/editorial-comment-zse-should-foster-confidence/ accessed 12 June 2017 page number unknown.

718 See related comments by Muronzi C 2017 Tycoons in Nasty CFI Control Battle https://www.theindependent.co.zw/2017/07/21/tycoons-nasty-cfi-control-battle/ accessed 09 October 2018 page number unknown; Misra M "Insider Trading: Indian Perspective on Prosecution of Insiders". 2011 *Journal of Financial Crime* 162,165.

719 See related comments by Madende An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe (2009-2014) 51.

720 Securities and Exchange Commission of Zimbabwe 2017 *Management and Departments* HYPERLINK "http://www.seczim.co.zw/about-secz/management" http://www.seczim.co.zw/about-secz/management accessed 08 April 2018 2; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 78-81; Chitimira *The Regulation of Insider Trading in South Africa* 98-100.

721 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

systems to detect insider trading activities.[722] The SECZ receives alleged insider trading cases from the police and other market participants. However, the ZSE does not have adequate electronic surveillance systems to detect suspicious price movements which could be indicative of insider trading.[723] The researcher submits that the ZSE should adopt adequate electronic surveillance systems to effectively detect insider trading activities in the Zimbabwean financial markets. The lack of detection of insider trading activities negatively affects the objectives of the regulation of insider trading in Zimbabwe.[724] Accordingly, investors may be reluctant to invest in Zimbabwe because illicit trading activities are not detected sometimes due to lack of sufficient resources at the ZSE.

The ZSE regulates the disclosure of non public price-sensitive inside information through the ZSE listing requirements.[725] The ZSE listing requirements prohibits directors from dealing with non public price-sensitive inside information in listed securities.[726] The researcher submits that it seems that the ZSE listing requirements are only restricted to natural persons although juristic persons can also commit insider trading through natural persons.[727] Although the ZSE listing requirements prohibit insider trading they do not

722 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

723 Securities Exchange Commission of Zimbabwe 2012 *Annual Report* HYPERLINK "../../posode/AppData/Local/Microsoft/Windows/NWUUser/Downloads/Securities Commision Annual Report 2012.p%09df"file:///C:/Users/NWUUser/Downloads/Securities%20Commision%20Annual%20Report%202012.p df accessed 17 March 2018 8 and 20; Zimbabwe Stock Exchange 2015 *Launch of the Zimbabwe Stock Exchange's Automated Trading System* HYPERLINK "https://www.african-markets.com/en/stock-"https://www.african-markets.com/en/stock-markets/zse/launch-of-the-zimbabwe-stock-exchange-s-automated-trading-system accessed 01 September 2017 1; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 91.

724 Sections 4(1)(a)-(f) of the *Securities Act*.

725 See section 3.69(i)-3.69(iv) of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

726 See sections 3.69(i) of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

727 See sections 3.69(i)-3.69(iv) of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

provide specific penalties for insiders who trade with non public price-sensitive information in the Zimbabwean financial markets. Furthermore, the ZSE listing requirements also outline the procedures that must be followed during and after the publication of the price-sensitive information by the issuers.[728] For instance, the ZSE listing requirements provides that directors must first obtain the boards' approval before trading in listed securities.[729] In addition, directors must report to the company about all their buying and selling of shares within 3 days of the completion of the transactions.[730] It is submitted that the purpose of these rules is to promote transparency when directors are dealing in their company's securities.

5.7 The Adequacy of the Relevant Courts

The courts have the authority to enforce civil and criminal sanctions for insider trading under the *Securities Act*.[731] Although the courts can hear insider trading cases, since the enactment of the *Securities Act,* there has been no single insider trading case that has been successfully prosecuted in the Zimbabwean courts.[732] The lack of successful insider trading cases could have been exacerbated by the lack of sufficient people with the relevant expertise in the courts.[733] Consequently, judges, magistrates and prosecutors who are not skilled in analysing or investigating financial markets crimes may not be able

---

728 See section 3.4 and 3.5 of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

729 See sections 3.69(i)-3.69(iv) of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

730 See sections 3.69(i)-3.69(iv) of the ZSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

731 Sections 90 and 91 of the *Securities Act;* Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 107, 118-120.

732 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See also Chitimira H "An Overview Analysis of Selected Challenges in the Enforcement of the Prohibition of Insider Trading and Market Manipulation in the European Union and South African Regulatory Frameworks" 2015 *Law, Democracy And Development Journal* 94, 95 and 104.

733 See related comments by Crouch M and Lindsey T *Law, Society and Transition in Myanmar* (Bloomsbury Publishing place 2014) page number unknown.

to understand how the offender benefited from the insider trading activity.[734] The researcher submits that lack of expertise by judges, magistrates and prosecutors may delay the adjudication of insider trading cases. In this regard, it is important for court officials to understand the nature of insider trading and the extent to which it affects investor confidence in the Zimbabwean financial markets.[735] To address this challenge, the SECZ should organise workshop sessions to train judges and prosecutors on insider trading practices.

The *Magistrates Court Act* has established the commercial court to speed up the commercial cases.[736] For instance, the *Magistrates Court Act* provides that the commercial court will prosecute commercial crimes including insider trading cases.[737] The researcher submits that the establishment of the commercial court is a good step to prioritize commercial crimes. It is submitted that the commercial court is not yet operating because the Judicial Service Commission is still busy with the administration of the court.[738] The delay in operating the commercial court is not good for sppeding up the process of adjudicating commercial crimes in Zimbabwe.

---

734 See related comments by Crouch and Lindsey *Law, Society and Transition in Myanmar* page number unknown; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 07 October 2018 26-27.

735 See related comments by Crouch and Lindsey *Law, Society and Transition in Myanmar* page number unknown; Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 07 October 2018 26-27.

736 Section 6 of the *Magistrates Court Act* 18 (Chapter 7:10] of 1932 as amended by the *Judicial Laws Amendment* (Ease of Settling Commercial and other Disputes) of 2017; see related comments by Nkala S 2018 *Bulawayo High Court to be Expanded* HYPERLINK "https://www.newsday.co.zw/2018/01/bulawayo- high-court-expanded/" https://www.newsday.co.zw/2018/01/bulawayo- high-court-expanded/ accessed 07 October 2018 page number unknown.

737 Section 6 of the *Magistrates Court Act*; see related comments by Nkala 2018 HYPERLINK "https://www.newsday.co.zw/2018/01/bulawayo-high-court-expanded/" https://www.newsday.co.zw/2018/01/bulawayo-high-court-expanded/ accessed 07 October 2018 page number unknown.

738 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

5.8 The Lack and/or Inconsistent Co-operation between Enforcement Authorities

The ZSE is responsible for detecting any unusual trading activities in the Zimbabwean financial markets.[739] Thereafter, the ZSE refers the alleged insider trading case to the SECZ for investigation.[740] Although, this suggests that there is some cooperation between the SECZ and the ZSE, the ZSE is not able to fulfil its obligation because it does not have electronic surveillance systems to detect illicit trading activities.[741] Therefore, acquiring adequate resources will assist both institutions to effectively enforce the prohibition of insider trading in Zimbabwe.

The SECZ cooperates with other regional and international regulatory institutions.[742] In this regard, the SECZ holds regular meetings with other regional regulatory institutions on strengthening the regulation of securities transactions including insider trading.[743] However, since the enactment of the *Securities Act,* the SECZ has not investigated or settled any regional or international insider trading case.[744] The SECZ and relevant regional and international regulatory bodies should enter into an agreement

---

739 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

740 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

741 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

742 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. 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.

743 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. 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.

744 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

(Memorandum of Understanding (MOU) on the terms and conditions of their cooperation.[745] The researcher submits that regulatory measures should be put in place to ensure good cooperation between the SECZ and other bodies.

5.9 Lack of Insider Trading Awareness and Educational Programmes

It should be noted that there is limited investor education in relation to insider trading in the Zimbabwean financial markets by the SECZ.[746] Educational programmes could help market participants to know about insider trading activities and avoid engaging in such activities in the Zimbabwean financial markets.[747] The SECZ and other listed companies must carry out insider trading educational programs for employees, investors, students and the general public to curb insider trading practices in Zimbabwe.[748] The SECZ and listed companies should carry out educational programmes by developing workshop programmes, media, advertising posters and pamphlets targeted at all market participants.

5.10 Conclusion

The SECZ and the ZSE do not have adequate electronic surveillance systems to detect any alleged insider trading practices in Zimbabwe.[749] Electronic surveillance systems are

---

745 See related comments by Li Z *Securities Regulation in the International Environment* (LLD thesis University of Glasgow 2008) 182; Junsun P "Enforcement of Securities Law in the Global Marketplace: Cross-Border Cooperation in the Prosecution of Transnational Hedge Fund Fraud" 2014 *Brooklyn Journal of International Law* 231, 234; Mann MD and Barry WP Developments in the Internationalization of Securities Enforcement" *The International Lawyer* 667, 670 and 674.

746 Section 4(1)(f) of the *Securities Act*; see related comments by El-Dean BA *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* (Brill Academic Publishers Netherlands 2002) 50.

747 See related comments by Sharan V and Kumar A *Investor Awareness, Education and Protection in India Situation Analysis and Assessment* (Deutsche Gesellschaft für International New Delhi 2013) 39-40; Securities Commission Malaysia 2014 *Protecting our Investors Through Enforcement and Education* HYPERLINK "https://www.sc.com.my/wpcontent/uploads/eng/html/resources/annual/ar2014_eng/part3.pdf" https://www.sc.com.my/wpcontent/uploads/eng/html/resources/annual/ar2014_eng/part3.pdf accessed 07 October 2018 52.

748 See related comments by Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 182, 250, 343 and 348;

This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka and Mahombera on 29 June 2018. Chinamo 2013 important for the detection of insider trading practices in the Zimbabwean financial markets. Accordingly, the SECZ and the ZSE should acquire adequate electronic surveillance systems to detect and prevent insider trading in the Zimbabwean financial markets.[750] Moreover, the SECZ, the ZSE and the courts have few employees with relevant expertise in investigating and prosecuting financial markets crimes.[751] As a result, insider trading investigations are sometimes delayed or not prosecuted due to court backlogs and the lack of expertise among the SECZ employees and court officials.[752] The researcher submits that the SECZ, the ZSE and the courts should employ people who have relevant expertise in the financial markets to effectively investigate insider trading cases.

The *Securities Act* does not expressly provide administrative sanctions for insider trading offences.[753] Administrative sanctions must be utilised by SECZ seeing that they can be imposed on offenders easier and faster than criminal penalties. For instance, in criminal cases the onus is on the prosecution to prove the case beyond reasonable doubt that the insider committed the alleged insider trading offence which can be extremely difficult to prove in insider trading cases.[754] However, the burden of proof in proceedings for administrative sanctions is balance of probabilities which is lighter than the burden of proof in criminal cases. Furthermore, administrative sanctions could enable the SECZ and the courts to timeously settle or prosecute insider trading cases.[755] The researcher

www.seczim.co.zw/.../concept- papers?...critical-analysis-of-challenges-and- successes accessed 01 September 2017 page number unknown.

750 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

751 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

752 See related comment by Misra 2011 *Journal of Financial Crime* 165; Muronzi S 2017 *Tycoons in Nasty CFI Control Battle* HYPERLINK "https://www.theindependent.co.zw/2017/07/21/tycoons-nasty-cfi-control-battle/" https://www.theindependent.co.zw/2017/07/21/tycoons-nasty-cfi-control-battle/ accessed 09 October 2018 page number unknown;

753 See sections 87-95, 105(1) of the *Securities Act*.

754 See related discussion in paragraph 5.3.1 in Chapter Five of this thesis.

755 Gona, Gwanzura and Matsa 2014 *International Journal of Innovative Research and Development* 178; Gopaul *The Impact and Constitutionality of Delayed Trials on the Rights of a Suspect or Accused Person During Criminal Proceedings* 70-71.

submits that insider trading administrative sanctions, if effectively utilised could enable the SECZ to enforce the insider trading prohibition consistently.

Although investor education is one of the objectives of the SECZ, the role of the SECZ in insider trading awareness programmes is flawed.[756] As discussed above, there is a minimal insider trading awareness programmes in the Zimbabwean financial markets.[757] Furthermore, awareness programmes are important to teach market participants about the insider trading offences. In this regard, the researcher submits that the SECZ should adopt insider trading awareness programmes such as pamphlets and should organise workshops.

It is against this background that the next chapter discusses the regulation of insider trading in the United States of America (USA). The regulation of insider trading in the USA is examined to draw possible lessons from the USA insider trading regulatory experiences and recommend possible measures that could be utilised in Zimbabwe.

---

756 Section 4(1)(f) of the *Securities Act*; Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 124-125.

757 See related comments by Saungweme, Peters and Brijlal 2012 *African Journal of Business Management* 1636; Sharan and Kumar *Investor Awareness, Education and Protection in India Situation Analysis and Assessment* 39-40.

CHAPTER SIX

THE REGULATION OF INSIDER TRADING IN THE UNITED STATES OF AMERICA

6.1 Introduction

The chapter discusses the regulation of insider trading in the United States of America (USA) at a federal level. The regulation of insider trading in the USA is examined because its anti-insider trading enforcement framework is one of the most progressive frameworks to date.[758] The researcher submits that the effectiveness of the USA anti-insider trading enforcement framework is supported by evidence from the many insider trading cases that are settled by the United States Securities and Exchange Commission (SEC) or prosecuted by the courts since 1934.[759] Furthermore, this chapter examines the USA anti-insider trading enforcement framework at a federal level since their insider trading provisions, are to a certain extent, robust enough for deterrence purposes.[760] For example, the USA federal anti-insider trading regulatory framework provides criminal, civil and administrative penalties, private right of action, bounty rewards and whistle-blower immunity provisions to effectively combat insider trading in the USA financial markets.[761]

758 See related comments by Shen H "A Comparative Study of Insider Trading Regulation Enforcement in the US and China" 2008 *Journal of Business and Securities Law* 42, 43; Chitimira H "An Analysis of the Market Abuse Prohibition Enforcement in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 188, 188; Steinberg IM "Insider Trading Regulation- A Comparative Analysis" 2003 *The International Lawyer* 153, 159; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012) 23.

759 See related discussion in paragraph 6.4.1 of this chapter; see related comments by Chitimira 2014 *Mediterranean Journal of Social Sciences* 190; Steinberg 2003 *The International Lawyer* 158-162.

760 See related comments by Banof AB "The Regulation of Insider Trading in the United States, United Kingdom, and Japan" 1988 *Michigan Journal of International Law* 145,148.

761 See discussion in paragraph 6.2 and 6.3 of this chapter; see related comments by Steinberg 2003 *The International Lawyer* 154; Guin DJ and Donaldson DR "The Insider Trading and Securities Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate for use in Private 10B-5 Actions?" 1990 *Washington and Lee Law Review* 541, 577. .

In light of this, the chapter examines the statutory prohibition of insider trading under the *Securities Act*,[762] *Securities Exchange Act*,[763] *Insider Trading Sanctions Act*,[764] *Insider Trading and Securities Fraud Enforcement Act*,[765] *Sarbanes-Oxley Act*[766] and *Dodd-Frank Wall Street Reform and Consumer Protection Act*.[767] This is done to identify and suggest elements which can be incorporated in the Zimbabwean anti-insider trading framework in order to make it more sufficient and competitive.

Furthermore, the role of the SEC and the courts in detecting, investigating and prosecuting insider trading activities is examined. It is submitted that the SEC and the courts are playing a big role in effectively detecting, investigating and prosecuting insider trading in the USA.[768] The discussion draws possible lessons on how the Securities and Exchange Commission of Zimbabwe (SECZ), the Zimbabwe Stock Exchange (ZSE) and

---

762 Section 7(a) of the *Securities Act* of 1933 Public Law 22, 48 Stat.74 15 USC 77a-77mm et seq (2000) (*Securities Act*); see related comments by Roiter ED "Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws" 1982 *Fordham Law Review* 781, 783-786; Page A and Yang K "Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?" 2005 *University of California, Davis Law Review* 1, 13-14 and 40.

763 Sections 10b read with 16(b) of the *Securities Exchange Act* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll (*Securities Exchange Act*); see related comments by Thel S "The Original Conception of Section 10(b) of the Securities Exchange Act" 1990 *Stanford law Review* 385, 386.

764 Section 2 and 5 of the *Insider Trading Sanctions Act* of 1984 Public Law 98-376, 98 Stat.1264 (1984) (*Insider Trading Sanctions Act*); see related comments by Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455, 462-472; Silver CB "Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984" 1985 *Duke Law Journal* 960, 973-979.

765 Sections 3 and 4 of the *Insider Trading and Securities Fraud Enforcement Act* of 1988 Public Law 100-704, 102 Stat. 4677 (*Securities Fraud Enforcement Act*); see related comments by Friedman HM "The Insider Trading and Securities Fraud Enforcement Act of 1988" 1990 *North Carolina Law Review* 465, 475-479; Garfinkel JA "New Evidence on the Effects of Federal Regulations on Insider Trading: The Insider Trading and Securities Fraud Enforcement Act" 1997 *Journal of Corporate Finance* 89, 92-94; Fletcher J "Compliance Programs for Insider Trading" 1994 *Southern Methodist University Law Review* 1783, 1787.

766 Section 306 of the *Sarbanes-Oxley Act* of 2000 (*Sarbanes-Oxley Act*); see related comments by Stuart KJ "Insider Trading and the United States Securities Laws" 2010 *IPBA Journal* 23, 23; Schipani CA and Seyhun HN "Defining 'Material, Nonpublic': What Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327, 328.

767 Section 746 of the *Public Company Accounting Reform and Investor Protection Act* of 2002 Public Law 107-204, 116 Stat. 745 (*Dodd-Frank Act*); see related comments by Choi SJ and Pritchard AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 9; Bakken T "Dodd-Frank's Extension of Criminal Corporate Liability through the Foreign Corrupt Practices Act: Enabling Whistleblowers and Monitoring Conflict Minerals" 2015 *Pace Law Review* 1, 3.

768 See discussion in paragraph 6.4.1 and 6.4.3 of this chapter.

the courts in Zimbabwe can enhance their enforcement of the insider trading provisions from the USA perspective.

6.2 Overview of Insider Trading Prohibitions

6.2.1 The Regulation of Insider Trading under the Securities Act

Prior to 1933, insider trading was not regulated by any legislation at federal level.[769] However, the sales of securities were primarily governed by state law.[770] State law is not discussed in this chapter because it is beyond the scope of this research. After the stock market crash of 1929, the *Securities Act* was enacted and it provided that issuers must disclose all the material information that would be valuable to investors.[771] Furthermore, the *Securities Act* provided that all securities sold in the USA must be registered with the SEC.[772] This was done to curb illicit dealings with non public price-sensitive information in the USA financial markets. In addition, it is submitted that the aim of the *Securities Act* was to restore investor confidence by obliging issuers to disclose non public inside information relating to affected securities.[773] However, the *Securities Act* did not expressly prohibit insider trading and define key terms such as insider trading, insider and inside information.

---

769 See related comments by Bainbridge 1985 *Virginia Law Review* 456-458; Thompson JH "A Global Comparison of Insider Trading Regulations" 2013 *International Journal of Accounting and Financial Reporting* 1, 2.

770 See related comments by Bainbridge 1985 *Virginia Law Review* 456-458; Thompson 2013 *International Journal of Accounting and Financial Reporting* 2.

771 Section 5 of the *Securities Act;* see related comments by Hanna J "The Securities Exchange Act of 1934" 1934 *California Law Review* 1, 3; Roiter 1982 *Fordham Law Review* 783-786; Page and Yang 2005 *University of California, Davis Law Review* 13-14 and 40.

772 Section 6 of the *Securities Act;* see related comments by Hanna 1934 *California Law Review* 3; Roiter 1982 *Fordham Law Review* 783-786; Page and Yang 2005 *University of California, Davis Law Review* 13-14 and 40.

773 Section 6 of the *Securities Act*; see related comments by Kuhn CJ "The Securities Act and its Effect Upon the Institutional Investor" year unknown *Law and Contemporary Problems* 80, 80-82; Blum JW "The Federal Securities Act, 1933-36" 1938 *Journal of Political Economy* 52, 52.

6.2.2 *The Regulation of Insider Trading under the Securities Exchange Act*

The *Securities Exchange Act*[774] was enacted to complement the *Securities Act.*[775] This was done to curb misconducts that were alleged to have contributed to the crash of the stock market in 1929.[776] These misconducts included insider trading, the sale of fraudulent securities and other acts that stock traders engaged in at the expense of investors.[777] The researcher analyses the prohibition of insider trading under the *Securities Exchange Act* below.

6.2.2.1 Offences

The *Securities Exchange Act* prohibited insiders from dealing with non public price-sensitive information in relevant securities in the financial markets.[778] However, the insider will be liable for insider trading if:

---

774 See sections 10(b) and 16(b) of the *Securities Exchange Act*; Bacastow DJ "Due Process and Criminal Penalties Under Rule 10b-5: The Unconstitutionality and Inefficiency of Criminal Prosecutions for Insider Trading" 1982 *Journal of Criminal Law and Criminology* 96, 97-111; Parker GF "The Regulation of Insider Trading in Japan: Introducing a Private Right of Action" 1995 *Washington University Law Quarterly* 1399, 1402 and 1404.

775 Section 5 of the 1933 *Securities Act*; Cinar M "The Issue of Insider Trading in Law and Economics: Lessons for Emerging Financial Markets in the World" 1999 *Journal of Business Ethics* 345, 345-346 and 348; Parker 1995 *Washington University Law Quarterly* 1402 and 1404.

776 See sections 10(b) and 16(b) of the *Securities Exchange Act*; see related comments by Adams R, Marshall M and Masci D Federal Regulatory Directory: The Essential Guide to the History, Organization, and Impact of US Federal Regulation (SAGE Publications Inc Los Angeles 2014) 327; Parker 1995 *Washington University Law Quarterly* 1402 and 1404; Smith RC and Walter I Governing the Modern Corporation: Capital Markets, Corporate Control, and Economic Performance (Oxford University Press New York 2006) 8.

777 See sections 10(b) and 16(b) of the *Securities Exchange Act*; see related comments by Adams, Marshall and Masci Federal Regulatory Directory: The Essential Guide to the History, Organization, and Impact of US Federal Regulation 327; Parker 1995 Washington University Law Quarterly 1402 and 1404; Smith and Walter *Governing the Modern Corporation: Capital Markets, Corporate Control, and Economic Performance* 8.

778 Section 16(b) of the *Securities Exchange Act*; see related comments by Deitz HJ "A Practical Look at Section 16(b) of the Securities Exchange Act" 1974 *Fordham Law Review* 1, 2.

(a) the security purchased or sold by an insider was registered with the SEC.[779] This implies that only securities registered with the SEC are protected from insider trading by the *Securities Exchange Act.*

(b) there has been a purchase or sale of the issuer's securities.[780] It is submitted that the insider could only incur insider trading liability if he or she traded with non public price-sensitive inside information in relevant securities of the issuer.

(c) he or she engaged in insider trading transactions as an insider in terms of the *Securities Exchange Act.*[781] In terms of that Act, an insider is any officer, director, and persons holding more than 10% of the stock in a company.[782] The insider is prohibited from dealing with non public price-sensitive information in such stock or securities.[783] This suggests that only insiders were prohibited from committing insider trading under the *Securities Exchange Act*. Tippees are people who receive non public price-sensitive information of the company from an insider and can commit insider trading.[784] Be that as it may, tippees were not prohibited under the *Securities Exchange Act.* It is submitted that tippees should have been expressly prohibited to curb insider trading effectively in the USA capital markets.

Furthermore, the *Securities and Exchange Act* prohibited insider trading indirectly by prohibiting any person from employing manipulative or deceptive devices in connection

---

779 See section 12 of the *Securities Exchange Act;* see related comments by Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 31-36.

780 Section 16(b) of the *Securities Exchange Act;* see related comments by Yourd KL "Trading in Securities by Directors, Officers and Stockholders: Section I6 of the Securities Exchange Act" 1939 *Michigan Law Review* 133, 134-139.

781 Section 16(a)(1) of the *Securities Exchange Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial law and Practice* 31-36; Yourd 1939 *Michigan Law Review* 134-139; Gardels DE "Section 16(b) of the Securities and Exchange Act of 1934: Is a Vice President an Officer?" 1979 *Nebraska Law Review* 733, 735-738.

782 Section 16(a)(1) of the *Securities Exchange Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial law and Practice* 31-36; Yourd 1939 *Michigan Law Review* 134-139; Gardels DE "Section 16(b) of the Securities and Exchange Act of 1934: Is a Vice President an Officer?" 1979 *Nebraska Law Review* 733, 735-738.

783 Section 16(b) of the *Securities Exchange Act*; see related comments by Yourd 1939 *Michigan Law Review* 135.

784 Section 16(a)(1) of the *Securities Exchange Act*; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 211; An I "Deterrence of Tippee Trading Under Rule 10b-5" 1971 *The University of Chicago Law Review* 327, 373.

with the purchase or sale of securities.[785] In order to give the indirect prohibition of insider trading context the SEC promulgated rule 10b-5 which prohibits fraud or misstatement by any person in connection with the purchase or sale of securities.[786] Although, the *Securities Exchange Act* and rule 10b-5 did not expressly prohibit insider trading, the courts have interpreted this provisions as prohibiting any insider from trading with non public price-sensitive inside information relating to registered securities.[787] It is submitted that although the role of the court is important it would have been better if the *Securities Exchange Act* had expressly prohibited insider trading. It is further submitted that in order for the insider to be held liable in terms of this provision, he or she must have known that trading with non public price-sensitive information was prohibited by the *Securities and Exchange Act*.[788] The researcher submits that the aim of this provision was to protect the integrity of the USA financial markets by prohibiting any person from using manipulative or deceptive devices in connection with the purchase or sale of securities.

Furthermore in 2000, the SEC adopted rule 10b5-1 to regulate trading in securities with non public price-sensitive information by insiders and to provide defences to any insider convicted of insider trading.[789] Rule 10b5-1 provided that the insider will evade insider trading liability if:

---

785 Section 10(b) of the *Securities and Exchange Act*; see related comments by Gold AS "Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors" 2004 *Catholic University Law Review* 667, 671-676; Thel 1990 *Stanford Law Review* 386-388.

786 See related comments by Solomon LD and Wilke D "Securities Professionals and Rule 10b-5: Legal Standards, Industry Practices, Preventative Guidelines and Proposals for Reform" 1975 *Fordham Law Review* 505, 509; Bergmann LE "Securities -- Standing to Sue Under SEC Rule 10b-5 and the Purchaser-Seller Limitation – Manor Drug Stores v Blue Chip Stamps" 1974 *Boston College Industrial and Commercial Law Review* 978, 980-981.

787 See related comments by Acobat MA "Insider Trading Jurisprudence after United States V Ohagan: A Restatement (Second) of Torts § 551(2) Perspective" 1999 *Cornell Law Review* 1357, 1363; Solomon and Wilke 1975 *Fordham Law Review* 509.

788 Section 10(b) of the *Securities and Exchange Act*; see related comments by Thel 1990 *Stanford Law Review* 387; Fischel DR "Secondary Liability Under Section 10(b) of the Securities Act of 1934" 1981 *California Law Review* 80, 83-85.

789 See related comments by Jaeolinzer AD "SEC Rule 10b5-l and Insiders Strategic Trade" 2009 *Management Science Journal* 224, 225-226; Horwich A "The Origin, Application, Validity, and Potential Misuse of Rule 10b5-1" 2007 *The Business Lawyer* 915, 920-922; Bondi BJ and Lofchie SD "The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance" 2011 *NYU Journal of Law and Business* 151, 161-162.

(a) the insider entered into a binding contract to purchase or sell the security in the amount or at the stipulated price on the date at which the trade was effected.[790] It is submitted that this defence will be justifiable only when the insider entered into a binding contract before he or she becomes aware of the non public price-sensitive information in question. This implies that if the insider was aware of the non public price-sensitive information in question when he or she entered into a contract to purchase or sell securities he or she cannot rely on this defence.

(b) the insider received instructions to execute a trade in the amount or at the stipulated price on the date at which the trade was effected before he or she becomes aware of the non public price-sensitive information.[791] The researcher submits that this defence helps *bonafide* insiders who were not aware of the relevant non public price-sensitive inside information. The *Securities Exchange Act* provides that the insider must be aware of non public price-sensitive information when dealing in relevant securities before he or she can be held liable for insider trading.[792]

(c) the insider adopted a written plan for trading in the securities. [793] This implies that the insider adopted a written plan for trading in the securities before becoming aware of material non public inside information. The researcher submits that this defence is insufficient as the written plan can be abandoned when the insider becomes aware of non public price-sensitive information.[794]

Nonetheless, the *Securities Exchange Act* did not define non public price-sensitive information.[795] The failure of the *Securities Exchange Act* to define insider trading led the

790 Rule 10b5-1 of the SEC; See related comments by Horwich 2007 *The Business Lawyer* 923; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

791 Rule 10b5-1 of the SEC; See related comments by Horwich 2007 *The Business Lawyer* 923; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

792 Rule 10b5-1 of the SEC; See related comments by Horwich 2007 *The Business Lawyer* 923; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

793 Rule 10b5-1 of the SEC; See related comments by Horwich 2007 *The Business Lawyer* 923.

794 Rule 10b5-1 of the SEC; See related comments by Horwich 2007 *The Business Lawyer* 923; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

795 Schipani CA and Seyhun HN "Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327, 329;

SEC to adopt rule 14e-3 which prohibits fraud in connection with a tender offer.[796] Rule 14e-3 requires any person in possession of material non public price-sensitive information relating to a tender offer to either disseminate it to the public or to refrain from trading in the securities pertaining to that tender offer.[797] The use of the words "any person" implies that juristic persons were also prohibited from trading with non public price-sensitive inside information relating to the relevant securities. Before the adoption of rule 14e-3, only primary insiders were prohibited from dealing with non public price-sensitive information.[798] Rule 14e-3 provides that any person who is not a primary insider, including tippees and juristic persons could be held liable for insider trading.[799] It is submitted that the SEC showed commitment to combating insider trading by introducing rule 14e-3 which prohibits tippees from committing insider trading. Although, the *Securities Exchange Act* and the SEC rules prohibit insider trading they, nonetheless, remained deficient.

6.2.2.2 Insider Trading Penalties

Any person who violated insider trading provisions would be liable to pay a fine of $10 000 or imprisonment for a period not exceeding five years.[800] The researcher submits that both the fine and the imprisonment term were not sufficient enough to deter people from committing insider trading considering the enormous profits that insiders gain through

---

796 See rule 14e-3 of the SEC; see related comments by Bainbridge *An Overview of Insider Trading Law and Policy* 5; Allen SD "The Scope of the Disclosure Duty under SEC Rule 14e-3" 1981 *Washington and Lee Law Review* 1055, 1055; Lobb J "SEC Rule 14e-3 in the Wake of United States v. O'Hagan: Proper Prophylactic Scope and the Future of Warehousing" 1999 *William and Mary Law Review* 1853, 1855.

797 Rule 14e-3 of the SEC; See related comments by Bainbridge *An Overview of Insider Trading Law and Policy* 5; Lobb 1999 *William and Mary Law Review* 1855; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 212.

798 Rule 14e-3 of the SEC; See related comments by Bainbridge *An Overview of Insider Trading Law and Policy* 5; Lobb 1999 *William and Mary Law Review* 1855; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 212.

799 Section 16(b) of the *Securities Exchange Act*; See related comments by Bainbridge *An Overview of Insider Trading Law and Policy* 5; Lobb 1999 *William and Mary Law Review* 1855; Tallman KA "Private Causes of Action Under SEC Rule 14e-3" 1983 *George Washington Law Review* 290, 291-292.

800 Section 32(a) of the 1934 *Securities Exchange Act*; see related comments by Thompson 2013 *International Journal of Accounting and Financial Reporting* 4; Thanitcul S and Srinopnikom T "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions" 2018 *Kasetsart Journal of Social Sciences* 1, 5; Cook CD and Feldman M "Insider Trading under the Securities Exchange Act" 1953 *The Harvard Law Review Association* 385, 406-407.

insider trading. Thus, the criminal penalties were not sufficient considering the fact that the *Securities Exchange Act* did not expressly empower the SEC to prosecute offenders. The researcher submits that these enforcement approaches only recompense the affected person and did not punish the offender. In addition to the SEC's enforcement actions, any person affected by insider trading activity had the right to sue for compensatory damages through private rights of action.[801] This means any person affected by insider trading had the authority to claim damages from the insider trading offender.

6.2.3 The Regulation of Insider Trading under the Insider Trading Sanctions Act

In 1984, the *Securities Exchange Act* was amended by the *Insider Trading Sanctions Act* to revamp the insider trading penalties. Although the *Insider Trading Sanctions Act* did not define insider trading or inside information, it gave the SEC the authority to seek civil penalties in the federal courts.[802] The researcher submits that the criminal penalties were not that effective in combating insider trading compared to civil penalties. Furthermore, a civil penalty is more deterrent than disgorgement because disgorgement merely returns the insider to the position he or she was before the insider trading activity.[803] Accordingly, in addition to disgorgement, a civil penalty was necessary to discourage insider trading activities.

Furthermore, the SEC could seek a civil penalty of up to three times the amount of profit gained or loss avoided from those found guilty of insider trading offences.[804] It is submitted

---

801 See related comments by Grundfest JA "Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority" 1994 *Harvard Law Review Association* 964, 1011-1014; Wang WKS "Measuring Insider Trading Damages for a Private Plaintiff" 2009 *UC Davis Business Law Journal* 1, 25-27; Goodman SD "Private Causes of Action for Option Investors under SEC Rule 10b-5: A Policy, Doctrinal, and Economic Analysis" 1987 *Harvard Law Review* 1959, 1962-1966.

802 Section 2 of the *Insider Trading Sanctions Act*; See related comments by Brodsky 1984 *Washington and Lee Law Review* 937; Silver 1985 *Duke Law Journal* 962; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 284-285.

803 See related comments by Brodsky 1984 *Washington and Lee Law Review* 937; Silver 1985 *Duke Law Journal* 962; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 284-285.

804 Section 3 of the *Insider Trading Sanctions Act*; see related comments by Brodsky 1984 *Washington and Lee Law Review* 937; Chitimira *A Comparative Analysis of the Enforcement of*

that although the adoption of a civil penalty was an improvement from the *Securities Exchange Act*, the civil penalty was not enough because the *Insider Trading Sanctions Act* did not provide a specific amount.

The fine for the criminal offence increased from $10,000 to $100,000 for natural persons and $500 000 for juristic persons.[805] The researcher commends the legislator for providing separate criminal fines for natural and juristic persons. It is submitted that often juristic persons gain profit more than natural persons. However, the maximum imprisonment term remained five years.[806] Although the *Insider Trading Sanctions Act* increased insider trading penalties, insider trading activities continued to take place with greater frequency in the mid-1980s.[807] However, the courts continued to develop the regulation of insider trading in the USA.[808]

6.2.5 Regulation of Insider Trading under the Securities Fraud Enforcement Act

The *Securities Fraud Enforcement Act* amended the *Securities Exchange Act. The Securities Fraud Enforcement Act* was enacted to improve the procedures and remedies for the prevention of insider trading in the USA.[809] Although, the *Securities Fraud Enforcement Act* did not define the term "controlling persons", the Act expanded insider

---

Market Abuse Provisions 213; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 284-285.

805 Section 3 of the *Insider Trading Sanctions Act*; Coffey and O'Brien 1986 *The Voice of the Profession Journal* 78; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213-216; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 284-285; Bainbridge 1985 *Virginia Law Review* 471-472 and 479.

806 Section 2D of the *Insider Trading Sanctions Act*; see related comments by Silver 1985 *Duke Law Journal* 962-963 and 973; Joo TW "Legislation and Legitimation: Congress and Insider Trading in the 1980s" 2007 *Indiana Law Journal* 575, 578-579.

807 See related comments by Choi SJ and Pritchard AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 7; Joo 2007 *Indiana Law Journal* 584.

808 See related comments by Silver 1985 *Duke Law Journal* 974; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 294; Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455, 496.

809 See related comments by Friedman HM "The Insider Trading and Securities Fraud Enforcement Act of 1988" 1990 *North Carolina Law Review* 465, 465-466; Garfinkel JA 1997 *Journal of Corporate Finance* 90.

trading penalties for controlling persons.[810] The *Securities Fraud Enforcement Act* provided that the term "controlling person" may include "not only employers, but any person with power to influence or control the direction or the management, policies or activities of another person".[811] However, it did not define insider trading.

Furthermore, the *Securities Fraud Enforcement Act* made it clear that tippers could be liable for trading with non public price-sensitive information.[812] This implies that tippees can be held liable for insider trading. However, the *Securities Fraud Enforcement Act* did not describe circumstances in which tippees may be held liable for committing insider trading offences.[813] It was left to the courts to determine when tippees could be held liable.

Moreover, the *Securities Fraud Enforcement Act* authorised the SEC to make bounty rewards "payments of up to 10% of the civil penalty imposed to persons who provide information regarding insider trading violations".[814] Due to the difficulty of detecting insider trading, informants played an important role of informing the SEC about insider trading activities taking place in the financial markets.[815] The bounty rewards encourage the informants to report insider trading practices to the SEC to get bounty rewards of up to 10% of the civil penalties recovered.[816] In addition, the information that whistle-blowers provide assist the SEC in its mission to curb insider trading activities.

---

810 Section 21A(a)(3) of the *Securities Fraud Enforcement Act*; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213; Friedman 1990 *North Carolina Law Review* 477.

811 Section 20(a) of the *Securities Exchange Act*; see related comments by Guin and Donaldson 1990 *Washington and Lee Law Review* 575-584; Friedman 1990 *North Carolina Law Review* 477; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213.

812 Section 21A(a)(1) of the *Securities Fraud Enforcement Act*; Friedman 1990 *North Carolina Law Review* 476; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213.

813 Section 21A(a)(1) of the *Securities Fraud Enforcement Act*; Friedman 1990 *North Carolina Law Review* 476; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213.

814 Section 21A of the *Securities Fraud Enforcement Act;* see related comments by Guin and Donaldson1990 *Washington and Lee Law Review* 576; Friedman 1990 *North Carolina Law Review* 479.

815 See related comments by Macey J "Validity Challenges to Sec Rule14e-3" 2007 *Michigan Law Review* 1899, 1917-192; Alexander R "The Role of Whistleblowers in the Fight against Economic Crime" 2006 *Journal of Financial Crime* 131, 131-132.

816 See related comments by Moy GG "The Role of Whistleblowers in Protecting the Safety and Integrity of the Food Supply" 2018 *A Nature Researcher Journal* page number unknown; Guin and Donaldson 1990 *Washington and Lee Law Review* 576; Kawadza H "Revisiting Financial

Furthermore, the *Securities Fraud Enforcement Act* gave the SEC authority to provide assistance to foreign securities regulators in exchanging information regarding alleged insider trading practices.[817] This encourages cooperation between of the SEC and other foreign regulatory institutions to assist each other with investigations and information regarding any alleged insider trading cases.[818]

Civil penalties increased from $100 000 to $1,000 000 or three times the amount of profit gained or loss avoided.[819] Furthermore, the maximum criminal fine for natural persons increased from $100 000 to $1 million and the maximum fine for juristic persons from $500,000 to $2,500 million.[820] Although, civil and criminal penalties increase they were not stringent enough to combat insider trading activities. Criminal sentence increased from five years to ten years maximum sentence.[821] It seems that the courts were also reluctant to impose longer prison sentences.

6.2.6 The Regulation of Insider Trading under the Sarbanes-Oxley Act

The *Sarbanes-Oxley Act* was enacted to eliminate corporate fraud, insider trading and other market abuse offences.[822] For instance, the *Sarbanes-Oxley Act* prohibited insiders

---

Services Sector Transparency through Whistleblowing: The Case of South Africa and Switzerland" 2017 *Journal of African Law* 83, 88, 90-94.

817 Section 21(a)(2) of the *Securities Fraud Enforcement Act*; see related comments by Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584; Langevoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 161, 161.

818 Section 21(a)(2) of the *Securities Fraud Enforcement Act*; see related comments by Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584; Langevoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 161, 161.

819 Section 4 of the *Securities Fraud Enforcement Act*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

820 Section 4 of the *Securities Fraud Enforcement Act;* see related comments by Friedman 1990 *North Carolina Law Review* 479, 485-486; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

821 Section 4 of the *Securities Fraud Enforcement Act;* see related comments by Friedman 1990 *North Carolina Law Review* 479, 485-486; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

822 Section 306 of the *Sarbanes-Oxley Act;* see related comments by Brocket F "Information Content of Insider Trades before and after the Sarbanes-Oxley Act" 2010 *The Accounting Review* 419, 419 and 423; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

from trading with non public price-sensitive inside information during a pension plan blackout period.[823] However, it is submitted that the *Sarbanes-Oxley Act* did not prohibit tippees from committing insider trading. The *Sarbanes-Oxley Act* also failed to define insider trading and inside information. This means that the *Sarbanes-Oxley Act* was only restricted to prohibiting insider trading activities by primary insiders. Furthermore, the *Sarbanes-Oxley Act* required insiders to report their trades to the SEC within two business days.[824] It is submitted that the requirement of issuers to report trades was to prevent issuers from trading with non public price-sensitive information.[825]

Under the *Sarbanes-Oxley Act,* individuals face up to 20 years in prison or a fine of up to $5 million for natural persons and up to $25 million for corporations' insider trading.[826] The criminal penalty is to a certain extent deterrent enough, however the courts are reluctant to impose the maximum imprisonment sentence.

