

CHAPTER FIVE

THE REGULATION OF INSIDER TRADING IN UNITED STATES OF AMERICA: A COMPARATIVE PERSPECTIVE.

5.1. INTRODUCTION.

The United States of America (US) insider trading regulatory framework is arguably the one that was the most adopted and *preferred* by other countries.¹ South Africa is no exception. Therefore in this Chapter, a comparative analysis of the regulatory frameworks in these two countries will be carried out.

Furthermore, this Chapter will examine whether integration of the US insider trading principles into the South African regulatory framework has worsened or improved the regulation of insider trading in South Africa.² Therefore relevant US provisions and cases will be examined and where necessary contrasted with similar cases and provisions in South Africa.

5.2. REGULATORY FRAMEWORK REGARDING INSIDER TRADING IN THE UNITED STATES OF AMERICA.

Firstly, a general overview of the development of insider trading legislation in the US is necessary and thereafter a comparison with developments in South Africa will be made. The securities regulation of insider trading in the US at a federal level was introduced by the Securities Exchange Act of 1934 (the 1934 Act).³ Before the 1934 Act, cases dealing with insider trading were decided on the basis of existing common law and often failed to

¹ For instance Japan and China expressly follow the US principles. See Steinberg M I “Insider Trading – A Comparative Perspective” (2002) <http://www.sec.gov> 20 12 October 2006.

² See generally Botha D “Control of Insider Trading in South Africa: A Comparative Analysis” (1991) 3 *South African Mercantile Law Journal* 1-18 1.

³ See section 16(a) and (b) as well as section 10(b).

successfully deal with the issue in question. In *Godwin v Agassiz*⁴ the Supreme Court denied relief to the plaintiff who had sold his own shares to his detriment after having read a newspaper report stating that the company had stopped operating. He was unaware of the fact that directors were buying and selling shares on the basis of non public information at their disposal because these transactions were *anonymously* conducted through the Stock Exchange.

However the 1934 Act was deficient in several respects, for example section 16(a)⁵ failed to adequately empower the United States Securities and Exchange Commission⁶ to recover profits that were illegally obtained by those who practised insider trading. This function was merely left to a company's own managers, directors and shareholders. In an attempt to resolve this problem, the United States Securities and Exchange Commission (SEC) introduced a number of anti-fraud provisions through Rule 10b-5 but they nonetheless remained inadequate. Rule 14e-3 was further enacted to correct these flaws, but it was also unsuccessful.⁷

The Congress at the request of SEC enacted the Insider Trading Sanctions Act of 1984 (the 1984 Act).⁸ This Act empowered the SEC to order anyone who practised insider trading through *tipping* or otherwise to pay an amount of up to three times the profit made or loss avoided for the benefit of all persons who were prejudiced by it.⁹ Unfortunately, the 1984 Act failed to provide an adequate solution to the regulatory problems in the US.

⁴ (Mass 1933) 186 NE 659.

⁵ See paragraph 5.2.2 of this Chapter.

⁶ This body was established in 1934 as an independent board to enforce the insider trading prohibition in the United States of America.

⁷ See Arshadi N and Eyssell T H *The Law and Finance of Corporate Insider Trading: Theory and Evidence* Kluwer Academic Publishers 1993 46.

⁸ Public Law 98-376.

⁹ See paragraphs 5.2.4 and 5.2.6 of this Chapter.

In an attempt to have a more adequate insider trading legislation, the Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988 (the 1988 Act).¹⁰ This Act introduced numerous changes to the regulation of insider trading in the US. For instance, it stipulated that public companies should adopt adequate policies to monitor and discourage their employees from practising insider trading.¹¹ However, many of these persons were still able to contravene the provisions of this Act. The *Enron* scandal is a glaring example. As a result of poor auditing and insider trading activities on the part of directors the company's net income was reduced by \$600 million and its debt increased to about \$628 million.¹² In response to these accounting and corporate scandals the Congress enacted the Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes-Oxley Act).¹³ This Act introduced a new stringent regulatory structure for accounting companies and professionals to discourage *inter alia* illicit practices such as insider trading.¹⁴

In contrast to the early developments of the regulation of insider trading in the US, the legislature in South Africa only introduced a prohibition on insider trading in terms of section 233 of the Companies Act, 61 of 1973.¹⁵ It however borrowed blindly, many principles from the US regulatory framework as will be discussed later.

¹⁰ Public Law 100-704, 102 Stat 4677 (19 November 1988).

