

CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT.

1. INTRODUCTION AND BACKGROUND OF THE RESEARCH.

1.1. INTRODUCTION.

Insider trading is a practice by which one person armed with 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.¹ The controversial insider trading debate dates back to the 1920s when its effect was first felt in the United States of America after a heavy crash occurred in its Stock Markets in 1929.

In 1933 the United States of America became the first country to regulate insider trading, but some scholars still argue that regulating insider trading is economically undesirable in several respects. On the other hand scholars who support the regulation of insider trading agree that regulation is necessary to have accurate and efficient financial markets. They submit further that active enforcement of insider trading legislation helps companies to have a broader market base and aids countries to have viable economies.

¹ See Osode P C “Defending the Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory” in Okpaluba C (ed) *Law in Contemporary South African Society* (2004) New Africa Books 303. The investing and non investing public in most countries have expressed disapproval of the illegal practice of insider trading. In some countries it was seen as a criminal offence committed against the issuer of the affected securities, while in others as a crime against the affected company and investors, as well as a “civil offence” committed against the company or issuer of affected securities and investors. The term “issuer of securities” is used in this dissertation to refer to a company or any other issuer of money market instruments. I do agree with the view that insider trading must be treated as an offence against the issuer of securities *and prejudiced investors*. However the application of the insider trading legislation in South Africa does not adequately protect the investors who purchase or sell shares to their disadvantage because they are ignorant of the relevant inside information.

In South Africa the prohibition of insider trading can be traced back to section 233 of the Companies Act, 61 of 1973 which was later replaced by section 440F of the same Act. All these provisions however turned out to be ineffective and insider trading was allegedly a common practice in South Africa. The South African legislature eventually followed the example of other countries that disapproved of insider trading practices by enacting a separate piece of legislation specifically to deal with the matter.² The historical development of the provisions that regulated insider trading will be dealt with in Chapter Two of this dissertation.

The enactment of the Insider Trading Act, 135 of 1998 was a positive indication that the South African authorities and policy makers acknowledged that insider trading undermines public investor confidence, reduces market efficiency, negatively affects a company's performance and in the long run it will adversely affect the economy. The 1998 Act was eventually replaced by the Securities Services Act, 36 of 2004. This research will investigate whether the regulatory framework that was established by the legislation in South Africa can effectively regulate insider trading activity. This will be done in conjunction with an investigation into the problems caused by insider trading activity in South African companies and financial markets. The problem seems to be far from being solved and technological developments such as the electronic buying and selling of securities on Johannesburg Securities Exchange might, if not managed properly, bring more challenges in relation to the detection of insider trading. It is further an open question whether the regulation of insider trading should be restricted to regulated markets. Many legal scholars agree that the insider trading problem will be resolved only if the existing regulatory framework is effectively implemented and enforced by the courts. To examine whether these concerns are valid, the following questions ought to be answered in this research:

² The government and its policy makers must be commended for its efforts to combat insider trading by passing the Insider Trading Act 135 of 1998. Although a number of activities that are related to insider trading were now also prohibited there were gaps and flaws in the 1998 Act. See Osode P C *op cit* note 1 303. Also see the concluding remarks by Osode P C "The New Insider Trading Act: Sound Law Reform or Legislative Overkill?" (2000) 44 *Journal of African Law* 239.

- Is the South African insider trading legislation adequate? If it is not, what can be done to offer a solution to the insider trading problem?
- Is the existing insider trading regulatory framework capable of enhancing investor confidence, and is it effective and internationally competitive? If not, how can its effectiveness be improved?
- Are the companies and the public aware of the problems caused by insider trading? What can be done to educate and increase public awareness in this regard?
- What else, if anything can be done to combat insider trading in South Africa?
- Is the insider trading regulatory framework applicable to all companies, financial instruments and financial markets?

The research will therefore look closely into the adequacy and effectiveness of the existing legal framework, the role of the Financial Services Board (FSB) and its capability to perform its function of initiating prosecutions and civil actions effectively and timeously without interference from other institutions.³

The researcher will look comparatively at the regulation of insider trading in other selected countries for the purpose of learning from their experience and bringing the South African legislation in line with the latest developments elsewhere. The discussion in Chapters Five, Six and Seven will focus briefly on the United States of America, Canada and especially Australia respectively.