6.2.7 The Regulation of insider trading under the Dodd-Frank Act

In 2010, the *Dodd-Frank Act* amended the *Securities Exchange Act* to prohibit government employees, agents of an agency or department of the federal government from trading in relevant securities with non public price-sensitive inside information.[827] It is important for any person including government employees to refrain from trading with non public price-sensitive information in order to curb insider trading. Furthermore,

---

823 Section 306 of the *Sarbanes-Oxley Act;* see related comments by Brocket 2010 *The Accounting Review* 419 and 423; Zhang IX "Economic consequences of the Sarbanes–Oxley Act of 2002" 2007 *Journal of Accounting and Economics* 74, 84; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

824 Section 403 of the *Sarbanes-Oxley Act*; see related comments by Brocket 2010 The Accounting Review 419 and 423; Chitimira A Comparative Analysis of the Enforcement of Market Abuse Provisions 215-216.

825 Section 403 of the *Sarbanes-Oxley Act*; see related comments by Brocket 2010 The Accounting Review 419 and 423; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

826 Section 1106 of the *Sarbanes-Oxley Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215; Nting RT *Sarbanes-Oxley Act, Insider Trading and Earnings Management* (Degree of PhD University of Glasgow 2008) 59-62.

827 Section 746 of the *Dodd-Frank Act;* Choi SJ and Pritchardt AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 9; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

anyone who trades with government information may be liable for insider trading under the *Dodd-Frank Act.*[828] Thus, unlike the *Securities Exchange Act* where only the insider and his tippee are liable, the scope of offenders was increased by the *Dodd-Frank Act.*[829] However, the *Dodd-Frank Act* does not provide specific penalties for insider trading activities.[830]

Furthermore, the *Dodd-Frank Act* provides incentives to whistle-blowers who voluntarily provide the SEC with original information about violations of the federal insider trading securities laws.[831] Whistle-blowers will only be rewarded if their tip leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million.[832] It is submitted that the information provided by the whistle-blower should not be known to the SEC. The SEC should first determine degree of assistance provided by the whistle-blower.[833] Since the *Dodd-Frank Act* came into force, the SEC Whistle-blower Office has awarded more than $250 million to whistle-blowers.[834] This indicates that the assistance of the whistle-blowers is very important to the SEC.

---

828 Section 746 of the *Dodd-Frank Act*; Choi 2017 *Yale Journal on Regulation* 9; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

829 Bakken T "Dodd-Frank's Extension of Criminal Corporate Liability through the Foreign Corrupt Practices Act: Enabling Whistleblowers and Monitoring Conflict Minerals" 2015 *Pace Law Review* 1, 3; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

830 Section 746 of the *Dodd-Frank Act.*

831 Section 748 of the *Dodd-Frank Act;* Oswald OJ "Whistleblower Provisions of the Dodd-Frank Act" 2012 *Review of Banking and Financial Law* 486, 487-488.

832 Section 748 of the Dodd-Frank Act; Oswald 2012 *Review of Banking and Financial Law* 487-488.
Section 922-923 read with 748 of the *Dodd-Frank Act;*
Zuckerman J and Stock M 2018 *SEC Whistleblower Program: Exposing Insider Trading* HYPERLINK"https://www.zuckermanlaw.com/sec-whistleblower-program-exposing-insider-tradin/"https://www.zuckermanlaw.com/sec-whistleblower-program-exposing-insider-tradin/ accessed 12 November 2018 page number unknown; Bakken 2015 *Pace Law Review* 3; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

6.3 The Enforcement of the insider trading Prohibition

6.3.1 The Role of the SEC

The SEC is an independent institution that is established for overseeing the regulation of the securities industry in the USA.[835] This implies that the SEC does not operate under the specific direction of the judicial, legislative or the executive branches of government which is good for institutions such as this.[836] For example, the SEC may adopt insider trading rules that enhance the regulation and enforcement of insider trading prohibitions in the USA.[837] Furthermore, the SEC protects the integrity of the USA financial markets and promotes investor confidence by regulating the disclosure of non public price-sensitive information.[838] In relation to insider trading, the SEC achieves these objectives by promoting equal access to material information by all market participants to discourage any insider trading activities in the USA financial markets.[839]

In relation to detecting insider trading activities, the SEC receives insider trading referrals of suspicious insider trading activities from the Financial Industry Regulatory Authority

---

835 Section 4 of the *Securities Exchange Act*; Walter N "Prioritizing Enforcement in Insider Trading" 2012 *Yale Law and Policy Review* 521, 521;Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 231; Doty JR "The Role of the Securities and Exchange Commission in an Internationalized Marketplace" 1992 *Fordham Law Review* 77, 77-78.

836 Section 4 of the *Securities Exchange Act*; see related comments by Gilardi F and Maggetti M "The Independence of Regulatory Authorities" in Faur D *Handbook on the Politics of Regulation* (Edward Elgar Publishing place unknown 2011) 1-6; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 231; Doty 1992 *Fordham Law Review* 77-78; Dasgupta PS *The Independence of Regulatory Agencies in Practice: The Case of Telecommunications Regulators in the United Kingdom and France* (Doctor of Philosophy London School of Economics and Political Science 2009) 23-26.

837 Section 10b of the *Securities and Exchange Act*; Fisch JE "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation" 1991 *Georgia Law Review* 179, 185-187; Carlton DW and Fischel DR "The Regulation of Insider Trading" 1983 *Stanford Law Review* 859. 884-888; Caccese MS "Insider Trading Laws and the Role of Securities Analysts" 1997 *Financial Analysts Journal* 1, 9.

838 Section 2 of the *Securities Exchange Act;* Doty 1992 *Fordham Law Review* 77-78; Austin J "What Exactly is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation" 2017 *William and Mary Business Law Review* 215, 221-226.

839 Section 2 of the *Securities Exchange Act*; Doty 1992 *Fordham Law Review* 77-78; Austin 2017 *William and Mary Business Law Review* 221-226.

(FINRA) or the Options Regulatory Surveillance Authority (ORSA).[840] The FINRA and the ORSA have electronic surveillance systems that detect insider trading activities in the USA financial markets.[841] The researcher submits that the fact that the FINRA and the ORSA refer any suspicious trading to the SEC could suggest that there is cooperation between the SEC, the FINRA and the ORSA in curbing insider trading activities in the USA financial markets. The role of the SEC in preventing and investigating insider trading activities is discussed below.

(a) The Enforcement Division is a committee of the SEC that investigates any possible insider trading activities.[842] These investigations are conducted privately.[843] It is submitted that investigations are conducted privately to avoid compromising sensitive evidence and also to protect the integrity of the people involved in the investigation. The *Administrative Procedure Act*[844] empowers the administrative agencies such as the SEC to conduct formal inquiry and informal inquiry into insider trading cases.[845] An informal inquiry is

---

840 See related comments by Meulbroek LK "An Empirical Analysis of Illegal Insider Trading" 1992 *Journal of Finance* 1661, 1663; Goel R "Integrating a Systems Approach to Detect Risk of Insider Trading" 2013 *International Journal of Humanities and Social Science* 21, 21.

841 See related comments by Financial Industry Regulatory Authority 2018 *Office of Fraud Detection and Market Intelligence (OFDMI)* HYPERLINK "http://www.finra.org/industry/ofdmi" http://www.finra.org/industry/ofdmi accessed 13 November 2018 page number unknown; Ahern KR "Information Networks: Evidence From Illegal Insider Trading Tips" 2015 journal unknown 1, 30.

842 Securities Exchange Commission 2007 *About the Division of Enforcement* https://www.sec.gov/enforce/Article/enforce-about.html accessed 13 November 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 233; Garba 2013 *International Journal of Management* 19-20; Karmel RS "Creating Law at the Securities and Exchange Commission: The lawyer as Prosecutor" 1998 *Law and contemporary Problems Journal* 33, 38; Gray EP, Cottrell AA, Stellmach W and Hanniford KD "Will the Securities and Exchange Commission's Proposed Changes to Administrative Proceedings Quite Critics?" 2015 *The Investment Lawyer Journal* 1, 3-4 and 6.

843 DeMarzo PM, Fishman MJ and Hagerty KM "The Optimal Enforcement of Insider Trading Regulations" 1998 *Journal of Political Economy* 602, 604-603; Spitz MA "Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain" 1989 *Boston College International and Comparative Law Review* 265, 273; Lin K *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience* (LLM Dissertation Tilburg University 2013) 21.

844 Section 5 of the *Administrative Procedure Act* (APA), Pub.L. 79–404, 60 Stat. 237, enacted June 11, of 1946 (*Administrative Procedure Act*); see related comments by Freedman JO "Summary Action by Administrative Agencies" 1972 *University of Chicago Law Review* 1, 6; Nelson J "Administrative Law Judges' Removal "Only For Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?" 2011 *Administrative Law Review* 401, 411-414.

845 Section 5 of the *Administrative Procedure Act;* Gray, Cottrell, Stellmach and Hanniford 2015 *The Investment Lawyer Journal* 3-4 and 6; Securities and Exchange Commission 2007 *About the*

conducted by the SEC to gather information by interviewing witnesses, examining records and reviewing trading data to detect and combat insider trading.[846] Furthermore, there is a formal inquiry where the Enforcement Division's officers may subpoena witnesses to testify and produce books, records, and other relevant documents.[847] Once the Enforcement Division's officers have completed the investigation they present their findings to the SEC for review.[848] This is done to determine whether there is enough evidence to pursue a case in the federal court or before an administrative judge.[849] If there is enough evidence to pursue the matter, the SEC may authorise the Enforcement Division to file a case in federal court or bring an administrative action. The Enforcement Division also acts on behalf of the SEC in federal court.[850]

In addition, the Enforcement Division has the authority to pursue civil remedies in the federal courts. For instance, the SEC may seek civil penalties not exceeding $1 million or three times the amount of the profit gained or loss avoided by the insider trading

---

Division of Enforcement https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2017 page number unknown.

846 Section 11 of the *Administrative Procedure Act*; see related comments by Securities Exchange Commission 2018 *Administrative Proceedings* HYPERLINK https://www.sec.gov/litigation/admin.shtml https://www.sec.gov/litigation/admin.shtml accessed 13 November 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232-233; Gray, Cottrell, Stellmach and Hanniford 2015 *The Investment Lawyer Journal* 3-4 and 6.

847 Jabbari D "Critical Theory in Administrative Law" 1994 *Oxford Journal of Legal Studies* 189, 213; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232-233; Gray, Cottrell, Stellmach and Hanniford 2015 *The Investment Lawyer Journal* 3-4 and 6; Securities and Exchange Commission 2007 HYPERLINK "https://www.sec.gov/enforce/Article/enforce-" https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2017 page number unknown.

848 Securities and Exchange Commission 2007 HYPERLINK "https://www.sec.gov/enforce/Article/enforce-" https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2017 page number unknown; 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 200, 202; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 233-234.

849 See related comments by Securities and Exchange Commission 2007 *About the Division of Enforcement* https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2017 page number unknown; Zwerdling J "Reflections on the Role of an Administrative Law Judge" 1973 *Administrative Law Review* 9, 22; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 233-234.

850 Securities and Exchange Commission 2007 *About the Division of Enforcement* https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2017 page number unknown; Chitimira and Lawack 2013 *Obiter* 203; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 233-234.

offenders.[851] It is submitted that the civil penalty was not stringent enough to combat insider trading. In addition, the SEC may seek disgorgement of profits gained from insider trading activities.[852] Disgorgement is an order by the SEC to the insider trading offender to give up the profits that he or she made as a result of insider trading. The purpose of this remedy is to prevent an unjustly enriched party and restore benefits received by the offender to an aggrieved party.[853] The researcher submits that it is important for the SEC to have multiple penalties such as disgorgement.

The SEC may cooperate with other foreign securities regulators to curb insider trading practices in the USA financial markets and elsewhere.[854] This cooperation was achieved through the signing of a Memorandum of Understanding (MOU) with other foreign securities regulatory bodies.[855] The MOU allows the SEC to request information about any alleged insider trading activities from other foreign regulators and also to investigate such cases.[856] It is submitted that the SEC has to date cooperated with other regulatory institutions to curb insider trading activities, as in the case of *SEC v Tiger Asia Management*.[857] In 2009, the Hong Kong Securities and Futures Commission (SFC)

---

851 Section 4 of the *Securities Fraud Enforcement Act*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584; Chitimira and Lawack 2013 *Obiter* 202.

852 Section 20A of the *Securities Exchange Act*; see related comments by Mira 1985 *Catholic University Law Review* 445, 448; Karsch 1985 *Journal of Comparative Business and Capital Market Law* 285; Silver 1985 *Duke Law Journal* 963.

853 See related comments by Mira 1985 *Catholic University Law Review* 445,445; Eisenberg MA "The Disgorgement Interest in Contract Law" 2006 *Michigan Law Review* 559, 561.

854 Section 21(a)(2) of the *Securities Fraud Enforcement Act*; Caccese 1997 *Financial Analysts Journal* 11; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 234; Langevoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 161, 162; Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *SA Merc LJ* 44, 66-68; Doty 1992 *Fordham Law Review* 83-84.

855 Section 21(a)(2) of the *Securities Fraud Enforcement Act*; see related comments by Caccese 1997 *Financial Analysts Journal* 11; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 234; Langevoort 2000 *Dickinson Journal of International Law* 162; Cassim 2007 *SA Merc LJ* 66-68; Doty 1992 *Fordham Law Review* 83-84.

856 See related comments by Caccese 1997 *Financial Analysts Journal* 11; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 234; Langevoort 2000 Dickinson *Journal of International Law* 162; Cassim 2007 *SA Merc LJ* 66-68; Doty 1992 *Fordham Law Review* 83-84.

857 See the following cross boarder cases where the SEC was involved *SEC v Tiger Asia Management* LLC, Civil Action No. 12-cv-7601 (DMC); other cases includes *SEC v Certain Unknown Traders in the Securities of H.J. Heinz Company* Civil Action No. 13-CIV-1080; *SEC v Compania Internacional Financia, SA* Civil Action No. 11-cv-04904-JPO; *SEC v Richard Bruce*

alleged that "Tiger Asia had engaged in insider trading and price manipulation on Chinese bank stocks". The insider trading activity took place between December 2008 and January 2009. The SEC began its investigation in October 2010.[858] Tiger Asia pleaded guilty and agreed to pay settlements for illicit gains and law enforcement penalties issued by the SFC and SEC. Tiger Asia Management made $16.7 million in illicit profits and agreed to pay $44 million to settle the SEC charges. Moreover, the SEC may be reimbursed for expenses incurred in assisting foreign securities regulatory authorities.[859] The researcher submits that the amount of foreign cases that have been investigated by the SEC shows that the SEC has made progress in curbing insider trading activities in the USA and other foreign financial markets.

The SEC has authority to provide incentives for whistleblowers that provide it with information about violations of federal securities laws.[860] Whistle-blowers may be awarded an amount not exceeding 30% of bounties.[861]

Officers of the Enforcement Division have expertise in federal securities laws, including conducting significant investigations or litigation.[862] This approach has enhanced the enforcement of the insider trading prohibition in the USA. The SEC has managed to investigate and impose civil and administrative sanctions for insider trading on many offenders because it employs people who are qualified and have experience in detecting and investigating insider trading practices and other market abuse offences.[863] This is

---

Moore Civil Action No. 13-cv-2514 (HB) (S.D.N.Y.); *SEC v Arnold McClellan and Annabel McClellan* Case No. CV-105412 (JCS) (N.D. Cal. filed November 30, 2010).

858 *SEC v Tiger Asia Management* LLC.

859 Section 4(f) of the *Securities Exchange Act*; Caccese 1997 *Financial Analysts Journal* 11; Doty 1992 *Fordham Law Review* 83-84.

860 Section 748 of the *Dodd-Frank Act*; see related comments by Alexander 2006 *Journal of Financial Crime* 131-132; Moy 2018 *A Nature Researcher Journal* page number unknown.

861 See related discussion in paragraph 6.3.1 of this Chapter.

862 Investopedia 2018 *Division of Enforcement* HYPERLINK "https://www.investopedia.com/terms/d/division-of-%09enforcement.asp" https://www.investopedia.com/terms/d/division-of-enforcement.asp accessed 17 July 2018 page number unknown; Securities and Exchange Commission 2007 *About the Division of Enforcement* HYPERLINK"https://www.sec.gov/enforce/Article/enforce-%09about.html" https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2018 page number unknown; Chitimira 2013 *Obiter* 204.

863 Investopedia 2018 HYPERLINK "https://www.investopedia.com/terms/d/division-of-enforcement.asp" https://www.investopedia.com/terms/d/division-of-enforcement.asp accessed

also achieved because the Enforcement Division has sufficient resources to detect and investigate insider trading practices the USA financial markets.[864]

Table 6.1 provides statistics for different types of actions brought to the SEC between 2016 and 2017 financial year. However, the researcher will focus on insider trading statistics because other types of actions are beyond the scope of this research. Table 6.1 below indicates that in 2017 not many insider trading cases were reported to the SEC compared to 2016 which is an improvement. The decrease is as a result of the effectiveness of enforcement authorities in enforcing the prohibition of insider trading in the USA. Some of the cases settled by the SEC in 2012 involve two financial advisors and three of their friends and family members who were charged with insider trading for more than $1.8 million profits involving the misuse of price-sensitive inside information relating to a Philadelphia-based insurance holding company's merger negotiations with a Japanese company.[865]

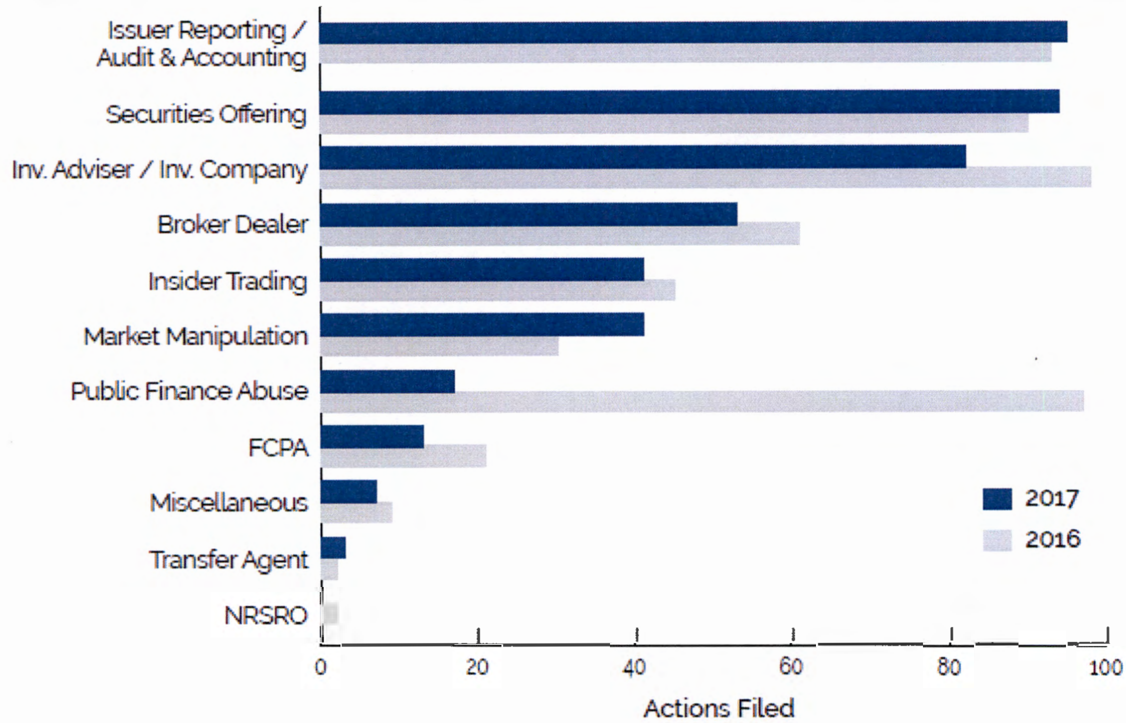
---

17 July 2018 page number unknown; Securities and Exchange Commission 2007 HYPERLINK "https://www.sec.gov/enforce/Article/enforce-about.html" https://www.sec.gov/enforce/Article/enforce-about.html accessed 17 July 2018 page number unknown; Chitimira 2013 *Obiter* 204.

864 Chitimira 2013 *Obiter* 204-205; Kazarian E *Integration of the Securities Market Infrastructure in the European Union: Policy and Regulatory Issues* (International Monetary Fund Publisher New York 2006) 21.

865 Securities and Exchange Commission 2018 *SEC Charges Five With Insider Trading on Confidential Merger Negotiations Between Philadelphia Company and Japanese Firm* HYPERLINK"https://www.sec.gov/news/press-release/2012-2012-41htm" https://www.sec.gov/news/press-release/2012-2012-41htm accessed 15 November 2018 page number unknown.

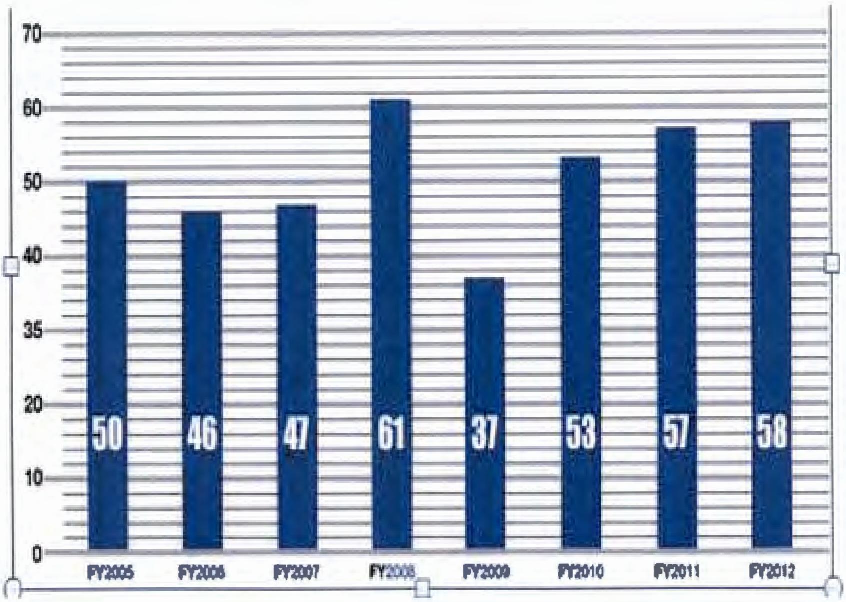
Table 6.1: Statistics of the types of actions brought between 2016 and 2017 financial year.



Adapted from the SEC 2017 Annual Report.[866]

[866] Securities and Exchange Commission 2017 *Division of Enforcement Annual Report* HYPERLINK https://www.sec.gov/enforce/reports-and-publications/enforcement-2017-annual-report https://www.sec.gov/enforce/reports-and-publications/enforcement-2017-annual-report accessed 14 November 2018 7.

Table: 6.2 Insider Trading Enforcement Actions



Adapted from the SEC Website[867]

Table 6.2 shows insider trading enforcement actions from 2005 to 2012. This table shows inconsistent enforcement of insider trading by the SEC.

(b) The Corporate Finance Division is another committee of the SEC.[868] The Corporate Finance Division ensures that registered firms provide the required level of disclosure of material information to investors.[869] This is done for investors to make informed

---

867 Securities and Exchange Commission 2018 *SEC Enforcement Action: Insider Trading Cases* HYPERLINK "https://www.sec.gov/spotlight/insidertrading/cases.shtml" https://www.sec.gov/spotlight/insidertrading/cases.shtml accessed 15 November 2018 page number unknown.

868 Securities and Exchange Commission 2017 *Division of Corporation Finance* HYPERLINK "https://www.sec.gov/page/corpfin-section-landing" https://www.sec.gov/page/corpfin-section-landing accessed 15 November 2018 page number unknown; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 112-113; Goel R "Integrating a Systems Approach to Detect Risk of Insider Trading" 2013 *International Journal of Humanities and Social Science* 22-23.

869 Securities and Exchange Commission 2017 HYPERLINK "https://www.sec.gov/page/corpfin-section-landing" https://www.sec.gov/page/corpfin-section-landing accessed 15 November 2018 page number unknown; see related comments by Chitimira 2014 *Speculum Juris* 200-201; Steinberg MI "Insider Trading, Selective Disclosure, and Prompt Disclosure: A Comparative Analysis" 2014 *University of Pennsylvania Journal of International Economic Law* 635, 638;

investment decisions. Publication of material information is done online through the Electronic Data Gathering Analysis and Retrieval system (EDGAR system).[870] The EDGAR system increases the efficiency and accessibility of corporate filings. The EDGAR system is used by all publicly traded companies when submitting required documents to the SEC.[871] It is submitted that EDGAR has improved the time it takes for corporate documents to become publicly available. Furthermore, the researcher submits that the EDGAR is used by the Corporate Finance Division to prevent insider trading. Moreover, EDGAR also detects insider trading activities.

(c) The Market Regulation Division of the SEC also regulates the New York Stock Exchange and other self regulatory organizations in the USA.

(d) The Investment Management Division of the SEC monitors investment companies and their advisory professionals to curb insider trading in the USA financial markets

6.3.3 The Role of the Department of Justice and the Courts

The courts have the responsibility to enforce insider trading civil and criminal penalties in the USA. The courts play a major role in enforcing the regulation of insider trading in the USA financial markets.[872] For instance, in 2014 the court in *United States v Newman*[873] provided circumstances under which tippees can be held liable for insider trading

---

Langevoort DC and Gulat JM The Muddled Duty to Disclose Under Rule 10b-5" 2004 *Vanderbilt Law Review* 1643, 1657-1664.

870 Securities and Exchange Commission 2012 *About the Division of Corporation Finance* HYPERLINK "https://www.sec.gov/divisions/corpfin/cfabout.shtml" https://www.sec.gov/divisions/corpfin/cfabout.shtml accessed 17 July 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232; Chitimira 2014 *Speculum Juris* 112-113; Goel 2013 *International Journal of Humanities and Social Science* 22-23.

871 Securities and Exchange Commission 2012 HYPERLINK "https://www.sec.gov/divisions/corpfin/cfabout.shtml" https://www.sec.gov/divisions/corpfin/cfabout.shtml accessed 17 July 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232; Chitimira 2014 *Speculum Juris* 112-113; Goel 2013 *International Journal of Humanities and Social Science* 22-23.

872 Section 21 of the *Securities Exchange Act*; Caccese 1997 *Financial Analysts Journal* 9 and 11; Chitimira 2014 *Speculum Juris* 119-121.

873 *United States v Newman* 773 F.3d 438 (2d Cir. 2014).

activities. The court held that a tippee cannot be convicted unless the tippee knew that the insider disclosed confidential information in breach of a fiduciary duty for personal benefit. The researcher submits that the decision of the court to provide circumstances where the tippee may be held liable is commendable as it helped to enforce the insider trading prohibition. Furthermore in 2016, the court in *Salman v SEC,*[874] held that the benefit a tipper must receive need not be monetary, such benefit can be an intangible gift. This decision by the court is commendable since it prevents tippees from escaping insider trading liability.

Furthermore in 2011, Raj Rajaratnam was found guilty of insider trading by the courts and he gained $63.8 million from insider trading dealings.[875] Rajaratnam forfeited $53 million and was ordered by the court to pay a fine of $10 million and sentenced to 11 years imprisonment. It was reported that the 11 year imprisonment period was the longest ever imposed for insider trading in the USA.[876] The courts are reluctant to impose longer imprisonment sentences. The effectiveness of the courts is as result of the availability of adequate resources and recruitment of people with the relevant expertise in the financial markets to support the SEC.[877]

874 *Salman v SEC* 580 US (2016).

875 See related comments by Stempel J 2018 *Rajaratnam Fails to Cut US Insider Trading Conviction, Sentence* HYPERLINK "https://www.reuters.com/article/us-usa-crime-rajaratnam/rajaratnam-fails-to-cut-u-s-%09insider-trading-conviction-sentence-idUSKCN1IX5B3" https://www.reuters.com/article/us-usa-crime-rajaratnam/rajaratnam-fails-to-cut-u-s-insider-trading-conviction-sentence-idUSKCN1IX5B3 accessed 15 November 2018 page number unknown.

876 See related comments by Stempel 2018 HYPERLINK "https://www.reuters.com/article/us-usa-crime-%09rajaratnam/rajaratnam-fails-to-cut-u-s-insider-trading-conviction-sentence-idUSKCN1IX5B3"https://www.reuters.com/article/us-usa-crime-rajaratnam/rajaratnam-fails-to-cut-u-s-insider-trading-conviction-sentence-idUSKCN1IX5B3 accessed 15 November 2018 page number unknown.

877 See related comments by Kazarian *Integration of the Securities Market Infrastructure in the European Union: Policy and Regulatory Issues* 21; Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-Thesis University of Fort Hare 2008) 97; Caccese 1997 *Financial Analysts Journal* 9 and 11.

6.4 Conclusion

This chapter has examined the regulation of insider trading in the USA financial markets. It is noted that insider trading was first regulated by the *Securities Exchange Act.*[878] Although the *Securities Exchange Act* prohibited insider trading, it did not prohibit tippees from trading with non public price-sensitive information.[879] It is submitted that the fact that tippees were not prohibited from insider trading could have increased insider trading activities in the USA. Furthermore, the *Securities Exchange Act* did not define the terms "insider trading" and "inside information".[880] The researcher submits that it was important for the *Securities Exchange Act* to define these terms. Accordingly, the *Securities Exchange Act* was not adequate to effectively combat insider trading.

The *Insider Trading Sanctions Act* amended the *Securities Exchange Act* to revamp insider trading penalties.[881] For instance, the SEC was given the authority to seek up to three times the amount of profit gained or loss avoided.[882] It is submitted that this was a welcome development since the *Securities Exchange Act* did not provide such authority. Furthermore, the *Insider Trading Sanctions Act* increased criminal penalties to $100 000 for natural persons and $500 000 for juristic persons. Although, the insider trading penalties were increased insider trading activities continued to take place.

The *Securities Fraud Enforcement Act* amended the *Securities Exchange Act* to prohibit controlling persons from trading with non public price-sensitive information.[883] this was a

---

878 Section 10b read with 16(b) of the *Securities Exchange Act*; see related comments by Thel 1990 *Stanford law Review* 386.

879 Section 10b read with 16(b) of the *Securities Exchange Act*; see related comments by Thel 1990 *Stanford law Review* 386.

880 Section 10b read with 16(b) of the *Securities Exchange Act*; see related comments by Thel 1990 *Stanford law Review* 386.

881 See related comments by Silver 1985 *Duke Law Journal* 974; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 294; Bainbridge 1985 *Virginia Law Review* 496.

882 Section 3 of the *Insider Trading Sanctions Act*; see related comments by Brodsky 1984 *Washington and Lee Law Review* 937; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213; Karsch 1984 *Journal of Comparative Business and Capital Market Law* 284-285.

883 Section 21A(a)(3) of the *Securities Fraud Enforcement Act*; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213; Friedman 1990 *North Carolina Law Review* 477.

good move since it expanded the scope of the insider trading prohibition to include controlling persons. In addition the *Securities Fraud Enforcement Act* prohibited tippees from trading with non public price-sensitive information.[884] Furthermore, the *Securities Fraud Enforcement Act* provided the SEC with authority to provide bounty rewards to whistleblowers.[885] As has been discussed above, whistleblowers play an important role of providing the SEC with information unknown to it about insider trading and other related offences. However, although the *Securities Fraud Enforcement Act* increased civil and criminal penalties, insider trading activities continued to take place in the USA financial markets.

The *Sarbanes-Oxley Act* sought to combat fraud, insider trading and other market abuse offences in the accounting companies.[886] Although, the Act prohibited insider trading during a pension plan blackout period, it did not prohibit tippees.[887] Furthermore, the *Sarbanes-Oxley Act* increased criminal penalties to 20 years and $5 million for natural persons and $25 million for juristic persons. However, it appears that the courts preferred to impose higher monetary penalties than long prison sentences for insider trading related offences. For instance, it was the first time the court imposed the longest imprisonment term for insider trading in 2011 in the Rajaratnam case.[888] The 11 years imprisonment term imposed on the offender in this case shows that the courts are generally reluctant to impose long prison sentences.

---

884 Section 21A(a)(1) of the *Securities Fraud Enforcement Act*; Friedman 1990 *North Carolina Law Review* 476; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 213.

885 Section 21A of the *Securities Fraud Enforcement Act;* see related comments by Guin and Donaldson1990 *Washington and Lee Law Review* 576; Friedman 1990 *North Carolina Law Review* 479.

886 Section 306 of the *Sarbanes-Oxley Act*; see related comments by Brocket 2010 *The Accounting Review* 419 and 423; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

887 Section 306 of the *Sarbanes-Oxley Act*; see related comments by Brocket 2010 The Accounting Review 419 and 423; Zhang 2007 *Journal of Accounting and Economics* 84; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

888 See related comments by Bacastow DJ "Due Process and Criminal Penalties under Rule 10b-5: The Unconsitutionality and Inefficiency of Criminal Prosecutions for Insider Trading" 1982 *The Journal of Criminal Law And Criminology* 96, 97; Stempel 2018 HYPERLINK "https://www.reuters.com/article/us-usa-crime-rajaratnam/rajaratnam-fails-to-cut-u-s-insider-trading-conviction-sentence-idUSKCN1IX5B3" https://www.reuters.com/article/us-usa-crime-rajaratnam/rajaratnam-fails-to-cut-u-s-insider-trading-conviction-sentence-idUSKCN1IX5B3 accessed 15 November 2018 page number unknown.

The *Dodd-Frank Act* amended the *Securities Exchange Act* to prohibit government employees from dealing with non public price-sensitive information.[889] The researcher submits that even though there has been several laws that prohibit insider trading in the USA policy makers should adopt a single legislation that regulates insider trading to avoid possible challenges involving overcriminalisation. Accordingly, a specific legislation may provide certainty on how insider trading should be regulated in the USA.

The fact that there are numerous cases prosecuted in the courts suggest that there is cooperation between the courts and the SEC. It is submitted that this cooperation has enhanced the regulation of insider trading in the USA. Furthermore, the SEC's cooperation with other foreign regulatory institutions is relatively effective and many insider trading offenders have been prosecuted.[890] Given the discussion above Zimbabwe can learn from the USA to adopt administrative penalties such as private right of actions. Other lessons that Zimbabwe can learn from USA is discussed in Chapter Eight.

---

889 Section 746 of the *Dodd-Frank Act*; Choi and Pritchardt 2017 *Yale Journal on Regulation* 9; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.
See related discussion in paragraph 6.4.1 in Chapter Six of this thesis.

CHAPTER SEVEN

THE REGULATION OF INSIDER TRADING IN SOUTH AFRICA

7.1 Introduction

Several persons have acknowledged that the effects of insider trading activities are experienced in different financial markets, including South Africa.[891] South Africa also regulates insider trading in a bid to curb the illicit trading activities in its financial markets.[892] Insider trading has been regulated in South Africa since 1973 and its anti-insider trading framework has been regarded as the most progressive in the Southern African Development Community (SADC).[893] It appears that the insider trading provisions under the *Financial Markets Act*[894] are to a certain extent stringent and robust enough compared to the Zimbabwean anti-insider trading framework. In light of this, this chapter examines the statutory prohibition of insider trading under the *Companies Act*[895] and its

891 See related comments by Beny LN "Insider Trading Laws and Stock Markets around the World (Former title: Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence)" 2006 *Michagan Law Review* 1, 5; Mwenda KK "Insider Dealing Law in Zambia: A Flawed Concept" *Ghana Law Journal* 1996-1999 137, 138 and 141.

892 See related comments by Osode CP "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 239; Mwenda *Ghana Law Journal* 1996-1999 114; Mwenda KK "Redefining Insider Dealing Law For Emerging Markets: A Comparative Legal Study" 1977 *Zimbabwe Law Review* 29, 30; Osode CP "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 688-689.

893 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 *South African Mercantile Law Journal* 458, 491; It has been reported that in South Africa was ranked first among 148 countries surveyed for the World Economic Forum Global Competitiveness Report for four consecutive years in respect of the regulation of securities markets. For further information see Stander R "Market Intergrity and Twin Peaks" 2016 *Financial Services Board Newsletter* 1, 20.

894 Section 78 of the *Financial Markets Act* 19 of 2012.

895 Section 70nov (11) of the *Companies Act* 46 of 1926 (1926 *Companies Act*); see related comments by Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 1, 2-3; Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-Thesis University of Fort Hare 2008) 23.

amendments,[896] the *Insider Trading Act*,[897] the *Securities Services Act*,[898] and the *Financial Markets Act*.[899] This is done in order to identify and suggest elements which can possibly be incorporated in the Zimbabwean anti-insider trading framework in order to make it more adequate, stronger and competitive.

It should also be noted that since the enactment of the *Financial Markets Act* in South Africa, various insider trading offenders have been successfully investigated and their cases settled by the Directorate of Market Abuse (DMA) and the EC respectively to date.[900] This success could be attributed to the administrative penalties that are provided in the *Financial Markets Act* which were satisfactorily enforced by the EC.[901] This chapter also discusses the role of the Johannesburg Stock Exchange Limited (JSE), the DMA, the EC and the courts in detecting, investigating and prosecuting insider trading activities in the South African financial markets. This is done to draw possible lessons on how the Securities and Exchange Commission of Zimbabwe (SECZ), the Zimbabwe Stock Exchange (ZSE) and the courts could effectively enforce insider trading provisions in Zimbabwe. Since the introduction of the twin peaks model in South Africa, the DMA, EC, and FSB have been replaced by the Financial Sector Conduct Authority (FSCA).[902]

---

896 Section 233 of the *Companies Act* 61 of 1973 (1973 *Companies Act*); see section 440F(2)(a) of the *Companies Amendment Act* 78 of 1989 (1989 *Companies Amendment Act*); section 440F of the *Second Companies Amendment Act* 69 of 1990 (1990 *Companies Amendment Act*); also see related comments by Botha 1991 *South African Mercantile Law Journal* 4-15.

897 Section 2(1) and (2) of the *Insider Trading Act* 135 of 1998 (*Insider Trading Act*); see related comments by Jooste R "The Regulation of Insider Trading in South Africa Another Attempt" 2000 *South African Law Journal* 284, 288; Osode 2000 *Journal of African Law* 241-243.

898 Section 73 of the *Securities Services Act* 36 of 2004 (*Securities Services Act*); see related comments by Cassim R "Some Aspects of Insider Trading- Has the Securities Services Act 36 of 2004 Gone Too Far?" 2007 *South African Mercantile Law Journal* 44, 56.

899 Section 78 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*); Kawadza H "The Liability Regime For Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383, 394.

900 See insider trading statistics in paragraph 7.2.3.2.6 of Chapter Seven of this thesis. Although few cases of insider trading have been prosecuted due to the difficulty of burden of proof and the delay or backlog of the South African justice system, several cases have been settled by the EC which imposed administrative sanctions on the offenders. See related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 470.

901 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. See related comments by Luiz S "Market Abuse and Enforcement Committee" 2011 *South African Mercantile Law Journal* 151, 156-170.

902 See Chapter Four of the *Financial Sector Regulation Act* 09 of 2017 (*Financial Sector Regulation Act*).

However, the FSCA has not yet put into operation its plan on how it will enforce the prohibition of insider trading.[903] Therefore, the researcher discusses the enforcement of insider trading as it was under the *Financial Markets Act*.

7.2 Historical Overview of Insider Trading Prohibition

7.2.1 The Regulation of Insider Trading Prior to 1973

There was no legislation that regulated insider trading in the South African financial markets prior to 1973.[904] The *Stock Exchanges Control Act*[905] and the *Financial Markets Control Act*[906] regulated market manipulation. However, the *Stock Exchange Act* and the *Financial Markets Control Act* did not prohibit illicit trading with non public price-sensitive information in relevant securities. The researcher submits that although market manipulation was regulated the legislature overlooked the regulation of insider trading in South Africa under the *Stock Exchanges Control Act* and the *Financial Markets Control Act*.

Although insider trading was not specifically regulated by any law, the 1926 *Companies Act*[907] indirectly dealt with issues related to insider trading. For instance, the 1926 *Companies Act* provided that directors should report to the company their shareholding interest.[908] The directors' obligation to report their shareholding interest was aimed at promoting transparency in relation to the directors' interests and their shareholding

---

903 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher with Pascoe A (Chief Investigator of the FSCA) on 28 June 2018.

904 Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 937, 946-948; Kawadza 2015 *South African Mercantile Law Journal* 386; Chitimira *The Regulation of Insider Trading in South Africa* 22-26.