¹¹ Arshadi N and Eyssell T H *supra* note 7 51.

¹² See Palmiter A R *Securities Regulation: Examples and Explanations* 3rd ed Aspen Publishers New York 2005 24.

¹³ See Palmiter A R *op cit* note 12 23.

¹⁴ The Sarbanes-Oxley Act will be referred to only where necessary. There are also other separate Acts that specifically regulate insider trading such as the Racketeer Influenced and Corrupt Organization Act of 1970 (RICO) that will not be discussed for purposes of this dissertation. This Chapter discusses mainly the US federal statutes on insider trading.

¹⁵ See the historical development of the regulation of insider trading in Chapter 2 of this dissertation.

5.2.1. The scope and meaning of “insider trading”.

Unfortunately insider trading is not statutorily defined in the US legislation. The discretion to decide what constitutes insider trading was left to the federal courts and the SEC.¹⁶ However, neither the federal courts nor the SEC defined the concept. Key terms and concepts relating to the insider trading offence are also not defined in the statutes, for instance terms such as “inside information”, “insider”, “tippee” and “illegal insider trading”.¹⁷

Although the South African regulatory framework has attempted to comprehensively define some of the relevant terms in section 72 of the Securities Services Act, 36 of 2004,¹⁸ it appears to have followed the US approach and did not attempt to define the fundamental concept of insider trading. Consequently some of the flaws that characterise the US regulatory framework are also found in South Africa. It is therefore clear that this non-codification approach of the US should not have been adopted in South Africa.

5.2.2. The prohibition on “insider trading”.

The similarities and differences in the provisions of the US and South African legislation that prohibits insider trading will be briefly examined here. The 1934 Act directly prohibited insider trading in the US in section 16(b)¹⁹ and indirectly in section 10(b).²⁰ However section 16(b) applied only to directors or officers of a company who held more

¹⁶ See Steinberg M I *op cit* note 1 16.

¹⁷ See Steinberg M I *supra* note 1 16-17. Also see generally Nasser “The Morality of Insider Trading in the United States and Abroad” (1999) 52 *Okla L Rev* 377-385.

¹⁸ Hereinafter referred to as the “New Act”.

¹⁹ Section 16(b) prohibited short-swing profits (profits obtained in less than 6 months) by corporate insiders in the corporation’s stock except when it was in the best interests of that corporation or its shareholders.

²⁰ Section 10(b) prohibited any person to use or to employ in the purchase or sale of any securities registered on a securities exchange or any unregistered securities, a deceptive device for the purpose of contravening any rules and regulations of the SEC.

than a 10 percent stake in the company. Section 16(a) provided a mandatory disclosure requirement for such insiders. They had to file with the SEC any transactions amounting to insider trading within ten days after they were concluded. These provisions did not apply to other persons, for instance tippees.

Due to the inadequacies of these provisions, the SEC adopted rule 10b-5 which broadly speaking, prohibited fraud or misrepresentation by *any person* in relation to the purchase or sale of any securities. It is interesting to note that neither section 10(b) nor Rule 10b-5 specifically prohibited trading by insiders while in possession of non public inside information. A prohibition on insider trading was contingent upon the interpretation of the courts.²¹ However, it is clear that non disclosure by an insider of material facts that were not known to the other party during the negotiations, would amount to a misrepresentation.

In an attempt to solve this inadequacy the Congress enacted section 14(e) and the SEC adopted Rule 14e-3 which, however, applied only in tender offer situations.²² Rule 14e-3 prohibited “*any person who has obtained directly or indirectly, material confidential information*” regarding a tender offer from the offeror (bidder), target company or an intermediary, to *trade or tip* another person to trade in that offer before making an adequate public disclosure of such information. Furthermore, a tippee who knew or should have known that such information had come from an insider was also prohibited from trading with it until an adequate public disclosure was made. Rule 14e-3 applied to all persons (even juristic persons) but nonetheless it was not enforced in practice.

The inherent inadequacy of the 1934 Act led the Congress to adopt the 1984 Act. This Act introduced section 21A empowering the courts to impose a criminal penalty on any person who violated the insider trading provisions. Unfortunately, it failed to solve the

²¹ As articulated *In the Matter of Cady, Roberts and Company* [1961-1964 Transfer Binder] CCH *Fed Sec L Rep* 76. 803 81. 016 and also *Chiarella v United States* (1980) 445 US 222-230.

