

CHAPTER FOUR

PROHIBITION OF INSIDER TRADING UNDER SECURITIES SERVICES ACT, 36 OF 2004.

4.1. INTRODUCTION.

The Insider Trading Act, 135 of 1998,¹ was notably inadequate and ineffective as was discussed in the previous Chapter. In another attempt to make the South African insider trading legislation adequate, effective and more comparable to the highest standards of similar legislation in the developed world, it was repealed and replaced by the Securities Services Act, 36 of 2004.²

Apart from repealing the 1998 Act, the New Act also consolidated the law relating to the regulation and control of exchanges and securities trading such as the Stock Exchanges Control Act, 1 of 1985, the Financial Services Board Act, 97 of 1990, the Financial Markets Control Act, 55 of 1989 and the Custody and Administration of Securities Act, 85 of 1992.³ It is submitted that the consolidation was inevitable for purposes of introducing adequate and more effective legislation to free the South African financial markets and companies from illicit practices such as insider trading.⁴

Although some amendments and new offences for market abuse practices were introduced by the New Act, many deficiencies in the 1998 Act were simply carried over into the New Act. It is against this background that this Chapter seeks to investigate and expose these deficiencies for purposes of recommending practical measures that may be taken to resolve the insider trading problem in South Africa.⁵

¹ The Insider Trading Act 135 of 1998 is hereinafter referred to as “The 1998 Act”.

² The Securities Services Act 36 of 2004 is hereinafter referred to as “The New Act”.

³ The New Act came into effect on 1 February 2005.

⁴ See Du Plessis R and Cassim R “The Securities Services Act 36 of 2004” <http://www.bowman.co.za> 18 August 2006.

⁵ This is necessary to remove the perception held by some persons that the South African legislation on insider trading is “a bark and no bite legislation”. See Henning J J and Du Toit S “The regulation of

This Chapter will further discuss whether 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 markets⁶ or whether it has failed. Therefore an analysis into the adequacy and effectiveness of the insider trading provisions as contained in the New Act will be carried out in this Chapter, as well as a critical examination of the penalties, defences and remedies proscribed in the New Act.

This will include, further, a discussion of other related market abuse practices such as tipping. Furthermore, the role of the Financial Services Board (FSB), the Directorate for Market Abuse (DMA) and the Enforcement Committee (EC) will be analysed, to determine whether these bodies are enforcing the anti-insider trading provisions effectively. It appears as if many of the allegedly inadequate provisions of the 1998 Act were simply retained in the New Act with little or no changes to them,⁷ so that it is still possible for non public price-sensitive information to be abused by persons for their personal benefit or for the benefit of others.

The perception exists that the New Act brought significant improvements to the regulation of insider trading in South Africa. There can be no doubt that the consolidation into a single Act of all the previous legislation relating to the regulation and control of exchanges and securities trading, was an attempt to improve and resolve some of the problems found in the repealed legislation.⁸ For purposes of this research, attention will be focused on the significance and desirability of the repeal of the 1998 Act.

false trading, market manipulation and insider dealing” (2000) 25(2) *Journal for Judicial Science* 155 163.

⁶ See section 2 of the New Act.

⁷ See sections 73(1)(a), 73(2)(a), 73(3)(a), 73(4), 74, 77(1), 77(2), 77(3) and 77(4) of the New Act. Mere amendment or repealing of the legislation relating to insider trading without necessarily dealing with the flaws and deficiencies in the previous legislation will not resolve the insider trading problem in South Africa. See Jooste R “A critique of the insider trading provisions of the 2004 Securities Services Act” (2006) 123 *SALJ* 437.

⁸ See section 117 of the New Act and the schedule for a list of repealed legislation.

The researcher however still submits that what is crucially needed is adequate and effective legislation to regulate insider trading irrespective of whether it is embodied in a consolidated Act or in several statutes.

Firstly, it should be noted that the scope and application of the insider trading prohibition is still limited to transactions in securities listed on regulated markets.⁹ Insider trading may however also occur in unregulated financial markets, for example trading in securities of unlisted companies or government and semi-government bonds.¹⁰

Secondly, it is submitted that the express exclusion of money market instruments that may or may not be listed on regulated markets from the ambit of the definition of “securities” may in future turn out to be a mistake.¹¹ Here the insiders will be persons with expertise and inside information in relation to interest rate changes which are likely to have a material effect on the financial markets and money market instruments.