905 Section 40 of the *Stock Exchange Act* 1 of 1985 (*Stock Exchange Act*); Chitimira 2014 *PELJ* 939.

Section 20 and 21 of the *Financial Markets Control Act* 55 of 1989 (*Financial Markets Control Act*); Chitimira 2014 *PELJ* 940-941.

907 Section 70nov (11) of the 1926 *Companies Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 386; Botha 1991 *South African Mercantile Law Journal* 4; Chitimira 2014 PELJ 946; Chitimira *The Regulation of Insider Trading in South Africa* 23.

908 Section 70nov (11) of the 1926 Companies Act; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 386; Botha 1991 *South African Mercantile Law Journal* 4; Chitimira 2014 *PELJ* 946; Chitimira *The Regulation of Insider Trading in South Africa* 23.

transactions in the company.[909] It should be further noted that the 1926 *Companies Act* did not expressly prohibit insider trading. Various terms such as "insider" and "inside information" were not defined. Insider trading activities were not adequately prevented in the South African financial markets prior to 1973.

Thereafter, the Van Wyk de Vries Commission[910] was appointed in 1963 to examine the adequacy of the 1926 *Companies Act*. This commission was tasked to evaluate the developments in the South African corporate law.[911] The Van Wyk de Vries Commission found that insider trading was a malpractice that was taking place in the South African financial markets.[912] Furthermore, the Van Wyk de Vries Commission recommended that insider trading should be adequately regulated. The regulation was reportedly supposed to be extended to directors and other potential insiders.[913] Owing to these recommendations the legislature introduced the 1973 *Companies Act*.

7.2.2 The Regulation of Insider Trading Between 1973 and 2004

7.2.2.1 The Regulation of Insider Trading by the 1973 *Companies Act*

Insider trading activities in relevant securities were regulated in the 1973 *Companies Act*.[914] The Act provided that any director, past director, officer or person who has

---

909 Section 70nov (11)of the 1926 *Companies Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 386; Botha 1991 *South African Mercantile Law Journal* 4; Chitimira 2014 PELJ 946; Chitimira *The Regulation of Insider Trading in South Africa* 23.

910 See the Van Wyk de Vries Commission of Inquiry into the Companies Act Report of 1963 (Van Wyk de Vries Report).

911 See the Van Wyk de Vries Report; see related comments by Benade LM "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *The Comparative and International Law Journal of Southern Africa* 277, 297 and 298; Osode PC "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688, 693.

912 See paragraph 44.49 of the Van Wyk de Vries Report; see related comments by Benade 1970 *The Comparative and International Law Journal of Southern Africa* 297 and 298; Osode 1999 *African Journal of International and Comparative Law* 693.

913 See Van Wyk de Vries Report paragraphs 44.49; 44.50; see related comments by Benade 1970 *The Comparative and International Law Journal of Southern Africa* 297 and 298; Osode 1999 *African Journal of International and Comparative Law* 693.

914 See Section 233 of the 1973 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 4; Kawadza 2015 *South African Mercantile Law Journal* 386.

knowledge of information that may affect the price of securities and deals directly or indirectly with such information in relevant securities for personal gain may be guilty of an offence.[915] However, the insider trading provision in the 1973 *Companies Act* had numerous flaws and shortcomings. For instance, only primary insiders such as director, past director and officer were prohibited by the 1973 *Companies Act*.[916] Thus, secondary insiders and juristic persons could still trade with non public price-sensitive information and evade liability because they were not prohibited. Furthermore, the 1973 *Companies Act* defined the term "officer" as any employee of the company who is in possession of the company's information as a result of his or her responsibilities in the company.[917] The researcher submits that the definition of an officer was applicable to employees that were privy to non public price-sensitive information. The term "past director" was defined to include "a person who has ceased to be a director for six months".[918] Furthermore, a "person" was defined to include "any person according to whose instructions directors would normally act".[919] The researcher submits that the above definitions were flawed because they were restricted to directors, past directors, employees or persons connected to the company. For instance, insider trading can be committed by journalists, family members or friends of insiders. Furthermore, the term "interest" included "any right to subscribe for, or any right to any shares or debentures or any option in respect of shares or debentures, without derogating from the generality of the word".[920] The researcher submits that the fact that the legislature used the phrase "includes" meant that the definition of interest was not exhaustive.

---

915 Section 233 of the 1973 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 4; Kawadza 2015 *South African Mercantile Law Journal* 386; Chitimira 2014 PELJ 946-947; Osode 1999 *African Journal of International and Comparative Law* 963-965.

916 Section 233 of the 1973 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 4; Kawadza 2015 *South African Mercantile Law Journal* 386; Chitimira 2014 PELJ 946-947; Osode 1999 *African Journal of International and Comparative Law* 963-965; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 26-27.

917 Section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PELJ* 947; Botha 1991 *South African Mercantile Law Journal* 4; Osode 1999 *African Journal of International and Comparative Law* 963.

918 Section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PELJ* 947; Botha 1991 *South African Mercantile Law Journal* 4; Osode 1999 *African Journal of International and Comparative Law* 963.

919 Section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PELJ* 947; Botha 1991 *South African Mercantile Law Journal* 4; Osode 1999 *African Journal of International and Comparative Law* 963.

920 See section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PELJ* 937.

The 1973 *Companies Act* did not describe what constitutes non public price-sensitive information. It is submitted that this omission on the part of the legislature could have caused other insiders to trade with non public price-sensitive information ignorantly. In addition, the 1973 *Companies Act* did not provide any instances where inside information will be regarded as being public.[921]

The 1973 *Companies Act* also obliged directors to report to the company as soon as possible any changes in their material interest in their shareholding in the company.[922] This means that directors were required to report the names of any officers who were in possession of non public price sensitive information to the company.[923] The researcher submits that reporting the interest of director's shareholding was intended to create transparency and curb insider trading activities in the South African financial markets but did not assist in combating insider trading.

The 1973 *Companies Act* treated insider trading as a criminal offence.[924] For instance, any person who was found guilty of an insider trading offence could be liable for a maximum fine of R8 000 or two years imprisonment, or both such fine and imprisonment. The researcher submits that R8 000 or two years imprisonment was not enough to discourage people from committing insider trading because it was too low. Accordingly, there was no successful insider trading prosecutions in South Africa since the adoption of the 1973 *Companies Act*.[925] In light of this, the researcher submits that the 1973

921 Section 229 of the 1973 *Companies Act*; see related comments by Chitimira 2014 *PELJ* 947; Botha 1991 *South African Mercantile Law Journal* 4; Osode 1999 *African Journal of International and Comparative Law* 963.

922 Section 232 of the 1973 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *PELJ* 947; Kawadza 2015 *South African Mercantile Law Journal* 386.

923 Sections 232(1)(b) and (c) read with section 230(2) of the 1973 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *PELJ* 947; Kawadza 2015 *South African Mercantile Law Journal* 386.

924 Section 441 of the 1973 *Companies Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 387; Botha 1991 *South African Mercantile Law Journal* 4; Chitimira 2014 *PELJ* 948; Bhana N "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *SAJBM* 198, 201.

925 See related comments by Botha 1991 *South African Mercantile Law Journal* 5; Kawadza 2015 *South African Mercantile Law Journal* 387-388; Chitimira *The Regulation of Insider Trading in South Africa* 32; Bhana 1987 *SAJBM* 201.

Companies Act was not sufficient to deter people from committing insider trading in the South African financial markets. Consequently, the 1989 *Companies Amendment Act* was enacted to address the flaws in the 1973 *Companies Act*.

7.2.2.2 The Regulation of Insider Trading by the 1989 *Companies Amendment Act*

Due to the inadequacies of the insider trading provisions in the 1973 *Companies Act*, section 233 was repealed and replaced by section 440f of the 1989 *Companies Amendment Act*.[926] The 1989 *Companies Amendment Act* introduced a chapter that dealt with the regulation of securities in the South African financial markets.[927] However, the 1989 *Companies Amendment Act* repeated the same flaws in the 1973 *Companies Amendment Act*. For example, it did not describe what inside information is and restricted insider trading to natural persons and tippees were not prohibited. The analysis of the insider trading offence and definitions is in paragraph 7.2.2.1 of Chapter Seven of this thesis.

The 1989 *Companies Amendment Act* increased insider trading criminal penalties from a maximum fine of R8 000 to R50 000.[928] It appears that the legislature overlooked the fact that usally juristic persons gain more profit than natural persons. The researcher submits that the legislature should have provided separate criminal penalties for both juristic persons and natural persons for deterrence purposes. Moreover, the imprisonment sentence was also increased from two years to ten years.[929] In the 1960s and 1970s

926 Section 440F the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 7; Kawadza 2015 *South African Mercantile Law Journal* 388; Chitimira 2014 *PELJ* 949-950.

927 Chapter XVA of the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 6; Osode 1999 *African Journal of International and Comparative Law* 695; Chitimira 2014 *PELJ* 949-950; Chitimira *The Regulation of Insider Trading in South Africa* 32.

928 Section 441 of the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 7; Kawadza 2015 *South African Mercantile Law Journal* 388; Chitimira *The Regulation of Insider Trading in South Africa* 33; Osode 1999 *African Journal International and Company Law* 696.

929 Section 441 of the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 7; Kawadza 2015 *South African Mercantile Law Journal* 388; Chitimira *The Regulation of Insider Trading in South Africa* 33; Osode 1999 *African Journal International and Company Law* 696.

criminal penalties were preferred in the United States of America (USA) because they were regarded as more severe than other penalties. This could explain why the legislature did not include civil and administrative penalties for insider trading violations in the 1989 *Companies Amendment Act*. Although the legislature made commendable efforts, the insider trading provisions under the 1989 *Companies Amendment Act* never came into operation.[930]

The 1989 *Companies Amendment Act* also established the Securities Regulation Panel (SRP) which supervised the regulation of securities.[931] The 1989 *Companies Amendment Act* required directors to disclose certain information about their shareholding to the SRP.[932] The researcher submits that the establishment of the SRP showed great progress and commitment by the legislature to combat insider trading activities. In relation to insider trading, the SRP had the authority to monitor and investigate insider trading activities.[933] With regard to investigation, the SRP had authority to subpoena and interrogate witnesses to obtain evidence in relation to alleged insider trading cases.[934] However, despite the SRP's role and powers, no insider trading case was successfully prosecuted under the 1989 *Companies Amendment Act*.[935]

---

930 The insider trading provisions in the 1989 *Companies Amendment Act* were replaced by section 440F of the 1990 *Companies Amendment Act*. See related comments by Chitimira 2014 *PELJ* 951; Osode 1999 *African Journal of International Comparative Law* 696; Botha 1991 *South African Mercantile Law Journal* 9.

931 Section 440B of the 1989 *Companies Act Amendment*; see related comments by Botha 1991 *South African Mercantile Law Journal* 6; Osode 1999 *African Journal of International Comparative Law* 950-951; Chitimira 2014 *PELJ* 950-951.

932 Section 440G of the 1989 *Companies Act Amendment*; see related comments by Botha 1991 *South African Mercantile Law Journal* 7; Osode 1999 *African Journal of International Comparative Law* 950-951; Chitimira 2014 *PELJ* 950-951.

933 Section 440C(1)(b) of the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 6; Osode 1999 *African Journal of International Comparative Law* 696; Memorandum on the Objects of the Companies Second Amendment Bill of 1989 [B99-89] (GA); Chitimira *The Regulation of Insider Trading in South Africa* 37.

934 Section 440D of the 1989 *Companies Act*; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *PELJ* 950-951; Osode 1999 *African Journal of International Comparative Law* 696.

935 See related comments by Botha 1991 *South African Mercantile Law Journal* 7-11; Osode 1999 *African Journal of International Comparative Law* 696-697.

7.2.2.3 The Regulation of Insider Trading under the 1990 *Companies Amendment Act*

Although the 1989 *Companies Amendment Act* prohibited insider trading, insider trading activities were increasing in the South African financial markets because the prohibition of insider trading was not effectively enforced.[936] The legislature repealed the 1989 *Companies Amendment Act* and introduced the 1990 *Companies Amendment Act.*[937] The 1990 *Companies Amendment Act* provided that any person who knowingly deals with non public price-sensitive information relating to the affected securities will be guilty of insider trading if such inside information had been obtained:[938]

"(a) through a relationship of trust or any other contractual relationship irrespective of whether or not the person concerned is a party to that relationship; or
(b) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof".[939]

It is submitted that great progress was made in the 1990 *Companies Amendment Act* as tippees were prohibited from dealing with non public price-sensitive information in relevant securities or financial instruments.[940] For instance, the words "irrespective of whether or not the person concerned was a party to that relationship", suggested that tippees were also prohibited from trading with non public price-sensitive information pertaining to relevant securities.[941] This can be regarded as an improvement because the 1989 *Companies Amendment Act* did not prohibit tippees from trading with non public price-sensitive information.

---

936 See related comments by Kawadza 2015 *South African Mercantile Law Journal* 388-389; Chitimira 2014 *PELJ* 950; Chitimira *The Regulation of Insider Trading in South Africa* 38.

937 See related comments by Chitimira 2014 *PELJ* 951-952; Osode 1999 *African Journal of International and Comparative Law* 695-699; Botha 1991 *South African Mercantile Law Journal* 11-15.

938 Section 440F(1) of the 1990 *Companies Amendment Act;* see related comments by Osode 1999 *African Journal of International and Comparative Law* 698; Chitimira 2014 *PELJ* 952.

939 Section 440F(1) of the 1990 *Companies Amendment Act*; see related comments by Osode 1999 *African Journal of International and Comparative Law* 699; Chitimira 2014 *PELJ* 952.

940 Section 440F(1) of the 1990 *Companies Amendment Act*; see related comments by Osode 1999 *African Journal of International and Comparative Law* 699; Chitimira 2014 *PELJ* 952.

941 Section 440F(1) of the 1990 *Companies Amendment Act*; see related comments by Osode 1999 *African Journal of International and Comparative Law* 699; Chitimira 2014 *PELJ* 952.

The 1990 *Companies Amendment Act* extended the scope of the insider trading prohibition by adopting a wide definition of the term "security".[942] The term "security" included "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".[943]

The 1990 *Companies Amendment Act* defined inside information as:
"(a) information related to the internal affairs of a company, for instance its operations, assets and earnings;
(b) information that was not generally available to the reasonable investor; and
(c) information that would reasonably be expected to have a material effect on the price of such securities if it were generally available".[944]

It is submitted that the term 'generally available' meant that reasonable steps were taken to make such information available to investors.[945] The researcher contends that the description of inside information in the 1990 *Companies Amendment Act* was good because it included types of information that can affect the price or value of securities. However, the 1990 *Companies Amendment Act* did not provide examples or explain what "reasonable steps" mean.

The 1990 *Companies Amendment Act* introduced two rebuttable presumptions, to assist the prosecution to obtain more successful insider trading prosecutions.[946] Firstly, it was presumed that if the alleged offender was in possession of the price-sensitive information

---

942 See section 440A(1) of the 1990 *Companies Amendment Act* for the definition of the term "security"; see related comments by Osode 1999 *African Journal of International and Comparative Law* 699; Chitimira 2014 *PELJ* 951.

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

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

945 Section 440F(2)(b) of the 1990 *Companies Amendment Act*; See related comments by Chitimira 2014 *PELJ 953;* Chitimira *The Regulation of Insider Trading in South Africa* 35-36.

946 Section 440F(3) of the 1990 *Companies Amendment Act*; see related comments by Chitimira 2008 *The Regulation of Insider Trading in South Africa* 36; Botha 1991 *South African Mercantile Law Journal* 13-14.

during the affected transaction in question, it would be deemed, unless otherwise proven, that he or she knowingly committed insider trading in respect thereof.[947] Secondly, if the prosecution proved that the alleged offender received the information in question as contemplated above, then he or she was deemed to have known that he or she was in possession of non public inside information.[948] Be that as it may, it appears that these presumptions merely treated all forms of insider trading as illegal. The policy makers overlooked the circumstances involving ignorant and/or unintentional use of non public inside information by *bona fide* persons.[949] Accordingly, these presumptions were somewhat flawed and prejudicial to persons that ignorantly and/or inadvertently disclosed non public price-sensitive inside information to others in the course of their employment duties.

In terms of the 1990 *Companies Amendment Act* the maximum fine of R500 000 and imprisonment period of 10 years did not change.[950] Furthermore, any person found guilty of insider trading could be liable to pay any loss or damage suffered by the affected person.[951] It is submitted that the adoption of the civil penalty by the legislature was a great improvement in a bid to curb insider trading activities. Nonetheless, there was still no insider trading case that was prosecuted in the South African financial markets. This could suggest that the 1990 *Companies Amendment Act* was inadequate and/or ineffectively enforced to curb insider trading activities.

---

[947] Section 440F(3) of the 1990 *Companies Amendment Act*; see related comments by Chitimira 2008 *The Regulation of Insider Trading in South Africa* 36; Botha *1991 South African Mercantile Law Journal* 13-14.

[948] Section 440F(3) of the 1990 *Companies Amendment Act*; see related comments by Chitimira 2008 *The Regulation of Insider Trading in South Africa* 36; Botha 1991 *South African Mercantile Law Journal* 13-14.

[949] Section 440F(3) of the 1990 *Companies Amendment Act*; see related comments by Chitimira 2008 *The Regulation of Insider Trading in South Africa* 36.

[950] Section 441 of the 1990 *Companies Amendment Act*; Botha 1991 *South African Mercantile Law Journal* 14; Kawadza 2015 *South African Mercantile Law Journal* 388; Osode 1999 *African Journal of International and Comparative Law* 697-699.

[951] Section 440F(4)(a) of the 1990 *Companies Amendment Act*; Osode 1999 *African Journal of International and Comparative Law* 697-699.

7.2.2.4 The Regulation of Insider Trading under the *Insider Trading Act*

Owing to the ineffectiveness of the 1973 *Companies Act* and its amendments, the King Task Group committee[952] was appointed to conduct an investigation into insider trading activities in the South African financial markets.[953] The King Task Group committee recommended that the legislature should enact a specific legislation to regulate insider trading. [954] Furthermore, the regulation was not only to combat insider trading but to also adopt international best practices to create a conducive environment for foreign investment.[955] The *Insider Trading Act* repealed and replaced the insider trading provisions of the 1973 *Companies Act* and all its amendments to provide better regulation of insider trading.[956]

7.2.2.4.1 Definitions of Key Concepts

The *Insider Trading Act* did not expressly define "insider trading". However, practices that could amount to insider trading were included in the *Insider Trading Act*.[957] For instance, it would amount to insider trading if any individual who is in possession of non public price-sensitive information knowingly dealt with such information directly or indirectly in relevant securities for his or her personal benefit or for the benefit of another person.[958] The researcher submits that the insider trading prohibition in the *Insider Trading Act* was not sufficient because it was restricted to natural persons only. The South African legislature overlooked the possibility that natural persons could acquire non public price-sensitive

---

952 Final Report by the King Task Group into Insider Trading Legislation (21 October 1997).

953 See related comments by Osode 1999 *African Journal of International and Comparative Law* 700; Chitimira 2014 *PELJ* 939.

954 Section 2(1) and (2) of the *Insider Trading Act*; Luiz SM "Insider Trading Regulation- If at First You Don't Succeed" 1999 *South African Mercantile Law Journal* 136, 138; Jooste 2000 *South African Law Journal* 293-294; Osode 2000 *Journal of African Law* 241.

955 See related comments by Luiz 1999 *South African Mercantile Law Journal* 138; Jooste 2000 *South African Law Journal* 293-294; Osode 2000 *Journal of African Law* 241.

956 See related comments by Osode 2000 *Journal of African Law* 239; Luiz 1999 *South African Mercantile Law Journal* 136-138.

957 Section 1 of the *Insider Trading Act*; Kawadza 2015 *South African Mercantile Law Journal* 389; Jooste 2000 *South African Law Journal* 293-294.

958 Section 1 of the *Insider Trading Act*; Kawadza 2015 *South African Mercantile Law Journal* 389; Jooste 2000 *South African Law Journal* 293-294.

information during the course of their work and trade on such information on behalf of the company. Therefore, it would have been better if the policy makers had prohibited both natural and juristic persons from insider trading to curb illicit trading activities by every person who can trade with such information.

Although secondary insiders or tippees were prohibited from trading with non public price-sensitive information, the *Insider Trading Act* did not define the term "tippee".[959] The *Insider Trading Act* provided that any individual who had inside information and knew that the direct or indirect source of the inside information was a director, employee or shareholder and traded in the affected securities on the basis of such information shall be guilty of insider trading.[960] The researcher submits that this was great progress since tippees were now included in the definition of an insider under the *Insider Trading Act*.

The definition of the term "insider" included "a director, employee or shareholder of an issuer of securities or financial instruments or any person who has access to such information by virtue of their employment, office or profession".[961] The researcher submits that the definition of an insider was wider and specific than in the 1990 *Companies Amendment Act*.[962]

It should be noted that the *Insider Trading Act* defined inside information as specific or precise inside information obtained by an insider that would have a material effect on the price or value of any securities.[963] This definition was not sufficient as the *Insider Trading Act* did not provide when inside information would be regarded as being public.

959 Section 1 of the *Insider Trading Act*; see related comments by Jooste 2000 *South African Law Journal* 289-290; Osode 1999 *African Journal of International and Comparative Law* 700; Osode 2000 *Journal of African Law* 244-245.

960 Section 1 of the *Insider Trading Act*; see related comments by Jooste 2000 *South African Law Journal* 289-290; Osode 1999 *African Journal of International and Comparative Law* 700; Osode 2000 *Journal of African Law* 244-245.

961 Section 1 of the *Insider Trading Act*; see related comments by Jooste 2000 *South African Law Journal* 289-290; Osode 1999 *African Journal of International and Comparative Law* 700; Osode 2000 *Journal of African Law* 244-245.

962 See the discussion of the term insider in paragraph 7.2.2.3 above.

963 Section 1 of the *Insider Trading Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 139-140; Jooste 2000 *South African Law Journal* 290-293; Osode 2000 *Journal of African Law* 243.

Furthermore, the researcher submits that the absence of the definition of the term "specific or precise" could contribute to the increase of insider trading activities in the South African financial markets if such terms are not properly understood by offenders. Accordingly, the legislature should have defined those terms.

7.2.2.4.2 Insider Trading Offences

The *Insider Trading Act* broadened the scope of insider trading offences. The researcher discusses insider trading offences under the *Insider Trading Act* below.

Any person who deals directly or indirectly for his or her own account or another with non public price-sensitive information in relevant securities could be liable for insider trading.[964] In order for the insider to be held liable for this offence, the *Insider Trading Act* required that such person must be an "insider" as defined by the *Insider Trading Act.* The term insider has been discussed above. However, the term "insider" only extends to natural persons thus juristic persons were not prohibited from trading with non public price-sensitive information in listed securities.[965] The researcher submits that the fact that the legislature overlooked juristic persons as insiders could have led to the contravention of insider trading by juristic persons under the *Insider Trading Act*.

In addition, the insider must have been aware that he or she is trading with non public price-sensitive information in listed securities before he or she would be held liable for insider trading.[966] Thus an insider who was not aware that he or she was in possession of non public price-sensitive information could not be held liable for insider trading. The

---

964 Section 2(1)(a) of the *Insider Trading Act*; see related comments by Jooste 2000 *South African Law Journal* 293-294; Osode 2000 *Journal of African Law* 241-242; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

965 See section 2(1)(a) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

966 See related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294.

element of knowledge plays a significant role in proving that an insider is liable for insider trading.

Furthermore, the insider must have dealt with non public price-sensitive information in listed securities to make profit or avoid loss before he or she incurs insider trading liability.[967] However, the *Insider Trading Act* did not clearly define the term "dealing". The researcher submits that the absence of a definition of dealing could have caused any person to deal with non public price-sensitive information ignorantly or innocently. Moreover, dealing with non public price-sensitive information was prohibited only if such information had a material effect or is likely to have a material effect on the price or value of securities concerned.[968] However, the *Insider Trading Act* did not provide the degree of materiality, it was left for the courts to determine on a case by case basis. The researcher supports the view that the courts must determine the degree of materiality on case by case because each case is different.

Any person who knew that he or she had non public price-sensitive information and encouraged or discouraged another from dealing in relevant securities was liable for insider trading.[969] The purpose of this prohibition was to discourage people who were aware of non public price-sensitive information from provoking others to deal or refrain from dealing in relevant securities. Furthermore, a mere suggestion by the insider to buy or sell securities would suffice as a discouragement or encouragement to deal in securities under the *Insider Trading Act*. Moreover, the tippee could incur liability for this offence only if he or she, as a result of the tip knew that he or she had non public price-sensitive information and traded based on that information. Knowledge of non public price-sensitive information is important in proving insider trading liability.

---

967 See related comments by Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294.

968 Section 1 of the *Insider Trading Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32; Osode 2000 *Journal of African Law* 241; Chitimira *The Regulation of Insider Trading in South Africa* 54; Jooste 2000 *South African Law Journal* 293-294.

969 Section 2(1)(b) of the *Insider Trading Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 34-36; Osode 2000 *Journal of African Law* 242; Chitimira 2014 *PELJ* 955-958.

Any person who knew that he or she had non public price-sensitive information and disclosed such information to another person was liable for insider trading.[970] Although the *Insider Trading Act* prohibited improper disclosure of non public price-sensitive information, it is submitted that juristic persons were excluded from this offence.[971] Furthermore, in order for an insider trading offender to incur liability he or she should have been aware or in possession of non public price-sensitive information at the time of the disclosure.[972]

7.2.2.4.3 Insider Trading Criminal Penalties

Any person who was found guilty of insider trading was liable to pay a maximum fine of R2 million or imprisonment for a period not exceeding 10 years or both.[973] However, the criminal penalty was not adequate because the *Insider Trading Act* did not distinguish criminal penalties for natural and juristic persons.[974] The distinction of criminal penalties for natural and juristic persons is important because companies can gain more profit than natural persons. Although, the criminal penalty was increased, one would have thought that the penalty would discourage people from committing insider trading activities. However, there was no insider trading case that was successfully prosecuted under the *Insider Trading Act* and insider trading activities continued.[975] The burden of proof in

---

970 Section 2(2) of the *Insider Trading Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 33-34.

971 Section 2(2) of the *Insider Trading Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 33-34; Osode 2000 *Journal of African Law* 295-296; Jooste 2000 *South African Law Journal* 294-295.

972 Section 2(2) of the *Insider Trading Act*; see related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 33-34; Osode 2000 *Journal of African Law* 295-296; Jooste 2000 South African Law Journal 294-295.

973 Section 5 of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 245-246; Kawadza 2015 *South African Mercantile Law Journal* 291; Chitimira 2014 *PELJ* 960-961.

974 Section 5 of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 245-246; Kawadza 2015 *South African Mercantile Law Journal* 291; Chitimira 2014 *PELJ* 960-961.

975 See related comments by Osode 2000 *Journal of African Law* 245-246; Kawadza 2015 *South African Mercantile Law Journal* 291; Chitimira 2014 *PELJ* 960-961.

respect of criminal penalties is higher than for civil penalties and may have contributed to the ineffectiveness of the insider trading prohibition in South Africa.[976]

7.2.2.4.4 Insider Trading Civil Penalties

The *Insider Trading Act* provided civil penalties that could be imposed on insider trading offenders. The researcher discusses civil penalties for different insider trading offences below:

(a) Civil liability for violation of the prohibition of insider trading

Any person affected by insider trading activity could claim the amount gained or the loss avoided by the offender, a penalty for compensatory or punitive damages, interest and costs of the FSB from the offenders.[977] However, such civil compensatory amount could not exceed three times the amount of the profit gained or loss avoided as a result of the insider trading.[978] The researcher submits that the penalty was not stringent enough for purposes of discouraging insider trading activities. Furthermore, the legislature should have included a specific civil penalty amount in addition to the penalty provided above to make it more stringent. In addition the court had discretion to determine the precise amount to which the abolished FSB would be entitled.[979] It is submitted that this provision applied to both insiders and tippees.

---

976 See discussion about the burden of prove in criminal cases in paragraph 7.2.2.2 of Chapter Seven of this thesis.

977 Section 6(1)(a)-(c) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247.

978 Section 6(1)(a)-(c) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247.

979 Section 6(4)(a)(iv) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247.

(b) Civil liability for improperly disclosing inside information, encouraging insider trading and engaging in insider trading for the account of another

The *Insider Trading Act* provided multiple civil penalties for any insider found guilty of improperly disclosing inside information,[980] encouraged another[981] or has engaged in insider trading for the account of another.[982] Although the *Insider Trading Act* made an improvement with regard to civil penalties, there was no civil penalty for insiders who discourage another from dealing in securities.[983] Any person who unlawfully disclosed inside information, encouraged or discouraged another could be jointly and severally liable for insider trading for the profit gained or loss avoided, interest and cost.[984] In addition to that, the insider trading offender was also liable to pay the FSB an amount not exceeding three times the amount of the profit gained or loss avoided.[985] The researcher submits that the civil penalty did not provide a specific amount for insider trading. This civil penalty was not sufficient to discourage people from committing insider trading. The researcher submits that the *Insider Trading Act* broadened civil penalties than the position under the 1990 *Companies Amendment Act*. Furthermore, the researcher submits that under the *Insider Trading Act* about 153 insider trading cases were settled by the Insider Trading Directorate which was an improvement from the 1973 *Companies Act* and its amendments.

---

980 Section 6(2)(a) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 299; Chitimira *The Regulation of Insider Trading in South Africa* 60-61.

981 Section 6(2)(b) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 299; Chitimira 2008 *The Regulation of Insider Trading in South Africa* 60-61.

982 Section 6(2)(c) of the *Insider Trading Act;* see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247-248.

983 Section 6(2) of the of the *Insider Trading Act;* see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247-248.

984 Section 6(2)(c) of the *Insider Trading Act;* see related comments by Jooste 2000 *The South African Law Journal* 299-300; Osode 2000 *Journal of African Law* 247-248.

985 Section 6(3) of the *Insider Trading Act;* see related comments by Osode 2000 *Journal of African Law* 247-248; Jooste 2000 *South African Law Journal* 299.

7.2.2.4.5 Insider Trading Defences

The *Insider Trading Act* provided a number of defences to those who allegedly contravened the insider trading provision.[986] Any person who knew that he or she had non pubic price-sensitive information and deals directly or indirectly for his or her personal account or another could not incur insider trading liability[987] if he or she proved on balance of probabilities that:

(a) he or she was "acting on specific instructions from a client".[988] It is submitted that the insider would be liable if he or she knew or was aware of the non public price-sensitive information in the course of taking the instructions. The defendant was expected to decline the client's instructions if he or she was aware of inside information to evade liability.[989] The researcher submits that this defence protected insiders who were not aware of non public price-sensitive information.

(b) he or she would have "acted in the same manner without non public price-sensitive inside information".[990] It is submitted that this defence protected the accused who could show that the non public price-sensitive information did not influence him or her to deal in the affected securities. Put differently, the accused had to prove that he or she would have traded even in the absence of the inside information.[991] This allowed insiders to avoid a conflict of interest and breach of their fiduciary duties through the abuse of non public price-sensitive information in their possession.

---

986 See section 4 of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 251.

987 Section 2(1)(a) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

988 See section 4(1)(a) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 251; Jooste 2000 *The South African Law Journal* 296; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

989 See section 4(1)(a) of the *Insider Trading Act*; see related comments by Jooste 2000 *The South African Law Journal* 296; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

990 See section 4(1)(b) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

991 See section 4(1)(b) of the Insider Trading Act; see related comments by Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

(c) he or she was "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".[992] The researcher submits that this defence was justifiable if dealing with non public price-sensitive information would not offend the investors. Furthermore, the alleged offender can argue that he or she was acting in pursuit of the completion or implementation of an affected transaction.[993]

Moreover, any insider who knew that he or she has non public price-sensitive information and discloses it could not incur liability if he or she proved on a balance of probabilities that:[994]

(a) he or she "believed on reasonable grounds, that no person would deal in the securities or financial instruments as a result of such disclosure".[995] As a result, insiders that disclosed non public price-sensitive information innocently or unintentionally could not be liable for insider trading.

(b) he or she "disclosed the inside information in the proper performance of the function of his or her employment, office or profession and at the same time disclosed that the information was inside information".[996] This defence protected insiders who disclosed non public price-sensitive information in good faith. The disclosure should have been made while the insider was performing his or her employment duties for him or her to escape liability.

---

992 See section 4(1)(c) of the *Insider Trading Act*. See also Osode 2000 *Journal of African Law* 25; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

993 Section 4(1)(d) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 251; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32.

994 Section 4(2) of the *Insider Trading Act*; see related comments by Jooste 2000 *Journal of African Law* 296; Osode 2000 *Journal of African Law* 250-252.

995 Section 4(2)(a) of the *Insider Trading Act*; see related comments by Jooste 2000 *Journal of African Law* 296; Osode 2000 *Journal of African Law* 250-252.

996 Section 4(2)(b) of the *Insider Trading Act*; see related comments by Jooste 2000 *Journal of African Law* 296; Osode 2000 *Journal of African Law* 250-252.

The researcher commends the legislature for introducing insider trading defences in the *Insider Trading Act*. The insider trading defences reflected a move from harsh insider trading offences which did not afford offenders any defence for insider trading activities.

7.2.2.4.6 Enforcement of the Insider Trading Prohibition

The *Insider Trading Act* also designated the Financial Services Board (FSB) to supervise and enforce insider trading laws in the South African financial markets.[997] The FSB had the authority to investigate any violation of the *Insider Trading Act* including insider trading cases.[998] The researcher submits that the FSB's authority to investigate insider trading activities relieved the burden of the South African Police to investigate insider trading activities. The FSB was empowered to summon and interrogate any person who was believed to be able to furnish any information that could assist during the insider trading investigations.[999] In addition, the FSB had the authority to institute civil proceedings against the offenders.[1000] Furthermore, the FSB could administer the proof of claims and distribution of payments.[1001] The FSB could also make rules or guidelines dealing with the manner in which inside information could be disclosed and the conduct expected of persons with regard to such information.[1002]

The *Insider Trading Act* also established the Insider Trading Directorate as a committee of the FSB.[1003] The Insider Trading Directorate could institute civil proceedings on behalf

---

997 Section 11(1) of the *Insider Trading Act*; see related comments by Osode 1999 *African Journal of International and Comparative Law* 701.

998 Section 11(2)(a) of the *Insider Trading Act*; see related comments by Chitimira 2014 *PELJ* 963 and 965; Osode 2000 *Journal of African Law* 252-254.

999 Section 11(2)(d) and (e) of the *Insider Trading Act*; see related comments by Chitimira 2014 *PELJ* 963 and 965; Osode 2000 *Journal of African Law* 252-254.

1000 Section 11(2)(b) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 253; Chitimira 2014 *PELJ* 963 and 965.

1001 Section 11(2)(c) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 253; Jooste 2000 *The South African Law Journal* 301.

1002 Section 11(2)(h) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 253. See the analysis of the functions of the FSB in paragraph 7.2.3.2.5 of Chapter Seven.

1003 Section 12(1) of the *Insider Trading Act*; see related comments by Osode 2000 *Journal of African Law* 253.

of the FSB.[1004] In terms of the civil penalties, the Insider Trading Directorate had the authority to withdraw, abandon or compromise any civil proceedings.[1005] However, any agreement of compromise was required to be made an order of court and the amount of any payment made in terms of compromise was made public.[1006] Although, criminal penalties could still be enforced it seems that the civil proceedings were preferred and utilised than criminal proceedings. Furthermore, most insider trading civil cases were not litigated in courts but settled by the FSB. There is no civil court judgment for insider trading that was obtained between 1999 and 2004.

7.2.3 The Prohibition of Insider Trading Post 2004

7.2.3.1 The Regulation of Insider Trading under the *Securities Services Act*

The *Securities Services Act*[1007] repealed the *Insider Trading Act* with the intention to remedy the inadequacies in the *Insider Trading Act.* Furthermore, the provisions of the *Securities Services Act* like the *Insider Trading Act* broadened the scope of the insider trading offences which are discussed below.

The *Securities Services Act* repeated the same flaws that were in the *Insider Trading Act* of not defining the term 'insider trading'.[1008] It was important for legislation to prescribe what constitutes insider trading. Nonetheless, like the *Insider Trading Act*[1009] the *Securities Services Act* defines an insider as a person who trades with inside

1004 Section 12(13) of the *Insider Trading Act;* 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* 200, 207.

1005 Section 12(13) of the *Insider Trading Act;* Chitimira and Lawack 2013 *Obiter* 200, 207.

1006 Section 12(13) of the *Insider Trading Act;* Chitimira and Lawack 2013 *Obiter* 200, 207.

1007 Section 73 of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 446; Chitimira 2014 *PELJ* 955.

1008 Section 77 of the *Securities Services Act;* see related comments by Jooste 2006 *South African Law Journal* 438; Chitimira 2014 *PELJ* 958.

1009 Section 1 of the *Insider Trading Act*; Luiz SM "Insider Trading Regulation - If at First You Don't Succeed" 1999 *South African Mercantile Law Journal* 136, 143; Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437, 438.

information.[1010] The definition of inside information by the *Securities Services Act* was the same as in the *Insider Trading Act* which was adequate.[1011] Moreover, the *Securities Services Act* defined a person to include a partnership and a trust.[1012] The researcher submits that this definition included juristic persons as insiders which is an improvement from the *Insider Trading Act.*

7.2.3.1.1 Insider Trading Offences and Defences

An insider who knew that he or she had non public price-sensitive information and who deal directly or indirectly, for his or her benefit in any relevant listed securities was liable for insider trading.[1013] The researcher submits that both natural and juristic persons were prohibited from trading with non public price sensitive information which is an important step in curbing illicit trading activities in the South African financial markets. However, an insider will not incur liability if:

(a) he or she proves on balance of probabilities that he or she only became an insider after he or she had given an authorised user the instruction to deal in relevant listed securities and the instruction was not changed when he or she became an insider.[1014] It appears this defense was not available to the defendant who was aware that a client disclosed to him or her non public price-sensitive information in the course of giving instructions. The researcher submits that the defendant has the choice of rejecting the

1010 Section 72 of the *Securities Services Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 143; Jooste 2006 *South African Law Journal* 438.

1011 See the discussion of what inside information is in paragraph 7.2.2.4.1 of Chapter Seven of this thesis.

1012 Section 72 of the *Securities Services Act*; see related comments by Luiz 1999 *South African Mercantile Law Journal* 143; Jooste 2006 *South African Law Journal* 438.

1013 Section 73(1)(a) of the *Securities Services Act;* see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92.

1014 Section 73(1)(b)(ii) of the *Securities Services Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 463; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32; Osode 2000 *Journal of African Law* 251.

client's instructions where the client discloses non public price-sensitive information in the course of giving instructions.[1015]

(b) he or she proved on balance of probability that he or she was "pursuing a transaction in which all the parties to the transaction had possession of the same non public price-sensitive information".[1016] The researcher submits that this defense was only applicable if the defendant proved that the transaction was not for personal benefit.

An insider who knew that he or she had non public price-sensitive information and who deal directly or indirectly or through an agent for another person in any relevant listed securities could incur insider trading liability.[1017] It is submitted that this provision prohibited actual dealing by an insider with non public price-sensitive information in relevant listed securities for another person. The researcher submits that this offence was not only restricted to dealing for personal gain but also dealing for another person. However, an insider could not incur liability if:

(a) he or she proved on balance of probabilities that he or she was an authorised user.[1018] This defense is similar to the defense for an insider who deals with non public price-sensitive information for his or her own account.[1019]

(b) he or she proved on 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".[1020] It is submitted

1015 Section 73(1)(b)(ii) of the *Securities Services Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 463; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 32; Osode 2000 *Journal of African Law* 251.

1016 Section 73(1)(b)(i) of the *Securities Services Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 463-464.

1017 Section 73(2)(a) of the *Securities Services Act;* see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 465-467.

1018 Section 73(2)(b)(i) of the *Securities Services Act*; see related comments by Chitimira *The Regulation of Insider Trading in South Africa* 92-93.

1019 See the discussion of this defense in the defenses of the first offence above.

1020 Section 73(2)(b)(iv) of the *Securities Services Act*; also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 465-467; Chitimira *The Regulation of Insider Trading in South Africa* 92-93.

that this defense applied where an insider was innocent or ignorant and when he or she became an insider after giving the instruction to an authorised user. However, the defendant or the accused was obliged to prove that his or her instruction was not altered in any way after he or she became an insider.[1021]

(c) he or she proved on balance of probabilities that he or she was "pursuing a transaction in which all the parties to the transaction had possession of the same inside information".[1022] It appears that the intention of the transaction by the accused was required not to be for personal gain.[1023] However, the researcher submits that this defence can be manipulated by insiders.

Additionally, an insider who knew that he or she had inside information and disclosed it to another person could incur insider trading liability.[1024] However, the defendant could not incur liability if he or she proved on balance of probabilities that he or she disclosed the non public price- sensitive information in the proper performance of the functions of his or her employment, office or profession.[1025] The researcher submits that this defense was only applicable when the defendant was dealing with inside information in good faith and it was in the course of fulfilling his or her employment duties.