³ The legislation on insider trading in South Africa seems not to have been fully implemented and enforced in our courts. Although a number of investigations were reported to have been conducted by the Financial Services Board and the Insider Trading Directorate (which is now The Directorate for Market Abuse), the mere fact that only a few settlements in civil cases and no criminal convictions have been recorded, confirms that assumption. See <http://www.fsb.co.za> 13 July 2006.

Identification of flaws in the current regulatory framework⁴ without recommending how to correct them would serve no purpose. The research seeks to provide answers to many questions concerning insider trading in South Africa, such as whether the solution lies in enacting new laws or enforcing the existing laws. Is it a matter of amending existing laws or a matter of having adequate and effective laws? Was it a wise move to repeal the Insider Trading Act, 135 of 1998 or was it a legislative blunder? It is hoped that this research will play a significant role in providing guidelines and insight on the way forward.

1.2. BACKGROUND OF THE RESEARCH.

There is an assumption that insider trading is a common practice in South Africa and that unscrupulous directors, managers and others use non public price-sensitive information on a large scale at the expense of those who do not have access to such information. Insider trading was treated as mere fraud against shareholders rather than the issuer of securities and it was regulated accordingly.⁵

When it eventually transpired that the provisions that were embodied in the Companies Act, 61 of 1973 were not adequate to regulate insider trading, a committee chaired by Mr Mervin King was appointed to investigate and recommend appropriate ways of regulating insider trading in South Africa.⁶ The King Report recommended a new Act to deal specifically with the regulation of insider trading in South Africa. The Insider

⁴ The term “regulatory framework” is used interchangeably to refer to the insider trading regulatory framework and also the insider trading legislation.

⁵ See Stephan Malherbe and Nick Segal “2001 draft for OECD” on <http://www.google.com> 11 January 2006. The shareholder–manager conflict was therefore worsened by the failure of the legislature to enact an adequate and effective insider trading regulatory framework. Also see Commission of Enquiry into the Companies Act Main Report 15 April 1970 85-88. Previously insider trading provisions were only applicable to directors, officers and employees of companies to the exclusion of others like “tippees” who can also benefit from it.

⁶ The report of this commission will be referred to as the King Report.

Trading Act, 135 of 1998 was enacted and came into force on 17 January 1999.⁷ An analysis of the effectiveness of this Act as well as an analysis of its successor, the Securities Services Act, 36 of 2004 is necessary to investigate whether it was desirable to consolidate into one Act, other legislation that previously dealt with securities and financial instruments as well.⁸

1.3. THE REGULATION-DEREGULATION DEBATE.

Insider trading practices are often reported in the press and news reports in many developed countries where adequate laws were put in place to regulate it and which are also effectively enforced. This does not necessarily happen in developing countries like South Africa.

The United States of America, after the 1929 collapse of its stock markets, became the first country to enact laws against insider trading.⁹ The subject of insider trading has attracted so many controversies that some financial analysts and academics actually argue that the regulation of insider trading is both undesirable and unnecessary. The

⁷ See Cilliers H S and Benade M L *Corporate Law* 3rd ed Butterworths Durban 2000 149-150; Myburgh A and Davis B “Commentary on the impact of Insider Trading Act” <http://www.google.com> 03 October 2006. Although the Insider Trading Act 135 of 1998 arguably managed to convince most directors and managers that insider trading is undesirable for their companies’ efficiency and ability to receive a broader market base from both domestic and foreign investors, many companies were reluctant to comply with its provisions.

⁸ The Securities Services Act 36 of 2004 came into force on 1 February 2005 and also repealed the Stock Exchange Control Act 1 of 1985 (SECA), the Financial Markets Control Act 55 of 1989 (FMCA), the Custody and Administration of Securities Act 85 of 1992 and the Insider Trading Act 135 of 1998. Amendments were made to the Companies Act 61 of 1973, the Financial Services Board Act 97 of 1990 and the Insolvency Act 24 of 1936. Also see Osode P C *op cit* note 2 239.