²² See Gaillard E (ed) *Insider Trading: The Laws of Europe, the United States and Japan* Kluwer Law and Taxation Publishers Netherlands 1992 296.

inadequacy problem because its provisions applied only to a few persons and the Congress further enacted the 1988 Act. This Act amended section 21A and imposed liability on “controlling persons”²³ for insider trading activities of their employees. However, it appears that this Act was still flawed and inadequate, hence the SEC and the Congress were forced back to the drawing board.

Recently, the SEC adopted Rule 100 and Regulation Fair Disclosure (FD)²⁴ which prohibits companies from selectively disclosing material non public information to market professionals and favoured shareholders. The SEC further adopted Rule 10b5-1 in another attempt to combat insider trading.

Most recently, the Sarbanes-Oxley Act of 2002 was passed to prohibit accounting companies and professionals from being involved in insider trading activities. Section 306(a) for instance prohibits employees from trading in their company’s stock relating to its pension plan funds during closed periods. The purpose is to avoid insider trading.

It is interesting to note that the South African regulatory framework also prohibits any person (including juristic persons) from practising insider trading and related activities like tipping, in terms of sections 73 and 77 of the New Act. Furthermore, it appears to have adopted the US approach of combating other fraudulent and deceptive practices by providing for a criminal sanction in relation to these practices in terms of sections 75 and 76 of the same Act.

However, the most important feature of the regulatory framework in the US, namely a co-ordinated (joint) effort between the courts and the SEC to co-ordinate the battle against insider trading and related activities seems to be absent in South Africa. It appears that

²³ A “controlling person” includes not only employers but also any person with the power to influence or control the direction or the management policies or activities of another person. See Gaillard *E op cit* note 22 308.

²⁴ See Securities Exchange Act Release Number 43154 [2000 Transfer Binder] Fed Sec L Rep CCH 86,319. Also see Palmiter *A R op cit* note 12 371.

there is little co-operation between the courts and the Financial Services Board and therefore a paucity of successful prosecutions or civil claims especially in the courts.²⁵

5.2.3. Adequacy of available defences.

A wide range of defences are available to those who allegedly practised insider trading and related activities in terms of the US legislation. For instance, accused persons can escape liability if they prove that they were unaware of the materiality (price-sensitive nature) of the non public information which they possessed. They may also escape liability in terms of section 10(b) and Rule 10b-5 if they prove that they had no fiduciary duty in relation to the affected companies and shareholders or prove that they did not misappropriate or abuse material non public information that relate to the affected securities.²⁶

Moreover, they can avoid liability if they prove that they acted under duress or were compelled to deal in the affected securities. However, this defence was unsuccessfully raised by the appellant in the *Harp* case.²⁷ The court held that Harp had unlawfully misused non public information and failed to prove that he had entered into a contract under a threat or an unlawful or wrongful act or duress, including economic duress.

Another defence at the disposal of an accused or defendant, is to prove that his trading in affected securities was *bona fide* and not aimed at violating any insider trading provisions. This was clearly relied upon in the *Dirks* case²⁸ where it was held that he did not breach any fiduciary duty to the Equity Funding Corporation of America by

²⁵ See paragraph 4.6.3 in Chapter 4 of this dissertation.

²⁶ As highlighted *In Matter of Cady, Roberts and Company* *supra* note 21. Also see generally Bullard M E “Insider Trading in Mutual Funds” (2005) 84 *Oregon Law Review* 821.

²⁷ See *Robert D Harp v Corning INC and Corning NetOptix Inc* (2006) US Court of Appeals 2988660 WL (1st Cir Mass).

²⁸ *Dirks v SEC* (1983) 463 US 646-655. See generally Langevoort D C and Gulati G M “The Muddled Duty to Disclose Under Rule 10b-5” (2004) 57 *Vand L Rev* 1639. Also see generally *SEC v Zandford* (2002) 535 US 813-825 and *SEC v Santos* (2003) 292 F Supp 2d 1026.

disclosing massive fraud in its accounting policies. Dirks was a securities analyst who uncovered fraud in the Equity Funding Corporation of America after a tip off from its former employee, Ronald Secrist. He was consequently charged with insider trading. It was alleged that Dirks passed this information to the SEC, and to other persons (clients) who sold their Equity Funding securities to avoid substantial losses before any public disclosure of the fraud was made.²⁹

Perhaps the most important defence ever to be developed in the US insider trading legislation is the Chinese Wall.³⁰ It is specifically provided for in terms of Rule 14e-3 to avoid any prejudice to entities which have developed adequate and effective mechanisms that prevent the abuse of non public confidential information between employees in separate subsidiary divisions of an entity.