Thirdly, the penalties for insider trading are perhaps still not sufficiently harsh for deterrence purposes, in spite of the fact that the New Act retained the 10 year imprisonment term and increased the fine to R50 million. Some unscrupulous persons may also evade conviction for insider trading offences by pleading guilty on a lesser offence such as fraud. This was clearly reflected in *S v Western Areas Limited and others*,¹² where, *Western Areas Limited* was unsuccessfully charged with insider trading.

⁹ See section 3(1) of the New Act.

¹⁰ See generally Barrie G N “Ethics and insider trading in local government: A case of the law and the profits?” (1994) 9 *SAPL* 74.

¹¹ See section 1(b) of the definition of securities.

¹² (2004) (4) SA 591 (W) where four accused persons were charged with fraud and contravention of section 424 of the Companies Act 61 of 1973 (the Companies Act), of section 40(c) of the Stock Exchanges Act 1 of 1985 and section 2(1) of the 1998 Act. On appeal the accused objected to the indictment on the basis that the charges did not disclose an offence in as much as it is not competent in law to found criminal liability for fraud based on a duty to disclose flowing from the Securities Regulation Panel Rules and the Companies Act, where neither the rules nor the relevant provisions of the Act created criminal liability for non compliance therewith. The court held that, on a proper interpretation of the defence set out in section 4 (1) (d) of the 1998 Act, the conduct of the accused

Fourthly, all the insider trading offences in terms of the New Act are still *rigidly* based on the requirement that a person must know that he has inside information.

Lastly, the New Act fails to resolve the problem of inadequacy of the defences which was one of the major weaknesses of the 1998 Act. This includes the omission of a Chinese Wall defence¹³ to protect larger companies from the risk of being liable for insider trading if they have more than one division but have adequate measures in place to prevent improper dissemination of non public inside information between such divisions. The concept of a Chinese Wall defence, its merits and demerits will be discussed in paragraph 4.5 and later Chapters. In essence, the defence entails an operational segregation of functions within an organization and the prevention of inside information from being abused or from flowing freely between departments or divisions.¹⁴

The mere fact that so many of the issues that were highlighted in Chapter 3 still remain unresolved, may lead to a conclusion that the introduction of the insider trading prohibition in the New Act that consolidates legislation on market abuse practices, is insignificant.¹⁵

persons was lawful. See Cassim R “Some Aspects of Insider Trading – Has the Securities Services Act, 36 of 2004 Gone too Far?” (2007) 19 *SA Merc LJ* 44 59.

¹³ Chinese Wall defences are recognized in *Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)* paragraph 24. They are also provided for in the statutes on insider trading in United States of America and Australia. See the Securities Exchange Commission rules 14e – 3(b)(i)-(ii); the Corporations Act of 2001 sections 1043F and 1043G respectively. Also see generally Van Zyl F H “The European Union directive on insider trading: a model for South Africa?” (1994) 6 *SA Merc LJ* 291-301 and the discussion of Chinese Wall defences by Mwenda K K “Banks and the use of Chinese Walls in managing conflict of duties” (2000) 2 *Web Journal of Current Legal Issues* 14.

¹⁴ See Cassim R *op cit* note 12 46.

¹⁵ See Jooste R *op cit* note 7 460.

4.2. DEFINITIONS AND CONCEPTS.

4.2.1. Who is an insider?

In terms of section 72 of the New Act, *insider* means “a *person* who has inside information through:

- (a)(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or
- (a)(ii) having access to such information by virtue of employment, office or profession; or
- (b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)”.

The term “individual” in the 1998 Act was replaced by the term “person” which includes a partnership and any trust and focus in the definition on *persons* as insiders clearly implies the inclusion of juristic persons.¹⁶ In this context the scope of the definition is now wider. The various categories of insiders that are contemplated under the New Act are firstly the *primary insiders* such as the directors, employees or shareholders of an issuer of securities to which the inside information relates that include *fortuitous insiders* or individuals who obtained access to the inside information by virtue of their employment, office or professions. Secondly there are tippees who are *secondary insiders* and the definition now also covers *juristic* persons. However, as highlighted earlier, the omission of a Chinese Wall defence to protect larger companies from the risk of being liable for insider trading was therefore a serious flaw in the New Act and a major compromise on the part of the legislature.

Furthermore, in agreement with Cassim,¹⁷ the researcher submits that a company which repurchases its own shares is an *insider* to itself. This should be acknowledged to

¹⁶ See section 72. Also see section 2 of the Interpretation Act 33 of 1957.