⁹ In reaction to the Congress’s mandate to protect investors and to keep the markets free from fraud, the Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted to combat insider trading abuses which were believed to have contributed to the 1929 crash of stock markets. See generally “The regulation of insider trading in United States of America” <http://www.sec.gov> 02 March 2006; Georgakopoulos N L, Bainbridge S M and Dooley M P “How insider trading should be regulated” <http://www.genesisanalytics.com> 02 March 2006.

proponents for insider trading regulation, on the other hand, allude to the fact that the regulation of insider trading is vital for efficient, accurate and internationally competitive financial markets and that insider trading activity should not be tolerated. The question of whether or not it is desirable to regulate insider trading however, remains unanswered.

The basis of the arguments *in favour of insider trading regulation* can be summarized as follows:

- Insider trading reduces public investor confidence and must be regulated properly to protect all the investors. This argument is based on the assumption that insiders who trade in securities or financial instruments at the expense of other outside investors hamper the company's potential to attract more investors.
- Insider trading worsens the manager-shareholder conflict and results in increased agency costs. This is called the *agency theory of insider trading*, which is supported by Jensen and Meckling¹⁰ and also Georgakopoulos.¹¹ They argue that insider trading which benefits the company or shareholders is legitimate but if it results in an illegal benefit of control that accrues to the managers at the shareholder's expense it will raise the agency costs.¹²

¹⁰ See Jensen M C and Meckling W H "Commentary on how insider trading increases agency costs or expenses" <http://www.genesisanalytics.com> 02 March 2006.

¹¹ See Georgakopoulos N L, Bainbridge S M and Dooley M P *op cit* note 9 on "How insider trading should be regulated". Also see Georgakopoulos N L "Insider Trading as a Transaction Cost: A Market Microstructure Justification and Optimization of Insider Trading Regulation" (1993) 26 *Connecticut Law Review* 34-69.

¹² Jensen M C and Meckling W H "The agency theory of insider trading" define agency costs as the expenses incurred by a company that hires the services of stock brokers and financial analysts in an attempt to enhance its efficiency. They further submit that regulating insider trading reduces conflict of interest between shareholders and managers. Hence it helps to avoid any prejudice to the shareholders concerned. The agency theory focuses on the impact of insider trading by corporate insiders on a company's level of efficiency and corporate value. Also see generally <http://www.genesisanalytics.com> 02 March 2006.

- Bainbridge¹³ submits that insider trading amounts to theft of a company or corporation's property and must be controlled to reduce and avoid the consequences it may have for companies and financial markets. Prohibiting insider trading is the best means of property protection and is important for any company to remain competitive and efficient. This view is supported by Dooley¹⁴ who states that illegal disclosure of confidential information by an insider to any other person is an offence against the company to which that person owes the fiduciary duty to refrain from self-dealing in confidential information. The proprietary rights in relation to its confidential information accrue to the company which should have in place an internal insider trading regulatory framework that prohibits insiders and others from selectively dealing with it at the company's expense.
- In terms of the *market theories*, the proponents for insider trading regulation argue that regulation of insider trading will improve the accuracy and efficiency of financial markets, and that combating insider trading reduces the risk of manipulation of stock prices by insiders or even high inflation rates in affected countries. Regulation will further allow company managers to trade in securities in the best interests of their companies which may cause stock prices to be more stable and more accurately reflect the actual value of securities and financial instruments.
- Kraakman¹⁵ submits that a market characterized by a high level of insider trading may be less liquid and recommends that all companies have their own self-regulatory mechanisms. If the information asymmetry is extreme, uninformed investors may refrain from trading altogether and therefore there is a need for countries to have good insider trading laws which are effectively enforced.

¹³ See Georgakopoulos N L, Bainbridge S M and Dooley M P *op cit* note 9 on "How insider trading should be regulated". Also see Bainbridge S M "The Insider Trading Prohibition: A Legal and Economic Enigma" (1986) 38 *University of Florida Law Review* 35.

¹⁴ See Dooley M P "Enforcement of Insider Trading Restrictions" (1980) 66 *Virginia Law Review* 1-89.

¹⁵ See Kraakman R H "The Legal Theory of Insider Trading Regulation in the United States" in Hopt K and Wymeersch E (eds) *European Insider Dealing* Butterworths London 39-54.