Any insider with non public price-sensitive information who encouraged or discouraged another from dealing in securities listed on a regulated market was liable for insider trading.[1026] However, the *Securities Services Act* did not provide defenses for insiders who encourage or discourage others from dealing with non public price-sensitive

1021 Section 73(2)(b)(iv) of the *Securities Services Act;* also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 465-467.

1022 Section 73(2)(b)(iii) of the *Securities Services Act;* also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 465-467.

1023 Section 73(2)(b)(iii) of the *Securities Services Act;* See related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 465-467.

1024 Section 73(3)(a) of the *Securities Services Act;* also see Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

1025 Section 73(3)(b) of the *Securities Services Act;* also see Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

1026 Section 73(4) of the *Securities Services Act;* see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470; Jooste 2000 *The South African Law Journal* 284, 294-295.

information.[1027] The researcher submits that the *Securities Services Act* is flawed since it does not provide defences for insiders who discourage or encourage dealing with inside information that they possess inadvertently.[1028]

7.2.3.1.2 Insider Trading Criminal Penalties

Any insider convicted of insider trading could be sentenced to a maximum fine of R50 million or imprisonment for a period not exceeding 10 years or both a fine and imprisonment.[1029] The *Securities Services Act* increased the fine from R2 million in the *Insider Trading Act*[1030] to R50 million. The researcher submits that even though the *Securities Services Act* increased criminal penalties there was no insider trading case that was successfully prosecuted before the courts.[1031]

7.2.3.1.3 Insider Trading Civil Penalties

Apart from criminal penalties, the *Securities Services Act* provided civil penalties.[1032] Any person who deal directly or indirectly for his or her own account with inside information in relevant securities was liable to pay the FSB any profit or loss incurred by the affected person.[1033] In addition, the insider trading offender was liable to pay any compensatory and punitive damages as determined by the court not exceeding three times the amount of profit gained or loss avoided by offenders. Furthermore, the court could make an order

---

[1027] Section 73(4) of the *Securities Services Act;* see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470; Jooste 2000 *The South African Law Journal* 284, 294-295.

[1028] Section 73(4) of the *Securities Services Act;* see related comments by Jooste 2006 *The South African Law Journal* 450.

[1029] Section 115(a) of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 453; Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68.

[1030] Section 5 of the *Insider Trading Act*; see related comments by Jooste 2006 *South African Law Journal* 453; Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68.

[1031] See related comments by Chitimira *The Regulation of Insider Trading in South Africa* 87; Cassim 2007 *South African Mercantile Law Journal* 68-69; Jooste 2006 *South African Law Journal* 453.

[1032] See section 77 of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 456; Chitimira *The Regulation of Insider Trading in South Africa* 88-89.

[1033] Section 77(1)(c)(i) of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 456; Chitimira *The Regulation of Insider Trading in South Africa* 88-89.

obliging the insider trading offender to pay any interest and cost of suit as determined by the court.[1034]

Furthermore, the insider could be liable to an equivalent of the profit made or loss avoided.[1035] The insider was also liable to pay a penalty for compensatory and punitive damages not exceeding three times the profit made or loss avoided.[1036] The researcher submits that the punitive penalty and the damages not exceeding three times is sufficient enough. Although, the *Securities Services Act* provided that the civil penalty could not exceed three times the profit made or loss avoided there was no threshold or a specific amount that the insider trading offender was liable for. Instead of providing a specific amount the *Securities Services Act* stated that the courts could use their discretion to determine the civil penalty amount.[1037] Furthermore, the insider could be ordered to pay interest,[1038] costs of suit as determined by the court,[1039] commission or consideration received for such encouragement.[1040] The insider was jointly and severally liable together with that other person to pay the civil penalty.[1041]

7.2.3.2 Regulation of Insider Trading Under the *Financial Markets Act*

7.2.3.2.1 Definitions and Key Concepts

Notwithstanding the fact that the term "insider trading" is not expressly defined in the *Financial Markets Act*, a number of practices that could amount to insider trading in South

---

1034 Section 77(1) of the *Securities Services Act*; see related comments by Jooste 2006 *South African Law Journal* 456; Chitimira *The Regulation of Insider Trading in South Africa* 88-89.

1035 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

1036 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

Section 77(1)(c)(ii) of the *Securities Services Act*.

1038 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

1039 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

1040 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

1041 Section 77(2) of the *Securities Services Act*; see related comments by Osode 2000 *Journal of African Law* 247-248; Chitimira *The Regulation of Insider Trading in South Africa* 89.

Africa are enumerated in this Act.[1042] For instance, the *Financial Markets Act* prohibits any person who deals with non public price-sensitive information directly or indirectly; any unlawful disclosure of non public price-sensitive information; any person who encourages or discourages another to deal with non public price-sensitive inside information in relevant listed securities for his or her own benefit. This implies that for a person to commit insider trading he or she must be an insider in terms of the *Financial Markets Act*. The Act defines an "insider" as a person who has non public price- sensitive information through being a director, employee or shareholder of an issuer of listed securities on a regulated market or who has inside information by virtue of employment, office or profession.[1043] It is submitted that the description of an insider is sufficient because both natural and juristic persons are prohibited from trading with non public price-sensitive information.

The insider must deal with non public price-sensitive inside information in listed securities.[1044] The description of inside information in the *Financial Markets Act* is the same as in the *Insider Trading Act* and the *Securities Services Act*.[1045] Therefore the researcher will not discuss the term inside information under the *Financial Markets Act*.

Although the *Financial Markets Act* does not expressly define the term "tipping", the tippee is prohibited from dealing with non public price-sensitive inside information in relevant securities.[1046] For instance, the *Financial Markets Act* provides that an insider who knows that he or she has non public price-sensitive inside information and continues to disclose it to another person, commits insider trading.[1047] The researcher submits that tipping must be defined and the circumstances under which a tippee will be held liable for insider trading should be outlined.

1042 Sections 77 and 78 of the *Financial Markets Act*; see related comments by Chitimira 2014 *PELJ* 966.

1043 Section 77 of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 459-460.

1044 The term "inside information" is discussed in paragraph 7.2.2.4.1 of Chapter Seven of the thesis.

1045 The term "inside information" is discussed in paragraph 7.2.2.4.1 of Chapter Seven of the thesis.

1046 Sections 77 and 78(1) and (2) of the *Financial Markets Act*; Osode 2000 *Journal of African Law* 245; Jooste 2006 *South African Law Journal* 459.

1047 Section 78(4) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 242; Chitimira *The Regulation of Insider Trading in South Africa* 83.

The term "publication" is not defined in the *Financial Markets Act.* However, the *Financial Markets Act* provides circumstances in which non public price-sensitive information will be regarded as being published.[1048] For instance, inside information will be regarded as being made public when the information is published according to the FSB and JSE rules.[1049] In addition, inside information will be regarded as being made public when the information is contained in records that can be accessed by the public.[1050] The researcher submits that inside information should be published in journals or newspapers that are accredited because some newspapers may publish rumors or lies.

7.2.3.2.2 Insider Trading Offences and Defenses

The *Financial Markets Act* preserved the insider trading offences and defenses which had existed in the *Securities Services Act.* Therefore the researcher does not discuss them.[1051] See the discussion in paragraph 7.2.3.1.2 above.

7.2.3.2.3 Insider Trading Criminal Penalties

Any person found guilty of insider trading will be liable to pay a fine not exceeding R50 million or imprisonment for a period not exceeding 10 years or both.[1052] The researcher submits that the criminal penalty is not sufficient because it does not distinguish the fine that the juristic person and natural persons will be liable to pay. It is submitted that juristic persons can trade with non public price-sensitive inside information in relevant securities through natural persons and escape insider trading liability.[1053] Therefore, the policy

---

1048 Section 79 of the *Financial Markets Act*; see related comments by Chitimira 2014 *PELJ* 955-956; Luiz 1999 *South African Mercantile Law Journal* 140-141.

1049 Section 79(a) of the *Financial Markets Act.*

1050 Section 79(b) of the *Financial Markets Act.*

1051 See section 78 of the *Financial Markets Act* read with section 73 of the *Securities Services Act.*

1052 Section 109(a) read with 84(10) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68; Chitimira 2015 *Speculum Juris* 97-101.

1053 See related comments by Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32; Jooste 2006 *South African Law Journal* 438-439; Jooste 2000 *South African Law Journal* 287-289.

makers should have distinguished the fine for juristic persons and natural persons because many at times juristic persons earn more profit than natural persons. Furthermore, the researcher submits that the imprisonment sentence is not stringent enough to discourage people from trading with inside information in relevant listed securities. For instance, the offender may without fear still commit insider trading even after serving 10 years in prison. The researcher submits that the *Financial Markets Act* should be amended to specify stringent criminal penalties to combat insider trading activities in South African financial markets.

7.2.3.2.4 Insider Trading Administrative Penalties

In the case where the EC is satisfied that the offender has committed insider trading, the EC will order him or her to pay an amount not exceeding R1 million plus three times of the profit that the insider trading offender made or loss avoided.[1054] Furthermore, any person affected by insider trading activities could claim part of the proceeds in respect of any interests, investigation costs and commission as determined by the EC from the former FSB.[1055] It should be noted that any person affected by insider trading activities could only receive his or her damages after the FSB has recouped its expenses.[1056] This implies that in some cases the person affected by the insider trading could not receive the full amount that he or she claimed since the FSB was empowered to recover its expenses.[1057]

The researcher submits that although the administrative penalty may increase deterrence due to the higher compensatory damages that could be imposed on the insider trading offenders, the *Financial Markets Act* does not provide a separate administrative penalty

---

1054 See section *Financial Institutions (Protection of Funds) Act* 28 of 2001 (*Protection of Funds Act*); Section 82(1)(b) of the *Financial Markets Act*; Chew 1998 *Singapore Journal of Legal Studies* 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1055 Section 82(1)(c) and (d) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 247, 248 and 249; Chitimira 2014 *PELJ* 961.

1056 Section 82(4)(a) and (b) of the *Financial Markets Act;* see related comments by Osode 2000 *Journal of African Law* 249.

1057 See related comments by Osode 2000 *Journal of African Law* 249.

for natural persons and juristic persons. It is unfair for the juristic person to receive the same penalty as natural persons. Furthermore, the researcher submits that other remedies such as private rights of action, specific civil pecuniary penalties, punitive damages and class actions should be provided in the *Financial Markets Act*. Private right of action allows insider trading victims the opportunity to claim civil penalties directly from the insider trading offender.

7.2.3.2.5 The Role of the Former FSB under the *Financial Markets Act*

The FSB was a board established to monitor and enforce the insider trading prohibition under the *Financial Markets Act*.[1058] The FSB had the power to supervise and ensure the enforcement of the prohibition of insider trading under the *Financial Markets Act*.[1059]

The FSB could investigate any suspected insider trading practices through the abolished DMA.[1060] For instance, the FSB may summon and interrogate any person whom was considered to be in a position to give relevant information on the alleged insider trading violation.[1061] The researcher submits that summoning any person to give relevant information about the insider trading case assisted the FSB in the investigations. This strengthened the evidence of the FSB in relation to the insider trading cases and investigations. Furthermore, the FSB may also search and seize any premises which are believed to assist in its investigations.[1062] However, the search and seizure of any premises was required not to infringe on the constitutional rights of the owner of the premises. For instance, the right to privacy,[1063] the right to property and the right to dignity

---

1058 Section 84(1) of the *Financial Markets Act;* 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* 200, 206.

1059 Section 84(1)and (2) of the *Financial Markets Act*. This section resembles section 11 of the *Insider Trading Act* read with section 82 of the *Securities Services Act* which dealt with same functions of the FSB.

1060 Section 85(1)(c) of the *Financial Markets Act*; see related comments by Chitimira and Lawack 2013 *Obiter* 206; also see Luiz and Van Der Linde 2013 *South Africa Mercantile Law Journal* 472.

1061 Section 84(3)(a) of the *Financial Markets Act;* see related comments by Chitimira and Lawack 2013 *Obiter* 201; Osode 1999 *African Journal of International and Comparative Law* 700-701.

1062 Section 84(3)(c)(i) to (vi) of the *Financial Markets Act;* see related comments by Chitimira and Lawack 2013 *Obiter* 202.

1063 Section 14, 25 and 10 of the 1996 Constitution of South Africa (Constitution of South Africa).

under the South African Constitution. The search and seizure of any premises by the FSB investigators could only be done in premises where it was believed that there was evidence that would assist in the investigations.

The FSB could institute criminal, civil and administrative proceedings for insider trading against the offender.[1064] The FSB could administer proof of claims and distribution of payments to insider trading victims.[1065] This implies that the insider trading damages awarded to the FSB by the court will then be deposited by the FSB into a trust account.[1066] Before the victims of insider trading could be awarded their damages, the FSB will first recoup all the expenses it incurred in respect of the insider trading proceedings.[1067] The FSB will then distribute the balance left to the claims officer to allocate to the victims of insider trading.[1068] Although, this process ensured that the FSB was financially independent, any person affected by the insider trading activity could only recover their losses after the FSB had collected its own expenses. This implies that some of the victims could only receive less the amount that they lost as a result of insider trading.

The FSB could publish by notice on the official website to inform the public about any market abuse case that it was investigating and the details of the investigation when it was in the interest of the public.[1069] The researcher submits that when details of an insider trading case are published this may affect the reputation of the insider thus making

---

1064 Section 84(2)(c) read with 85(1)(c)(i) of the *Financial Markets Act;* Chitimira and Lawack 2013 *Obiter* 202.

1065 Section 84(2)(d) of the *Financial Markets Act;* Osode 2000 *Journal of African Law* 249-250.

1066 See related comments by Osode 2000 *Journal of African Law* 249-250; Chitimira H *Principles of Market Abuse Regulation: A Comparative South African Perspective* (Juta Publishers Cape Town 2018)36.

1067 Section 82(4) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Chitimira *Principles of Market Abuse Regulation: A Comparative South African Perspective* 36.

1068 Section 82(4) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Chitimira *Principles of Market Abuse Regulation: A Comparative South African Perspective* 36.

1069 Section 84(2)(e)(i) and (ii) of the *Financial Markets Act;* see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253; Chitimira and Lawack 2013 *Obiter* 203.

investors reluctant to invest in their company. Accordingly, the publication of the details of insider trading could deter people from committing insider trading activities.[1070]

The FSB could make market abuse rules after consultation with the DMA.[1071] The rules dealt with the procedures and market abuse regulatory guidelines for the DMA and other stakeholders. It is submitted that rules are important as they provide guidance where the *Financial Markets Act* is silent in relation to market abuse.

The FSB staff members are reportedly having the relevant expertise and forensic skills in financial markets.[1072] However, the FSB relied on the JSE electronic system to detect insider trading practices in the South African financial markets.[1073] It was submitted that electronic surveillance system is expensive and the FSB could not afford to have its own electronic surveillance system to detect market abuse offences.[1074] The researcher submits that the cooperation between the FSB and the JSE enabled the effective regulation of insider trading. Furthermore, Pascoe and Keetse stated that it is not the mandate of the FSB to detect market abuse practices but to investigate and refer the cases to the EC.[1075]

The FSB co-operated with other regional and international regulatory institutions such as the United States Securities and Exchange Commission (SEC), Securities and Exchange

---

1070 Section 84(2)(e) of the *Financial Markets Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253; Chitimira and Lawack 2013 *Obiter* 203.

1071 Section 84(2)(f) of the *Financial Markets Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253; Chitimira and Lawack 2013 *Obiter* 203.

1072 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investgator, DMA) and Keetse S (former HOD, DMA) on 06 October 2017; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 76.

1073 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investgator, DMA) and Keetse S (former HOD, DMA) on 06 October 2017.

1074 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (Investigation Team Leader of Directorate of Market Abuse) and Keetse S (HOD - Directorate of Market Abuse, FSB) on 06 October 2017.

1075 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (Investigation Team Leader of DMA) and Keetse S (HOD - Directorate of Market Abuse, FSB) on 06 October 2017.

Commission of Zimbabwe (SECZ) and Namibia Financial Institutions Supervisory Authority (NAMFISA) to combat insider trading activities.[1076] Furthermore, the FSB has signed a Memorandum of Understanding (MOU) with the regulatory institutions to cooperate together in combating illicit trading activities. For instance, before the abolishment of the DMA, it assisted foreign regulators in 12 market abuse cases between 1999 and 2018.[1077] This suggests that the cooperation between the regulatory institutions was effective.

Currently, the FSB no longer exists. The Financial Sector Conduct Authority (FSCA) is now responsible for supervising financial sector laws and the conduct of financial institutions.[1078] The *Financial Sector Regulation Act*[1079] has introduced these changes since South Africa has adopted the Twin Peaks model. The Twin Peaks model introduced two separate regulators namely, the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). The PA forms part of the South African Reserve Bank (SARB) and is responsible for promoting and enhancing the stability of regulated financial institutions.[1080] The FSCA is responsible for ensuring that financial institutions treat financial customers fairly. Moreover, the FSCA is required to enhance the efficiency and integrity of the financial markets and educate market participants about market abuse activities.[1081]

1076 See the definition of regulated market in section 77 of the *Financial Markets Act*. This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (Investigation Team Leader of DMA) and Keetse S (HOD - Directorate of Market Abuse, FSB) on 06 October 2017. See related comments by Osode 2000 *Journal of African Law* 259; Chitimira A *Comparative Analysis of the Enforcement of Market Abuse Provisions* 109-100.

1077 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher, with Pascoe A (former Chief Investigator, DMA) on 28 June 2018 and the statistics are correct as at 2018-06-20.

1078 Section 58(1)(a) of the *Financial Sector Regulation Act* 9 of 2017 *(Financial Sector Regulation Act);* Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 152.

1079 Section 58(1)(a) of the *Financial Sector Regulation Act;* see related comments by Godwin 2018 *Law and Financial Markets Review* 152; Millard D "The Impact of the Twin Peaks Model on the Insurance Industry" 2016 *PELJ* 1, 3-4.

1080 Section 32-34 of the *Financial Sector Regulation Act;* see related comments by Godwin 2018 *Law and Financial Markets Review* 152.

1081 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher, with Pascoe A (former Chief Investgator, DMA) on 28 June 2018. See related comments by Godwin 2018 *Law and Financial Markets Review* 152

It should be noted that the DMA no longer exists. However, the FSCA has not put in place a department that will be responsible for the investigation of market abuse cases.[1082] This shows that the FSCA was not prepared because it abolished the DMA and EC without putting proper measures in place. Although, the *Financial Sector Regulation Act* does not regulate insider trading, the *Financial Markets Act* still regulate insider trading since it is not yet repealed.[1083] This means that the *Financial Markets Act* need to be amended to provide the new enforcement measures that the FSCA will introduce in relation to enforcing market abuse rules.

7.2.3.2.6 The Role of the Former DMA

The DMA was a committee within the FSB which performed some of the functions of the FSB.[1084] The DMA had the power to: (a) institute insider trading civil proceedings against the offender,[1085] and (b) investigate any insider trading matter.[1086] The DMA also had the power to search and seize any documents in the possession of suspected persons, summon and interrogate any person who was believed to be in a position to give relevant information to the FSB.[1087] The DMA may refer a matter to the EC or to the Director of Public Prosecutions (DPP) for criminal prosecution if it believes that the insider trading offence has been committed.[1088] Consequently, the DMA could assist the DPP with necessary information during the prosecution.[1089] The mere fact that the DMA could assist the DPP with information during insider trading investigations suggests that there was

---

1082 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher, with Pascoe A (former Chief Investgator, DMA) on 28 June 2018. see related comments by Godwin 2018 *Law and Financial Markets Review* 152

1083 This information was obtained from an interview that was conducted at the FSCA by the researcher, with Pascoe on 28 June 2018.

1084 Section 85(1)(a) and (b) of the *Financial Markets Act*; Chitimira and Lawack 2013 *Obiter* 206.

1085 Section 85(1)(c)(i) of the *Financial Markets Act*; Chitimira and Lawack 2013 *Obiter* 206-207.

1086 Section 85(1)(c)(ii) of the *Financial Markets Act;* Chitimira and Lawack 2013 *Obiter* 207.

1087 Section 85(1) of the *Financial Markets Act;* see related comments by Chitimira and Lawack 2013 *Obiter* 207-208.

1088 Section 99 of the *Financial Markets Act*; Chitimira 2008 *The Regulation of Insider Trading in South Africa*.

1089 See related comments by Keetse S "Market Abuse Investigations Update" 2016 *Financial Services Board Newsletter* 1, 6; This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe and Keetse (Head of Department - Directorate of Market Abuse, FSB) on 06 October 2017.

some cooperation between the DPP and the DMA. Be that as it may, no criminal case of insider trading was heard by the courts.

The DMA employed nine forensic investigators including five lawyers, a chartered accountant, and an analyst.[1090] Furthermore, members of the DMA were appointed on the basis of their availability, expertise and knowledge of financial markets.[1091]

The co-operation between the DMA and the JSE made it possible to investigate many insider trading cases in the South African financial markets.[1092] From 1999 to 2018 the insider trading cases that were investigated and settled through the DMA were about 319.[1093] Table 7.1 sets out new market abuse cases registered and completed cases by the former DMA from 2005-2017. In addition Figure 7.1 shows insider trading (Blue), price manipulation (Green) and false statements (Grey) statistics between 2005 and 2017. Insider trading cases have high figures followed by price manipulation and false statement cases. Although, insider trading cases have been dominating, in 2017 they were at the lowest than any other year since 2005.

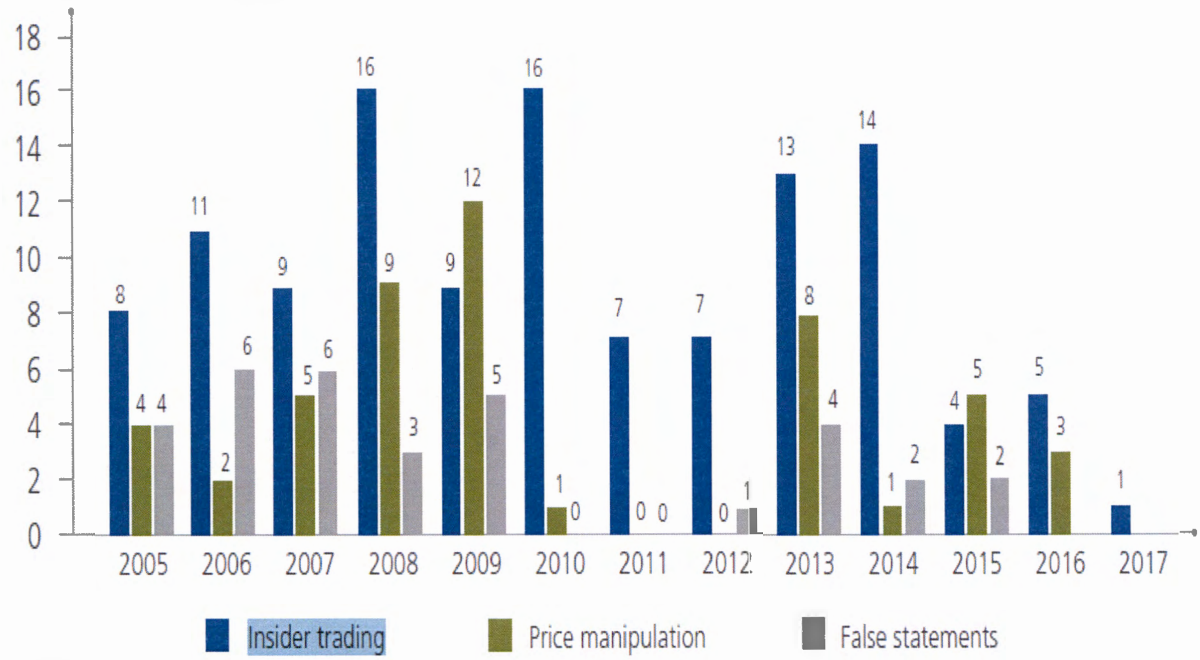
1090 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe and Keetse (Head of Department - Directorate of Market Abuse, FSB) on 06 October 2017.

1091 Section 83(4) of the *Financial Markets Act*; Chitimira and Lawack 2013 *Obiter* 204.

1092 Section 83(4) of the *Financial Markets Act*; Chitimira and Lawack 2013 *Obiter* 204.

1093 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher with Pascoe A (former Chief Investigator, DMA) on 28 June 2018. The statistics are correct as at 20 June 2018.

Table 7: 1 Market abuse incidents since 2005



Adapted from the Financial Services Board's 2017 Annual Report[1094]

[1094] See the Financial Services Board 2017 *Annual Report* HYPERLINK "https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf" https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 12 December 2018 60.

Table 7: 2 New market abuse cases registered per calendar year and investigations completed since the inception of the DMA in 2005 (excludes investigations completed by the Insider Trading Directorate)

	Opening balance	New cases	Completed cases	Closing balance
2005	12	11	(1)	22
2006	22	20	(28)	14
2007	14	16	(15)	15
2008	15	19	(21)	13
2009	13	21	(12)	22
2010	22	23	(20)	25
2011	25	16	(21)	20
2012	20	9	(15)	14
2013	14	25	(21)	18
2014	18	17	(18)	17
2015	17	11	(17)	11
2016	11	16	(17)	10
2017	10	3	(2)	11
Total		207	(208)	

Adapted from the Financial Services Board's 2017 Annual Report[1095]

7.2.3.2.7 The Role of the Former EC

The EC was another committee of the FSB that adjudicated on all alleged violations of market abuse practices, including insider trading.[1096] The *Financial Markets Act* does not expressly state the mandate of the EC. However, the functions of the EC are expressly provided in the *Protection of Funds Act*.[1097] When the DMA was satisfied that an insider trading offence has been committed, it referred the case to the EC for adjudication.[1098] When the DMA referred the matter to the EC, the referral was accompanied by: (a) a

1095 See the Financial Services Board 2017 *Annual Report* HYPERLINK "https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf" https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 12 December 2018 61.

1096 Section 99 of the *Financial Markets Act* read with Section 6A(2) of the *Protection of Funds Act*; Chitimira and Lawack 2013 *Obiter* 208; Luiz 2011 *South African Mercantile Law Journal* 156-157.

1097 Section 6A to 6H of the *Financial Institutions Act*.

1098 Section 6A(2) of the *Financial Institutions Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 472; Luiz 2011 *South African Mercantile Law Journal* 156-157; Van Eeden EP *A Comparative Evaluation of the Financial Markets Act 19 of 2012 and Financial Sector Regulation Bill 2015 with Reference to the Regulation of Insider Trading* (LLM-Thesis University of Pretoria 2016) 23.

notice stating the facts and nature of the alleged insider trading;[1099] and (b) the applicant's affidavit setting out the facts of the alleged contravention and other relevant supporting documents.[1100] The respondent was obliged to submit an answering affidavit within 30 days of the delivery of the notice and affidavit to the applicant.[1101] The applicant was allowed to have legal representation during the hearing.[1102]

The EC was obliged to determine whether the respondent had committed an insider trading offence based on documentary evidence received from the DMA.[1103] After the hearing if the EC is satisfied on a balance of probabilities[1104] that the defendant has committed insider trading, an administrative sanction was then imposed on that offender.[1105] It is submitted that the burden of proof of balance of probabilities enhanced the enforcement of insider trading prohibitions by the EC.[1106] Furthermore, it is submitted that the EC was able to settle many insider trading cases in a short period of time than in criminal cases.

1099 Section 6B(1)(a) of the *Financial Institutions Act*; also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 472; Luiz 2011 *South African Mercantile Law Journal* 156-157; Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1100 Section 6B(1)(b) of the *Financial Institutions Act*; also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 472; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1101 Section 6B(2)(b) of the *Financial Institutions Act*; also see Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 472; Luiz 2011 *South African Mercantile Law Journal* 156-157.

1102 Section 6C(5)(e) of the *Financial Institutions Act*; Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 472; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1103 *Pather v FSB* (2014) 3 ALL SA 208 (GP) 239; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1104 The balance of probabilities standard of proof is applied when administrative proceedings are used; also see *Pather v Financial Service Board* and *Zietsman v Directorate of Market Abuse* (2015) JOL 34007 (GP) 1 18; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1105 Section 82 of the *Financial Markets Act*; also see discussion on administrative sanction on paragraph 7.4.3 of this chapter; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 23.

1106 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher with Pascoe A (former Chief Investgator, DMA) on 28 June 2018.

After the offender was ordered to pay an administrative sanction by the EC, the EC was obliged to send a copy of the judgement to the applicant and the respondent.[1107] However, the respondent could appeal against the decision of the EC to the board of appeal if he or she was not satisfied with the decision.[1108] This meant that the decision of the EC could also be challenged by the board of appeal.[1109] Furthermore, the board of appeal will then conduct a hearing within a reasonable time and make a binding decision.[1110]

It is submitted that between 2009 and 2010, the EC recovered R5, 5 million through administrative penalties as a result of market abuse activities.[1111] Part of this amount was claimed by persons who were prejudiced by market abuse activities.[1112] Furthermore, in 2016, the EC fined the appellants in the sum of R1 000 000 and ordered them to pay the costs, jointly and severally in the case of *Zietsman v The Financial Services Board*.[1113] This statistics shows that since the establishment of the EC, there has been some progress in enforcing the insider trading administrative penalties. Moreover, it is submitted that the EC often preferred to impose administrative penalties because they are imposed faster than criminal proceedings.[1114] The FSB prefers administrative penalties because they are resolved by administrators who have experience and skills in financial markets crimes and not magistrates or judges who may not be proficient in financial markets crimes. Since the EC is abolished it is yet to be seen how the FSCA will enforce the administrative penalties.

1107 Section 6E(1) of the *Financial Institutions Act*; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 25.

1108 Section 6F(1) and (2) of the *Financial Institutions Act*; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 25.

1109 Section 6F(1) and (2) of the *Financial Institutions Act*; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 25.

1110 Section 6F(1) and (2) of the *Financial Institutions Act*; Luiz 2011 *South African Mercantile Law Journal* 156-157; also see Van Eeden *A Comparative Evaluation of the Financial Markets Act 19 of 2012* 25.

1111 See statistics by Kawadza 2015 *South African Mercantile Law Journal* 397.

1112 See statistics by Kawadza 2015 *South African Mercantile Law Journal* 397.

1113 Zietsman and Another v Directorate of Market Abuse and Another para 3.

1114 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher, with Pascoe A (former Chief Investigator, DMA) on 28 June 2018.

7.2.3.2.8 The Role of the Johannesburg Stock Exchange Limited (JSE)

The JSE prevents and detects insider trading practices in South Africa.[1115] For instance, the JSE has technological surveillance systems in its surveillance department to detect illicit insider trading activities.[1116] The electronic surveillance system allows the JSE's Surveillance Division to detect unusual trading.[1117] Furthermore, after detecting any insider trading activity, the officials in the JSE's Surveillance Division may contact the directors of the affected listed company to determine whether they are aware of any price-sensitive information that is due to be made released.[1118] The concerned company will then be requested to make relevant announcement through Stock Exchange News Service (SENS).[1119] The JSE also reports unusual trading activities to the DMA for investigation.[1120] The researcher submits that the electronic surveillance system is a good model to use in detecting insider trading activities because it is difficult to detect insider trading activities in the financial markets without the surveillance system.

In relation to prevention, the JSE Listing rules also prohibit insider trading activities in the South African financial markets.[1121] Issuers are also requested to disclose to holders of

---

1115 Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 109; Chitimira H "Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market-Abuse Provisions in South Africa" 2013 *Obiter* 200,204; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89.

1116 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investigator, DMA) and Keetse S (former HOD, DMA) on 06 October 2017. See related comments by Chitimira 2014 *Speculum Juris* 112; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 91.

1117 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investgator, DMA) and Keetse S (former HOD, DMA) on 06 October 2017. See related comments by Chitimira 2014 *Speculum Juris* 112; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 91.

1118 See related comments by Chitimira 2014 Speculum Juris 122; Chitimira A Comparative Analysis of the Enforcement of Market Abuse Provisions 91.

1119 Section 3.5 read with 3.8 of the JSE Listing Requirements; see related comments by Chitimira 2014 *Speculum Juris* 122; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89

1120 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investgator, DMA) and Keetse S (former HOD, DMA) on 06 October 2017. See related comments by Botha 1991 *South African Mercantile Law Journal* 5.

1121 JSE Listing Requirements are internal rules of the JSE and not statutory principles. See section 3.6, 3.9, 3.11, 3.12, 3.22 of the JSE Listing Requirements; see related comments by Botha 1991 securities all necessary information to enable them to exercise their rights.[1122] Issuers are also requested to disclose all the details of their transactions relating to relevant securities.[1123] An issuer who fails to comply with these requirements may be suspended or face possible removal of their securities from the JSE.[1124] The researcher submits that the JSE Listing rules are intended to enhance the prohibition of insider trading as the JSE monitors the process of trading in securities to ensure transparency and fairness in the South African financial markets. Furthermore, it is submitted that the JSE Listing rules are sufficient and aligned with international best practices to curb insider trading activities.

With regard to equity securities, the JSE requires that brokerages and financial institutions must ensure that their members know the market abuse provisions provided in the *Financial Markets Act*.[1125] This implies that brokerages and financial institutions should conduct training programs for market participants on provisions of market abuse activities before they start trading.[1126] It is submitted that the JSE empowers brokerages and financial institutions to educate market participants about insider trading offences thereby assisting in curbing insider trading activities.[1127]

It seems that there is co-operation between the DMA and the JSE because the DMA investigators and the JSE surveillance staff meet every two weeks to assess the progress

---

South African Mercantile Law Journal 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1122 Section 3.44 of the JSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1123 Section 3.19 of the JSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1124 Section 3.23 of the JSE Listing Requirements; see related comments by Botha 1991 *South African Mercantile Law Journal* 5; Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1125 Section 7.10.2 of the JSE Listing Requirements; see related comments by Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1126 Section 7.10.2 of the JSE Listing Requirements; see related comments by Chitimira 2014 *Speculum Juris* 109-111; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-91.

1127 Section 7.10.2 of the JSE Listing Requirements.

of cases being investigated.[1128] The researcher submits that the support of the JSE to the FSB is really contributing to the enforcement of insider trading laws in South Africa.

7.2.3.2.9 The Role of the Courts

In South Africa, the high courts and regional courts have jurisdiction to hear insider trading cases referred to them by the DMA.[1129] Not many insider trading cases have been prosecuted by the courts and the lack of insider trading cases prosecuted by the courts is attributed to the burden of proof in criminal cases.[1130]

7.3 Conclusion

This chapter examined the regulation of insider trading in the South African financial markets. It is noted that insider trading was first regulated by the 1973 *Companies Act*. This Act and its amendments were flawed. For instance, the 1973 *Companies Act* and its amendments regarded insider trading as a criminal offence and there were very few insider trading cases prosecuted by the courts between 1973 and 1990.[1131] It is submitted that the *Companies Act* and its amendments preferred criminal penalties which required a higher burden of proof. The burden of proving the case beyond reasonable doubt was high and difficult. Furthermore, the 1973 *Companies Act* and its amendments omitted to define insider trading, did not prohibit juristic persons from committing insider trading and did not define inside information and when it will be regarded as having been made public.[1132] Due to these flaws, the legislature enacted the *Insider Trading Act*.

1128 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Investigations team leader, DMA) and Keetse S (former, Head of Department, DMA, FSB) on 06 October 2017; Chitimira 2014 *Speculum Juris* 109-121; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89.

1129 See section 109 of the *Financial Markets Act*; see related discussion on the matter by Chitimira 2014 *Speculum Juris* 119-121; Kawadza 2015 *South African Mercantile Law Journal* 394; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 93.

1130 See related comments by Kawadza 2015 *South African Mercantile Law Journal* 398-399; Chitimira 2014 *PELJ* 958.

1131 See related comments by Chitimira 2014 *PELJ* 945-954; Kawadza 2015 *South African Mercantile Law Journal* 390.

1132 See discussion in paragraphs 7.2.2.1-7.2.2.3 in Chapter Seven of this thesis.

The *Insider Trading Act* prohibited any person from dealing with non public price-sensitive inside information for his or her account or for another, from improperly disclosing non public price- sensitive inside information or encouraging or discouraging another person from dealing with such information in the relevant securities.[1133] This was an improvement as the *Insider Trading Act* broadened the scope of the insider trading offences. Furthermore, the *Insider Trading Act* introduced civil penalties for insider trading, the FSB and the Insider Trading Directorate as insider trading regulatory institutions. The Insider Trading Directorate was entitled to institute civil proceedings aimed at disgorging the amount of the profit gained or the loss avoided as a result of insider dealing by an insider. Despite these changes, there were very few insider trading civil cases that were heard by the courts between 1999 and 2005.[1134] It should be noted that although the criminal penalty was available there was no insider trading case that was successfully prosecuted under the *Insider Trading Act.*

Although significant progress was made under the *Insider Trading Act*, its provisions were also flawed to a large extent. For instance, juristic persons were excluded from the insider trading prohibition. Furthermore, the terms "insider trading" and "material effect" were not defined, which could be regarded as a failure of the legislature to provide sufficient definitions. This flaw could have contributed to the inconsistent enforcement of insider trading prohibitions in the South African financial markets.

This led to the enactment of the *Securities Services Act* to repeal the *Insider Trading Act*. The *Securities Services Act* broadened the scope of the insider trading prohibition in South Africa.[1135] However, the *Securities Services Act* repeated the same flaws that were in the *Insider Trading Act.*

[1133] See discussion in paragraph 7.2.2.4 in Chapter Seven of this thesis.

[1134] See related comments by Chitimira 2014 *PELJ* 945-954; Kawadza 2015 *South African Mercantile Law Journal* 390.

[1135] See discussion in paragraph 7.2.3.1 of this chapter; Jooste 2006 *South African Law Journal* 437.

In light of this, the *Financial Markets Act* was enacted in a bid to, *inter alia*, improve the regulation of insider trading in South Africa.[1136] However, most of the insider trading provisions contained in the *Securities Services Act* were replicated in the *Financial Markets Act*. All the insider trading offences contained in the *Securities Services Act* were contained in the *Financial Markets Act*.[1137] The *Financial Markets Act* broadened the ambit of the insider trading prohibition and its penalties. For instance, the *Financial Markets Act* increased criminal and civil penalties for both the primary and secondary insiders and/or offenders.[1138] Furthermore, the *Financial Markets Act* included administrative penalties.[1139] Administrative penalties were enforced by the former EC. Currently, the FSB, DMA and EC are now abolished by the *Financial Sector Regulation Act*. However, the FSCA has not yet put in place measures on how to deal with insider trading cases.

1136 Section 78 of the *Financial Markets Act*; also see the discussion in paragraph 7.2.3.2 of this Chapter.

1137 See section 73 of the *Securities Services Act* and section 82 of the *Financial Markets Act*.

1138 See sections 82 read with section 109 of the *Financial Markets Act*; Kawadza 2015 *South African Mercantile Law Journal* 393-399.

1139 Section 82 of the *Financial Markets Act*.

CHAPTER EIGHT

OVERALL COMPARATIVE ANALYSIS OF THE REGULATION OF INSIDER TRADING IN ZIMBABWE, SOUTH AFRICA AND THE UNITED STATES OF AMERICA

8.1 Introduction

In this chapter the researcher comparatively examines how insider trading is statutorily prohibited in Zimbabwe, South Africa and the United States of America (USA). The comparison is done to suggest the possible ways that could make the relevant insider trading laws more adequate and competitive in these jurisdictions. Furthermore, this chapter comparatively examines how the insider trading prohibition is enforced in Zimbabwe, South Africa and the USA. This is done to examine whether the prohibition of insider trading is effectively enforced and implemented in these respective jurisdictions.

8.2 Overall Analysis of the Key Definitions

The term "insider trading" is not expressly defined under the *Securities Act*[1140] in Zimbabwe. However, the *Securities Act* expressly provides practices that amount to insider trading. For instance, the *Securities Act* provides that any person who knowingly deals directly or indirectly with non public price-sensitive inside information in relevant securities will be liable for insider trading.[1141] Furthermore, any person who unlawfully

1140 Section 87 of the *Securities Act* 17 of 2004 [Chapter 24:25] as amended *(Securities Act)*; see related comments by Kawadza H "The Liability Regime For Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383, 389; Jooste R "The Regulation of Insider Trading in South Africa Another Attempt" 2000 *South African Law Journal* 284, 293-294; Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 26-27.

1141 Sections 88(1)(a) of the *Securities Act*; see related comments by Kawadza 2015 *South African Mercantile Law Journal* 389; Jooste 2000 *South African Law Journal* 293-294; Osode PC "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239, 241; Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *The South African Law Journal* 437, 450-451.

discloses non public price-sensitive inside information[1142] or encourages or discourages another person from dealing with such information could incur insider trading liability.[1143] The challenge with these provisions is that insider trading is only restricted to natural persons. In this regard, it is submitted that directors could deliberately commit insider trading offences through juristic persons or their companies and easily hide behind the corporate veil of such companies. Likewise, the *Financial Markets Act*[1144] and the *Securities and Exchange Act*[1145] or any other legislation in the USA do not define the term "insider trading". For instance, the *Securities and Exchange Act* provides that any person who deals in relevant securities with non public price-sensitive information will be liable for insider trading. Unlike in Zimbabwe, the *Securities and Exchange Act* prohibits both natural and juristic persons from trading with non public price-sensitive information. The same can be said about South Africa. In South Africa, the *Financial Markets Act* prohibits an insider who directly or indirectly deals for his own account or for another, any insider who unlawfully discloses non public price-sensitive information, any insider who encourages or discourages another person not to deal with non public price-sensitive information. Insider trading practices in Zimbabwe and South Africa are more similar than in the USA. For instance, in the USA it is not an offence to discourage or encourage any person not to deal in relevant listed securities.