Unfortunately, there is no Chinese Wall defence or similar provision in South African law to protect bigger companies and corporations which might have developed adequate measures to avoid any manipulation of non public information between their different departments.³¹ The legislature should have adopted adequate defences to avoid prejudice to all innocent persons.

5.2.4. Reliance on both civil and criminal sanctions.

The US regulatory framework relies heavily on both civil and criminal sanctions to discourage insider trading. This can be traced back to the 1934 Act, which provided that any person who violated its provisions was criminally liable for a fine of \$10 000 or imprisonment for a period not exceeding 5 years.³² Furthermore, this Act empowered the

²⁹ See Bainbridge S M *Corporation Law and Economics* Foundation Press 2002 534-536.

³⁰ A Chinese Wall defence includes policies, a set of procedures which explains the nature of material non public information and the prohibited conduct of employees in relation to that information. See Gaillard E *op cit* note 22 302. Also see Lipton and Mazur "The Chinese Wall Solution to the Conflict Problems of Securities Firms" (1975) 50 *NYUL Rev* 459 464-466.

³¹ See paragraph 4.5 in Chapter 4 of this dissertation.

³² See section 32(a) of the 1934 Act.

SEC to impose civil liability on such persons of up to 3 times the profit made or the loss avoided as a result of insider trading. However, these sanctions were allegedly inadequate for deterrence purposes and it was generally assumed that many persons benefited from insider trading without any fear of incurring liability. Perhaps, this was also influenced by the fact that insider trading activities were too difficult to detect.

The 1984 Act was enacted as a result of the inadequacy of its predecessor. This Act increased the penalties for insider trading to a fine of \$100 000 for natural persons and \$500 000 for juristic persons. The maximum imprisonment term for natural persons however remained 5 years. Moreover, the civil remedy remained the same in spite of the wide powers conferred upon the SEC by the Act to claim treble damages from the offenders.³³ Unfortunately, the penalties imposed by this Act were allegedly still inadequate. It remained possible for persons to benefit from their insider trading practices after paying the stipulated fine or after serving their terms in prison.

The 1988 Act was subsequently enacted in a bid to resolve the inadequacy problem and a further amendment to section 32(a) was made. The maximum criminal sentence was increased to a fine of \$1 million for natural persons and to \$2, 5 million for juristic persons. Furthermore, the imprisonment sentence was significantly increased to a period not exceeding 10 years. It also enabled the SEC to effect a payment of up to 10 percent of the fine collected (*bounty rewards*) to anyone who provided information leading to civil penalties. The purpose is to encourage individuals to expose insider trading activities.³⁴

Most recently, these sanctions were further increased by the Sarbanes-Oxley Act of 2002. The maximum fine is now \$5 million for natural persons and \$25 million for juristic persons and the maximum imprisonment sentence is now 20 years. It is important to note that the criminal sanctions and the civil remedies are enforced by the Department of

³³ See Botha D *op cit* note 2 10; also see section 32(a) as amended.

³⁴ See section 21A (e) of the 1988 Act and Palmiter A R *op cit* note 12 370.

Justice and the SEC respectively. This resulted in more successful criminal prosecutions by the courts as well as civil settlements at the instance of the SEC.³⁵

The current South African Act also provides for civil as well as criminal sanctions. Furthermore in civil cases it seems as if the provision for a civil penalty of up to 3 times the profit made or the loss avoided was directly borrowed from the US.³⁶ As is the case in the US, the enforcement of the civil remedy is the responsibility of an independent board, the Financial Services Board (FSB). It is however questionable whether this offered the ideal solution to the South African situation in relation to civil remedies, or whether the legislature should not also have taken note of examples from other jurisdictions such as Australia.

In contrast with the criminal sanction for insider trading in the US, the South African legislature has only provided for a maximum fine of R50 million or imprisonment for a period not exceeding 10 years or both. Moreover no distinction is been made in relation to the sanctions imposed on natural and juristic persons. It appears that these sanctions are still inadequate for deterrence purposes.

5.2.5. The enforcement and effectiveness of insider trading legislation.

The roles of the SEC and of the courts will be discussed under this heading and this will be followed by a comparative analysis of similar enforcement mechanisms in South Africa.