- Earlier scholars focus mainly on the morality of insider trading, that is whether it is fair or unfair to innocent investors. They argue that insider trading must be regulated because it is unfair to outside investors and it reduces public investor confidence.¹⁶ However this approach does not take into account that it is not only investors who are affected by insider trading. It lacks a rigorous theoretical framework and fails to generate useful legal and policy prescriptions for insider trading regulation.
- Coming to South Africa, insider trading is now treated as both a civil wrong and a criminal offence, but this research will reveal that legislation in South Africa did not remove illicit insider trading practices from the South African financial markets. Although the Insider Trading Act, 135 of 1998 had some impact in reducing insider trading practices, it still had its weaknesses¹⁷ which were not addressed in the Securities Services Act, 36 of 2004 where the same flaws were largely repeated. Therefore there is still a need for a more adequate, effective and internationally competitive insider trading regulatory framework in South Africa.

Those who *oppose the regulation* of insider trading, on the other hand, argue that regulation is undesirable and unnecessary and actually reduces financial market efficiency. They submit that for companies and financial markets to be efficient, valuable information about securities should not be disclosed to everyone. Regulating insider trading might further result in serious prejudice to employees who ignorantly and innocently disclose inside information to other persons if these persons would later trade in securities on the basis of this information.

¹⁶ See Scotland R A “Unsafe at any Price: A Reply to Manne” (1967) 53 *Virginia Law Review* 1425-1478.

¹⁷ See Osode P C *op cit* note 2 239 who argues that the 1998 Act did not provide for a mandatory disclosure mechanism for all instances of insider trading, nor did it give a right of action to issuers and only looked at deterrence as the best way to stop insider trading. Hence it was inadequate and ineffective. Also see Davidson S “Insider trading: A reply to Brian Kantor” (1991) 21(3) *Businessman’s Law*, who submitted that prohibiting insider trading is not the only way to guarantee market efficiency and that increased disclosure requirements would lead to even greater efficiency. It is therefore plausible to properly regulate insider trading, rather than to endure its effects.

Proponents of deregulation also state that insider trading reduces the conflict between shareholders and managers, and consequently agency costs. It is therefore unreasonable to regulate it. Manne,¹⁸ and Calton and Fischel¹⁹ allude to the fact that strict insider trading regulation may have a chilling effect on the work of securities analysts and therefore inhibit sensible dialogue between company officials and securities analysts. They submit that stringent insider trading laws must be removed so that securities analysts can do their analytical research without any fear of contravening a prohibition on disclosure of price-sensitive information.

Proponents of deregulation further argue that insider trading is an efficient disclosure mechanism that is less costly than the traditional means of disclosure. However it is difficult to understand how insider trading can be an efficient disclosure mechanism because the trading often takes place before publication of the information. Manne²⁰ argues that because insider trading is based on the use of non public information, it will whenever it occurs, cause prices to adjust and to reflect the value of the securities more accurately.

Coming to the South African scenario, proponents for deregulation also argue that regulating insider trading will lead to inefficient markets. This is the so-called *efficient market hypothesis* (EMH), which means that relevant information must play a part in the determination of share prices and that the time between the production of information

¹⁸ Manne H G “*Insider trading and the stock market*” (1966a) *New York* 189ff. Also see Elder L “Legalize insider trading” <http://www.capmag.com> 05 May 2005.

¹⁹ Calton and Fischel “The Regulation of insider trading” (1983) 35 *Stanford Law Review* 857-866.

²⁰ See Manne H G “In Defence of Insider Trading” (1966b) 44 *Harvard Business Review* 113-122; Calton and Fischel *op cit* note 19 857-866. The proponents of the deregulation of insider trading submit that it promotes market efficiency because the persons who possess inside information will not trade in securities or financial instruments without practically disclosing it. Calton and Fischel as well as Manne, argue that the regulation of insider trading will worsen the manager-shareholder conflict. Hence it is both undesirable and unnecessary to regulate it. Furthermore they maintain that insider trading is a victimless offence, hence enforcing insider trading laws discourages corporate investments and is not cost effective.

and its communication to the market will be reduced if insider trading is allowed. The deregulation argument however did not enjoy much support in South Africa. On the contrary, the King Task Group was appointed to investigate the insider trading problem in South Africa and to make recommendations for an adequate and effective insider trading regulatory framework.