The *Securities Act* does not define the term insider, but provides individuals who can be held liable for insider trading in Zimbabwe.[1146] For instance, directors, employees, advisers, consultants or shareholders or any person who obtains non public price-

1142 Sections 88(2) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 242; Jooste 2006 *The South African Law Journal* 452.

1143 Sections 88(1)(b) and (c) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 242; Jooste 2006 *The South African Law Journal* 451.

1144 Section 77 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*); 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* 458, 459; Dooley MP "Enforcement of Insider Trading Restrictions" 1980 *Virginia Law Review* 1, 5.

1145 Section 746 of the *Dodd-Frank Wall Street Reform And Consumer Protection Act* Public Law 111–203, 124 Stat 1376 (Dodd-Frank Act); section 10b read with 16(b) of the *Securities Exchange Act* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended (*Securities Exchange Act*); see related comments by Thel S "The Original Conception of Section 10(b) of the Securities Exchange Act" 1990 *Stanford law Review* 385, 386;

1146 Section 87 of the *Securities Act*.

sensitive inside information from an insider is regarded as an insider.[1147] Although, the description of the term "insiders" under the *Securities Act* covers both primary and secondary insiders, it does not include juristic persons. On the other hand, in South Africa, the *Financial Markets Act* defines an "insider" as a person who is in possession of non public price-sensitive information through being a director, employee, shareholder or any person who has non public price-sensitive inside information by virtue of employment, office or profession.[1148] The difference between South Africa and Zimbabwe is that the *Financial Markets Act* expressly defines an insider while the *Securities Act* merely states several people who can be held liable for insider trading. Furthermore, the term "insider" does not include juristic persons like in the *Financial Markets Act*. It is submitted that the legislature in Zimbabwe should consider broadening the scope of an insider to curb insider trading activities by different persons.

In the USA, the *Securities Exchange Act* defines an "insider" as any officer, director or persons holding more than 10% of the stock in a company.[1149] In addition, the *Dodd-Frank Act* prohibits government employees and agents of an agency or department of the federal government.[1150] It is submitted that in the USA, the *Securities Exchange Act* does not expressly prohibit secondary insiders but the courts have interpreted the term "insider" to include secondary insiders. Primary insiders are people who have direct access to non public price-sensitive information. Secondary insiders include a person who receives inside information through direct or indirect communication with a primary insider.[1151]

1147 Section 87 of the *Securities Act*; see related comments by Jooste 2006 *South African Law Journal* 438; Osode 2000 *Journal of African Law* 244; Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *South African Mercantile Law Journal* 44, 45.

1148 Section 77 of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *South African Mercantile Law Journal* 459-460; Osode 2000 *Journal of African Law* 244-245.

1149 Section 16(b) of the *Securities Exchange Act*; see related comments by Yourd KL "Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act" 1939 *Michigan Law Review* 133, 135.

1150 Section 746 of the *Dodd-Frank Act;* Choi SJ and Pritchardt AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 9; Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012) 215-216.

1151 See related comments by Chitimira *The Regulation of Insider Trading in South Africa* 83; also see Rider and Tajima *Commercial Law in a Global Context: Some Perspectives inAnglo-Japanese Law* 209.

The *Securities Act* defines "inside information" as "specific or precise information obtained or learned by an insider which has not been made public and which if it were made public would be likely to have a material effect on the price or value of a listed security".[1152] The definition of the term "inside information" is the same as the position in South Africa under the *Financial Markets Act*.[1153]

The description of inside information under the *Securities Act* is the same as the *Financial Markets Act*.[1154] However, in the USA neither the *Securities Exchange Act* nor any other legislation or the SEC has provided a clear definition of inside information.[1155] In most cases the USA courts find insider trades made immediately prior to the disclosure of corporate takeovers, earnings announcements or dividend announcements to be unlawful.[1156] In the USA, the courts have interpreted the term "immediately" as meaning within days or hours of an announcement by the firm. However, it is not clear if an insider who trades with non public price-sensitive information one month before an announcement will incur insider trading liability. Furthermore, it is not clear whether trading on other types of valuable information which can have an impact on stock prices such as corporate structuring or new security issues could give rise to insider trading. It is submitted that the ambiguity of the term "material non public information" enables insiders to deal with non public price-sensitive information in relevant securities without legal consequence. Accordingly, it is submitted that policy makers in the USA should provide a clearer definition or description of material, nonpublic information.

1152 Section 87 of the *Securities Act*; Schipani CA and Seyhun HN "Defining 'Material, Nonpublic:' What Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327, 341-345; Devenish GE "What Constitutes 'Inside Information' for Purposes of Insider Trading?" 2017 *THRHR* 506, 511-512.

1153 See section 77 of the *Financial Markets Act*.

1154 See paragraphs 2.3.1.1 and 7.2.3.2.1 in Chapter Two and Seven of this thesis respectively.

1155 Section 10b read with 16(b) of the *Securities Exchange Act*; see related comments by Thel 1990 *Stanford law Review* 386; see paragraph 6.6 in Chapter Six of this thesis.

1156 See related comments by Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law 329;* Devenish 2017 *THRHR* 511-512.

8.3 Overall Analysis of the Insider Trading Offences

The *Securities Act* prohibits any person who knows that he or she has non public price-sensitive inside information and deals directly or indirectly for his or her benefit or for another person in any relevant affected listed securities.[1157] This provision further indicates that any insider who knowingly deals indirectly with non public price-sensitive inside information through an agent for his or her personal benefit or for another person's benefit will incur insider trading liability. It is submitted that the term "individual" in this provision only includes natural persons. Therefore, the omission by the legislatures to exclude juristic persons could still lead to the increased contravention of the insider trading by individuals their companies and other juristic persons.

Furthermore, an individual who encourages or discourages another person from dealing in any relevant listed securities while in possession of non public price-sensitive inside information relating to securities will be liable for insider trading.[1158] In order for the individual to incur insider trading liability under this provision he or she must know that he or she was in possession of non public price-sensitive inside information at the time he traded or dealt with such information in the affected securities.

Moreover, an individual who knows or ought to know that he or she has non public price-sensitive inside information and discloses such information to other persons shall be liable for insider trading.[1159] However, the *Securities Act* does not expressly prohibit any unlawful disclosure of non public price-sensitive inside information relating to affected securities by juristic persons. It is submitted that the policy makers should prohibit insider

---

1157 Section 88(1)(a) of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92; Jooste 2006 *The South African Law Journal* 446.

1158 Section 88(1)(b) and (c) of the *Securities Act*; see related comments by Chitimira H "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310, 312 and 321; Jooste 2006 *The South African Law Journal* 451-452; Cox JD "Insider Trading and Contracting: A Critical Response to the Chicago School" 1986 *Duke Law Journal* 628, 629; Jooste 2000 *The South African Law Journal* 294-295.

1159 Section 88(2) of the *Securities Act*; Luiz 1999 *South African Mercantile Law Journal* 139-140; Chitimira 2014 *De Jure* 321.

trading committed by both natural and juristic persons in order to effectively combat the illicit trading activities in the Zimbabwean financial markets.

In South Africa, the *Financial Markets Act* prohibits any insider who knows that he or she has non public price-sensitive information and deals directly or indirectly or through an agent for his or her benefit or another in any relevant listed securities.[1160] This shows that the *Financial Markets Act* prohibits both natural and juristic persons from committing insider trading offences unlike the position under the *Securities Act*. However, it is not clear who exactly could be regarded as an agent for the purposes of this provision under the *Financial Markets Act*. The lack of a clear and precise definition of the term "through an agent" could still lead to the contravention of the insider trading prohibition because insiders may escape liability as the result of the wrong interpretation in South Africa. Furthermore, the *Financial Markets Act* prohibits any person who knows that he or she has non public price-sensitive inside information and encourages or discourages another from dealing in relevant securities.[1161] It is submitted that the insider will incur insider trading liability if he or she was aware of the non public price-sensitive information before dealing with it in relevant securities.[1162] The *Financial Markets Act* also prohibits any insider who knows that he or she has non public price-sensitive inside information and discloses it to another.[1163] This provision is the same as the position under the *Securities Act*.

Insider trading offences in the USA are phrased differently from the insider trading offences in South Africa and Zimbabwe. For instance, the *Securities Exchange Act* prohibits any insider from dealing with non public price-sensitive information in relevant

---

1160 Section 78(2)(a) of the *Financial Markets Act;* see related comments by Osode 2000 *Journal of African Law* 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92.

1161 Section 78(5) of the *Financial Markets Act*; see related comments by Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 34-36; Osode 2000 *Journal of African Law* 242; Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 937, 955-958.

1162 Section 78(5) of the *Financial Markets Act.*

1163 Section 78(4) of the *Financial Markets Act*; see related comments by Luiz and Van Der Linde 2013 *SA Merc LJ* 470.

securities in the financial markets.[1164] However, the insider will be liable for insider trading if he or she is an insider in terms of the *Securities Exchange Act.*[1165] The term "insider" in the USA has been discussed above.

Furthermore, the *Securities and Exchange Act* prohibits insider trading indirectly by prohibiting any person from employing manipulative or deceptive devices in connection with the purchase or sale of securities.[1166] This provision does not actually prohibit insider trading conduct on its own but it authorised the SEC to adopt rules that prohibits insider trading. Pursuant to that, the SEC adopted rule 10b-5 which prohibits any person from engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security".[1167] However, rule 10b-5 does not prohibit tippees nor describe insider trading thus this provision is not adequate to prohibit insider trading.

Unlike in South Africa and Zimbabwe, there is no provision that prohibits persons who encourage or discourage others to deal with non public price-sensitive information in the USA.

1164 Section 16(b) of the *Securities Exchange Act*; see related comments by; Deitz HJ "A Practical Look at Section 16(b) of the Securities Exchange Act" 1974 *Fordham Law Review* 1, 2.

1165 Section 16(b) of the *Securities Exchange Act*; see related comments by; Deitz 1974 *Fordham Law Review* 2.

1166 Section 10(b) of the *Securities and Exchange Act*; see related comments by Gold AS "Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors" 2004 *Catholic University Law Review* 667, 671-676; Thel 1990 *Stanford Law Review* 386-388.

1167 Rule 10b-5 of the SEC; see related comments by Solomon LD and Wilke D "Securities Professionals and Rule 10b-5: Legal Standards, Industry Practices, Preventative Guidelines and Proposals for Reform" 1975 *Fordham Law Review* 505, 509; Bergmann LE "Securities -- Standing Sue Under SEC Rule 10b-5 and the Purchaser-Seller Limitation – Manor Drug Stores v Blue Chip Stamps" 1974 *Boston College Industrial and Commercial Law Review* 978, 980-981.

8.4 *Overall Analysis of the Insider Trading Penalties*

8.4.1 *Criminal Penalties*

The *Securities Act* provides that any person found guilty of any insider trading offence may be liable to pay a fine not exceeding level ten (Zim $200 000) or imprisonment for a period not exceeding five years or both such a fine and imprisonment.[1168] It is submitted that the criminal penalties are not sufficient for deterrence purposes because some persons could still commit insider trading due to the potential huge profits they could gain in respect thereof. However, in South Africa the criminal penalty is to a certain extent more severe than the criminal penalty in Zimbabwe. For instance, the *Financial Markets Act* provides that any person found guilty of insider trading by the courts may be liable to pay a fine not exceeding R50 million or imprisonment for a period not exceeding 10 years or both.[1169] However, it should be noted that the enforcement authorities in South Africa are struggling to obtain criminal convictions on insider trading cases.[1170] In criminal cases the prosecution should prove that the offender committed the insider trading offence in question beyond reasonable doubt which is difficult to prove.[1171] Thus the burden of proof is an obstacle to the enforcement of the criminal penalty in Zimbabwe and South Africa.

Under the *Sarbanes-Oxley Act* individuals face up to 20 years in prison or a fine not exceeding USA $5 million for natural persons and up to USA $25 million for

---

1168 Section 90 of the *Securities Act*; see related comments by Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 62-64; Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1, 10-11 and 14; Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 154-155.

1169 Sections 109(a) read with 84(10) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68; Chitimira 2015 *Speculum Juris* 97-101.

1170 Sections 109(a) read with 84(10) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68; Chitimira 2015 *Speculum Juris* 97-101.

1171 This information was obtained from an interview that was conducted at the Financial ServicesBoard (FSB) by the researcher, with Pascoe A (former Chief Investigator of the DMA) and Keetse S (HD - Directorate of Market Abuse, FSB) on 06 October 2017. See related comments by Öberg, J "Is it 'Essential' to Imprison Insider Dealers to Enforce Insider Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1, 14.

corporations'.[1172] It is submitted that the separate penalties for natural and juristic persons provides a fair and justifiable criminal fine. Furthermore, although the *Sarbanes-Oxley Act* provides the highest criminal penalties among the three jurisdictions discussed above insider trading activities still continue to take place in the USA financial markets.

8.4.2 Civil Penalties

In Zimbabwe, insider trading is treated as a delict committed against the SECZ, any person who issued any affected security, every holder of an affected security, any person who traded in listed securities without knowledge of non public price-sensitive information under the *Securities Act*.[1173] This implies that any person listed above can institute an insider trading case against the offender or institute a class action.[1174] A class action lawsuit is used when several people who have been affected by the insider trading activity come together to institute a single lawsuit. It is submitted that insider trading class actions have not been successfully used in Zimbabwe. Furthermore, the *Securities Act* provides that an insider trading offender may be liable to pay the profit which accrued to him or her,[1175] avoidance of loss[1176] or reduction in the price or value of affected securities in

---

1172 Section 1106 of the *Sarbanes-Oxley Act* of 2002 Public Law 107–204 116 Stat 745 (*Sarbanes-Oxley Act);* see related comments by Banoff BA "The Regulation of Insider Trading in the United States, United Kingdom, and Japan" 1988 *Michigan Journal of International Law* 145, 152-153; Silver CB "Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984" 1985 *Duke Law Journal* 960, 961 and 964.

1173 Section 91(1)(a)-(d) of the *Securities Act*. This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1174 Section 92 of the *Securities Act*; see related comments by Zimmerman AS and Jaros DM "The Criminal Class Action" 2011 *University of Pennsylvania Law Review* 1387, 1410-1430; Porrini D and Ramello GB "Class Action and Financial Markets: Insights From Law and Economics" 2011 *Journal of Financial Economic Policy* 1, 11; Sahu GK "The Class Action Suit: A Challenge for Protection of Interest of Investors" 2016 *International Journal of Law* 12, 13-14.

1175 Section 91(1)(a) of the *Securities Act*; see related comment by see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin DJ and Donaldson DR "The Insider Trading and Securities Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate for use in Private 10B-5 Actions?" 1990 *Washington and Lee Law Review* 541, 544, 575-584.

1176 Section 91(1)(b) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

terms of the *Securities Act*.[1177] The challenge with this civil penalty is that it only helps the insider trading victim to return to the position he or she was before the insider trading offence was perpetrated. The researcher submits that the civil penalty only compensates affected parties but does not go beyond compensation to deter insider trading offenders from committing insider trading offences in Zimbabwe.

However, the *Securities Act* does not provide the guidelines that must be followed by persons who want to claim their damages from the SECZ. In addition, there is no provision in the *Securities Act* that allows private rights of action. Moreover, the SECZ does not have the authority to use whistle blower immunity measures or bounty rewards to people who provide the SECZ with information that may assist the SECZ to obtain a conviction. Whistle-blower immunity measurers and bounty rewards are important because they encourage people who have information unknown to the SECZ or courts to bring it forward to curb illicit trading practices in Zimbabwe.[1178] The authorities are struggling to obtain a conviction for insider trading as a result, very few insider trading cases have been settled in Zimbabwe to date.[1179]

In the USA, the *Securities Exchange Act* as amended by the *Securities Fraud Enforcement Act* provides that any insider trading offender may be liable for a fine not exceeding 1 million US dollar or three times the amount of profit gained or loss avoided.[1180] It is submitted that the civil penalty in the USA is to a certain extent more

---

1177 Section 91(1)(c) of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301; Osode 2000 *Journal of African Law* 247; Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

1178 See related comments by Desai U "Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010" 2012 *Loyola University Chicago Law Journal* 427, 429; Shu-Acquaye F "Dodd-Frank Wall Street Reform and Consumer Protection Act: The Evolution of Whistleblower Protections, Employment Contracts and Mandatory Arbitration Agreements" 2017 *Depaul Business And Commercial Law Journal* 127, 133-145

1179 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1180 Section 4 of the *Insider Trading and Securities Fraud Enforcement Act* of 1988 Public Law 100-704, 102 Stat 4677 *(Securities Fraud Enforcement Act)*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

deterrent than the position under the *Securities Act* in Zimbabwe. In addition, the *Securities Fraud Enforcement Act* allows any affected person to institute private rights of action against insider trading offenders.[1181] However, neither the *Securities Fraud Enforcement Act* nor the *Securities Exchange Act* provides the period or duration when private actions may be instituted by the affected persons against the offenders. It appears the courts determine the duration or actual time when the affected persons can institute private rights of actions against the offenders after considering all the relevant factors.[1182]

The *Dodd-Frank Act* also allows the SEC to pay bounty rewards to whistle-blowers who provide the SEC with information regarding any violations of the securities laws.[1183] However, the information must assist the SEC to obtain a successful conviction exceeding $1 million US dollar in any judicial or administrative proceedings.[1184] Since the establishment of the whistleblower program, the SEC Whistleblower Office has awarded more than $149 million to 41 whistle-blowers.[1185] This shows the success of the whistleblower program in the USA.

The *Financial Markets Act* provides that an insider trading offender may be liable to pay R1 million compensatory damages or three times the profit made or loss avoided by the

---

1181 Section 20A of the *Securities Exchange Act* as amended by section 5 of *Securities Fraud Enforcement Act*; see related comments by Figueroa D "Insider Trading and Other Securities Frauds in the United States: Lessons For Chile" 2014 *Michigan Business and Entrepreneurial Law Review* 165, 174; Cheung R "Insider Trading: A Critical Assessment of the Private Right of Action" 2013 *Company Lawyer* 1, 1-2; Parker GF "The Regulation of Insider Trading in Japan: Introducing a Private Right of Action" 1995 *Washington University Law Review* 1399, 1419-1421.

1182 Section 20A of the *Securities Exchange Act* as amended by section 5 of *Securities Fraud Enforcement Act*; see related comments by Figueroa 2014 *Michigan Business and Entrepreneurial Law Review* 174; Cheung 2013 *Company Lawyer* 1-2; Parker 1995 *Washington University Law Review* 1419-1421.

1183 Section 922 of the *Dodd-Frank Act*; Desai 2012 *Loyola University Chicago Law Journal* 429; Shu-Acquaye 2017 *Depaul Business And Commercial Law Journal* 133-145.

1184 Section 922 of the *Dodd-Frank Act*; Desai 2012 *Loyola University Chicago Law Journal* 429; Shu-Acquaye 2017 *Depaul Business and Commercial Law Journal* 133-145.

1185 Zuckerman J and Stock M 2018 *Whistleblower Rewards and Bounties for Disclosures of Market Manipulation Schemes* HYPERLINK "https://www.zuckermanlaw.com/whistleblower-rewards-bounties-disclosures-market-manipulation-schemes/" https://www.zuckermanlaw.com/whistleblower-rewards-bounties-disclosures-market-manipulation-schemes/ accessed 05 December 2018 page number unknown; Desai 2012 *Loyola University Chicago Law Journal* 429; Shu-Acquaye 2017 *Depaul Business and Commercial Law Journal* 133-145.

offender.[1186] Furthermore, the *Financial Markets Act* stipulates how successful claimants can claim their damages from the then FSB.[1187] The Financial Markets Act provides that the money or damages obtained from insider trading offenders must deposited into a trust account.[1188] However, the victims of insider trading will only get their damages after Financial Sector Conduct Authority (FSCA) has deducted its costs incurred during investigations and in the pursuit of the civil proceedings.[1189] Put differently, the balance of funds left after the FSCA has recouped its costs will be distributed by the claims officer to the persons affected by the illegal insider trading in question.[1190] It is submitted that this procedure is to a certain extent unfair because the affected persons could end up receiving an amount that is less than what he or she lost due to insider trading. However, unlike the position in the USA, there is no provision in the *Financial Markets Act* that allows the affected persons to employ class actions and/or private rights of action in insider trading cases in Zimbabwe.[1191]

8.4.3 Administrative Penalties

There are no specific administrative penalties for insider trading under the Securities Act.[1192] This status quo could have contributed to the lack of many successful

---

1186 Section 82(1)(b) of the *Financial Markets Act*; see related comments by Chew M "The Adequacy and Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" 1998 *Singapore Journal of Legal Studies* 331, 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1187 Section 82(4) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Luiz S "Market Abuse and Enforcement Committee" 2011 *South African Mercantile Law Journal* 151, 157-159.

1188 Section 82(4)(a) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Luiz 2011 *South African Mercantile Law Journal* 157-159.

Section 82(5) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Luiz 2011 *South African Mercantile Law Journal* 157-159.

1190 Sections 82(4) and (5) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 249; Luiz 2011 *South African Mercantile Law Journal* 157-159.

1191 See sections 77-88 of the *Financial Markets Act*; see related comments by Davis F, Taghipour B and Walker TJ "Insider Trading Surrounding Securities Class Action Litigation and Settlement Announcements" 2017 *Managerial Finance Journal* 124, 125; Booth RA "The End of the Securities Fraud Class Action as We Know It" 2007 *Berkeley Business Law Journal* 1, 6, 10 and 15.

1192 Sections 87-95 of the *Securities Act*; see related comments by Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

prosecutions and settlements for insider trading cases in the Zimbabwean financial markets.[1193]

The offender may be liable to pay an amount not exceeding R1 million plus three times the profit made or loss avoided by the insider trading offenders in South Africa.[1194] It is submitted that the administrative penalties have been successfully enforced sometimes in South Africa. For instance, since the enactment of the *Financial Markets Act* until 20 June 2018, the EC obtained some administrative settlements in about 64 insider trading cases in South Africa.[1195] Furthermore, any person affected by insider trading activities may also claim part of the proceeds in respect of any interests, investigation costs and commission that was determined by the EC from the FSB before the EC and the FSB were abolished.[1196] It is submitted that affected persons may receive an amount less than the amount he or she lost as a result of the insider trading activity.

Like the position in South Africa, the SEC has the authority to impose any appropriate administrative penalties on insider trading offenders such as disgorgement, cease-and-desist and punitive penalties in the USA.[1197] The SEC continues to successfully enforce administrative penalties in the USA financial markets.

1193 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1194 Section 82(1)(b) of the *Financial Markets Act*; see related comments by Chew 1998 *Singapore Journal of Legal Studies* 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1195 Section 82(1)(b) of the *Financial Markets Act*; see related comments by Chew 1998 *Singapore Journal of Legal Studies* 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1196 See related comments by Osode 2000 *Journal of African Law* 247, 248 and 249; Chitimira 2014 *PELJ* 961.

1197 Section 929P of the *Dodd-Frank Act*; Chitimira H "Overview of the Federal Prohibition on Market Abuse in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 119, 123; Thanitcul S and Srinopnikom T "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions" 2018 *Kasetsart Journal of Social Sciences* 1, 2 and 3.

8.5 *Overall Analysis of the Role of Regulatory Bodies and Related Authorities*

8.5.1 The Role of Institutions that Detect Suspicious Trading Activities

The Zimbabwe Stock Exchange has the responsibility of detecting insider trading activities. However, the ZSE does not have electronic surveillance systems to detect suspicious price movements which could be indicative of insider trading.[1198] Currently, the SECZ receives alerts of suspicious insider trading activities from the police or other market participants in the Zimbabwean financial markets.[1199] It is submitted that in most cases the police and other market participants cannot easily identify whether a particular activity is actually insider trading and/or could give rise to insider trading activities in the Zimbabwean financial markets. Therefore, Zimbabwe could learn from the USA and South African experiences by empowering the ZSE with sufficient resources to acquire sufficient electronic surveillance systems to effectively detect all insider trading activities in the Zimbabwean financial markets.

In South Africa, the Johannesburg Stock Exchange Limited (JSE) has the authority to detect suspicious trading activities in the financial markets.[1200] The JSE uses electronic surveillance systems to detect illicit trading activities in the South African financial markets. These surveillance systems are reportedly able to detect any signs of insider trading activities, the names, addresses, contact details and other relevant details of the

---

1198 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018; Zimbabwe Stock Exchange 2015 *Launch of the Zimbabwe Stock Exchange's Automated Trading System* https://www.african-markets.com/en/stock- markets/zse/launch-of-the-zimbabwe-stock-exchange-s-automated-trading-system accessed 01 September 2017 1; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 112.

1199 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1200 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. See related comments by Chitimira 2014 *Speculum Juris* 112; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 91.

parties involved in the transactions in the South African financial markets.[1201] It is submitted that the use of electronic surveillance systems has been successful because most of the insider trading cases that have been investigated and settled in South Africa were detected by the JSE and referred to the DMA and the FSB for further investigation.

A similar approach is also used in the USA. For instance, the Financial Industry Regulatory Authority (FINRA), the Options Regulatory Surveillance Authority (ORSA) and SEC's Electronic Data Gathering Analysis and Retrieval (EDGAR) system detect possible illicit trading activities in the USA financial markets.[1202] Unlike in South Africa and Zimbabwe where the FSCA and SECZ do not have their own electronic surveillance systems, the SEC employs the EDGAR system.[1203] The FINRA, the ORSA and the EDGAR electronic surveillance systems detect insider trading activities in the USA financial markets.[1204]

8.5.2 Overall Analysis of the Role of National Regulatory Authorities and Related Bodies

The SECZ ensures proper supervision and enforcement of the insider trading provisions in the Zimbabwean financial markets.[1205] For instance, the SECZ established the Supervision and Surveillance department that is responsible for investigating and enforcing the provisions of the *Securities Act* to curb illicit practices such as insider trading. [1206] The Supervision and Surveillance department has powers to summon,

---

1201 See related comments by Tomasic R and Pentony B "Insider Trading in Australia Part: Regulation and Law Enforcement" 1991 *Australian Studies in Law, Crime and Justice Series* 1, 36-37; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 91.

1202 See related comments by Meulbroek LK "An Empirical Analysis of Illegal Insider Trading" 1992 *Journal of Finance* 1661, 1663; Goel R "Integrating a Systems Approach to Detect Risk of Insider Trading" 2013 *International Journal of Humanities and Social Science* 21, 2.1

1203 See paragraphs 4.3 and 7.2.3.2.8 in Chapter Four and Seven of this thesis respectively.

1204 See related comments by Financial Industry Regulatory Authority 2018 *Office of Fraud Detection and Market Intelligence (OFDMI)* HYPERLINK "http://www.finra.org/industry/ofdmi" http://www.finra.org/industry/ofdmi accessed 13 November 2018 page number unknown; Ahern KR "Information Networks: Evidence From Illegal Insider Trading Tips" 2015 journal unknown 1, 30.

1205 Section 4 of the *Securities Act*; See paragraph 4.2.3 in Chapter Four of this thesis.

1206 Section 103(1)(e) of the *Securities Act*; see related comments by Clacher I, Hillier D and Lhaopadchan S "Corporate Insider Trading: A Literature Review" 2009 *Spanish Journal of Finance and Accounting* 373, 379.

interrogate, search or seize evidence from any person suspected of committing insider trading practices.[1207] It is submitted that since the establishment of the SECZ, the SECZ has not been sufficiently effective in enforcing the prohibition of insider trading in the Zimbabwean financial markets. For instance, very few insider trading cases have been successfully investigated or settled by the SECZ. This is caused by lack of adequate enforcement measures and resources to effectively enforce insider trading provisions in Zimbabwe. Moreover, the SECZ has few people with the relevant expertise in the detection and combating of market abuse and other related financial crimes.[1208] The researcher submits that lack of resources on the part of the SECZ has negatively affected the regulation of insider trading in the Zimbabwean financial markets.

In South Africa, prior to the establishment of the Financial Sector Conduct Authority (FSCA), the FSB was the financial regulator responsible for monitoring and enforcing the insider trading prohibitions under the *Financial Markets Act*.[1209] The FSB enforced the insider trading prohibition through the DMA which was an investigatory arm of the FSB and the EC which monitored the enforcement of the market abuse administrative penalties in South Africa. [1210] It is submitted that the DMA was able to successfully investigate many insider trading cases because it employed some people with the relevant expertise and experience in market abuse and financial markets practices.[1211] This could have been influenced by the fact that the DMA was mainly focused on investigating and enforcing market abuse offences on behalf of the FSB. The other reason could be the fact that the South African approach enabled the FSB to independently obtain its own resources form the taxes, levies and other relevant

---

1207 Sections 102(1) and (2) of the *Securities Act*; Chitimira H The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework (LLM-Thesis University of Fort Hare 2008) 99.

1208 See analysis in paragraphs 5.4, 5.5, 5.6, 5.7, 5.8 and 5.9 in Chapter Five of this thesis.

1209 Section 84(1) of the *Financial Markets Act;* 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* 200, 206.

1210 See analysis in paragraphs 7.2.3.2.5 and 7.2.3.2.6 in Chapter Seven of this thesis.

1211 This information was obtained from an interview that was conducted at the FSB by the researcher, with Mr Solly Keetse Head of Department of the DMA) and Mr Alexander Pascoe (Chief Investigator of the DMA) on the 6th of October 2017.

stakeholders. This could have equipped the DMA to enforce the insider trading prohibitions and fulfil its mandate.

The DMA had authority to "withdraw, abandon or compromise any civil proceedings" in respect of insider trading.[1212] Unlike in South Africa, the SECZ is not expressly empowered to withdraw, abandon or compromise any civil proceedings in respect of insider trading in Zimbabwe.[1213] This flaw could cripple the role of the SECZ in enforcing civil penalties and curbing illicit trading activities in Zimbabwe. In addition, the FSB had the authority to adopt its own rules for the effective monitoring and identification of market abuse activities in South Africa.[1214] Thus, unlike the position in South Africa, the SECZ does not have its own insider trading rules that supplement the insider trading prohibitions under the *Securities Act*. It is submitted that the SECZ should consider adopting such rules to effectively curb insider trading practices in Zimbabwe.

In the USA, the SEC established the Enforcement Division to investigate any possible insider trading activities.[1215] The Enforcement Division has the power to enforce civil remedies, institute administrative orders, recover any illegally obtained profits from guilty persons (disgorgement of profits), enforce the insider trading prohibition in the USA and other foreign financial markets, provide incentives to whistle-blowers who provide the relevant information to SEC,[1216] impose punitive penalties on such persons and refer

---

1212 See analysis in paragraph 7.2.2.4.6 in Chapter Seven of this thesis.

1213 Sections 102 read with 87-95 of the *Securities Act*; See analysis in paragraph 4.2.3 in Chapter Four of this thesis.

1214 Section 84(2)(f) of the *Financial Markets Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 253; Chitimira and Lawack 2013 *Obiter* 203.

1215 Securities Exchange Commission 2007 *About the Division of Enforcement* https://www.sec.gov/enforce/Article/enforce-about.html accessed 13 November 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 233; Garba 2013 *International Journal of Management* 19-20; Karmel RS "Creating Law at the Securities and Exchange Commission: The lawyer as Prosecutor" 1998 *Law and contemporary Problems Journal* 33, 38; Gray EP, Cottrell AA, Stellmach W and Hanniford KD "Will the Securities and Exchange Commission's Proposed Changes to Administrative Proceedings Quite Critics?" 2015 *The Investment Lawyer Journal* 1, 3-4 and 6.

1216 See analysis in paragraph 6.4.1 in Chapter Six of this thesis.

criminal matters to the Department of Justice.[1217] Although the Enforcement Division does not only concentrate on insider trading, it has played a crucial role in curbing illicit trading activities in the USA financial markets. Its effectiveness can be attributed to the sufficient resources put in place by the SEC and the employment of persons with the relevant expertise and experience in the financial markets in the USA.

Furthermore, the Corporate Finance Division of the SEC ensures that companies are registered and comply with the mandatory disclosure rules.[1218] The Corporate Finance Division also operates an online EDGAR system to ensure that all persons have equal access to non-public inside information relating to listed securities [1219] It is submitted that the EDGAR system has to date been successfully utilised by the SEC to prevent possible insider trading and other market abuse offences in the USA financial markets.

Moreover, the Market Regulation Division regulates self-regulatory organisations such as the New York Stock Exchange, the National Association of Securities Dealers and other self-regulatory organisations.[1220] In relation to insider trading, self-regulatory organisations supervise their members and assist in the detection of insider trading.

[1217] Section 4 of the *Securities Fraud Enforcement Act*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

[1218] Securities and Exchange Commission 2017 HYPERLINK "https://www.sec.gov/page/corpfin-section-landing" https://www.sec.gov/page/corpfin-section-landing accessed 15 November 2018 page number unknown; see related comments by Chitimira 2014 *Speculum Juris* 200-201; Steinberg MI "Insider Trading, Selective Disclosure, and Prompt Disclosure: A Comparative Analysis" 2014 *University of Pennsylvania Journal of International Economic Law* 635, 638; Langevoort DC and Gulat JM The Muddled Duty to Disclose Under Rule 10b-5" 2004 *Vanderbilt Law Review* 1643, 1657-1664.

[1219] Securities and Exchange Commission 2012 *About the Division of Corporation Finance* HYPERLINK"https://www.sec.gov/divisions/corpfin/cfabout.shtml" https://www.sec.gov/divisions/corpfin/cfabout.shtml accessed 17 July 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232; Chitimira 2014 *Speculum Juris* 112-113; Goel 2013 *International Journal of Humanities and Science* 22-23.

[1220] See related comments by Aliev M and Surmilo D "The Role of Self-Regulatory Organisations (SROS) in Developing Effective Securities Markets in Commonwealth of Independent States (CIS) Countries" 2002 *Journal of International Banking Regulations* 162, 163; Jenninc RW "Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission" 1964 *Law and Contemporary Problems* 663, 667-676.

8.5.3 *Overall Analysis of the Role of the Courts*

The courts are responsible to adjudicate insider trading cases in Zimbabwe.[1221] However, there is no single insider trading case that has been successfully prosecuted in the Zimbabwean courts to date.[1222] Furthermore, the *Magistrates Court Act* established a commercial court to speed up and facilitate the settlement of commercial disputes including insider trading cases.[1223] However, the commercial court is not yet operating because the judicial service commission has not yet put resources in place.[1224]

In South Africa, the High Courts and regional courts have jurisdiction to hear insider trading cases referred to them by the abolished FSB. However, the courts have to a certain extent struggled to obtain more convictions in insider trading cases to date.[1225] The only cases that the South African courts have managed to successfully adjudicate since the regulation of insider trading is *Zietsman and another v the Directorate of Market Abuse and another.*[1226]

1221 See sections 90 and 91 of the *Securities Act*; see related comments by Carvajal A and Elliott J "The Challenge of Enforcement in Securities Markets: Mission Impossible?" 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 28.

1222 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018; See paragraph 5.6 in Chapter Five of this thesis.

1223 Section 6 of the *Magistrates Court Act* [Chapter 7:10] (*Magistrates Court Act*) *as amended by the Judicial Laws Amendment Act* [Chapter 7:10] of 2017 (*Judicial Laws Amendment Act*); see related comments by Mohammed AL and Imad AK "Establishment of Specialist Commercial Courts in the State of Qatar: A Comparative Study" 2016 *International Review of Law* 1, 3-4.

1224 Section 6 of the *Judicial Laws Amendment Act*; Mohammed and Imad 2016 *International Review of Law* 3-4.

1225 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. See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 465.

1226 *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP). 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. See analysis in paragraph 7.2.3.2.7 in Chapter Seven of this thesis.

The courts play a significant role in enforcing the insider trading laws in the USA. For instance, in *USA v Newman*[1227] the court held that a meaningfully close personal relationship between a tipper and a tippee and an exchange of something pecuniary or valuable to the tipper was required to prove an insider trading violation in the USA. However, in the case of *Salman v USA*[1228] the court extended the tippee liability test and held that "gifts of confidential information without any compensation to relatives for the purposes of insider trading are a violation of securities laws". It is submitted that the courts have adequate resources and persons with the relevant expertise on financial markets and market abuse cases.[1229] This has contributed to the successful prosecution and settlement of insider trading cases in the USA.

8.6 Cooperation between Domestic and International Enforcement Authorities

The *Securities Act* does not expressly provide for adequate cooperation between the SECZ and other relevant stakeholders in preventing, detecting, investigating and prosecuting insider trading in Zimbabwe.[1230] However, it is submitted that the SECZ cooperates with the ZSE, the courts and the police to curb illicit trading activities in the Zimbabwean financial markets.[1231] The researcher submits that although the SECZ somewhat cooperates with other domestic enforcement authorities, there are very few insider trading cases that have been settled and prosecuted by the SECZ.[1232] Furthermore, the SECZ cooperates with other regional and international enforcement

---

1227 *United States of America v Newman* 773 F.3d 438 (2d Cir. 2014); see paragraph 6.2 in Chapter Six of this thesis.

1228 *Salman v USA* 792 F.3d 1087 (9th Cir. 2015); see related comments by Nagy DM "Salman v. United States: Insider Trading's Tipping Point?" 2016 *Stanford Law Review* 28, 28-29.

1229 Nagy 2016 *Stanford Law Review* 28-29.

1230 See generally sections 3, 87-95 of the *Securities Act;* see further paragraph 5.8 in Chapter Five of this thesis.

1231 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1232 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Chitimira 2014 *PELJ* 945-954; Kawadza 2015 *South African Mercantile Law Journal* 390.

authorities.[1233] However, it should be noted that the cooperation of the SECZ with other domestic and international authorities has not yet yielded more positive results regarding the detection, investigation, settlement and prosecution of insider trading cases in Zimbabwe and other jurisdictions to date. [1234]

In South Africa, the FSB, DMA, EC, the JSE and the courts cooperated to curb insider trading activities in the South African financial markets when[1235] for instance, the JSE detected and referred insider trading cases to the DMA for investigation.[1236] It is submitted that the cooperation of the enforcement authorities in South Africa was effective because many insider trading cases have been settled by the EC.[1237]Furthermore, the FSB cooperated with other international authorities including the SECZ, Namibia Financial Institutions Supervisory Authority (NAMFISA), and the SEC.[1238] It is submitted that since 1999 until 2018 the DMA has successfully investigated 12 cross border market abuse cases, including insider trading.[1239] On the other hand, the SEC cooperates with other domestic enforcement authorities such as the courts and self-regulatory organisations.[1240] Furthermore, the SEC has entered into Memorandum of Understanding (MOU) and/or similar agreements with other national enforcement authorities such as

---

1233 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. 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.

1234 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1235 This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (Investigation Team Leader of Directorate of Market Abuse) and Keetse S (HOD - Directorate of Market Abuse, FSB) on 06 October 2017.

1236 This information was obtained from an interview that was conducted at the FSB by the researcher, with Mr Solly Keetse (HOD of the DMA) and Mr Alexander Pascoe (Chief Investigator of the DMA) on the 6th of October 2017; Chitimira 2014 *Speculum Juris* 112.

1237 See paragraphs 7.2.3.2.6 and 7.2.3.2.7 in Chapter Seven of this thesis.

1238 Section 84(2)(b) of the *Financial Markets Act*; See related comments by Osode 2000 *Journal of African Law* 259; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 109-100.

1239 This information was obtained from an interview that was conducted at the Financial Sector Conduct Authority (FSCA) by the researcher with Pascoe A (former Chief Investigator of the DMA) on 28 June 2018. The statistics are correct as at 20 June 2018.

1240 See paragraphs 6.4.1, 6.4.2 and 6.4.3 in Chapter Six of this thesis.

Switzerland, Japan, the United Kingdom, Italy and many other countries.[1241] The MOU provides an effective means of obtaining information for securities laws enforcement and assist in developing a framework for cooperation and improved communication between the SEC and other international regulatory bodies. The SEC is to a certain extent effective in combating insider trading activities in other foreign financial markets. Some of the cross-border insider trading cases that have been successfully investigated by the SEC include *SEC v Tiger Asia Management,*[1242] *SEC v Certain Unknown Traders in the Securities of HJ Heinz Company*[1243] and *SEC v Richard Bruce Moore.*[1244]

8.7 Implementation of Insider Trading Awareness and Educational Programs

There is minimal investor education about insider trading and related illicit trading practices in the Zimbabwean financial markets by the SECZ.[1245] It is submitted that investor education is important because market participants need to know when dealing in the relevant securities with non public price-sensitive information is illegal. Moreover, all the relevant persons must know why insider trading is unlawful and prohibited offences to avoid committing such ignorantly and/or unwittingly. The lack of anti-insider trading investor education programmes could have contributed to the poor combating of insider trading activities in the Zimbabwean financial markets to date.