Competent courts play a pivotal role in enforcing the prohibition of insider trading and related practices in the US.³⁷ Rigorous enforcement and prosecution of such practices is

³⁵ See for example *SEC v Texas Gulf Sulphur Company* (1968) 401 F2d 833 (2d Cir); *Dirks v SEC* *supra* note 28; *United States v O'Hagan* (1997) 117 SCt 2199; *United States v Falcone* [2001 Transfer Binder] 91.489 Fed Sec L Rep CCH (2d Cir) and *SEC v Yun* (2003) 327 F3d 1263 (11th Cir).

³⁶ See section 77 of the New Act.

³⁷ These include the US High Courts and Supreme Courts.

clear testimony. The number of reported cases indicates that the courts are effectively enforcing the insider trading prohibition in the US. For instance in the Drexel Burnham Lambert scandal of 1990, Kimba Wood J sentenced Michael Milken to 10 years imprisonment or a criminal fine of \$200 million and ordered him to pay a \$400 million civil disgorgement of profits fine. Dennis Levine was sentenced to 2 years in prison or a fine of \$11, 5 million while Ivan F. Boesky was sentenced to 3 years imprisonment or a fine of \$50 million. Milken eventually paid the criminal fine of \$200 million and \$400 million civil disgorgement profits fine. Dennis Levine also paid the \$11, 5 million civil disgorgement of profits fine and Ivan F. Boesky paid the \$50 million civil disgorgement fine and an additional \$50 million civil penalty.³⁸

In *US v O'Hagan*³⁹ the Supreme Court rejected O'Hagan's plea of not guilty to insider trading charges and held that breach of a fiduciary duty by corporate insiders could also involve breach of a duty of trust and confidence on the part of such insiders or other shareholders of a corporation whose securities are traded.

Furthermore, the recent conviction of the former *Enron* executives, Jeffrey Skilling and Ken Lay for insider trading and related practices is additional evidence of the competence of the US courts. On 26 May 2006 Ken Lay was convicted on six counts of conspiracy and fraud and sentenced to 45 years in prison while Jeffrey Skilling was found guilty on 19 counts of conspiracy, fraud, making false statements and insider trading and sentenced to 185 years in prison.⁴⁰ On 23 October 2006, Skilling was criminally convicted on further counts of insider trading and sentenced to an additional imprisonment term of 25 years. The effectiveness of these courts has been made possible by adequate resources

³⁸ Tomasic R "Insider trading in the USA and United Kingdom" (1991) *Australian Studies in Law, Crime and Justice Series* 31-39.

³⁹ (1997) 521 US 642.

⁴⁰ See the judgement of the United States District Court S D Texas Houston Division in the case of *In re Enron Corporation Securities Derivative and "ERISA" Litigation Plaintiffs v Enron Corp Oregon Corporation Defendants* (2006) WL 2795321 (S D Tex). Also see Daily M and Whitcomb D "Lay, Skilling face long jail terms as curtain falls on Enron's Empire" <http://www.businessday.co.za> 26 May 2006.

and governmental support, as well as the fact that competent personnel were allocated to them.

In contrast with the US, it has already been pointed out that very few cases have to date, been successfully dealt with in South Africa.⁴¹

Although individual persons in the US are entitled to claim damages for insider trading in private litigation, the responsibility for criminal and civil enforcement of the relevant provisions rests primarily on the Department of Justice (the courts) and the SEC respectively.⁴²

The SEC was established in terms of section 4 of the 1934 Act as an independent *quasi-judicial* regulatory board. Its main responsibility is to enforce the federal securities laws through the regulation of the stock market and securities industry.⁴³ For purposes of effectiveness, the SEC is divided into four main divisions namely the Corporate Finance, Market Regulation, Investment Management and Enforcement Divisions.

The Corporate Finance Division oversees compliance with the mandatory disclosure requirement as well as registration by public companies of transactions such as mergers. It also operates online, the Electronic Data Gathering Analysis and Retrieval system (EDGAR system) to ensure equal access to non public inside information for all relevant persons.

⁴¹ A long road must be traversed before the South African courts will attain same effectiveness as the courts in US. See Ciaran R “Another Enron just a heart beat away” (2004) Vol 5 (2) *Deal Makers Magazine* Second Quarter 8-9.

⁴² See Langevoort D C and Gulati G M *op cit* note 28 1639. Also see Ashe M and Counsell L *Insider Trading: The Tangled Web* Format Publishing London 1990 7-12.