¹⁷ See Cassim F H L “The New Statutory Provisions on Company Share Repurchases: A Critical Analysis” (1999) 116 *SALJ* 760 777.

protect shareholders of a company against such a company taking advantage of non public price-sensitive information to repurchase their shares at a lower price than what the company would have paid if the information had been made public.¹⁸

4.2.2. What constitutes inside information and the requirement of knowledge thereof?

Inside information is defined as “specific or precise information which has not been made public and which (a) is obtained or learned as an insider, and (b) which if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market”.¹⁹

Not all information is therefore treated as inside information for purposes of regulating insider trading. Unconfirmed information or rumours are still excluded. As highlighted in the previous Chapter, only accurate and factual non public inside information would fall in the ambit of the definition and information has to meet five requirements to qualify as inside information in terms of the New Act.²⁰

Knowledge on the part of the defendant that he *has inside information* is still a prerequisite for criminal and civil liability in terms of sections 73 and 77. This means that the prosecution or the FSB has to prove that the defendant, in addition to having actually dealt in the securities, was aware that his information was in fact inside information. Unfortunately this implies again, that even the slightest degree of ignorance on the part of the defendant is sufficient to enable him to escape liability as was pointed out in the previous Chapter.²¹ Moreover, it appears that persons who know that they have non public price-sensitive information and who disclose it inadvertently and by mistake would also be liable, in terms of the New Act.

¹⁸ See Cassim R *op cit* 12 55.

¹⁹ See section 72.

²⁰ See paragraph 3.2.3 of Chapter 3.

²¹ See paragraph 3.4.5 of Chapter 3. It is unfortunate to note that the New Act, just like its predecessor (the 1998 Act) seems almost to encourage persons to abuse price-sensitive information for their own benefit or for the benefit of others on the basis that they can escape liability if knowledge of the inside information cannot be proved. This view is supported by Jooste R *op cit* note 7 442 – 444.

Although it may be argued that the term “know” or “knowing” is self explanatory, its meaning in the context of the provisions is difficult to establish, as is the actual time when a person must have the required knowledge for purposes of the New Act. Therefore it is still possible for a person to practise insider trading and escape liability if it cannot be proved that he has knowledge of the inside information. Provision could have been made, for instance, that once it was established that the accused or defendant was a person mentioned in paragraphs (a)(i) or (ii) of the definition of “insider” in section 72, it will be presumed until the contrary is proved, that the accused knew that the information he had, was inside information and that he had in fact appreciated the price-sensitive nature thereof.

4.2.3. The meaning of “publication”.

Inside information ceases to be inside information for purposes of the Act upon its publication. Already published information does not attract any liability unless such publication was not made in terms of the Act.

The term “publication” is not defined and was analyzed in the previous Chapter. Due to an assumption that non public price-sensitive inside information may be ignorantly abused because it is not always easy to establish the exact moment of publication and whether there was timeous publication.²² The researcher still contends that the provisions of section 74 simply narrate and retain the so-called guidelines for publication that was contained in section 3 of the 1998 Act without actually explaining how such guidelines are to be used to ensure proper and timeous publication. This list of guidelines is still not exhaustive²³ and will not be discussed further in this Chapter.

Perhaps, the New Act should have provided for a *mandatory duty* on insiders to disclose non public price-sensitive inside information in such a way that all stakeholders are given equal access to relevant information and at the same time to minimize the possibility of any unfair advantage to a few selected persons.

²² See paragraph 3.2.4 of Chapter 3.

²³ *Ibid.*

4.3. PROHIBITION OF INSIDER TRADING, CRIMINAL OFFENCES AND PENALTIES.

4.3.1. Prohibition on actual dealing in securities for personal benefit or for any other person.

Actual dealing in securities for *personal benefit* is expressly prohibited in terms of section 73(1)(a) of the New Act. The section provides that an insider who knows that he has inside information and who deals directly or indirectly or through an agent but for his own account, in securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence. This section retains with some minor additions and alterations the provisions of section 2(1)(a) of the 1998 Act.

The term “dealing” is not comprehensively defined.²⁴ It is only stated that the term “deal” includes conveying or giving an instruction to deal.²⁵ It appears that “dealing” means buying or selling of any listed securities. The New Act should have provided a concise definition of “dealing” to avoid any confusion, manipulation and contravention of section 73(1)(a).