1.4. AIMS AND OBJECTIVES.

1.4.1. Aim.

The aim of this research is to provide a clear roadmap for an effective, efficient, adequate and internationally competitive insider trading regulatory framework for South Africa and the enforcement thereof, to eliminate or at least reduce as far as possible, insider trading activities. This may enhance efficiency and stability in our financial markets, increase investor confidence and may possibly contribute to the solution of problems such as inaccurate stock market prices, high inflation, misrepresentation or non disclosure of material facts relating to securities and financial instruments and economic underperformance generally.

1.4.2. Objectives.

For the purposes of this dissertation, the researcher has the following specific objectives:

- a) To recommend structures that will ensure more effective implementation and enforcement of insider trading laws in South Africa.
- b) To recommend additional appropriate sanctions and penalties for illicit insider trading, that can be imposed on all offenders but without, at the same time, affecting anything done in good faith for the benefit of the company or in the normal course of a person's duties.
- c) To recommend methods and measures to ensure that potential perpetrators are aware of insider trading offences and that victims are *adequately* aware of the remedies that are available to them.

- d) To recommend amendments to the Securities Services Act, 36 of 2004 to ensure that its provisions are applicable to all financial instruments and financial markets.
- e) To encourage South African financial markets and individual companies to have their own internal insider trading regulatory frameworks.

1.5. ASSUMPTIONS UNDERLYING THE STUDY.

For the purposes of this research a number of assumptions have to be made in relation to matters that cannot be easily verified. The assumptions can be summarized as follows:

- a) Insider trading is a controversial issue and there is a wide-spread assumption that it occurs on a large scale in financial markets, that it reduces investor confidence and eventually cripples the economy of any country due to inefficient and unenforceable insider trading laws. It is contended that South Africa has good legislation on insider trading but that it is not properly implemented and enforced. The fact that many companies are being investigated by the Financial Services Board through the Directorate for Market Abuse is not necessarily an indication of a rigorous implementation of insider trading laws but rather that insider trading is in spite of that, still a problem in South Africa, because of the paucity of settlements and convictions.²¹
- b) If insider trading occurs on a large scale in a country it is likely to undermine investor confidence and the efficiency of financial markets which in turn may have an adverse effect on the economy. The weaknesses in the South African insider trading legislation therefore need to be addressed.²²

²¹ See <http://www.fsb.co.za> 13 June 2005. Various companies have been investigated and some are still being investigated for insider trading violations but very few convictions in criminal cases and settlements in civil cases have been achieved to date.

²² A greater degree of transparency on the part of companies may have the effect of attracting more investors. Illegal insider trading practices will on the other hand discourage investors.

- c) Clear and adequate insider trading legislation will also attract foreign investments to a country, make such a country more competitive in relation to attracting foreign investors and give companies in such a country a broader financial investment base. Section 2 of the Securities Services Act, 36 of 2004 actually gives recognition to this assumption and states that the main aim of the Act is to increase public investor confidence in South African financial markets by ensuring that all securities services are provided in a fair, efficient and transparent manner.

1.6. STATEMENT OF PROBLEM AND HYPOTHESES.

1.6.1. Statement of problem.

Because insider trading activity is a serious problem and is assumed to be a common practice in South Africa, the flaws and ambiguities in our insider trading legislation need to be addressed. The absence of convictions and successful civil claims suggests that many persons may escape liability or delays may occur in their prosecution if the enforcement of insider trading legislation is ineffective²³ which in turn may cause prejudice to affected persons and issuers of securities. The following specifically identified problems need to be addressed:

- a) The South African insider trading regulatory framework seems to be based on the premise that the only way to combat illegal insider trading is through deterrence. Its focus is on severe penalties for offenders and the availability of a civil remedy to aggrieved persons. These methods have not been effective. Further reform and alternative sanctions and remedies are needed.
- b) The implementation and enforcement of insider trading laws in South Africa needs urgent redress.
- c) More effective education and awareness strategies have to be employed to ensure that companies and members of the public are aware of the insider

²³ See Crotty A "First Insider Trading Case goes to Court" *Business Report* 19 October 2001 *Sunday Times* 26 January 1997 25. Also see Osode P C *op cit* note 1 303.

trading offence and available remedies. Apart from the insider trading manual which was published by the Johannesburg Securities Exchange at the request of the Minister of Finance, no other measures were taken to make the public aware of insider trading activity and its consequences. Companies and other entities should be encouraged to make their own policy guidelines available to staff and management.