In South Africa, the FSCA has a Consumer Education Department that conducts investor education programmes on matters involving securities regulation and insider trading.[1246]

1241 See paragraph 6.4.1 in Chapter Six of this thesis.

1242 *SEC v Tiger Asia Management* LLC, Civil Action No. 12-cv-7601 (DMC).See paragraph 6.4.1 in Chapter Six of this thesis.

1243 *SEC v Certain Unknown Traders in the Securities of H.J. Heinz Company* Civil Action No. 13-CIV-1080; Langevoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 161, 174-176.

1244 *SEC v Richard Bruce Moore* 2013 Civil Action No. 13-cv-2514 (HB) (SDNY); Langevoort 2000 *Dickinson Journal of International Law* 174-176.

1245 Section 4(1)(f) of the *Securities Act*; see related comments by El-Dean BA *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* (Brill Academic Publishers Netherlands 2002) 50.

1246 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.

Furthermore, the JSE published the insider trading booklet to create awareness on matters involving insider trading to all the relevant stakeholders.[1247] It is submitted that the Consumer Education Department of the FSCA and the JSE awareness measures have to a certain extent, played an important role in investor education in relation to insider trading in South Africa than the SECZ and the ZSE in Zimbabwe.

On the other hand, the SEC has an Investor Education and Advocacy Office which provides investor education on insider trading and related practices. The SEC has also drafted a brochure that provides information about legal and illegal insider trading.[1248] It is submitted that the system of investor education in the USA and South Africa is relatively similar.

8.8 Conclusion

The policy makers in Zimbabwe, South Africa and the USA treat insider trading as a threat to investor confidence and market efficiency. Consequently, insider trading is statutorily regulated in these respective jurisdictions. Nonetheless, the term insider trading and related key terms are not expressly defined in the relevant insider trading laws in South Africa, Zimbabwe and the USA.

It should be noted that the authorities are struggling to obtain more successful prosecutions in criminal cases of insider trading in both South Africa and Zimbabwe. This challenge could have been worsened by the higher burden of proof that is required for the prosecution to prove in criminal penalties of insider trading in both South Africa and Zimbabwe. Furthermore, in South Africa and the USA, the enforcement authorities prefer to impose civil and administrative penalties in insider trading cases. Thus, unlike in the

---

1247 Johannesburg Stock Exchange Insider Trading and Other Market Abuses (Including The Effective Management of Price Sensitive Information) (JSE Booklet 2016) 2-26; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 481;
Securities and Exchange Commission 2012 *Investor Publications* HYPERLINK "https://www.sec.gov/reportspubs/investor-publications/investorpubsinsidertradingguidehtm.html" https://www.sec.gov/reportspubs/investor-publications/investorpubsinsidertradingguidehtm.html accessed 28 November 2018 page number unknown.

USA the SECZ does not expressly have authority to impose administrative penalties for insider trading in Zimbabwe.

It is submitted that Zimbabwe must take some lessons from South Africa and the USA and empower the ZSE to adopt administrative penalties, adequate awareness measures, special market abuse courts, bounty rewards, whistle-blower immunity measures and electronic surveillance systems to detect insider trading activities in the Zimbabwean financial markets. It is submitted that South Africa and the USA have better electronic surveillance systems and anti-insider trading measures compared to Zimbabwe.

CHAPTER NINE

RECOMMENDATIONS AND CONCLUSION

9.1 Introduction

The *Securities Act*[1249] provides that the policy goals underlying the regulation of insider trading in Zimbabwe are to promote fairness, market integrity, market efficiency and to protect investor confidence. However, there are very few insider trading cases that have been successfully settled by the Securities and Exchange Commission of Zimbabwe (SECZ), which suggests that the prohibition of insider trading is not effectively enforced. Some of the challenges that the *Securities Act* has is lack of adequate insider trading provisions. For instance, the *Securities Act* only covers natural persons as insiders.[1250] However, it is submitted that natural persons can easily hide behind the banner of the juristic person and commit insider trading. In addition, the *Securities Act* does not provide separate civil and criminal penalties for both natural persons and juristic entities.[1251] It is submitted that imposing maximum penalties for all insiders is unfair. For instance, imposing the same penalties for an individual who deals directly and for an insider who discouraged the other person to deal with nonpublic price-sensitive information is unfair.

1249 See sections 4(1)(a),(c),(d),(e) and (f) read with section 88 of the *Securities Act* 17 [Chapter 24:25] of 2004 as amended (*Securities Act*); Austin J "What Exactly Is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation" 2016 *William and Mary Business Law Review* 1, 6-10; Krawiec KD "Fairness, Efficiency, And Insider Trading: Deconstructing the Coin of the Realm in the Information Age" 2001 *North Western University Law Review* 443, 444.

1250 Section 88(1)(a) of the *Securities Act*; see related comments by Osode PC "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 231, 241; Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 92; Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *The South African Law Journal* 437, 446.

1251 Sections 90 and 91 of the *Securities Act*; see related comment by Jooste R "The Regulation of Insider Trading in South Africa Another Attempt" 2000 *The South African Law Journal* 284, 297-298 and 300-301; Friedman HM "The Insider Trading and Securities Fraud Enforcement Act of 1988" 1990 *North Carolina Law Review* 465, 476-479 and 480-481; Guin DJ and Donaldson DR "The Insider Trading and Securities Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate for use in Private 10B-5 Actions?" 1990 *Washington and Lee Law Review* 541, 544, 575-584.

Furthermore, this research has revealed that the prohibition of insider trading is not effectively enforced by the SECZ, the Zimbabwe Stock Exchange (ZSE) and the courts in Zimbabwe.[1252] For instance, there is no insider trading case that has been adjudicated by the courts or settled by the SECZ since the enactment of the *Securities Act*.[1253] This could have been exacerbated by not having administrative penalties and merely relying on criminal and civil penalties whose enforcement is sometimes restricted by the fact that insider trading is treated as a delict.[1254]

In light of the above, this chapter provides the general observations on the regulation of insider trading in the Zimbabwean financial markets. The general observations focus on the regulation of insider trading in Zimbabwe, the United States America (USA) and South Africa as discussed in Chapter Eight. The chapter also provides recommendations and the overall conclusion on the regulation of insider trading in Zimbabwe. This is done to recommend possible measures that can be employed to enhance the curbing of insider trading practices in the Zimbabwean financial markets.

9.2 General Observations

Prior to 2004, the *Zimbabwe Stock Exchange Act*[1255] prohibited any person who traded with confidential information in securities.[1256] However, the *Zimbabwe Stock Exchange Act* did describe confidential information, insider trading and insider. Furthermore, the *Zimbabwe Stock Exchange Act* provided that any person found guilty of unlawful dealing

---

1252 See paragraphs 5.5-5.7 in Chapter Five of this thesis.

1253 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018. See related comments by Botha D "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *South African Mercantile Law Journal* 1, 5; Kawadza H "The Liability Regime For Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383, 387-388.

1254 Sections 91(1); 87-95 read with section 105(1) of the *Securities Act*; also see paragraphs 5.4.1-5.4.3 in Chapter Five of this thesis.

1255 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act* [Chapter 24:18] of 1973 as amended (*Zimbabwe Stock Exchange Act*).

1256 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* see related comments by Kiggundu J *Botswana Company Law Service* (Juta and Company Ltd Lansdowne 2005) 249; Khan MY *Indian Financial System* 8th Edition (McGraw Hill Education-India Private Limited New Delhi 2013) 39.

with confidential information was liable to a fine not exceeding Zim $6000 or imprisonment period not exceeding three years or to both such fine or imprisonment.[1257] Both the fine and imprisonment period were not severe enough to deter people from trading with non public price-sensitive information. Furthermore, the insider could without fear still commit insider trading after serving an imprisonment sentence. However, there is no insider trading case that was successfully prosecuted under the *Zimbabwe Stock Exchange Act.*

The Zimbabwean insider trading prohibition was introduced in 2004 through the *Securities Act.*[1258] The enactment of the *Securities Act* was an important step by the legislature to curb the illicit trading activities in the Zimbabwean financial markets. The practice of insider trading had never been prohibited in the Zimbabwean financial markets. However, the *Securities Act* is still flawed in many respects. For instance, it was noted that the *Securities Act* does not define insider trading.[1259] Moreover, related terms such as "insider", "attempted insider trading", "tipping" and "tippee" are not expressly defined in the *Securities Act.*[1260] It is important to define insider trading related terms to eliminate vagueness. It was also noted that the terms "insider trading", "tipping", "attempted insider trading" and "tippee" are not expressly defined in the relevant insider trading laws.[1261] In addition, it appears that juristic persons are not expressly treated as insiders for the purposes of insider trading offences under the *Securities Act.*[1262] Thus, unlike the position

---

1257 Section 56(6)(c)(i) of the *Zimbabwe Stock Exchange Act;* Seyhun HN "The Effectiveness of the Insider-Trading Sanctions" 1992 *The Journal of Law and Economics* 149, 152-153; Giorgio E "Possession of Information in the Insider Trading Offence" 2017 *Western Australian Student Law Review* 7, 16.

1258 See generally sections 87-95 of the *Securities Act.*

1259 Section 87 of the *Securities Act.*

1260 See related comments in paragraph 2.3 in Chapter One of this thesis.

1261 See section 77 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*); Sections 16(b) and 10(b) of the *Securities and Exchange Act* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended (*Securities and Exchange Act*); see related comments by Rosenzweig VM "Deterrence of Tippee Trading Under Rule 10b-5" 1971 *The University of Chicago Law Review* 327, 373; Jooste 2000 *South African Law Journal* 289-290; Osode 1999 *African Journal of International and Comparative Law* 700.

1262 Section 88 of the *Securities Act*; Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24, 31-32; Osode 2000 *Journal of African Law* 241.

in South Africa[1263] and the USA,[1264] juristic persons are not expressly prohibited from trading with non public price-sensitive information in the relevant securities in Zimbabwe yet they are capable of committing insider trading.

It was noted that the enforcement authorities in South Africa and the USA prefer administrative penalties over criminal penalties.[1265] This could have been influenced by the fact that administrative penalties are usually easily imposed on the insider trading offenders because the burden of proof required for administrative sanctions is lower than that of criminal penalties.[1266] On the other hand, it was noted that the *Securities Act* does not provide specific administrative penalties for insider trading offences in Zimbabwe.[1267] The absence of administrative penalties has negatively affected the enforcement of insider trading in Zimbabwe.[1268] The lack of successful insider trading cases in Zimbabwe is attributed to the absence of administrative penalties.

1263 Sections 77 read 80 of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 241; Jooste 2000 *South African Law Journal* 293-294; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 31-32.

1264 Section 16(b) of the *Securities Exchange Act* read with Rule 14e-3 of the SEC; see related comments by Bainbridge *An Overview of Insider Trading Law and Policy: An Introduction to The Insider Trading Research Handbook* (Edward Elgar Publishing Ltd California 2013) 5; Lobb J "SEC Rule 14e-3 in the Wake of United States v. O'Hagan: Proper Prophylactic Scope and the Future of Warehousing" 1999 William and Mary Law Review 1853,1855; Tallman KA "Private Causes of Action Under SEC Rule 14e-3" 1983 George Washington Law Review 290, 291-292.

1265 See paragraphs 7.2.3.2.4 and 7.2.3.2.7 in Chapter Seven of this thesis; This information was obtained from an interview that was conducted at the FSB by the researcher, with Pascoe A (former Chief Investgator, DMA) and Keetse S (former Head of Department, DMA) on 06 October 2017.

1266 See paragraph 6.4.1 in Chapter Six and paragraphs 7.2.3.2.4 and 7.2.3.2.7 in Chapter Seven of this thesis; see related comments by Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* HYPERLINK "https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 05 October 2018 19; Chitimira H *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-Thesis University of Fort Hare 2008) 54.

1267 Section 87-95 of the *Securities Act.*

1268 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

Furthermore, it was noted that the *Securities Act* treats insider trading as a delict.[1269] In delictual claims the plaintiff has to prove conduct, wrongfulness, fault, negligence and causation. However, the defendant may raise the following defences such as he did not act voluntarily, negligence, official capacity and execution of an official command. In delictual claims the defendant has an advantage of plenty of defenses that can assist him or her to escape insider trading liability. Therefore, treating insider trading as a delictual claim does not assist the SECZ and the courts in curbing insider trading activities because most cases will be lost.

Moreover, it was noted that the enforcement authorities have successfully investigated and settled many insider trading activities in South Africa[1270] and the USA.[1271] This shows that both jurisdictions have employed sufficient insider trading measures. Nonetheless, the same cannot be said about Zimbabwe. In Zimbabwe, there is no insider trading case that has been successfully settled by the SECZ or adjudicated by the courts.

It was further revealed that the Zimbabwean insider trading regulatory framework only relies on the policy goal of deterrence.[1272] For instance, the legislature has mainly focused on the use of civil and criminal penalties to deter people from trading with non public price-sensitive information to commit insider trading.[1273] Zimbabwe should not have only relied on the policy goal of deterrence to combat insider trading. Other anti-insider trading enforcement approaches such as whistle blower immunity provisions, Chinese walls, private rights of action and bounty rewards should have been employed to detect and prevent insider trading practices in Zimbabwe.

1269 Section 91 of the *Securities Act*; this information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1270 See statistics in paragraph 7.2.3.2.6 in Chapter Seven of this thesis.

1271 See statistics in paragraph 6.4.1 in Chapter Six of this thesis.

1272 See paragraph 3.4 of this thesis; see related comments by Conyers S "Insider trading" 1973 *International Business Law* 19, 19-25; Walter N *"Prioritizing Enforcement in Insider Trading"* 2011 *Yale Law and Policy Review* 521, 522 and 528; Fishman JM and Hagerty KM "The Mandatory Disclosure of Trades and Market Liquidity" 1995 *Oxford University Press* 637, 637-638.

1273 Section 90-91 of the *Securities Act*.

9.3 Recommendations

The researcher discusses the various recommendations that are aimed at enhancing the detection, prevention and combating of insider trading in the Zimbabwean financial markets below. This is done to suggest possible ways which can be incorporated in the Zimbabwean anti-insider trading regulatory framework in order to make it more adequate, stronger and competitive.

(a) ***The Zimbabwean Policy Makers Should Consider Adopting Adequate Insider Trading Definitions***

Although insider trading is prohibited in Zimbabwe, there is no legislation that adequately and expressly define the terms "insider trading", "insider", "tipping" and "tippee".[1274] Definitions are important because they eliminate vagueness of the insider trading related terms.

In South Africa,[1275] the *Financial Markets Act* does not define "insider trading", "tipping" and "tippee". However, it defines the term "insider" as "a person who has inside information through being a director, employee or shareholder, or having access to such information by virtue of employment, office or profession".[1276] The term insider includes both natural and juristic persons because the term "person" includes a partnership and any trust. Unlike in South Africa, in Zimbabwe the term insider" excludes juristic persons.[1277]

1274 Section 87 of the *Securities Act*; see paragraph 2.3.1.1 in Chapter Two of this thesis.
1275 Section 77 of the *Financial Markets Act*; see paragraph 7.2.3.2.1 in Chapter Seven of this thesis.
1276 Section 77 of the Financial Markets Act; see paragraph 7.2.3.2.1 in Chapter Seven of this thesis.
1277 See paragraph 7.2.3.2.1 in Chapter Seven of this thesis.

In the USA,[1278] there is no legislation that defines "insider trading", "tipping" and "tippee". However the *Securities and Exchange Act*[1279] defines an insider as any officer, director, and persons holding more than 10% of the stock in a company from dealing with non public price-sensitive information. The position in the USA is the same as in South Africa where the term insider includes both natural and juristic persons.

It is recommended therefore that the USA, South Africa and Zimbabwe jurisdictions should define insider trading related terms such as "insider trading", "tipping" and "tippee". The definitions of these terms are important because they give guidance on what is exactly prohibited. For instance, in the USA the courts had to define tippees and provide in which circumstances a tippee would be held liable for insider trading. This implies that if the legislation in the USA had defined the term tippee it would have been unnecessary for the courts to develop that definition. Furthermore, the policy makers in Zimbabwe should consider juristic persons as insiders.

(b) *The Securities Act Should be amended to Enact Adequate Civil Penalties for Insider Trading*

The *Securities Act* provides that any person found guilty of insider trading may be liable to pay any affected person profit which accrued to him or her,[1280] avoidance of loss[1281] or reduction in the price or value of affected securities.[1282] The researcher submits that the civil penalty is not stringent enough to deter people from committing insider trading activities. For instance, the civil penalty does not provide a specific amount that the offender will be liable to pay. However, in the USA the *Securities Fraud Enforcement*

1278 Sections 16(b) and 10(b) of the *Securities and Exchange Act* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended *(Securities Exchange Act);* section 306 of the *Public Company Accounting Reform and Investor Protection Act* of 2002 Public Law 107-204, 116 Stat. 745 *(Sarbanes-Oxley Act).*

1279 Section 16(b) of the *Securities Exchange Act;* of 1934 Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended; see related comments by Yourd 1939 *Michigan Law Review* 135.

1280 Section 91(1)(a) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

1281 Section 91(1)(b) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

1282 Section 91(1)(c) of the *Securities Act*; see related comment by Jooste 2000 *The South African Law Journal* 297-298 and 300-301.

Act[1283] provides that any insider trading offender shall be liable to pay any affected person a civil penalty of an amount not exceeding $1,000.000 or three times the profit gained or loss avoided.[1284] Unlike in USA, in Zimbabwe the *Securities Act* does not provide a specific amount as a civil penalty. The civil penalty in Zimbabwe does not punish the insider but merely returns the affected person to the position in which he or she was before insider trading activity took place. However, an amount not exceeding $1,000.000 or three times under the *Securities Fraud Enforcement Act* is not only meant to punish the offender but also to discourage the offender from trading with non public price-sensitive information in relevant securities.

The researcher recommends that the *Securities Act* should be amended to provide stringent civil penalties that will punish and deter the insider from dealing with non public price-sensitive information in relevant securities. Furthermore, the policy makers should provide a separate civil penalty for both natural and juristic persons. Many at times juristic persons gain more profit than natural persons as a result it is unfair for the courts to impose the same penalty for juristic persons. Therefore, separate penalties will ensure that both natural persons and juristic entities are treated fairly.

(c) *The Securities Act Should be amended to Enact Provisions for Stringent Criminal Penalties for Insider Trading*

The *Securities Act* currently provides that any person found guilty of insider trading may be liable to pay a fine not exceeding level ten (Zim $200 000) or imprisonment for a period not exceeding five years or both such fine and imprisonment.[1285] The researcher submits that these criminal penalties are not deterrent enough because an insider may without

1283 Section 4 of the *Insider Trading and Securities Fraud Enforcement Act* of 1988 Public Law 100-704, 102 Stat. 4677 (*Securities Fraud Enforcement Act*).

1284 Section 4 of the *Securities Fraud Enforcement Act*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

1285 Section 90 of the *Securities Act*; see related comments by Chitimira 2012 *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 62-64; Botha 1991 *South African Mercantile Law Journal* 10-11 and 14; Luiz S "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151, 154-155.

fear commit insider trading after serving five years imprisonment. It is submitted that the five years imprisonment sentence and the Zim $200 000 are not stringent enough to discourage people from committing insider trading activities.[1286]

In South Africa, the insider trading offenders may be liable to pay a fine not exceeding R50 million or imprisonment for a period not exceeding 10 years or both.[1287] It is submitted that these criminal penalties are to a certain extent more severe than the insider trading criminal penalties that are imposed on the offenders in Zimbabwe. The criminal penalty in South Africa is higher than in Zimbabwe because South Africa has experienced a high number of insider trading activities and has the intention to combat insider trading activities in the financial markets.

Moreover, in the USA, the *Securities and Exchange Act* was amended by the *Securities Fraud Enforcement Act* which provided that the insider may be liable to pay $1,000.000 or three times the profit gained or loss avoided.[1288] In addition, the *Sarbanes-Oxley Act*[1289] provides that insider trading offenders in the accounting companies may face up to 20 years prison sentence or a fine of up to $5 million for natural persons and up to $25 million for corporations.[1290] In light of the above, the researcher submits that the criminal penalties in the USA and South Africa are to a certain extent more severe than criminal penalties that are contained in the *Securities Act*. Both the fine and imprisonment sentence in South Africa and USA are higher than in Zimbabwe. In this regard, the researcher recommends that the *Securities Act* should be amended to provide stringent

---

1286 Section 90 of the *Securities Act*; see related comments by Blumberg JA "Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy" 1985 *North Carolina Law Review* 117, 125.

1287 Section 109(a) read with 84(10) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 245; Cassim 2007 *South African Mercantile Law Journal* 68; Chitimira 2015 *Speculum Juris* 97-101.

1288 Section 4 of the *Securities Fraud Enforcement Act*; see related comments by Friedman 1990 *North Carolina Law Review* 476-479 and 480-481; Guin and Donaldson 1990 *Washington and Lee Law Review* 544, 575-584.

1289 Section 1106 of the *Sarbanes-Oxley Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215.

1290 Section 1106 of the *Sarbanes-Oxley Act*; see related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215; Nting RT *Sarbanes-Oxley Act, Insider Trading and Earnings Management* (Degree of PhD University of Glasgow 2008) 59-62.

criminal penalties to combat the illicit trading activities in the Zimbabwean financial markets. Furthermore, the legislature should include separate fines for both natural and juristic persons as is the position in the USA. It is generally acknowledged that juristic persons gain more profit than natural persons.

(d) *The Zimbabwean Legislature Should Consider Adopting Adequate Insider Trading Administrative Penalties*

The *Securities Act* does not provide any specific administrative penalties for insider trading in Zimbabwe.[1291] The fact that the *Securities Act* does not include administrative penalties for insider trading could have contributed to the minimal number of settlements that have been successfully obtained by the SECZ and the courts in insider trading cases to date.[1292] Unlike the position in Zimbabwe, in South Africa, the *Financial Markets Act* provides that the insider trading offender may pay the Financial Sector Conduct Authority (FSCA) an administrative fine not exceeding R1 million plus three times the profit that the insider trading offender made or loss avoided by that offender.[1293] In addition, any person affected by insider trading activities may also claim part of the proceeds in respect of any interests, investigation costs and commission as determined by the FSCA.[1294] The researcher submits that a fine not exceeding R1 million plus three times he profit are to a certain extent sufficiently stringent to discourage unscrupulous persons from illicit trading with non public price-sensitive information. Furthermore, in the USA, the United States Securities and Exchange Commission (SEC) may seek disgorgement of profits gained by the insider trading offenders and punitive damages.[1295] It is submitted that the USA

1291 See sections 87-95 read with 105 of the *Securities Act*; see related comments paragraph 5.3.3 in Chapter Five of this thesis.

1292 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager, of the SECZ) on 29 June 2018.

1293 Section 82(1)(b) of the *Financial Markets Act*; Chew 1998 *Singapore Journal of Legal Studies* 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1294 Section 82(1)(c) and (d) of the *Financial Markets Act*; see related comments by Osode 2000 *Journal of African Law* 247, 248 and 249; Chitimira 2014 *PELJ* 961.

1295 Section 20A of the *Securities Exchange Act*; see related comments by Mira 1985 *Catholic University Law Review* 445, 448; Karsch "The Insider Trading Sanctions Act: Incorporating a provides different administrative penalties including those which the affected person may choose from. Furthermore, Zimbabwe should learn from the USA to provide different administrative penalties.

In this regard, the researcher submits that the *Securities Act* should be amended to enact adequate provisions for insider trading administrative penalties. Thus, as is the position in South Africa[1296] and the USA,[1297] administrative penalties could give rise to more successful settlements in insider trading cases since the burden of proof in administrative penalties is lower than in proceedings for criminal penalties. The *Securities Act* should specifically provide other administrative penalties such as revocation of license, limitations on the actions or operations of registered securities professionals, a suspension of registration, cease and desist orders, seizure and forfeiture orders, freezing of assets against the offender and disgorgement of profits by insider trading offenders.[1298] These administrative penalties do not only focus on claiming a specific amount from the offender but can also deter people from trading with non public price-sensitive information.

Market Information Definition" 1985 *Journal of Comparative Business and Capital Market Law* 283, 285; Silver 1985 *Duke Law Journal* 963.

1296 Section 82(1) of the *Financial Markets Act*; Chew 1998 *Singapore Journal of Legal Studies* 340; Osode 2000 *Journal of African Law* 247-248; Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908, 912-913.

1297 Section 929P of the *Dodd-Frank Act*; Chitimira H "Overview of the Federal Prohibition on Market Abuse in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 119, 123; Thanitcul S and Srinopnikom T "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions" 2018 *Kasetsart Journal of Social Sciences* 1, 2 and 3.

1298 See paragraph 5.4.3 in Chapter Five of this thesis. See related comments by Lyon G and Du Plessis JJ *The Law of Insider Trading in Australia* (The Federation Press Australia 2005) 113; Bromberg L, Gilligan G and Ramsay I "The Extent and Intensity of Insider Trading Enforcement – An International Comparison" 2017 *Journal of Corporate Law Studies* 73, 76 and 82.

(e) ***The Securities Act Should be amended to Enact Adequate Provisions for Private Rights of Action***

The *Securities Act*[1299] and the *Financial Markets Act*[1300] do not have provisions that expressly empower insider trading victims to bring private rights of action against the insider trading offenders in Zimbabwe and South Africa respectively. It is submitted that private rights of action empowers the affected party with the right to claim damages directly from the insider trading offenders.[1301] The researcher submits that the private right of action is important in Zimbabwe because affected persons may directly claim damages from the offender rather than depending on the SECZ. Furthermore, private rights of action enables affected persons to recover their damages directly from the offenders which enables them to get such damages without sharing or having them deducted in the form of costs and other expenses that could be incurred after claiming via the SECZ. Unlike the position in Zimbabwe and South Africa, the *Securities Fraud Enforcement Act* allows any person affected by insider trading activities to bring private rights of action against the insider trading offenders in the USA.[1302] In this regard, it is recommended that the South African and Zimbabwean legislature should amend the *Securities Act* and the *Financial Markets Act* to introduce private rights of action. This could give the affected persons the power to claim damages directly from offenders and enable them to recover damages without sharing the damages with the SECZ or FSCA.

1299 Sections 87-95 & section 105 of the *Securities Act*; see related comments by Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86, 103-104.

1300 Sections 77-88 of the *Financial Markets 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* 1399, 1404-1406.

1301 See related comments by Loke AFH "The Protected Interests in the Private Right of Action for Insider Trading: A Comparative Perspective" 2007 *Journal of Corporate Law Studies* 307, 307-310; Chitimira 2015 *Speculum Juris* 86, 103-104.

1302 Section 5 of the *Securities Fraud Enforcement Act* which amended section 20A of the *Securities Exchange Act;* see related comments by Parker 1995 *Washington University Law Review* 1404-1406.

(f) The SECZ Should Consider Establishing a Special Market Abuse Department

The SECZ Supervision and Surveillance department is responsible for the prevention, investigation and enforcement of all offences prohibited by the *Securities Act.*[1303] This implies that the Supervision and Surveillance department is expected to deal with many cases consisting of different offences that often delays insider trading investigations from being concluded.

Prior to the establishment of the Financial Sector Conduct Authority (FSCA), the Directorate of Market Abuse (DMA) was a committee responsible for preventing and investigating market abuse cases in South Africa.[1304] Although, the position has changed, the researcher submits that the DMA was a good committee that effectively investigated several insider trading cases in South Africa.[1305] This could have been influenced by the fact that the DMA mainly focused on market abuse investigations through its officers that had vast experience in the financial markets and related market abuse crimes.[1306]

In this regard, it is recommended that the SECZ must consider establishing a special market abuse department that focuses on preventing, investigating and prosecuting insider trading and other market abuse offences. This will complement the SECZ and increase the prosecution and settlement of insider trading cases in Zimbabwe. Furthermore, the market abuse department is important because it will mainly focus on market abuse related offences. Moreover, in order for this special market abuse department to function effectively, it must employ persons with the relevant experience and expertise in the financial markets and market abuse crimes and must also have access to relevant resources.

1303 See paragraph 4.2.3 in Chapter Four of this thesis; see related comments by Clacher I, Hillier D and Lhaopadchan S "Corporate Insider Trading: A Literature Review" 2009 *Spanish Journal of Finance and Accounting* 373, 379.

1304 See paragraph 7.2.3.2.6 in Chapter Seven of this thesis see related comments by 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* 200, 206.

1305 See paragraph 7.2.3.2.6 in Chapter Seven of this thesis; see related comments by Chitimira and Lawack 2013 *Obiter* 206.

1306 Section 82 of the *Financial Markets Act*; see paragraph 7.2.3.2.6 in Chapter Seven of this thesis.

(g) The Securities Act Should be amended to Empower the SECZ Should Employ Whistle-Blower Immunity Measures and Bounty Rewards

In the USA, the SEC employs whistle-blower immunity measures and bounty rewards for insider trading cases.[1307] Whistle-blowers are often rewarded with money for providing the SEC with information regarding insider trading activities in the USA financial markets.[1308] It is submitted that whistle blowers rewards are important because they encourage whistle blowers to assist the enforcement bodies with information regarding insider trading cases. However, whistle-blowers receive incentives only when the tip leads to a successful insider trading case or where the offender pays an amount exceeding $1 million.[1309] The SEC has restricted the whistle blower rewards to cases that they have won. This implies that the information provided by the whistleblower should be of assistance to the SEC. Furthermore, the whistle-blower immunity measures could assist the SECZ with useful information to detect, investigate and combat insider trading activities in the Zimbabwean financial markets.

Unlike in the USA, there are no whistle-blower immunity measures and bounty rewards in both Zimbabwe and South Africa.[1310] The researcher submits that both South Africa and Zimbabwe should consider following the position in the USA and recognize the importance of whistleblowers in preventing insider trading activities in their respective jurisdictions. Whistleblowers play an important part of assisting enforcement authorities with information about an insider trading case which sometimes is not known to the enforcement authority. In this regard, it is recommended that the *Securities Act* must be amended to expressly enact whistle-blower immunity measures. This could assist the

---

Section 746 of the *Dodd-Frank Act;* Choi SJ and Pritchardt AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1, 9; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 215-216.

1308 Section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of *2010* [Public Law 111–203] (*Dodd-Frank Act*); See related comments by Moy GG "The Role of Whistleblowers in Protecting the Safety and Integrity of the Food Supply" 2018 *A Nature Researcher Journal* 1, 2; Kawadza H "Revisiting Financial Services Sector Transparency through Whistleblowing: The Case of South Africa and Switzerland" 2017 *Journal of African Law* 83, 88, 90-94.

1309 Section 922 of the *Dodd-Frank Act*; See related comments by Moy 2018 *A Nature Researcher Journal* 2; Guin and Donaldson 1990 *Washington and Lee Law Review* 576; Kawadza 2017 *Journal of African Law* 88, 90-94.

1310 See paragraphs 7.2.3.2 & 7.2.3.2.7 in Chapter Seven and 2.3 in Chapter Two of this thesis.

SECZ and other relevant persons with information on ongoing insider trading practices and how to curb them.

(h) The SECZ Should Consider Adopting Adequate Insider Trading Rules

The *Securities Act* empowers the SECZ to make rules to achieve its objectives.[1311] Currently, the SECZ does not have insider trading rules. The SECZ is busy drafting rules regarding the regulation of securities in Zimbabwe.[1312] Furthermore, the *Securities Act* does not clearly stipulate whether such rules empower the SECZ to formulate its own rules on the regulation of insider trading in Zimbabwe.[1313]

In the USA, the SEC has authority to adopt rules that supplement the insider trading provisions of the *Securities and Exchange Act*. The SEC rules enhance the regulation of insider trading in the USA financial markets.[1314] For instance, the SEC rules on insider trading have broadened the scope of insider trading and have provided legal certainty on the regulation of insider trading in USA.[1315] Although, the Directorate of Market Abuse (DMA) and Financial Services Board (FSB) no longer exist in South Africa, the *Financial Markets Act* provides that the FSB had the authority to make market abuse rules after consultation with the DMA.[1316] For instance, the FSB could adopt rules concerning the manner in which market abuse cases should be conducted.[1317] Currently, there is no provision in the *Financial Sector Regulation Act* that allows the FSCA to adopt insider

---

1311 Sections 87-95 of the *Securities Act*; see related comments by Osode 2000 *Journal of African Law* 256-257; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 89-92.

1312 See generally section 118 of the *Securities Act*; see related comments by Ronen J "The Effect of Insider Trading Rules on Information Generation and Disclosure by Corporations" 1977 *The Accounting Review* 438, 440-441; Banoff BA "The Regulation of Insider Trading in the United States, United Kingdom, and Japan" 1988 *Michigan Journal of International Law* 145, 149.

1313 See generally sections 87-95 read with 118 of the *Securities Act*; see related comments by Ronen 1977 *The Accounting Review* 440-441; Banoff 1988 *Michigan Journal of International Law* 149.

1314 Section 10(b) of the *Securities and Exchange Act*; see related comments by Ronen 1977 *The Accounting Review* 440-441; Banoff 1988 *Michigan Journal of International Law* 149.

1315 See related comments by Ronen 1977 *The Accounting Review* 440-441; Banoff 1988 *Michigan Journal of International Law* 149.

1316 Section 84(1)(f) of the *Financial Markets Act;* see paragraph 7.2.3.2.5 in Chapter Seven of this thesis.

1317 Section 84(1)(f)(ii) of the *Financial Markets Act;* see paragraph 7.2.3.2.5 of this thesis.

trading rules.[1318] It is submitted that insider trading rules have played an important role in the regulation of insider trading in South Africa. The insider trading rules complemented the *Financial Markets Act*.

In this regard, it is recommended that the SECZ should urgently adopt insider trading rules to enhance the regulation of insider trading in the Zimbabwean financial markets. For instance, the SECZ should consider adopting rules on how insider trading hearings should be conducted by the SECZ. Moreover, insider trading rules complement the *Securities Act*.

(i) The ZSE Should Adopt Adequate Surveillance Systems with Electronic Alerts to Specifically Identify and Detect Insider Trading Activities

Although, the ZSE has the authority to detect insider trading activities, it does not have electronic surveillance systems to detect insider trading activities.[1319] The SECZ receive insider trading cases from the police and market participants.[1320] This shows that the ZSE has not been effective in detecting insider trading activities. Unlike in Zimbabwe, in South Africa, the Johannesburg Stock Exchange (JSE) uses electronic surveillance systems to detect illicit trading activities.[1321] Electronic surveillance systems are able to identify the names, addresses, telephone numbers and other details of the parties involved in the transactions.[1322] The same can be said about the USA, where the Financial Industry Regulatory Authority (FINRA) and the Options Regulatory Surveillance Authority (ORSA)

1318 See sections 56-75 of the *Financial Sector Regulation Act*.

1319 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1320 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer, of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

1321 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 (former Chief Investigator of the DMA) on the 6th of October 2017.

1322 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 (former Chief Investigator of the DMA) on the 6th of October 2017.

detects insider trading activities through electronic surveillance systems.[1323] In USA, the SEC also uses Electronic Data Gathering Analysis and Retrieval system (EDGAR) to detect insider trading activities in the USA financial markets.[1324]

The researcher recommends that the ZSE and the SECZ should adopt adequate electronic surveillance systems in order to monitor and detect illicit trading activities in the Zimbabwean financial markets. This could enable the SECZ and the ZSE to detect and prevent insider trading activities timeously in the Zimbabwean financial markets.

(j) The SECZ Should Consider Adopting Educational and Awareness Programs to Enhance the Regulation of Insider Trading

Currently, there are relatively few educational and awareness programs by the SECZ which provide information on insider trading offences in Zimbabwe.[1325] The SECZ has not been effective in relation to creating insider trading awareness programs. The absence of such educational and awareness programs could have contributed to the ineffective regulation of insider trading in Zimbabwe to date. It is acknowledged that market participants who do not have relevant knowledge about securities may make wrong decisions. Anti-insider trading educational and awareness programs are crucial for the impartation of useful knowledge about the illegal and legal use of non public price-sensitive information to market participants. In South Africa, the former Consumer

1323 See paragraph 7.2.3.2.8 in Chapter Seven and 6.4.1 in Chapter Six of this thesis. See related comments by Financial Industry Regulatory Authority 2018 *Office of Fraud Detection and Market Intelligence (OFDMI)* HYPERLINK "http://www.finra.org/industry/ofdmi" http://www.finra.org/industry/ofdmi accessed 13 November 2018 page number unknown; Ahern KR "Information Networks: Evidence From Illegal Insider Trading Tips" 2015 *Journal of Financial Economics* 1, 30.

1324 Securities and Exchange Commission 2012 *About the Division of Corporation Finance* HYPERLINK "https://www.sec.gov/divisions/corpfin/cfabout.shtml" https://www.sec.gov/divisions/corpfin/cfabout.shtml accessed 17 July 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 232; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 112-113.

1325 See related comments by Securities and Exchange Commission of Zimbabwe 2018 *Publications* HYPERLINK "http://www.seczim.co.zw/investor-information/publications" http://www.seczim.co.zw/investor-information/publications accessed 03 August 2018 page number unknown; Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012) 250.

Education Department of the FSB provided investor education which included raising awareness about insider trading in the South African financial markets.[1326] Currently, the FSCA has not put into place anything related to insider trading awareness and investor education. Investor education is important as market participants need to be educated on financial market crimes and other illicit securities trading offences. The SEC has an Investor Education and Advocacy Office which provides investor education and has also produced a brochure that provides information about legal and illegal insider trading.[1327] In light of the above, the researcher recommends that the SECZ should consider providing insider trading educational programs for market participants, company employees, banks and other relevant stakeholders. These educational and awareness programs could enable all persons to have the relevant knowledge on insider trading offences in Zimbabwe.

(i) The Zimbabwean Legislature Should Consider Establishing a Specialized Market Abuse Court

In Zimbabwe, South Africa and USA there are no special market abuse courts. The purpose of market abuse courts is to prosecute market abuse offences including insider trading cases only.[1328] It is submitted that the courts in Zimbabwe lack resources and relevant people who have expertise in the financial markets crimes as a result insider trading cases are often delayed.[1329] Therefore, the adoption of market abuse courts will ensure that insider trading cases are prosecuted timeously. In this regard, the researcher

---

1326 See related comments by Financial Services Board 2017 *Consumer Education* HYPERLINK "https://www.fsb.co.za/Departments/consumerEducation/Pages/AboutUs.aspx%20accessed%2003" https://www.fsb.co.za/Departments/consumerEducation/Pages/AboutUs.aspx accessed 03 August 2018 page number unknown; Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 250.

1327 Securities and Exchange Commission 2012 *Investor Publications* . HYPERLINK "https://www.sec.gov/reportspubs/investor-publications/investorpubsinsidertradingguidehtm.html" https://www.sec.gov/reportspubs/investor-publications/investorpubsinsidertradingguidehtm.html accessed 28 November 2018 page number unknown.

1328 See related comments by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* 562.

1329 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer of the SECZ) and Mahombera N (Surveillance and Risk Manager of the SECZ) on 29 June 2018.

recommends that the Zimbabwe should establish a specialized market abuse court to prosecute insider trading cases timeously.

(j) The Zimbabwe Legislature Should Consider Adopting the Twin Peaks Model

The *Financial Sector Regulation Act* has introduced the twin peaks model in South Africa[1330] to enhance market integrity, consumer protection and the combating of insider trading in its financial markets. The Twin Peaks model consists of the Prudential Authority which has the responsibility to promote and enhance the safety and soundness of regulated financial institutions.[1331] Furthermore, the FSCA has the responsibility to ensure that financial institutions treat financial services customers fairly, enhance the efficiency and integrity of the financial system and provide financial education programs. Currently, the FSCA is still putting measures into place to carry on with its mandate. It is submitted that the twin peaks model does place emphasis on deterring people from committing financial markets crimes but also promotes market efficiency, fairness and financial education.

In light of the above, the researcher recommends that the Zimbabwean government should consider adopting the twin peaks model to promote financial inclusion.