⁴³ The SEC does not work in isolation. Other institutions under its authority include the New York Stock Exchange (NYSE) as well as self regulatory organizations such as the National Association of Securities Dealers (NASD) and the Municipal Securities Rule Making Board (MSRB). Also see Spandaccini M “When Greed is not Good: The Law of Insider Trading” *Securities Law Report* (April 2003) Vol 6 <http://www.amazon.com> 14 August 2006 and Palmiter A R *op cit* note 12 402-415.

The Market Regulation Division regulates the New York Stock Exchange, the National Association of Securities Dealers, the Municipal Securities Rule Making Board and other Self Regulatory Organizations. It interprets any proposed changes to regulations, publicizes investment related topics for public education and monitors operations of the industry.

The Investment Management Division oversees investment companies and their advisory professionals. It also administers federal security laws to improve the disclosure of non public inside information and to minimize prejudice to investors without imposing an undue burden on regulated companies.

While the Enforcement Division investigates any violation of the laws and rules that govern insider trading and other related practices, its extensive investigatory powers include issuing subpoenae for production of relevant evidence such as documents and compelling suspects and others to testify in the courts. Furthermore, it has powers to enforce the civil remedies, institute administrative orders, recover any illegally obtained profits from guilty persons (disgorgement of profits), impose punitive penalties on such persons and refer criminal matters to the Department of Justice.⁴⁴

Another important element of the US regulatory framework is the Department of Justice. Thus the Supreme Courts and the High Courts in the US are responsible for hearing criminal cases against persons accused of insider trading or related illicit practices.

This co-operative effort of the SEC, private litigants and the Department of Justice in the enforcement of statutory, judicial and regulatory rules against insider trading and related practices has to an extent been effective. The provision of adequate resources, competent

⁴⁴ See generally Dooley M “Enforcement of Insider Trading Restrictions” (1980) 66 *Virginia Law Review* 1-83; Carlton D W and Fischel D R “The Regulation of Insider Trading” (1983) 35 *Stanford Law Review* 857-895. Also see *The Northwest Herald* (Unknown author) “Qwest ex-chief charged with insider trading” <http://www.nwherald.com> 12 August 2006 and Bainbridge S M *op cit* note 29 571-573.

personnel in the courts and the availability of adequate technological surveillance mechanisms to detect insider trading and related activities also contributed significantly to the success achieved in the US. It enhanced enforcement in practice of the insider trading legislation which was reflected in a significant number of cases that were successfully adjudicated to date.⁴⁵

In contrast to this, a similar regulatory framework in South Africa is still inadequate and less effective. Although the South African legislation on insider trading and related activities was highly influenced by the corresponding US legislation, it seems to lack a rigorous practical enforcement approach and infrastructure to combat insider trading. This is evidenced by many delays in prosecutions and the paucity of successful cases that were reported in South Africa to date.⁴⁶

5.3. CONCLUDING REMARKS.

The prohibition on insider trading and related offences in the US is generally accepted by the public, the judiciary and all the market participants in that country.⁴⁷ In other words, the prevalent attitudes in the US favour a rigorous enforcement and prosecution of such offences.⁴⁸

⁴⁵ See cases *supra* notes 27, 35 and 40. Also see *SEC v One or more purchasers of call options for the Common Stock of CNS INC* (2006) US District Court 3004875 WL (E D Pa) and Dolgoplov S “Insider Trading and The Bid-Ask Spread: A Critical Evaluation of Adverse Selection in Market Making” (2004) 33.83 *Capital University Law Review* 84.

⁴⁶ See analysis in paragraph 4.3.7 of Chapter 4 of this dissertation.

⁴⁷ See Steinberg M *Op cit* note 1 29.

⁴⁸ See generally *SEC v Sargent* (2000) 229 F 3d 68-75 (1st Cir) which displays the determination of the judiciary in enforcing insider trading provisions by upholding convictions based on circumstantial evidence. Also see section 32(a) of the Securities Exchange Act; Bergmans B *Inside Information and Securities Trading: A Legal and Economic Analysis of the Foundations of Liability in the US and the European Community* Graham and Trotman London 1991 41-60.

Although the adoption of some principles from the US regulatory framework shows a significant effort by the legislature to provide an adequate insider trading proscription in South Africa, deficiencies such as inconsistent provisions and apparently ineffective enforcement mechanisms have directly impeded these efforts.

It is submitted that the legislature should not have blindly adopted the US regulatory principles without adequate measures in place to enforce them. Perhaps, more emphasis should have been placed on procuring adequate technological surveillance machinery, training of competent personnel and educational awareness programmes to combat insider trading and not to duplicate the flaws in the US regulatory framework.