- d) Insider trading laws have a limited application in South Africa. They only apply to regulated markets and listed securities. Trading in unlisted securities on the basis of inside information is not prohibited. Some scholars argue that in cases of unlisted companies, the transactions are unlikely to be anonymous. The seller and purchaser will be knowing each other fully and the general principles relating to fraud and misrepresentation should apply. It is however still possible that shareholding through trusts or nominees may hide the identity of an insider and it can be argued that insider trading laws should also apply to unlisted securities. The wide scope of the topic under discussion compels the researcher to concentrate on insider trading activity in relation to listed securities but he is of the opinion that this matter has to be considered in future. In this dissertation however, it will be referred to briefly whenever necessary.
- e) Existing insider trading laws and rules do not clearly provide for a right of action to the issuers of securities.²⁴
- f) Unlike the position in other developed countries such as Canada where offenders are liable to compensate the actual person who was affected by the insider trading transaction, there is also no statutory provision for such an action in South Africa and aggrieved parties may only claim through the

²⁴ Some commentators argue that the absence of a right of action to issuers of securities in South African insider trading legislation is a serious mistake that needs urgent redress. See Osode P C *op cit* note 2 239.

FSB. The absence of such a right of action as an alternative to or in lieu of claiming through the FSB is in the opinion of the researcher a disadvantage.

- g) The Securities Services Act, 36 of 2004 provides for a number of offences in the form of actual dealing by an insider who is aware that he has inside information, or by encouraging others to deal or discouraging others from dealing, or simply by disclosing the inside information to others. The maximum sentence for all these offences is the same. While this is a very positive move in trying to combat insider trading the researcher observes that this may be unfair to insiders who for example made innocent remarks or inadvertently disclosed information to other persons, where they had no intention that such disclosure be acted upon.
- h) Weaknesses in an insider trading regulatory framework may not be conducive for companies and financial markets to become internationally competitive. This may, to an extent be overcome by companies having in place internal self regulatory systems to combat insider trading. This in turn may help companies to attract local and foreign investors.

1.6.2. Hypotheses.

For purposes of investigating, examination and solving these problems the following hypotheses were assumed:

- (a) Although the policy goal of deterrence which was adopted in South Africa to combat insider trading is very important, it must not be the only strategy. Alternative strategies should be considered.
- (b) The onus on the prosecution is severe in criminal cases of insider trading and the inclusion of a rebuttable presumption in relation to matters peculiarly within the knowledge of the accused should be considered. The same applies in civil cases to assist the Directorate for Market Abuse when it takes action or negotiates settlements.

- (c) Public awareness and education in relation to insider trading offences should be enhanced and incentives be used to encourage more persons to report incidents of insider trading to the responsible authorities without fear of reprisal.
- (d) Legislation should be widely applicable to all securities, irrespective of whether they are listed.
- (e) International competitiveness is a key to success of companies in today's global economy and technological environment. Competitiveness should be enhanced in every possible way, to combat insider trading. Companies should therefore have their own internal regulatory frameworks that discourage insider trading.

1.7. RATIONALE FOR THE STUDY.

The impact of insider trading has been felt in many financial markets worldwide and South Africa is no exception. The absence of legislation that can effectively regulate insider trading is the reason for this research, the rationale being the promotion of public investor confidence, awareness of insider trading activity and market efficiency. To achieve this, flaws in the existing legislation and regulatory framework should be identified and their negative impact be minimized. An in depth analysis will be made, of existing legislative provisions, their weaknesses and ambiguities, practices related to insider trading that are not covered, and the reasons why, if any, so little has been done in terms of the enforcement of the Securities Services Act, 36 of 2004. The functions and effectiveness of the FSB, Directorate for Market Abuse (DMA) and the courts will be considered.