(k) Deterrence should not be the only Policy Goal for the Insider Trading Prohibition in Zimbabwe

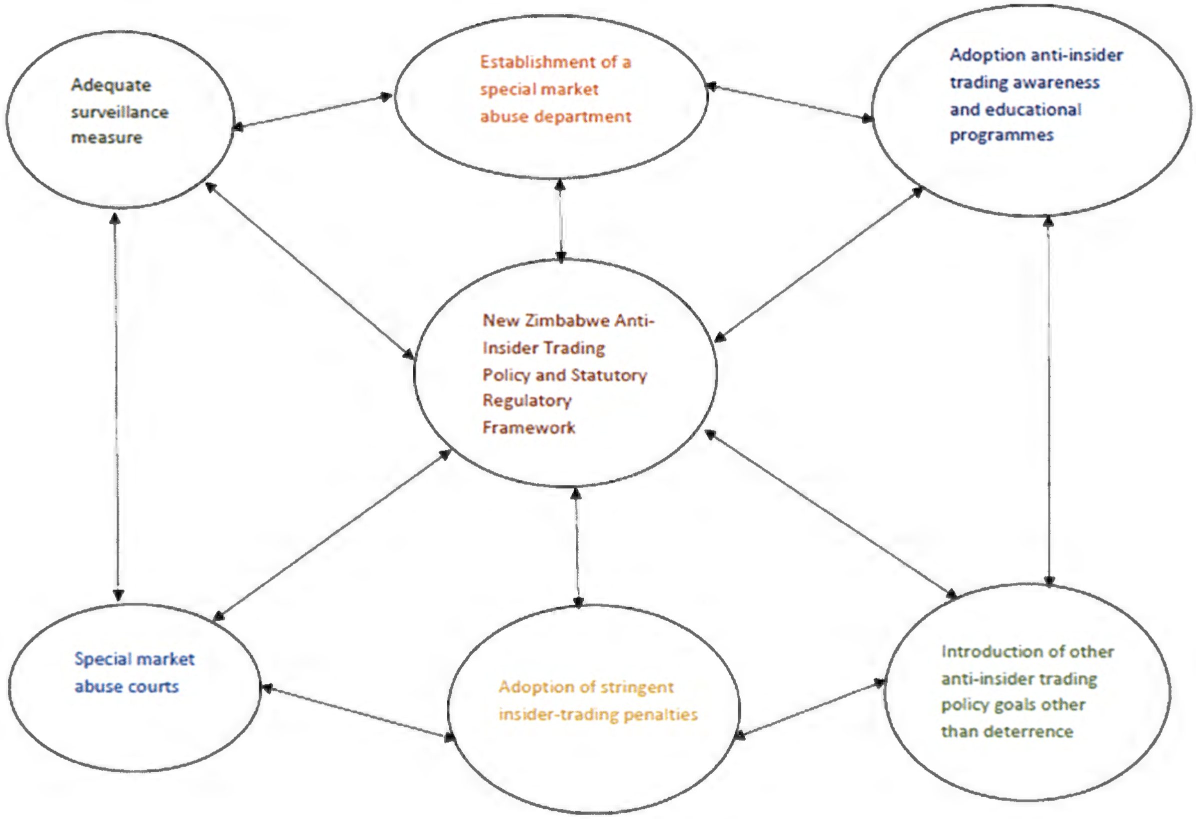
It is noted that Zimbabwe relies on the policy goal of deterrence as it keeps on increasing insider trading civil and criminal penalties. The researcher recommends that the legislature should consider other policy goals such as financial inclusion and market efficiency.

[1330] See sections 32-55 and 56-75 of the *Financial Sector Regulation Act;* see related comments by Goodspeed I "Twin Peaks" 2017 *South African Financial Regulation Journal* 1, 3-4.

[1331] See sections 32-55 and 56-75 of the *Financial Sector Regulation Act;* see related comments by Goodspeed I "Twin Peaks" 2017 *South African Financial Regulation Journal* 1, 3-4.

(l) Zimbabwe Should Seriously Consider Adopting a new anti-insider Trading Policy and Statutory Regulatory Framework

Figure 9.1: New Zimbabwe Anti-Insider Trading Policy and Statutory Regulatory Framework



As indicated above, the researcher recommends that the relevant authorities in Zimbabwe should seriously consider adopting a new Zimbabwe anti-insider trading policy and statutory regulatory framework as indicated in figure 9.1.

It is recommended that the ZSE and SECZ should adopt adequate electronic surveillance system. The electronic surveillance system will assist the ZSE and SECZ to timeously detect illicit trading activities in the Zimbabwean financial markets. Furthermore, electronic surveillance system is also important because it reveals the insiders' personal information.

The Judicial Service Commission should consider establishing a specialized market abuse court to timeously prosecute market abuse cases. The purpose of the market abuse court is to prosecute market abuse related offences including insider trading cases.

The researcher recommends that the SECZ should establish a specialized market abuse department that will prevent, detect and investigate market abuse cases. The Zimbabwean government should also support the market abuse department financially to enable it to effectively enforce the prohibition of market abuse in the Zimbabwean financial markets.

The SECZ should adopt insider trading educational programs and publish pamphlets with information regarding the insider trading prohibitions. Furthermore, the SECZ should organize workshops based on financial crimes including insider trading activities and invite judges, magistrates, prosecutors, police and market participants.

The policy makers should adopt stringent criminal, civil and administrative penalties to combat insider trading activities in the financial markets. Furthermore, insider trading penalties should not only compensate the affected person but they should deter people from committing insider trading activities.

The legislature should adopt other policy goals such as financial inclusion and must not rely on the policy goal of deterrence only.

9.4 Conclusion

The enactment of the *Securities Act* was a positive attempt by the legislature to curb the illicit insider trading activities in the Zimbabwean financial markets. Insider trading is regulated in Zimbabwe because it poses a threat to investor confidence, market integrity and market efficiency. Furthermore, the call for the enactment of the *Securities Act* was influenced by insider trading activities that continued to take place in the Zimbabwean financial markets without being successfully prosecuted by the relevant persons in the courts. Prior to 2004, the ZSE and Zimbabwe Anti-Corruption Committee (ZACC) investigated several insider trading cases. However, no one was convicted of insider trading because insider trading was not prohibited in the Zimbabwean financial markets. Therefore, the *Securities Act* was mainly enacted to curb insider trading activities, protect investors, market integrity and create a fair and efficient financial market.[1332]

However, the prohibition of insider trading has not been effectively enforced by the SECZ and the courts. It was observed that some of the obstacles to the effective enforcement of the insider trading prohibition include the lack of electronic surveillance systems to detect insider trading activities in the Zimbabwean financial markets.[1333] The researcher submits that insider trading activities are not easy to detect as a result electronic surveillance systems assist enforcement institutions to detect illicit trading activities. Furthermore, the ZSE, SECZ and the courts lack resources to effectively enforce the insider trading prohibitions in Zimbabwe. For instance, the enforcement institutions lack proper offices and persons who have expertise in the financial crimes. Therefore, the government should assist the enforcement authorities with funding to be able to effectively fulfill their mandate.

1332 See section 4(1)(a),(c),(d),(e) and (f) read with section 88 of the *Securities Act*.

1333 This information was obtained from an interview that was conducted at the SECZ by the researcher, with Mataruka T (Legal and Licensing Officer, SECZ) and Mahombera N (Surveillance and Risk Manager) on 29 June 2018.

BIBLIOGRAPHY

Literature

Aboody 2010 *University of California Los Angeles Journal*

Aboody D, *et al* "Top Executives Insider Trading Profits and Firm Performance" 2010 *University of California Los Angeles Journal* 1-22

Abubakar 2013 *International Journal Management*

Abubakar G "Impediments to Effective Enforcement of Insider Trading Regulations in Nigeria" 2013 *International Journal Management* 13-45

Acobat 1999 *Cornell Law Review*

Acobat MA "Insider Trading Jurisprudence after United States V Ohagan: A Restatement (Second) of Torts § 551(2) Perspective" 1999 *Cornell. Law Review* 1357-1377

Adams *Themes and Theories of the Insider Trading Provisions*

Adams M *Themes and Theories of the Insider Trading Provisions of the 2004 Securities Services Act* (LLM-Thesis University of Cape Town 2007)

Adams, Marshall and Masci *Federal Regulatory Directory*

Adams R, Marshall M and Masci D *Federal Regulatory Directory: The Essential Guide to the History, Organization, and Impact of US Federal Regulation* (SAGE Publications Inc Los Angeles 2014)

Akbas, Armstrong, Sorescu, and Subrahmanyam 2016 *Journal of Financial and Quantitative Analysis*

Akbas F, Armstrong WJ, Sorescu S, and Subrahmanyam A "Capital Market Efficiency and Arbitrage Efficacy" 2016 *Journal of Financial and Quantitative Analysis* 387-413

Alexander 2006 *Journal of Financial Crime*

Alexander R "The Role of Whistleblowers in the Fight against Economic Crime" 2006 *Journal of Financial Crime* 131-138

Anderson 2017 *Washington University Journal of Law and Policy* 228

Anderson JP "Insider Trading and the Myth of Market Confidence" 2017 *Washington University Journal of Law and Policy* 1-15

Anderson 2015 *Utah Law Review*

Anderson JP "Anticipating A Sea Change For Insider Trading Law: From Trading Plan Crisis To Rational Reform" 2015 *Utah Law Review* 339-389

Anderson 1982 *Hofstra Law Review*

Anderson AG "Fraud, Fiduciaries, and Insider Trading" 1982 *Hofstra Law Review* 341-377

Lowenfels 1974 *Washington University Law Quarterly*

Lowenfels J "Section 16(B): Insider Trading" 1974 *Washington University Law Quarterly* 872-910

Allen 1981 *Washington and Lee Law Review*

Allen SN "The Scope of the Disclosure Duty under SEC Rule 14e-3" 1981 *Washington and Lee Law Review* 1055-1073

Ansah 1998 *The International Journal of Accounting*

Ansah SO "The Impact of Corporate Attributes on the Extent of Mandatory Disclosure and Reporting by Listed Companies in Zimbabwe" 1998 *The International Journal of Accounting* 605-131

Arshadi 1998 *Financial Management Journal*

Arshadi N "Insider Trading Liability and Enforcement Strategy" 1998 *Financial Management Journal* 70-84

Ash 1988 *Ohio State Law Journal*

Ash BA "State Regulation of Insider Trading-A Timely Resurgence?" 1988 *Ohio State Law Journal* 393-416 229

Austin 2016 *William and Mary Business Law Review*

Austin J "What Exactly Is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation" 2016 *William and Mary Business Law Review* 215-240

Austin *What are the Challenges for Securities Regulators and How Can They Best Preserve the Integrity of The Markets*?

Austin J *What are the Challenges for Securities Regulators and How Can They Best Preserve the Integrity of The Markets*? (LLD-Thesis York University Toronto 2016).

Austin *Insider Trading and Market Manipulation: Investigating and Prosecuting Across Borders*

Austin J *Insider Trading and Market Manipulation: Investigating and Prosecuting Across Borders* (Edward Elgar Publishing Canada 2017).

Avci, Schipani and Seyhun 2018 *Yale Journal on Regulation*

Avci SB, Schipani CA and Seyhun HN "Eliminating Conflicts of Interests in Banks: The Significance of the Volcker Rule" 2018 *Yale Journal on Regulation* 343-381

Ayres I and Bankman 2001 *Stanford Law Review*

Ayres I and Bankman J "Substitutes for Insider Trading" 2001 *Stanford Law Review* 235-294

Bacastow 1982 *Journal of Criminal Law and Criminology*

Bacastow DJ "Due Process and Criminal Penalties Under Rule 10b-5: The Unconstitutionality and Inefficiency of Criminal Prosecutions for Insider Trading" 1982 *Journal of Criminal Law and Criminology* 96-134

Bainbridge 1985 *Virginia Law Review*

Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455-498

Bainbridge 2001 *University of California Los Angeles Law Review* 230

Bainbridge SM "The Law and Economics of Insider Trading: A Comprehensive Primer" 2001 *University of California Los Angeles Law Review* 3-83

Bainbridge 2001 *University of California Los Angeles Law Review*

Bainbridge SM "Insider Trading: An Overview" 2001 *University of California Los Angeles Law Review* 1-39

Bainbridge 2008 *University of California, Los Angeles School of Law Review*

Bainbridge SM "Manne on Insider Trading" 2008 *University of California, Los Angeles School of Law Review* 1-11

Bainbridge 1999 *SMU Law Review*

Bainbridge MS "Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud" 1999 *SMU Law Review* 1589-1652

Bainbridge 1985 *Virginia Law Review*

Bainbridge S "A Critique of the Insider Trading Sanctions Act of 1984" 1985 *Virginia Law Review* 455-498

Bainbridge *Research Handbook on Insider Trading*

Bainbridge SM *Research Handbook on Insider Trading* (Edward Elgar Publishing Limited United Kingdom 2013)

Bainbridge *An Overview of Insider Trading Law and Policy*

Bainbridge SM *An Overview of Insider Trading Law and Policy: An Introduction to The Insider Trading Research Handbook* (Edward Elgar Publishing Ltd California 2013)

Bakken 2015 *Pace Law Review*

Bakken T "Dodd-Frank's Extension of Criminal Corporate Liability through the Foreign Corrupt Practices Act: Enabling Whistleblowers and Monitoring Conflict Minerals" 2015 *Pace Law Review* 1-30

Bankman and Ayres 2002 *Stanford Law Review* 231

Bankman J and Ayres I "Substitutes for Insider Trading" 2002 *Stanford Law Review* 235-294

Banoff 1988 *Internationalization of Securities Markets Journal*

Banoff AB "The Regulation of Insider Trading in the United States, United Kingdom, and Japan"1988 *Internationalization of Securities Markets Journal* 145-170

Basdeo 2009 *PELJ*

Basdeo V "The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure" 2009 *PELJ* 307-331

Basdeo 2014 *PELJ*

Basdeo V "The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma" 2014 *PELJ* 1048-1069

Bauman 1984 *The University of Chicago Law Review*

Bauman TA "Insider Trading at Common Law" 1984 *The University of Chicago Law Review* 838-867

Beatty and Samuelson *Cengage Advantage Books: Essentials of Business Law*

Beatty JF and Samuelson SS *Cengage Advantage Books: Essentials of Business Law* 5th Edition (Cengage Learning Publishers United States of America 2015).

Benade 1970 *The Comparative and International Law Journal of Southern Africa*

Benade LM "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *The Comparative and International Law Journal of Southern Africa* 277-309

Benston 1973 *The American Economic Review*

Benston GJ "Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934" 1973 *The American Economic Review* 132- 155

Beny 2004 *Law and Economics Working Papers* 232

Beny LN "A Comparative Empirical Investigation of Agency and Market Theories of Insider Trading" 2004 *Law and Economics Working Papers* 1-64

Beny 2007 *Journal of Corporation Law*

Beny LN "Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate" 2007 *Journal of Corporation Law* 239-280

Beny 2002 *Harvard Law School Review*

Beny LN "The Political Economy of Insider Trading Legislation and Enforcement: International Evidence" 2002 *Harvard Law School Review* 1-59

Bergmann 1974 *Boston College Industrial and Commercial Law Review*

Bergmann LE "Securities -- Standing to Sue Under SEC Rule 10b-5 and the Purchaser-Seller Limitation – Manor Drug Stores v Blue Chip Stamps" 1974 *Boston College Industrial and Commercial Law Review* 978-996

Bernhardt, Hollifield and Hughson 1995 *The Review of Financial Studies*

Bernhardt D, Hollifield B and Hughson E "Investment and Insider Trading" 1995 *The Review of Financial Studies* 501-543

Bewaji *Insider Trading in Developing Jurisdictions Achieving an Effective Regulatory Regime*

Bewaji W *Insider Trading in Developing Jurisdictions Achieving an Effective Regulatory Regime* (Routledge London and New York 2012).

Bhana *South African Journal of Business Management*

Bhana N "Take-over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198-208

Black 1992 *UNSW Law Journal*

Black A "The Reform of Insider Trading Law in Australia" 1992 *UNSW Law Journal* 214-255

Black 1988 *Melbourne University Law Review* 233

Black A "Policies in the Regulation of Insider Trading and the Scope of Section 128 of the Securities Industry Code" 1988 *Melbourne University Law Review* 633-668

Blake and De Jong *Financial Exclusion A Guide for Donors and Funders*

Blake S and De Jong E *Financial Exclusion A Guide for Donors and Funders* (New Philanthropy Capital London 2008)

Blumberg 1985 *North Carolina Law Review*

Blumberg JA "Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy" 1985 *North Carolina Law Review* 117-157

Blum 1938 *Journal of Political Economy*

Blum JW "The Federal Securities Act, 1933-36" 1938 *Journal of Political Economy* 171-217

Bondi and Lofchie 2011 *NYU Journal of Law and Business*

Bondi BJ and Lofchie DS "The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance" 2011 *NYU Journal of Law and Business* 152-200

Botha 1991 *SA Merc LJ*

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

Brocket 2010 *The Accounting Review*

Brocket F "Information Content of Insider Trades before and after the Sarbanes-Oxley Act" 2010 *The Accounting Review* 419-446

Brodsky 1984 *Washington and Lee Law Review*

Brodsky DM "Insider Trading and the Insider Trading Sanctions Act of 1984: New Wine Into New Bottles?" 1984 *Washington and Lee Law Review* 921-941

Brodsky and Kramer 1998 *Cardozo Law Review* 234

Brodsky DM and Kramer DJ "A Critique of the Misappropriation Theory of Insider Trading" 1998 *Cardozo Law Review* 41-81

Bromberg, Gilligan and Ramsay 2017 *Journal of Corporate Law Studies*

Bromberg L, Gilligan G and Ramsay I "The Extent and Intensity of Insider Trading Enforcement – An International Comparison" 2017 *Journal of Corporate Law Studies* 73-110

Brudney 1979 *Harvard Law Review*

Brudney V "Insiders, Outsiders, and Informational Advantages under the Federal Securities Law" 1979 *Harvard Law Review* 322-376

Carlton and Fischel 1982 *Stanford Law Review*

Carlton DW and Fischel DR "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857-895

Carr 1999 *Boston College Law Review*

Carr BJ "Culpable Intent Required for all Criminal Insider Trading Convictions after United States v O'Hagan" 1999 *Boston College Law Review* 1187-1219

Carvajal and Elliott 2009 *International Monetary Fund*

Carvajal A and Elliott J "The Challenge of Enforcement in Securities Markets: Mission Impossible?" 2009 *International Monetary Fund* 1-20

Cassim *et al Contemporary Company Law*

Cassim F *et al Contemporary Company Law* (Juta and Company Limited South Africa Cleremont 2011)

Cassim 2007 *South African Mercantile Law Journal*

Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?" 2007 *South African Mercantile Law Journal* 44-70

Cassim and Cassim 2004 *International Company and Commercial Law Review* 235

Cassim FHI and Cassim R "The Capital Maintenance Concept and Share Repurchases in South African Law" 2004 *International Company and Commercial Law Review* 1-6

Chauhan, Chaturvedula and Viswanathan 2014 *The Review of Finance and Banking*

Chauhan Y, Chaturvedula C, and Viswanathan I "Insider Trading, Market Efficiency, And Regulation a Literature Review" 2014 *The Review of Finance and Banking* 7-14

Chakravarta and McConnell 1999 *Journal of Financial and Quantitative Analysis*

Chakravarta S and McConnell JJ "Does Insider Trading Really Move Stock Prices?" 1999 *Journal of Financial and Quantitative Analysis* 191-214

Chena, Hodgsonb and Linnenlueckec 2018 *Accounting and Finance Journal*

Chena X, Hodgsonb A and Linnenlueckec KM "Transferring and Trading on Insider Information in the United States and Australia: Just a Case of Happy Hour Drinks?" 2018 *Accounting and Finance Journal* 83-93

Cheng *A Comparison of Illegal Insider Trading in Canada: Globalised Market Economy and the Role of Law*

Cheng H *A Comparison of Illegal Insider Trading in Canada: Globalised Market Economy and the Role of Law* (LLD Simon Fraser University 2004)

Chew 1998 *Singapore Journal of Legal Studies*

Chew M "The Adequacy And Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" 1998 *Singapore Journal of Legal Studies* 331-375

Chitimira and Lawack 2013 *Obiter*

Chitimira H and Lawack VA "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 2)" 2013 *Obiter* 64-76

Chitimira and Lawack 2013 *Obiter*

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* 200-217 236

Chitimira *Principles of Market Abuse Regulation*

Chitimira H *Principles of Market Abuse Regulation: A Comparative South African Perspective* (Juta Publishers Cape Town 2018)

Chitimira 2014 *Mediterranean Journal of Social Sciences*

Chitimira H "Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012" 2014 *Mediterranean Journal of Social Sciences* 124-135

Chitimira 2014 *Mediterranean Journal of Social Sciences*

Chitimira H "Overview of the Federal Prohibition on Market Abuse in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 119-135

Chitimira *The Regulation of Insider Trading in South Africa*

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

Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions*

Chitimira H *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD-Thesis Nelson Mandela Metropolitan University 2012)

Chitimira 2015 *Law, Democracy and Development Journal*

Chitimira H "An Overview Analysis of Selected Challenges in the Enforcement of the Prohibition of Insider Trading and Market Manipulation in the European Union and South African Regulatory Frameworks" 2015 *Law, Democracy and Development Journal* 94-106

Chitimira 2014 *Speculum Juris*

Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108-124

Chitimira 2014 *Mediterranean Journal of Social Sciences* 237

Chitimira H "An Analysis of the Market Abuse Prohibition Enforcement in the United States of America" 2014 *Mediterranean Journal of Social Sciences* 188-199

Chitimira 2014 *PELJ*

Chitimira H "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PELJ* 939-971

Chitimira 2016 *Journal of Corporate and Commercial Law and Practice*

Chitimira H "Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa" 2016 *Journal of Corporate and Commercial Law and Practice* 24-41

Chitimira 2015 *Speculum Juris*

Chitimira H "The Regulation of Insider Trading in Australia: A Historical and Comparative Analysis" 2015 *Speculum Juris* 86-107

Chitimira 2014 *De Jure*

Chitimira H "A Historical Overview of the Regulation of Market Abuse Under the Securities Services Act 36 of 2004" 2014 *De Jure* 310-328

Choi and Pritchard 2017 *Yale Journal on Regulation*

Choi SJ and Pritchard AC "The SEC's Shift to Administrative Proceedings: An Empirical Assessment" 2017 *Yale Journal on Regulation* 1-15

Chuang 2001 *Zhongyuan Finance and Economics Law Journal*

Chuang YC "A Critique of US Insider Trading Regulation Theory" 2001 *Zhongyuan Finance and Economics Law Journal* 1-26

Cinar 1999 *Journal of Business Ethics*

Cinar M "The Issue of Insider Trading in Law and Economics: Lessons for Emerging Financial Markets in the World" 1999 *Journal of Business Ethics* 345-400

Cichos 1995 *Seattle University Law Review* 238

Cichos T "The Misappropriation Theory of Insider Trading: Its Past, Present, and Future" 1995 *Seattle University Law Review* 389-402

Clacher, Hillier and Lhaopadchan 2009 *Spanish Journal of Financeand Accounting*

Clacher I, Hillier D and Lhaopadchan S "Corporate Insider Trading: A Literature Review" 2009 *Spanish Journal of Finance and Accounting* 373-389

Cohen, Dunning and Shill 2010 *Securities Litigation Journal*

Cohen JM, Dunning KM and Shill GM "Erosion of the Fiduciary-Duty Requirement in Insider-Trading Actions" 2010 *Securities Litigation Journal* 12-23

Cohen 2006 *Boston College Law Review*

Cohen DT "Old Rule, New Theory: Revising the Personal Benefit Requirement for Tipper/Tippee Liability Under the Misappropriation Theory of Insider Trading" 2006 *Boston College Law Review* 547-560

Conyers 1973 *International Business Law*

Conyers S "Insider trading" 1973 *International Business Law* 19-28

Cook 1953 *The Harvard Law Review Association*

Cook CD and Feldman M "Insider Trading under the Securities Exchange Act" 1953 *The Harvard Law Review Association* 385-411

Coomer *Zimbabwe's Economic Crisis and Hyperinflation*

Coomer J *Zimbabwe's Economic Crisis and Hyperinflation 1997 – 2009* (Masters Dissertation in Financial Management University of Cape Town)

Cooter 1990 *Tel Aviv University Studies in Law Review*

Cooter R "Economic Model of the Fiduciary's Duty of Loyalty" 1990 *Tel Aviv University Studies in Law Review* 297-309

Cox 1986 *Duke Law Journal*

Cox DJ "Insider Trading and Contracting: A Critical Response to the Chicago School" 1986 *Duke Law Journal* 628-648

Cox 1990 *Sydney Law Review* 239

Cox DJ "An Outsider's Perspective of Insider Trading Regulation in Australia" 1990 *Sydney Law Review* 455-480

Cox and Fogarty 1988 *Ohio State Law Journal*

Cox CC and Fogarty KS "Bases of Insider Trading Law" 1988 *Ohio State Law Journal* 353-380

Cross and Miller *The Legal Environment of Business: Text and Cases-Ethical, Regulatory, Global and E-Commerce Issues*

Cross F and Miller R *The Legal Environment of Business: Text and Cases-Ethical, Regulatory, Global, and E-Commerce Issues* (Cengage Learning Publishers United States of America 1980)

Crouch and Lindsey *Law, Society and Transition in Myanmar*

Crouch M and Lindsey T *Law, Society and Transition in Myanmar* (Bloomsbury Publishing place 2014)

Czirak 2017 *Journal of Financial Intermediation*

Czirak P "Trading by Bank Insiders Before and During the 2007-2008 Financial Crisis" 2017 *Journal of Financial Intermediation* 1-33

Dalko and Wang 2016 *Studies in Economics and Finance Journal*

Dalko V and Wang MH "Why is Insider Trading Law Ineffective? Three Antitrust Suggestions" 2016 *Studies in Economics and Finance Journal* 704-735

Daly 2018 *Maryland Law Review Endnotes*

Daly C "Kokesh v Sec: The Supreme Court Redefines an Effective Securities Enforcement Tool" 2018 *Maryland Law Review Endnotes* 51-65

Dasgupta *The Independence of Regulatory Agencies in Practice*

Dasgupta PS *The Independence of Regulatory Agencies in Practice:The Case of Telecommunications Regulators in the United Kingdom and France* (Doctor of Philosophy London School of Economics and Political Science 2009)

Deitz 1974 *Fordham Law Review* 240

Deitz HJ "A Practical Look at Section 16(b) of the Securities Exchange Act" 1974 *Fordham Law Review* 1-22

DeMarzo, Fishman and Hagerty 1998 *Journal of Political Economy*

DeMarzo PM, Fishman MJ and Hagerty KM "The Optimal Enforcement of Insider Trading Regulations" 1998 *Journal of Political Economy* 602-630

Dent 2013 *Delaware Journal of Corporate Law*

Dent GW "Why Legalized Insider Trading Would Be a Disaster" 2013 *Delaware Journal of Corporate Law* 247-273

Dessi 1998 *Journal of Civil Rights and Economic Development*

Dessi AM "The Misappropriation Theory and Securities Fraud Liability; Its Days are Numbered" 1998 *Journal of Civil Rights and Economic Development* 319-341

Devenish 2017 *THRHR*

Devenish GE "What Constitutes 'Inside Information' for Purposes of Insider Trading?" 2017 *THRHR* 506-523

Deventer 2009 *Financial Services Board Monthly Bulletin*

Deventer G "Harnessing Administrative Law in Encouraging Compliance" 2009 *Financial Services Board Monthly Bulletin* 3-13

De Villiers *Share-Repurchase is the Ultimate Insider Trading*

De Villiers M *Share-Repurchase is the Ultimate Insider Trading* (LLM Dissertation University of Pretoria 2016)

Dooley 1980 *Virginia Law Review*

Dooley MP "Enforcement of Insider Trading Restrictions" 1980 *Virginia Law Review* 1-39

Doty 1992 *Fordham Law Review*

Doty JR "The Role of Securities and Exchange Commission in an Internationalized Marketplace" 1992 *Fordham Law Review* 77-98

Dunfee 1991 *Journal Business Ethics* 241

Dunfee TW "Business Ethics and Extant Social Contracts" 1991 *Journal Business Ethics* 23-45

Du Plessis and Lyon *The Law of Insider Trading in Australia*

Du Plessis JJ and Lyon G *The Law of Insider Trading in Australia* (Federation Press Sydney 2005)

Dye 1984 *Journal of Business*

Dye AR "Inside Trading and Incentives" 1984 *Journal of Business* 295-314

Easterbrook 1981 *Supreme Court Review*

Easterbrook FH "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information" 1981 *Supreme Court Review* 309-365

El-Dean *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt*

El-Dean BA *Privatisation and the Creation of a Market-Based Legal System: The Case of Egypt* (Brill Academic Publishers Netherlands 2002).

Eisenberg 2006 *Michigan Law Review*

Eisenberg MA "The Disgorgement Interest in Contract Law" 2006 *Michigan Law Review* 559-601

Feldman J and Logan 1995 *Juta's Business Law*

Feldman J and Logan S "Insider Trading: An Evaluation of the South African Position" 1995 *Juta's Business Law* 55-70

Figueroa 2014 *Michigan Journal of Private Equity and Venture Capital Law*

Figueroa D "Insider Trading and Other Securities Frauds in the United States: Lessons for Chile" 2014 *Michigan Journal of Private Equity and Venture Capital Law* 165-211

Fisch 1991 *Georgia Law Review*

Fisch JE "Start Making Sense: An Analysis and Proposal for Insider Trading Regulation" 1991 *Georgia Law Review* 179-192 242

Fischel 1982 *Stanford Law Review*

Fischel DR and Carlton DW "The Regulation of Insider Trading" 1982 *Stanford Law Review* 857-888

Fischel 1981 *California Law Review*

Fischel DR "Secondary Liability Under Section 10(b) of the Securities Act of 1934" 1981 *California Law Review* 80-91

Fishea and Robe 2002 *University of Michigan Journal of Law Reform*

Fishea RPH and Robe MA "The Impact of Illegal Insider Trading in Dealer and Specialist Markets: Evidence from a Natural Experiment" 2002 *University of Michigan Journal of Law Reform* 461-488

Fishman and Hagerty 1992 *The Rand Journal of Economics*

Fishman MJ and Hagerty KM "Insider Trading and the Efficiency of Stock Prices" 1992 *The Rand Journal of Economics* 106-120

Fishman JM and Hagerty 1995 *Review of Financial Studies*

Fishman JM and Hagerty KM "The Mandatory Disclosure of Trades and Market Liquidity" 1995 *Review of Financial Studies* 637-650

Fletcher 1994 *Southern Methodist University Law Review*

Fletcher J "Compliance Programs for Insider Trading" 1994 *Southern Methodist University Law Review* 1783-1790

Flynn 1992 *The Business Lawyer*

Flynn RC "SEC Distribution Plans in Insider Trading Cases" 1992 *The Business Lawyer* 107-120

Fox 1992 *Law and Contemporary Problems*

Fox BM "The National Perspective: Five Rationales Concerning Insider Trading" 1992 *Law and Contemporary Problems* 266-281

Fox 1992 *Law and Contemporary Problems* 243

Fox BM "Insider Trading in a Globalizing Market: Who Should Regulate What?" 1992 *Law and Contemporary Problems* 263-277

Freedman 1972 *University of Chicago Law Review*

Freedman JO "Summary Action by Administrative Agencies" 1972 *University of Chicago Law Review* 1-20

Friedman 1990 *North Carolina Law Review*

Friedman HM "The Insider Trading and Securities Fraud Enforcement Act of 1988" 1990 *North Carolina Law Review* 465-480

Fuller *Geofonm Law Review*

Fuller D "Credit Union Development: Financial Inclusion and Exclusion" *Geofonm Law Review* 145-170

Garba 2013 *International Journal of Management*

Garba A "Impediments to Effective Enforcement of Insider Trading Regulations in Nigeria" 13-29

Gardels 1979 *Nebraska Law Review*

Gardels DE "Section 16(b) of the Securities and Exchange Act of 1934: Is a Vice President an Officer?" 1979 *Nebraska Law Review* 733-750

Garfinkel 1997 *Journal of Corporate Finance*

Garfinkel JA "New Evidence on the Effects of Federal Regulations on InsiderTrading: The Insider Trading and Securities Fraud Enforcement Act" 1997 *Journal of Corporate Finance* 89-100

Gevurtz 2017 *Washington University Journal of Law and Policy Forthcoming*

Gevurtz FA "The Road Not Taken: A Comparison of the EU and US Insider Trading Prohibitions" 2017 *Washington University Journal of Law and Policy Forthcoming* 1-40

Ghati *Critical Analysis of the Insider Trading Framework of Tanzania* 244

Ghati W *Critical Analysis of the Insider Trading Framework of Tanzania* (LLM-Thesis University of the Western Cape 2015).

Gilardi and Maggetti "The Independence of Regulatory Authorities"

Gilardi F and Maggetti M "The Independence of Regulatory Authorities" in Faur D *Handbook on the Politics of Regulation* (Edward Elgar Publishing Place Unknown 2011)

Giorgio 2017 *Western Australian Student Law Review*

Giorgio E "Possession of Information in the Insider Trading Offence" 2017 *Western Australian Student Law Review* 7-29

Godwin 2018 *Law and Financial Markets Review*

Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151-170

Goel 2013 *International Journal of Humanities and Social Science*

Goel R "Integrating a Systems Approach to Detect Risk of Insider Trading" 2013 *International Journal of Humanities and Social Science* 21-45

Gold 2004 *Catholic University Law Review*

Gold AS "Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors" 2004 *Catholic University Law Review* 667-680

Golden *The International Capital Markets Review*

Golden J *The International Capital Markets Review* (Law Business Research Limited London 2011)

Goldman 2017 *Review of Banking and Financial Law*

Goldman S "Insider Trading and Newman Applied: Goldman Sachs" 2017 *Review of Banking and Financial Law* 144-158

Goodman 1987 *Harvard Law Review* 245

Goodman SD "Private Causes of Action for Option Investors under SEC Rule 10b-5: A Policy, Doctrinal, and Economic Analysis" 1987 *Harvard Law Review* 1959-1978

Golwen 1989 *Washington and Lee Law Review*

Golwen JS "Statutes of Limitation for Section 10(b) and Rule l0b-5: A New Proposal for Uniformity" 1989 *Washington and Lee Law Review* 665-687

Gona, Gwanzura and Matsa 2014 *International Journal of Innovative Research and Development*

Gona S, Gwanzura S and Matsa CL "Delays in Finalising Criminal Trials" 2014 *International Journal of Innovative Research and Development* 177-190

Gopaul *The Impact and Constitutionality of Delayed Trials on the Rights of a Suspect or Accused Person During Criminal Proceedings*

Gopaul A *The Impact and Constitutionality of Delayed Trials on the Rights of a Suspect or Accused Person During Criminal Proceedings* (LLM Thesis University of South Africa 2015)

Grossman *The Journal of Business*

Grossman SJ "An Analysis of the Role of 'Insider Trading' on Futures Markets" 1986 *The Journal of Business* 129- 140

Gray, Cottrell, Stellmach and Hanniford 2015 *The Investment Lawyer Journal*

Gray EP, Cottrell AA, Stellmach W and Hanniford KD "Will the Securities and Exchange Commission's Proposed Changes to Administrative Proceedings Quite Critics?" 2015 *The Investment Lawyer Journal* 1-25

Grundfest 2016 *Fordham Law Review*

Grundfest JA "Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation" 2016 *Fordham Law Review* 1143- 1160

Grundfest 1994 *Harvard Law Review Association* 246

Grundfest JA "Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority" 1994 *Harvard Law Review Association* 964-990

Gubler 2017 *The Georgetown Law Journal*

Gubler JZ "A Unified Theory of Insider Trading Law" 2017 *The Georgetown Law Journal* 1-23

Guin DJ and Donaldson 1990 *Washington and Lee Law Review*

Guin DJ and Donaldson DR "The Insider Trading and Securities Fraud Enforcement Act: Has Congress Supplied a Limitations Period Appropriate for use in Private 10B-5 Actions?" 1990 *Washington and Lee Law Review* 541- 560

Gullifer and Payne *Corporate Finance Law: Principles and Policy*

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

Hanáková *Social Consequences of the Wall Street Crash on 1930's America*

Hanáková B *Social Consequences of the Wall Street Crash on 1930's America* (Thesis Masaryk University 2015)

Hanna 1934 *California Law Review*

Hanna J "The Securities Exchange Act of 1934" 1934 *California Law Review* 1-19

Hanifa and Mwajuma 2014 *Law in Africa Journal*

Hanifa TM and Mwajuma K "Combatting Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa Journal* 52-79

Hawes 1981 *Journal of Comparative Corporate Law and Securities Regulation*

Hawes DW "A Development in Insider Trading Law in the United States: A Case Note on Chiarella v United States" 1981 *Journal of Comparative Corporate Law and Securities Regulation* 193-216

Hazen 1992 *Law and Contemporary Problems Journal* 247

Hazen TL "Defining Illegal Insider Trading Lessons from the European Community Directive on Insider Trading" 1992 *Law and Contemporary Problems Journal* 231-244

Heminway 2018 *Washington University Journal of Law and Policy*

Heminway JM "Tipper/Tippee Insider Trading as Unlawful Deceptive Conduct: Insider Gifts of Material Nonpublic Information to Strangers" 2018 *Washington University Journal of Law and Policy* 65-80

Herne 1986 *Journal of Comparative Business and Capital Market Law*

Herne S "Inside Information: Definitions in Australia, Canada, the UK and the US" 1986 *Journal of Comparative Business and Capital Market Law* 1-20

Hopt 1982 *Journal of Comparative Corporate Law and Securities Regulation*

Hopt KJ "Insider Trading on the Continent" 1982 *Journal of Comparative Corporate Law and Securities Regulation* 379-390

Hopt 1987 *Journal of Comparative Business and Capital Market Law*

Hopt KJ "The German Insider Trading Guidelines - Spring-Gun or Scarecrow?" 1987 *Journal of Comparative Business and Capital Market Law* 381-400

Horwich 2007 *The Business Lawyer*

Horwich A "The Origin, Application, Validity, and Potential Misuse of Rule 10b5-1" 2007 *The Business Lawyer* 915-929

Huang *International Securities Markets: Insider Trading Law in China*

Huang H *International Securities Markets: Insider Trading Law in China* (Kluwer Law International Netherlands 2006)

Huang 2012 *Journal of Business Law*

Huang H "Insider Trading and the Regulation on China's Securities Market: Where Are We Now and Where Do We Go from Here?" 2012 *Journal of Business Law* 379-390

Huang 2004 *Australian Journal of Corporate Law* 248

Huang H "The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform" 2004 *Australian Journal of Corporate Law* 1-42

Jabbari 1994 *Oxford Journal of Legal Studies*

Jabbari D "Critical Theory in Administrative Law" 1994 *Oxford Journal of Legal Studies* 189-217

Jaeolinzer 2009 *Management Science Journal*

Jaeolinzer AD "SEC Rule 10b5-I and Insiders Strategic Trade" 2009 *Management Science Journal* 224-240

Jain, Bhandari and Kushwah 2016 *International Journal of Research in Humanities, Arts and Literature*

Jain A, Bhandari S and Kushwah A "An Analysis of Hyperinflation in Zimbabwe" 2016 *International Journal of Research in Humanities, Arts and Literature* 1-45

Joo 2007 *Indiana Law Journal*

Joo TW "Legislation and Legitimation: Congress and Insider Trading in the 1980s" 2007 *Indiana Law Journal* 575-595

Jooste 1990 *South African Law Journal*

Jooste R "Insider Dealing in South Africa" 1990 *South African Law Journal* 589-609

Jooste 2000 *The South African Law Journal*

Jooste R "The Regulation of Insider Trading in South Africa another Attempt" 2000 *The South African Law Journal* 284-316

Jooste 2006 *South African Law Journal*

Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *South African Law Journal* 437-450

Junsun 2014 *Brooklyn Journal of International Law*

Junsun P "Enforcement of Securities Law in the Global Marketplace: Cross- Border Cooperation in the Prosecution of Transnational Hedge Fund Fraud" 2014 *Brooklyn Journal of International Law* 231-250

Kaishen *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience*

Kaishen L *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience* (LLM-Thesis Tilburg University 2013)

Kanamugire and Chimuka 2014 *Mediterranean Journal of Social Sciences*

Kanamugire CJ and Chimuka TV "The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule" 2014 *Mediterranean Journal of Social Sciences* 70-110

Karekwaivenani 2003 *The Journal of Humanities of the University of Zimbabwe*

Karekwaivenani G "A History of the Rhodesian Stock Exchange: The Formative Years, 1946-1952" 2003 *The Journal of Humanities of the University of Zimbabwe* 9-30

Karjala 1982 *Duke Law Journal*

Karjala DS "Statutory Regulation of Insider Trading in Impersonal Markets" 1982 *Duke Law Journal* 627-640

Karmel 1998 *Law and contemporary Problems Journal*

Karmel RS "Creating Law at the Securities and Exchange Commission: The lawyer as Prosecutor" 1998 *Law and contemporary Problems Journal* 33-50

Karsch 1984 *Journal of Comparative Business and Capital Market Law*

Karsch M "The Insider Trading Sanctions Act: Incorporating A Market Information Definition" 1984 *Journal of Comparative Business and Capital Market Law* 283-300

Kawadza 2015 *South African Mercantile Law Journal* 250

Kawadza H "The Liability Regime for Insider Dealing Violations in South Africa: Where We Have Been, Where We Are" 2015 *South African Mercantile Law Journal* 383-399

Kawadza 2017 *Journal of African Law*

Kawadza H "Revisiting Financial Services Sector Transparency through Whistleblowing: The Case of South Africa and Switzerland" 2017 *Journal of African Law* 83-115

Kawadza 2015 *Speculum Juris*

Kawadza H "Extra-Judicial Enforcement of Securities Regulation and the Public Interest Theory: A South African Perspective" 2015 *Speculum Juris* 49-60

Kazarian *Integration of the Securities Market Infrastructure in the European Union*