Section 73(1)(a) applies to dealing in securities listed on a *regulated market*. The term *regulated market* refers to “any market whether domestic or foreign which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market”.²⁶ The criminal offence of insider trading will therefore only be committed in respect of securities listed on such a market and the prohibition does not cover transactions concluded on unregulated markets, on which the levels of insider trading are allegedly higher.²⁷ For example unlawful transactions

²⁴ See Jooste R *op cit* note 7 445.

²⁵ See section 72.

²⁶ See section 72.

²⁷ See the analysis of the criminal sanction in Chapter 3.

relating to other money market instruments like derivatives are not covered in terms of the New Act.

It is interesting to note that the New Act applies extra-territorially, as was the case with the insider trading prohibitions of the 1998 Act. The Financial Services Board (FSB) has reportedly initiated co-operation agreements with similar authorities such as the Financial Services Authority (FSA) of the United Kingdom and the Securities Exchange Commission (SEC) of the United States of America. Therefore the FSB is inherently empowered to take appropriate steps against any person who allegedly practises insider trading in securities listed on regulated foreign markets.²⁸

The provisions of the New Act therefore cover a situation where any person, irrespective of whether he is a South African citizen or domiciled in South Africa, but at a time when he is *physically present in South Africa*, would deal in securities listed on a foreign market or would act through a broker based in another country. Such a person will incur liability under section 73 if he deals on the basis of *any* inside information that he has at the time. In these cases there is a *territorial link* that is established by the physical presence of the insider in South Africa at the time of the transaction. The application of the New Act is however not limited to situations where such a *territorial link* exists.

While this *extra-territorial link* appears to be a sound move for curbing insider trading, it has not been fully utilized due to the lack of adequate resources.²⁹ From a comparative perspective, one can argue that the legislature should have adopted practical enforcement measures to ensure that insider trading is effectively discouraged in South Africa. It was argued further that the prohibition should only apply to transactions on foreign

²⁸ For instance, if a South African resident abuses non public inside information by instructing a broker in New York to make a purchase of any listed securities to avoid liability in South Africa, the FSB could possibly rely on the SEC to detect such illicit trading activity. See Loubser R “Insider Trading and other Market Abuses (Including the effective management of price-sensitive information)” in the *Insider Trading Booklet* final draft 10-18 <http://www.jse.co.za> 10 October 2006.

²⁹ See Loubser R *supra* note 28 10-18.

markets where a *territorial link* is present by virtue, either of the fact that the insider is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa or by virtue of the prohibited conduct occurring in South Africa.³⁰

Section 73(1)(a) introduces the words “through an agent”. Consequently any insider who knowingly practises insider trading through an agent for his personal benefit will now also be guilty of a criminal offence. The extension of the criminal liability to dealing through an agent is a positive development, but it is not clear who exactly may be regarded as an agent for the purposes of this section. A concise definition as distinct from the ordinary meaning for the term “agent” could possibly have minimized the risk of some persons incurring insider trading liability ignorantly.³¹

In terms of section 73(2)(a), any insider who knows that he or she has inside information and who deals directly or indirectly *for any other person* in the securities listed on a regulated market to which such inside information relates or which are likely to be affected by it commits a criminal offence. This section also restates, with a few additions and alterations the provisions of section 2(1)(a) of the 1998 Act. It expressly provides that dealing in securities on behalf of another person is an offence. Unfortunately, the prohibition in terms of section 73(2)(a) is also still limited to securities listed on a regulated market. Furthermore, the absence of the words “through an agent” in section 73(2)(a) clearly shows that the legislature considered them as superfluous but as highlighted above, this could lead to abuse by some unscrupulous persons.

³⁰ See Cassim *R op cit* note 12 67. This is also the position in Australia and the United Kingdom - see section 1042B of the Australian Corporations Act of 2001 and section 62 (1) and (2) of the English Criminal Justice Act of 1993.

³¹ The New Act should have provided a concise definition of the term “agent” and exclusions of persons who would not be deemed “agents” to avoid any abuse and manipulation of inside information by some persons for their own benefit without incurring liability. See Loubser *R op cit* note 28 26.

The prohibitions on actual dealing in securities for personal benefit or for another therefore still contain a number of uncertainties and one can conclude that many of the flaws of section 2(1)(a) of the 1998 Act have not been removed.