1.8. LIMITATION OF THE STUDY.

The research will focus on the statutory provisions regulating insider trading in South Africa and in particular the provisions of the Securities Services Act, 36 of 2004. However legislation in force prior to 2004 will be discussed for the purpose of tracing the historical development of insider trading laws in South Africa and for purposes of

comparative study, referral will be made to insider trading legislation of selected foreign jurisdictions. The study will not discuss all the provisions of the Securities Services Act, 36 of 2004 and the Insider Trading Act, 135 of 1998 but it will be limited to those that are relevant to the topic. Provisions of other South African statutes will only be quoted for purposes of reference and comparison. The internal listing requirements and surveillance mechanisms of the JSE Ltd will not be dealt with in detail due to space and scope restrictions and because this research is restricted to legislation with the exception of the disclosure requirements which will be dealt with briefly in Chapter 4.

1.9. SPECIFIC MATTERS TO BE INVESTIGATED.

- a) The researcher will primarily investigate the strengths and weaknesses of the Securities Services Act, 36 of 2004 and its implementation.
- b) The repeal of all previous legislation and the consolidation thereof in the Securities Services Act, 36 of 2004 and whether this was move in the right direction will be considered briefly.
- c) An investigation into the powers of and the authority given to the Financial Services Board and the Directorate for Market Abuse is essential to evaluate the effectiveness of the enforcement of insider trading laws in South Africa.

1.10. RESEARCH METHODOLOGY.

For purposes of addressing the problems as highlighted and making appropriate recommendations for an effective insider trading regulatory framework in South Africa, the following research methods will be used:

- (a) Internet browsing.

The researcher will refer to relevant websites for information. This is important and convenient because it gives the researcher access to the

opinions of various commentators and authors. The dates referred to, ***are the dates on which the websites were accessed by the researcher.***

(b) Library.

A number of libraries will be visited to access relevant books, case law, journals, statutes and other relevant materials.

(c) Case law and court decisions.

An examination and analysis of relevant case law and judicial precedents will be conducted.

(d) The study of relevant legislation and statutes.

This research will focus on the Securities Services Act, 36 of 2004 and Insider Trading Act, 135 of 1998. Other relevant statutes from South Africa and other selected countries will be referred to for purposes of historical and comparative analysis.

(e) Historical analysis.

This method will be employed in Chapters Two and Three of this dissertation. The main objective is to investigate the evolution of insider trading legislation in South Africa and to compare it with the current provisions.

(f) Comparative research method.

The researcher will employ comparative studies between South African insider trading laws and those of selected countries that may have more effective regulatory frameworks in place, to learn from their experiences and for purposes of possible application in South Africa.

2. STRUCTURE OF THE DISSERTATION.

This dissertation has eight Chapters, including this Chapter.

Chapter One deals with the general study context. It outlines the aims, objectives, statement of problem, assumptions underlying the research, rationale of the study, specific matters to be investigated and the research methodology.

Chapter Two discusses the historical development of the regulation of insider trading in South Africa prior to 1998. This Chapter investigates the regulation of insider trading in terms of the Companies Acts of 1926 and of 1973 as amended, their impact, effectiveness and adequacy.

Chapter Three examines the adequacy and effectiveness of the provisions of the Insider Trading Act, 135 of 1998, including a critical analysis of the meaning and interpretation of the concept of insider trading, the adequacy of the proscribed penalties, defences and of the civil and criminal sanctions in terms of that Act.

Chapter Four investigates the adequacy and effectiveness of the prohibition of insider trading under the Security Services Act, 36 of 2004. This Chapter further discusses whether or not the current regulatory framework has successfully fulfilled its objectives, which are purportedly aimed at reducing systemic risk, protecting regulated persons and increasing public investor confidence in the South African financial markets.

Chapter Five provides a comparative perspective of the regulation of insider trading in United States of America and South Africa, for purposes of examining whether the integration of some of the US insider trading principles into the South African regulatory framework has worsened or improved the regulation of insider trading in South Africa.

Chapter Six provides a comparative analysis of the regulation of insider trading in Canada and South Africa and investigates whether our legislature should not also have taken note of some developments in Canada.

Chapter Seven gives an incisive comparative analysis of the regulation of insider trading in Australia and South Africa. Drawing from the successful track record of the Australian regulatory framework it must be investigated whether principles of Australian law can be recommended for consideration in South Africa.

Chapter Eight discusses some guidelines, conclusions and recommendations to solve the insider trading problem in South Africa.

It is important to note that for purposes of this dissertation the researcher uses the masculine to refer also to the feminine.