Kazarian E *Integration of the Securities Market Infrastructure in the European Union: Policy and Regulatory Issues* (International Monetary Fund Publisher New York 2006)

Keetse 2016 *Financial Services Board Newsletter*

Keetse S "Market Abuse Investigations Update" 2016 *Financial Services Board Newsletter* 1-16

Khan MY *Indian Financial System*

Khan MY *Indian Financial System* 8th Edition (McGraw Hill Education-India Private Limited New Delhi 2013)

Klaw 2016 *William and Mary Business Law Review*

Klaw BW "Why Now is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory" 2016 *William and Mary Business Law Review* 275-290

Kiggundu *Botswana Company Law Service*

Kiggundu J *Botswana Company Law Service* (Juta and Company Ltd Lansdowne 2005) 251

Kim 2014 *UCLA Law Review*

Kim SH "Insider Trading as Private Corruption" 2014 *UCLA Law Review* 931-

Krawiec 2001 *North Western University Law Review*

Krawiec KD "Fairness, Efficiency, And Insider Trading: Deconstructing the Coin of the Realm in the Information Age" 2001 *North Western University Law Review* 443-458

Kruger *The Regulation of Insider Trading on the JSE: A Comparative Study with Hong Kong*

Kruger MC *The Regulation of Insider Trading on the JSE: A Comparative Study with Hong Kong* (LLM-Thesis North-West University 2014)

Kruger *Legal Representation at Disciplinary Hearings and Before the CCMA*

Kruger W *Legal Representation at Disciplinary Hearings and Before the CCMA* (LLM Dissertation University of Pretoria 2012)

Kuhn year unknown *Law and Contemporary Problems*

Kuhn CJ "The Securities Act and its Effect Upon the Institutional Investor" year unknown *Law and Contemporary Problems* 80-120

Langervoort 2000 *Dickinson Journal of International Law*

Langervoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 162-190

Langevoort "What Were They Thinking? Insider Trading and the Scienter Requirement"

Langevoort DC "What Were They Thinking? Insider Trading and the Scienter Requirement" in Bainbridge SM *Research Handbook on Insider Trading* (Edward Elgar Publishing Limited United Kingdom 2013)

Langevoort 1982 *California Law Review*

Langevoort CD "Insider Trading and the Fiduciary Principle: A Post Chiarella Restatement" 1982 *California Law Review* 1-23

Langevoort 2000 *Dickinson Journal of International Law*

Langevoort DC "Cross-Border Insider Trading" 2000 *Dickinson Journal of International Law* 161-195

Langevoort and Gulat 2004 *Vanderbilt Law Review*

Langevoort DC and Gulat JM The Muddled Duty to Disclose Under Rule 10b-5" 2004 *Vanderbilt Law Review* 1643-1680

Levmore 1988 *Harvard Journal of Law and Public Policy*

Levmore S "In Defense of the Regulation of Insider Trading" 1988 *Harvard Journal of Law and Public Policy* 101-167

Lin *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience*

Lin K *A Study on China's Insider Trading Regulations Enforcement Compared with the US Experience* (LLM Dissertation Tilburg University 2013)

Linnertová and Oleg Deev 2015 *The European Journal of Finance*

Linnertová D and Oleg Deev O "Insider Trading Activities and Returns of German Blue Chips" 2015 *The European Journal of Finance* 1995-1920

Li Z *Securities Regulation in the International Environment*

Li Z *Securities Regulation in the International Environment* (LLD Thesis University of Glasgow 2008)

Lobb 1999 *William and Mary Law Review*

Lobb J "SEC Rule 14e-3 in the Wake of United States v. O'Hagan: Proper Prophylactic Scope and the Future of Warehousing" 1999 *William and Mary Law Review* 1853-1888

Loeffen *The Effects of Unregulated Insider Trading*

Loeffen HGC *The Effects of Unregulated Insider Trading* (Master's Thesis Tilburg University 2014)

Loke 2007 *Journal of Corporate Law Studies* 253

Loke AFH "The Protected Interests in the Private Right of Action for Insider Trading: A Comparative Perspective" 2007 *Journal of Corporate Law Studies* 307-333

Luchtman and Vervaele 2014 *New Journal of European Criminal Law*

Luchtman M and Vervaele J "Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?" 2014 *New Journal of European Criminal Law* 192-232

Luiz and Van Der Linde 2013 *SA Merc LJ*

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* 458-491

Luiz 1999 *South African Mercantile Law Journal*

Luiz SM "Insider Trading Regulation - If at First You Don't Succeed" 1999 *South African Mercantile Law Journal* 136-147

Luiz 2011 *South African Mercantile Law Journal*

Luiz S "Market Abuse and the Enforcement Committee" 2011 *South African Mercantile Law Journal* 151-170

Lyon and Du Plessis *The law of Insider Trading in Australia*

Lyon G and JJ Du Plessis *The law of Insider Trading in Australia* (The Federation Press Sydney 2005)

Macey 1984 *Hofstra Law Review*

Macey JR "From Fairness to Contract: The New Direction of the Rules Against Insider Trading" 1984 *Hofstra Law Review* 9-16

Macey 2007 *Michigan Law Review*

Macey J "Validity Challenges to Sec Rule14e-3" 2007 *Michigan Law Review* 1899-1829

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

Madende LT *An Assessment of the Regulatory Philosophy of the Securities and Exchange Commission of Zimbabwe (2009-2014)* (MBA Dissertation University of Zimbabwe 2015)

Makoni 2014 *Corporate Ownership and Control Journal*

Makoni PL "From Financial Exclusion to Financial Inclusion Through Microfinance: The Case of Rural Zimbabwe" 2014 *Corporate Ownership and Control Journal* 447-478

Mann and Barry *The International Lawyer*

Mann MD and Barry WP Developments in the Internationalization of Securities Enforcement" *The International Lawyer* 667-690

Manne *Insider Trading and the Stock Market*

Manne H *Insider Trading and the Stock Market* (The Free Press: New York 1966)

Manne 1966 *Harvard Bus Review*

Manne GH "In Defence of Insider Trading" 1966 *Harvard Bus Review* 113-145

Marra 1990 *University of Richmond Law Review*

Marra C "The Misappropriation Theory: A Practical Means of Imposing Rule 10b-5 Liability" 1990 *University of Richmond Law Review* 211-245

Masoud 2013 *International Journal of Finance and Banking Studies*

Masoud NMH "Stock Markets: A Catalyst for Economic Growth" 2013 *International Journal of Finance and Banking Studies* 12-23

Massawe and Kadilu 2014 *Law in Africa*

Massawe HT and Kadilu M "Combatting Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002" 2014 *Law in Africa* 52-88

McConnell and Chakravarty 1999 *Journal of Financial and Quantitative Analysis* 255

McConnell JJ and Chakravarty S "Does Insider Trading Really Move Stock Prices" 1999 *Journal of Financial and Quantitative Analysis* 191-200

McDowell and Novis 2001 *Electronic Journal of the US Department of State*

McDowell J and Novis G "The Consequences of Money Laundering and Financial Crime" 2001 *Electronic Journal of the US Department of State* 6-

McLucas, Walsh and Fountain 1992 *The Business Lawyer Journal*

McLucas RW, Walsh JH and Fountain LL "Settlement of Insider Trading Cases with the SEC" 1992 *The Business Lawyer Journal* 79-120

Meulbroek 1992 *Journal of Finance*

Meulbroek LK "An Empirical Analysis of Illegal Insider Trading" 1992 *Journal of Finance* 1661-1680

Millard 2016 *PELJ*

Millard D "The Impact of the Twin Peaks Model on the Insurance Industry" 2016 *PELJ* 1-14

Mira 1985 *Catholic University Law Review*

Mira TC "The Measure of Disgorgement in Sec Enforcement Actions against Inside Traders Under Rule 10b-5" 1985 *Catholic University Law Review* 445-470

Mitchell *Effectiveness of Insider Trading Law in South Africa's Equity Market: The Mergers and Acquisitions Example*

Mitchell J *Effectiveness of Insider Trading Law in South Africa's Equity Market: The Mergers and Acquisitions Example* (Master of Management in Finance and Investment-Dissertation University of the Witwatersrand 2015)

Mohammed and Imad 2016 *International Review of Law*

Mohammed AL and Imad AK "Establishment of Specialist Commercial Courts in the State of Qatar: A Comparative Study" 2016 *International Review of Law* 1-16

Montagano 2012 *Indiana Journal of Global Legal Studies* 256

Montagano CP "The Global Crackdown on Insider Trading: A Silver Lining to the Great Reccession" 2012 *Indiana Journal of Global Legal Studies* 575-590

Moore 1990 *Journal of Business Ethics*

Moore J "What Is Really Unethical about Insider Trading?" 1990 *Journal of Business Ethics* 171-182

Morgan *Ohio State Law Journal*

Morgan JR "Insider Trading and the Infringement of Property Rights" *Ohio State Law Journal* 79-223

Mumbengegwi *Macroeconomic and Structural Adjustment Policies in Zimbabwe*

Mumbengegwi C *Macroeconomic and Structural Adjustment Policies in Zimbabwe* (Palgrave Publishers New York 2002)

Munangagwa 2009 *Gettysburg Economic Review*

Munangagwa CL "The Economic Decline of Zimbabwe" 2009 *Gettysburg Economic Review* 110-145

Musikavanhu 2014 *SECZ Newsletter*

Musikavanhu T "Investor Education, Whose Responsibility?" 2014 *SECZ Newsletter* 4-6

Muzamani 1993 *African Review of Money Finance and Banking*

Muzamani JT "The Zimbabwe Stock Exchange" 1993 *African Review of Money Finance and Banking* 75-90

Mwenda (1996-1999) *Ghana Law Journal*

Mwenda KK "Insider Dealing Law in Zambia: A Flawed Concept" (1996-1999) *Ghana Law Journal* 137-1140

Mwenda 1997 *Zimbabwe Law Review*

Mwenda KK "Redefining Insider Dealing Law for Emerging Markets: A Comparative Legal Study" 1997 *Zimbabwe Law Review* 29-67

Mwenda 1996-1999 *Ghana Law Journal* 257

Mwenda KK "Insider Dealing Law in Zambia: A Flawed Concept" 1996-1999 *Ghana Law Journal* 137-155

Mwenda 2006 *Journal of Business and Securities Law*

Mwenda KK "Can Insider Trading Predicate The Offence of Money Laundering?" 2006 *Journal of Business and Securities Law* 127-145

Nagy 1998 *Ohio State Law Journal*

Nagy DM "Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion" 1998 *Ohio State Law Journal* 1223-1245

Nagy 2009 *Iowa Law Review*

Nagy DM "Insider Trading and the Gradual Demise of Fiduciary Principles" 2009 *Iowa Law Review* 1315-1340

Navickas 1984 *International Tax and Business Lawyer*

Navickas JM "Swiss Banks and Insider Trading in the United States" 1984 *International Tax and Business Lawyer* 159-170

Neethling 2014 *THRHR*

Neethling J "Wrongfulness In Delict: A Response To Brand JA" 2014 *THRHR* 116-135

Nelson 2011 *Administrative Law Review*

Nelson J "Administrative Law Judges' Removal "Only For Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?" 2011 *Administrative Law Review* 401-422

Nesche 1993 *Law and Contemporary Problems Journal*

Nesche KL 'It's Just Not Right:' The Ethics of Insider Trading" 1993 *Law and Contemporary Problems Journal* 123-165

Nnoma 2001 *North Carolina Journal of International Law and Commercial Regulation* 258

Nnoma GC "International Insider Trading: Reassessing the Propriety and Feasibility of the US Regulatory Approach" 2001 *North Carolina Journal of International Law and Commercial Regulation* 187-200

Nuno and Ferreira 2009 *The Review of Financial Studies*

Nuno F and Ferreira AM "Insider Trading Laws and Stock Price Informativeness" 2009 *The Review of Financial Studies* 3-19

Nting *Sarbanes-Oxley Act, Insider Trading and Earnings Management*

Nting RT *Sarbanes-Oxley Act, Insider Trading and Earnings Management* (Degree of PhD University of Glasgow 2008)

Oberg 2014 *Journal of Corporate Law Studies*

Oberg J "Is it Essential to Imprison Insider Dealers to Enforce Insider 24-66

Ochs 2014 *Journal of Corporate Law Studies*

Ochs BA "The SEC's Enforcement of Procedures to Prevent Insider Trading" 2007 *Journal of Investment Compliance* 1 Dealing Laws?" 2014 *Journal of Corporate Law Studies* 1-14

O'Hara 2001 *International Journal of Social Economics*

O'Hara AP "Insider Trading in Financial Markets: Legality, Ethics, Efficiency" 2001 *International Journal of Social Economics* 1046-1060

O'Leary and O'Leary 1986 *University of California Davis Law Review*

O'Leary TL and O'Leary TF "The Insider Trading Sanctions Act of 1984: Did Congress and the SEC go Home Too Early" 1986 *University of California Davis Law Review* 497-512

Onele 2016 *The Gravitas Review of Business and Property Law*

Onele J "Insider Dealing Under Nigerian Law: Any New Lessons?" 2016 *The Gravitas Review of Business and Property Law* 1-25

Organisation for Economic Co-operation and Development *Public Enforcement and Corporate Governance in Asia Guidance and Good Practices*

Organisation for Economic Co-operation and Development *Public Enforcement and Corporate Governance in Asia Guidance and Good Practices* Organisation for Economic Co-operation and Development publisher place unknown 2014)

Osode 1999 *African Journal of International and Comparative Law*

Osode CP "Insider Trading Regulation in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688- 700

Osode 1998 *Journal of South African Law*

Osode PC "Regulatory Theory, Private Interests and the Rationality of Insider Trading Regulation In The United States And Canada" 1998 *Journal of South African Law* 427-460

Osode *Defending The Regulation of Insider Trading on Basis of Sound Legal Orthodoxy*

Osode CP "*Defending The Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory Law" in Contemporary South African Society* (New Africa Books South Africa 2004)

Osode 2000 *Journal of African Law*

Osode CP "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239-456

Osode 1999 *Anglo-American Law Review*

Osode PC "The Regulation of Insider Trading In Canada: A Critical Appraisal" 1999 *Anglo-American Law Review* 166-188

Padilla 2011 *Journal of Libertarian Studies*

Padilla A "Should the Government Regulate Insider Trading?" 2011 *Journal of Libertarian Studies* 379-459

Page and Yang 2005 *University of California, Davis Law Review*

Page A and Yang K "Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?" 2005 *University of California, Davis Law Review* 1-45

Palk 2016 *Berkeley Business Law Journal* 260

Palk L "Ignorance Is Bliss: Should Lack of Personal Benefit Knowledge Immunize Insider Trading?" 2016 *Berkeley Business Law Journal* 101-145

Parker 1995 *Washington University Law Quarterly*

Parker GF "The Regulation of Insider Trading in Japan: Introducing a Private Right of Action" 1995 *Washington University Law Quarterly* 1399-1445

Parkman, George and Boss 1988 *Journal of Business Ethics*

Parkman AM, George BC and Boss M "Owners or Traders: Who Are the Real Victims of Insider Trading?" 1988 *Journal of Business Ethics* 965-980

Patel and Galloway 2017 *White Collar Crime Committee Newsletter*

Patel RV and Galloway TM "Tippee Insider Trading after Newman and Salman: Why Knowledge is Not Always Your Friend" 2017 *White Collar Crime Committee Newsletter* 1-45

Perino 2018 *University of Illinois Law Review*

Perino AM "The Lost History of Insider Trading" 2018 *University of Illinois Law Review* 1-42

Pfaeltzer 2014 *Utrecht Law Review*

Pfaeltzer JJW "Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?" 2014 *Utrecht Law Review* 134-145

Pillai, Rutvika and Shayan 2014 *International Journal of Advance Research in Computer Science and Management Studies*

Pillai D, Rutvika S and Shayan K "Impact of Insider Trading on Investment Decision by Investors" 2014 *International Journal of Advance Research in Computer Science and Management Studies* 249-258

Pillai 1986 *Journal of Comparative Business and Capital Market Law*

Pillai PN "Securities Regulation in Malaysia: Emerging Norms of Governmental Regulation" 1986 *Journal of Comparative Business and Capital Market Law* 39-73

Pilbeam K *Finance and Financial Markets*

Pilbeam K *Finance and Financial Markets* 4th Edition (Red Globe Press United Kingdom 1998)

Popova T, Georgakopoulos G, Sotiropoulos L and Vasileiou 2013 *International Business Research Journal*

Popova T, Georgakopoulos G, Sotiropoulos L and Vasileiou KZ "Mandatory Disclosure and Its Impact on the Company Value" 2013 *International Business Research Journal* 1-6

Porrini and Ramello 2011 *Journal of Financial Economic Policy*

Porrini D and Ramello GB "Class Action and Financial Markets: Insights From Law and Economics" 2011 *Journal of Financial Economic Policy* 1-10

Presto 2017 *Economic Crime Forensics Capstones*

Presto C "Illegal Insider Trading" 2017 *Economic Crime Forensics Capstones* 1-23

Pritchard 1998 *Boston University Law Review*

Pritchard AC "United States V O'hagan: Agency Law And Justice Powell's Legacy for the Law of Insider Trading" 1998 *Boston University Law Review* 13-46

Qureshi 1995 *Pacific Rim Law and Policy Journal*

Qureshi MI "Regulatory Mechanisms of Securities Trading in Malaysia (With Special Reference to Insider Trading)" 1995 *Pacific Rim Law and Policy Journal* 649-678

Rayghana 2017 *Southern African Accounting Association Journal*

Rayghana A "Financial Inclusion in South Africa: A Review of the Literature" 2017 *Southern African Accounting Association Journal* 632-650

Rider and Tajima *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law*

Rider BAK and Tajima Y *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* (Kluwer Law International London 1998)

Rider 2000 *Dickinson Journal of International Law* 262

Rider BAK "The Control of Insider Trading-Smoke and Mirrors" 2000 *Dickinson Journal of International Law* 1-16

Roiter 1982 *Fordham Law Review*

Roiter ED "Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws" 1982 *Fordham Law Review* 781-813

Ronen 1977 *The Accounting Review*

Ronen J "The Effect of Insider Trading Rules on Information Generation and Disclosure by Corporations" 1977 *The Accounting Review* 438-467

Rosenzweig 1971 *The University of Chicago Law Review*

Rosenzweig VM "Deterrence of Tippee Trading Under Rule 10b-5" 1971 *The University of Chicago Law Review* 327-345

Rowe and McAllister 2006 *Public Policy and Administration Journal*

Rowe M and McAllister L "The Roles of Commissions of Inquiry in the Policy Process" 2006 *Public Policy and Administration Journal* 99-120

Sahu 2016 *International Journal of Law*

Sahu GK "The Class Action Suit: A Challenge for Protection of Interest of Investors" 2016 *International Journal of Law* 12-35

Salbu 1992 *Harvard Journal of Law and Public Policy*

Salbu SR "The Misappropriation Theory of Insider Trading: A Legal, Economic, and Ethical Analysis" 1992 *Harvard Journal of Law and Public Policy* 223-245

Salbu 2012 *St John's Law Review*

Salbu RS "Differentiated Perspectives on Insider Trading: The Effect of Paradigm Selection on Policy" 2012 *St John's Law Review* 373-390

Saungweme, Ricardo and Pradeep 2013 *African Journal of Business Management*

Saungweme P, Peters R and Pradeep B "A Framework for Combating Insider Trading on Developing Stock Exchanges: Evidence from the Zimbabwean Stock Exchange" 2013 *African Journal of Business Management* 1630-1645 263

Schipani and Seyhun 2016 *Fordham Journal of Corporate and Financial Law*

Schipani CA and Seyhun HN "Defining 'Material, Nonpublic:' What Should Constitute Illegal Insider Information?" 2016 *Fordham Journal of Corporate and Financial Law* 327-355

Schotland 1967 *Virginia Law Review*

Schotland AR "Unsafe at any Price: A Reply to Manne, Insider Trading and the Stock Market" 1967 *Virginia Law Review* 1425-1445

Semaan, Freeman and Adams 1999 *Companies and Securities Law Journal*

Semaan L, Freeman M and Adams M "Is Insider Trading a Necessary Evil? An International Comparative Analysis" 1999 *Companies and Securities Law Journal* 220-243

Seyhun 1992 *The Journal of Law and Economics*

Seyhun HN "The Effectiveness of the Insider-Trading Sanctions" 1992 *The Journal of Law and Economics* 149-168

Sharpley *Criminal Litigation Practice and Procedure 2017/18*

Sharpley D *Criminal Litigation Practice and Procedure 2017/18* (College of Law Publishing Braboeuf Manor 2017).

Sharan and Kumar *Investor Awareness, Education and Protection in India Situation Analysis and Assessment*

Sharan V and Kumar A *Investor Awareness, Education and Protection in India Situation Analysis and Assessment* (Deutsche Gesellschaft für International New Delhi 2013)

Shen 2007 *Journal of Business and Securities Law*

Shen H "A Comparative Study of Insider Trading Regulation Enforcement in the US and China" 2007 *Journal of Business and Securities Law* 41-69

Siebecker 2017 *Fordham Law Review*

Siebecker MR "Political Insider Trading" 2017 *Fordham Law Review* 2717- 2735

Silver 1985 *Duke Law Journal*

Silver CB "Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984" 1985 *Duke Law Journal* 960-987

Simon 1998 *Supreme Court Review*

Simon KA "The Misappropriation Theory: A Valid Application of 10(B) to Protect Property Rights in Information" 1998 *Supreme Court Review* 1049-1066

Simon J *The Law of Derivatives*

Simon J *The Law of Derivatives* (Informa Law United States of America 2013).

Smith 2017 *North Carolina Law Review*

Smith DG "Insider Trading and Entrepreneurial Action" 2017 *North Carolina Law Review* 1508-1522

Smith and Walter *Governing the Modern Corporation*

Smith RC and Walter I *Governing the Modern Corporation: Capital Markets, Corporate Control, and Economic Performance* (Oxford University Press New York 2006)

Smith 2002 *Vanderbilt Law Review*

Smith DG "The Critical Resource Theory of Fiduciary Duty" 2002 *Vanderbilt Law Review* 1399-1445

Solomon and Wilke 1975 *Fordham Law Review*

Solomon LD and Wilke D "Securities Professionals and Rule 10b-5: Legal Standards, Industry Practices, Preventative Guidelines and Proposals for Reform" 1975 *Fordham Law Review* 505-517

Spitz 1989 *Boston College International and Comparative Law Review*

Spitz MA "Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain" 1989 *Boston College International and Comparative Law Review* 265-290

Stander 2016 *Financial Services Board Newsletter* 265

Stander R "Market Integrity and Twin Peaks" 2016 *Financial Services Board Newsletter* 1-16

Stefan and Stockl 2017 *Journal of Financial Market*

Stefan P and Stockl T "When Chasing the Offender Hurts the Victim: The Case of Insider Legislation" 2017 *Journal of Financial Market* 104-150

Steinberg 2003 *The International Lawyer*

Steinberg IM "Insider Trading Regulation- A Comparative Analysis" 2003 *The International Lawyer* 159-179

Sternberg *Just Business: Business Ethics in Action*

Sternberg E *Just Business: Business Ethics in Action* (Oxford University Press New York 2000)

Stiglitz Year Unknown *Oxford Review of Economic Policy*

Stiglitz JE "Financial Markets and Development" Year unknown *Oxford Review of Economic Policy* 55-87

Stuart 2010 *IPBA Journal*

Stuart KJ "Insider Trading and the United States Securities Laws" 2010 *IPBA Journal* 23-45

Su and Berkahn 2003 *Massey University Journal*

Su Z and Berkahn MA "The Definition of Insider in Section 3 of the Securities Markets Act 1988: A Review and Comparison with other Jurisdictions" 2003 *Massey University Journal* 1-45

Sung 2014 *UCLA Law Review*

Sung HK "Insider Trading as Private Corruption" 2014 *UCLA Law Review* 231-250

Swartz, Otto and Tshwene 2015 *Journal of Scientific Research and Reports*

Swartz PN, Otto IO and Tshwene K "The Implications of Negligent Misrepresentation in Law of Delict: A Judicial Rendition" 2015 *Journal of Scientific Research and Reports* 532-545 266

Tallman 1983 *George Washington Law Review*

Tallman KA "Private Causes of Action Under SEC Rule 14e-3" 1983 *George Washington Law Review* 290-316

Ten Oever 1997 *Yale Law Journal*

Ten Oever H "Insider Trading and the Dual Role of Information" 1997 *Yale Law Journal* 1325-1345

Thanitcul and Srinopnikom 2018 *Kasetsart Journal of Social Sciences*

Thanitcul S and Srinopnikom T "Monetary Penalties: An Empirical Study on the Enforcement of Thai Insider Trading Sanctions" 2018 *Kasetsart Journal of Social Sciences* 1-20

Thel 1990 *Stanford law Review*

Thel S "The Original Conception of Section 10(b) of the Securities Exchange Act" 1990 *Stanford law Review* 385-398

Thompson 2013 *International Journal of Accounting and Financial*

Thompson HJ "A Global Comparison of Insider Trading Regulations" 2013 *International Journal of Accounting and Financial* 1-25

Tomasic, Bottomley, McQueen *Corporations Law in Australia*

Tomasic R, Bottomley S, McQueen R *Corporations Law in Australia* 2nd Edition (The Federation Press Sydney 2002)

Tomasic and Pentony 1989 *Legal Service Bulletin*

Tomasic R and Pentony B 'Insider Trading" 1989 *Legal Service Bulletin* 3-34

Tsaurai and Odhiambo 2012 *Corporate Ownership and Control Journal*

Tsaurai K and Odhiambo NM "The Dynamics of Capital Market Development in Zimbabwe" 2012 *Corporate Ownership and Control Journal* 355-388

Tuyon and Ahmad 2016 *Borsa Istanbul Review*

Tuyon J and Ahmad Z "Behavioural Finance Perspectives on Malaysian Stock Market Efficiency" 2016 *Borsa Istanbul Review* 43-67 267

Valory 1998 *Santa Clara Law Review*

Valory K "The Misappropriation Theory of Insider Trading: What Constitutes a Similar Relationship of Trust and Confidence" 1998 *Santa Clara Law Review* 287-300

Van Eck J and Jordaan 2006 *Industrial Law Journal*

Van Eck J and Jordaan R "Administrative, Labour and Constitutional Law — A Jurisdictional Labyrinth" 2006 *Industrial Law Journal* 1987-1990

Van Eeden EP *A Comparative Evaluation of the Financial Markets Act 19 of 2012 and the Financial Sector Regulation of Insider Trading*

Van Eeden EP *A Comparative Evaluation of the Financial Markets Act 19 of 2012 and the Financial Sector Regulation of Insider Trading* (LLM-Dissertation University of Pretoria 2016)

Van Erp 2008 *Utrecht Law Review*

Van Erp J "The Impact of 'Naming and Shaming' on Business Reputations an Empirical Study in the Field of Financial Regulation" 2008 *Utrecht Law Review* 1-34

Van Osselaer 2017 *Texas Law Review*

Van Osselaer A "Insider Trading Enforcement and Link Prediction" 2017 *Texas Law Review* 309-323

Van Wyk de Vries Report

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

Veenman *Insider Trading: The Interrelation between Accounting Information, Stock Prices, and Reported Insider Trades*

Veenman D *Insider Trading: The Interrelation between Accounting Information, Stock Prices, and Reported Insider Trades* (Thesis University of Amsterdam 2010)

Walter 2011 *Yale Law and Policy Review*

Walter N "Prioritizing Enforcement in Insider Trading" 2011 *Yale Law and Policy Review* 521-545 268

Wang 2009 *University of California at Davis Business Law Journal*

Wang WKS "Measuring Insider Trading Damages for a Private Plaintiff" 2009 *University of California at Davis Business Law Journal* 1-22

Warren III 1991 *Washington and Lee Law Review*

Warren III GM "The Regulation of Insider Trading in The European Community" 1991 *Washington and Lee Law Review* 1037-1045

Wei 2005 *Loyola of Los Angeles International and Comparative Law Review*

Wei Y "The Development of the Securities Market and Regulation in China" 2005 *Loyola of Los Angeles International and Comparative Law Review* 479- 490

Welsh 2009 *Melbourne University Law Review*

Welsh M "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 *Melbourne University Law Review* 908-1000

Werhane 1989 *Journal of Business Ethics*

Werhane HP "The Ethics of Insider Trading" 1989 *Journal of Business Ethics* 841-868

Wilkiea and Johnson 2017 *Journal of Strategic Marketing*

Wilkiea DCH and Johnson LW "The Existence of Double Jeopardy Within the Order of Entry Effect" 2017 *Journal of Strategic Marketing* 334-355

Wolf 2017 *PELJ*

Wolf L "The Remedial Action of the 'State of Capture' Report in Perspective" 2017 *PELJ* 1-23

Yourd 1939 *Michigan Law Review*

Yourd KL "Trading in Securities by Directors, Officers and Stockholders: Section I6 of the Securities Exchange Act" 1939 *Michigan Law Review* 133-134

Zacks L *The Handbook of Equity Market Anomalies* 269

Zacks L *The Handbook of Equity Market Anomalies* (John Wiley and Sons Incorporated Canada 2011)

Zekos 2017 *Hertfordshire Law Journal*

Zekos JI "Is the Law Effective in Protecting Markets from Insider Trading?" 2017 *Hertfordshire Law Journal* 2-15

Zhang 2007 *Journal of Accounting and Economics*

Zhang IX "Economic consequences of the Sarbanes–Oxley Act of 2002" 2007 *Journal of Accounting and Economics* 74-99

Zhang M *Financial Inclusion from the Perspective of Basic Banking Servicesand Consumer Credit*

Zhang M *Financial Inclusion from the Perspective of Basic Banking Services and Consumer Credit* (PhD in Law University of Glasgow 2015)

Zimmerman and Jaros 2011 *University of Pennsylvania Law Review*

Zimmerman AS and Jaros DM "The Criminal Class Action" 2011 *University of Pennsylvania Law Review* 1387-1699

Zwerdling 1973 *Administrative Law Review*

Zwerdling J "Reflections on the Role of an Administrative Law Judge" 1973 *Administrative Law Review* 9-13

Internet Sources

Bromberg L, Gilligan G, Hedges J and Ramsay I "Sanctions Imposed for Insider Trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom and the United States: An Empirical Study" 2016 *Centre for International Finance and Regulation Working Paper* No. 5 file:///C:/Users/NWUUser/Downloads/SSRN-id2817172.pdf accessed 08 October 2018

Carvajal and Elliott 2009 *International Monetary Fund Working Paper WP/09/168* https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf accessed 23 September 2018 270

Chanakira N 2004 *ZSE Insider Trading Set to Worsen* https://www.thestandard.co.zw/2004/04/16/zse-insider-trading- set-to-worsen/ accessed 24 April 2018

Chikomwe J 2012 *Legal Tools for Regulating Self-Dealing* https://www.theindependent.co.zw/2012/07/06/legal-tools-for-regulating-self-dealing/ accessed 07 July 2017

Chinamo T 2014 *Capital Markets Development: A Journey That Never Ends* http://www.herald.co.zw/capital-markets-developments-a-journey-that-never-ends/ accessed 24 May 2017

Choruma A 2016 *Behaviour Expected of Company Directors* http://www.financialgazette.co.zw/behaviour-expected-of-company-direcotors/ accessed 20 October 2017

Commodity Futures Trading Commission 2014 *Strategic Plan 2014-2018 Fiscal Year*https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/2018strategicplan.pdf accessed 31 May 2018

Darškuvienė V 2010 *Financial Markets* https://www.bcci.bg/projects/latvia/pdf/7_Financial_markets.pdf accessed 29 August 2018

Duisenberg FW 2001 *Speech on the Role of Financial Markets for Economic Growth* https://www.ecb.europa.eu/press/key/date/2001/html/sp010531.en.html accessed 16 August 2017

European Commission 2008 *Financial Services Provision and Prevention of Financial Exclusion* http://Ec.europa.eu/employment_social/spsi accessed 01 June 2018

Federal Reserve Bank of San Francisco *2005 Please Explain How Financial Markets M ay Affect Economic Performance* http://www.frbsf.org/education/publications/doctor-econ/2005/january/financial-markets-conomic-performance/ accessed 15 May 2017 271

Financial Services Board 2017 *Annual Report* https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf accessed 27 August 2018

Financial Services Board 2016 *Financial Services Board 2016 Annual Report* websitehttps://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx accessed 17 August 2018.

Fitzgerald M 2018 *Double Jeopardy and Administrative Sanctions*https://www.lexology.com/library/detail.aspx?g=dadb2c3a-acd6-4a93-ae6f-62ddfe7ef8db accessed 25 September 2018

International Organization of Securities Commissions 2003 *Insider Trading How Jurisdictions Regulate It* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf accessed 02 April 2018

Kramer G 2013 *Insider Trading: Examining Tipper and Tippee Liability* http://gcnewyork.com/columns13/050913kramer.html accessed 24 February 2018

Lynton Edwards 2017 *History of the Zimbabwe Stock Exchange* https://lynton-edwards.com/about-the-zimbabwe-stock-exchange/ accessed 21 June 2017

Magaisa AT 2006 *Regulating Insider Trading* https://www.theindependent.co.zw/2006/06/16/regulating-insider- trading/ accessed 20 October 2017

Maha KJ and Hamadi M Year unknown *Investor Protection, Disclosure Regulation and Financial Market: International Evidence* https://www.virtusinterpress.org/IMG/pdf/Maha_Khemakhem_Jardak_Hamadi_Matoussi_paper.pdf accessed 09 September 2018

Mandizha T 2013 *Securities Commission Changes Name* https://www.newsday.co.zw/2013/11/06/securities-commission-changes-name/ accessed 26 August 2017

Mawire W 2015 *Launch of the Zimbabwe Stock Exchange's Automated Trading System* https://www.african-markets.com/en/stock-markets/zse/launch-of-the-zimbabwe-stock-exchange-s-automated-trading-system accessed 01 September 2017 272

Mori A and Tomotsune 2014 *Amendments to the Regulations on Insider Trading* https://www.amt-law.com/pdf/bulletins2_pdf/140327.pdf accessed 28 March 2018

Muronzi C 2017 *Tycoons in Nasty CFI Control Battle* https://www.theindependent.co.zw/2017/07/21/tycoons-nasty-cfi-control-battle/ accessed 09 October 2018

Nelen H and Lankhorst F 2016 *Organized Crime: Culture, Markets and Policies; Facilitating Organized Crime: The Role of Lawyers and Notaries* https://www.researchgate.net/publication/226565960_Facilitating_Organized_Crime_The_Role_o f_Lawyers_and_Notaries accessed 20 April 2018

Nemukuyu D 2015 *Anti-Corruption Commission Boss Jailed* https://www.herald.co.zw/how-did-zifa-pay-a-zaac-investigator/accessed 14 April 2018

Newkirk CT 1998 *Speech by SEC Staff: Insider Trading – A US Perspective* https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 22 April 2018

Newkirk CT and Robertson MA 1998 *Insider Trading – A US Perspective* https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm accessed 01 July 2017

Nkala S 2018 *Bulawayo High Court to be Expanded* https://www.newsday.co.zw/2018/01/bulawayo-high-court-expanded/ accessed 27 September 2018

Noked N 2013 *US Insider Trading Enforcement Goes Global* https://corpgov.law.harvard.edu/2013/05/26/u-s-insider-trading-enforcement-goes global/ accessed 30 October 2017

Nyakazeya P 2008 *Investigations on Insider Trading in Progress* – ZSE https://www.theindependent.co.zw/2008/11/27/investigations-on-insider-trading-in-progress-zse/ accessed 17 March 2018

Patel RV and Galloway TM 2017 *Tippee Insider Trading after Newman and Salman: Why Knowledge is Not Always Your Friend* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/wccn2017_Patel.authcheckdam.pdf accessed 10 September 2018. 273

Razemba F 2016 *Anti-Corruption Bosses Fired for Fraud* http://www.chronicle.co.zw/anti-corruption-bosses-fired-for- fraud/ accessed 14 April 2018

Replogle R 2011 *Insider Trading in the United States* http://m.acc.com/legalresources/quickcounsel/InsiderTradingUS.cfm accessed 17 August 2017

Reserve Bank of Zimbabwe 2016 *Zimbabwe National Financial Inclusion Strategy 2016-2020*http://rbz.co.zw/assets/zimbabwe-national-financial-inclusion-strategy-2016---2020.pdf accessed 01 June 2018

Richman S 2003 *The Fraud of Insider-Trading Law* https://www.fff.org/explore-freedom/article/fraud-insidertrading-law-part-2/accessed 20 October 2017

Rushwaya H 2014 *How Did ZIFA Pay a ZAAC Investigator?* https://www.herald.co.zw/how-did-zifa-pay-a-zaac-investigator/ accessed 14 April 2018

Sandeep P 2003 *Prevention of Insider Trading and Corporate Good Governance* http://www.iimahd.ernet.in/publications/data/2003-01-03SandeepParekh.pdf accessed 31 July 2017

Sebastian A 2016 *Why Insider Trading Is Bad for Financial Markets* http://www.investopedia.com/articles/markets-economy/092216/why-insider-trading bad-financial-markets.asp accessed 31 July 2017

Sebastian A *How Insider Trading Is Prevented in Corporations* https://www.investopedia.com/articles/investing/092616/how-insider-trading-prevented-corporations.asp accessed 25 September 2018

Securities Exchange Commission of Zimbabwe 2012 *Annual Report* file:///C:/Users/NWUUser/Downloads/Securities%20Commision%20Annual%20Report%202012.pdf accessed 17 March 2018

The United States Securities and Exchange Commission Securities Exchange Commission 2010 *Prohibition against Fraud, Manipulation, and Deception in Connection with Security Based Swaps* https://www.sec.gov/rules/proposed/2010/34-63236.pdf accessed 31 May 2018

The United States Securities and Exchange Commission Securities Exchange Commission 2007 *About the Division of Enforcement* https://www.sec.gov/enforce/Article/enforce-about.html accessed 13 November 2018

The United States Securities and Exchange Commission 2018 *Administrative Proceedings* https://www.sec.gov/litigation/admin.shtml accessed 13 November 2018

Zuckerman J and Stock M 2018 *SEC Whistleblower Program: Exposing Insider Trading* https://www.zuckermanlaw.com/sec-whistleblower-program-exposing-insider-tradin/ accessed 12 November 2018

Legislation and Government publications

Administrative Procedure Act [Chapter 324] of 1946

Anti-Corruption Commission Act [Chapter 9:22] of 2004

Banking Act [Chapter 24:20] of 1999

Commissions of Inquiry Act 22 of 2001 [Chapter 10:07]

Companies Act 46 of 1926

Companies Act 61 of 1973

Companies Amendment Act 69 of 1990

Companies Act [Chapter 24:03]

Constitution of Zimbabwe of 2013

Constitution of South Africa 1996

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Public Law 111–203

Financial Markets Act 19 of 2012

Insider Trading Sanctions Act of 1984

Insider Trading and Securities Fraud Enforcement Act of 1988

Magistrate Act [Chapter 7:10]

Prevention of Corruption Act [Chapter 9:16] 275

Rhodesia Stock Exchange Act of 1974

Sarbanes-Oxley Act of 2002 Public Law 107–204 116 Stat 745
Securities Act 17 of 2004 [Chapter 24:25]
Securities Services Act 2004 Of 2005
Zimbabwe Stock Exchange Act [Chapter 24:18]
ZSE Listing Requirements

Case Law

Pather v Financial Services Board [2014] 3 All SA 208 (GP)
Pather v Financial Service Board and Zietsman v Directorate of Market Abuse (2015) JOL 34007 (GP)
Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168
Salman v SEC 580 US (2016)
SEC v Tiger Asia Management LLC, Civil Action No. 12-cv-7601 (DMC)
SEC v Certain Unknown Traders in the Securities of H.J. Heinz Company Civil Action No. 13-CIV-1080
SEC v Compania Internacional Financia, SA Civil Action No. 11-cv-04904-JPO
SEC v Richard Bruce Moore Civil Action No. 13-cv-2514 (HB) (SDNY)
SEC v Arnold McClellan and Annabel McClellan Case No. CV-105412 (JCS) (N.D. Cal. filed November 30, 2010)
United States v Newman 773 F.3d 438 (2d Cir. 2014)
Zietsman and another v Directorate of Market Abuse and another 2016 (1) SA 218 (GP) (24 August 2015) 276

LIST OF ABBREVIATIONS

DPP	Directorate of Public Prosecutions
DMA	Directorate of Market Abuse
EC	Enforcement Committee
EDGAR	Electronic Data Gathering Analysis and Retrieval System
FINRA	Financial Industry Regulatory Authority
FSB	Financial Services Board

FSCA	Financial Securities Conduct Authority
JSE	Johannesburg Stock Exchange Limited
SA Merc LJ	South African Mercantile Law Journal
SECZ	Securities Exchange Commission of Zimbabwe
PER LJ	Potchefstroom Electronic Law Journal
ORSA	Options Regulatory Surveillance Authority
Va L Rev	Virginia Law Review
ZSE	Zimbabwe Stock Exchange
ZACC	Zimbabwe Anti-Corruption Committee