4.3.2. Prohibition on encouraging or discouraging other persons from dealing in securities.

An insider who knows that he has inside information and who encourages or causes another person to deal, or discourages or stops another person from dealing in securities listed on a regulated market to which the information relates or which are likely to be affected by it is liable for a criminal offence in terms of section 73(4). This section substantially adopts the provisions of section 2(1)(b) of the 1998 Act. Section 73(4) also outlaws the practice of *tipping*. Once again the accused must know that he has inside information and it is therefore possible for an accused to plead that he was ignorant of the price-sensitive nature of the inside information at the time when he encouraged or discouraged others to deal in the securities concerned.³²

However the wording of section 73(4) does not impose any liability on the recipients of such price-sensitive information (tippees). Tippees are insiders in terms of paragraph (b) of the definition of “insider” in section 72, being persons who know that their direct source of the information is a person mentioned in section 72(a). However, even if a tippee trades intentionally on the basis of a tip, he incurs criminal liability only if he knows that the information he has received, is inside information as contemplated in section 73(1) and (2).³³

³² See Jooste R “The Regulation of Insider Trading in South Africa – Another Attempt” (2000) 117 SALJ 284–298. Hereinafter Jooste (2000). Also see Jooste R *op cit* note 7–451.

³³ See Cassim R *op cit* note 12–65. Such tippees may escape criminal liability even if they *deliberately* trade in reaction to the tip but do *not* have any *knowledge* of the underlying inside information. The legislature could perhaps have imposed liability on tippees under such circumstances.

4.3.3. Prohibition on disclosure of inside information to other persons.

An insider who knows that he or she has inside information and who discloses such information to another person will be liable for a criminal offence in terms of section 73(3)(a). Apart from a few minor changes, this section resembles section 2(2) of the 1998 Act in many respects.

Like other provisions of the New Act, section 73(3)(a) now extends the liability for improper disclosure of non public price-sensitive information to juristic persons. However, improper disclosure of confidential matters that relate to juristic persons, by their agents is still not adequately covered. An insider in relation to the juristic person may abuse that inside information for personal gain or for the benefit of another person. As pointed out earlier in paragraph 4.2.3, the New Act should have provided for a mandatory duty on issuers to disclose inside information in such a way that all stakeholders are given equal access to relevant information and at the same time to minimize the possibility of any unfair advantage to a few selected persons.³⁴ The prohibition on improper disclosure of inside information cannot, in the absence of such a duty, be effectively enforced and section 73(3)(a) may easily be contravened without those involved being brought to book.

This is clearly illustrated by the recently alleged insider trading and sale of shares on the basis of improper disclosure of price-sensitive information in relation to Telkom Company Limited. It was reported that the stakeholders in the Elephant Consortium instructed lawyers to unmask all the secret shareholders who controversially purchased a “chunk” of Telkom shares and to investigate whether anyone who purchased any of the shares worth R9 billion would have done so in respect of their own shares. This came amid the fears on the part of some of the stakeholders that the Elephant Consortium might have ceded prematurely, part of its Telkom shares to raise cash.³⁵ Many uninformed shareholders could have been prejudiced, but in the absence of provisions

³⁴ See Loubser *R op cit* note 28 10-18.

³⁵ See Simpiwe Piliso “Telkom uproar – dissension in the ranks over the suspected secret sale of shares” *Business Times* 7 24 September 2006.

clarifying the degree of knowledge required and due to the inadequacies and ineffectiveness of section 73(3)(a), the accused persons escaped liability for insider trading. No sufficient evidence could be found against them and consequently, they were never brought before a court of law for their alleged insider trading.

As highlighted in paragraph 4.2.2, section 73(3)(a) also requires knowledge³⁶ on the part of the person who discloses inside information. Unfortunately it appears that persons who know that they have non public price-sensitive information and who disclose it inadvertently and by mistake would be liable in terms of this section. No provision was made for a defence that these persons may prove, or for them to be charged with other lesser offences. This is seemingly unfair to persons who disclose inside information to others by mistake. However, it must be noted that the JSE listing requirements relating to disclosure of price-sensitive information are specifically formulated to ensure that all stakeholders are given equal access to relevant information in a way that minimizes the possibility of benefiting only a few persons.³⁷ In terms of section 3.4, a general obligation of disclosure is imposed on all issuers to make a public announcement, through the JSE's Stock Exchange News Service (SENS), of any developments or activities that might result in a material effect on the price of the issuers's listed securities.

Section 3.4(a) states that, except for trading statements, an issuer must, immediately, unless the information is kept confidential for a limited period in terms of paragraph 3.6, release an announcement providing details of any developments in such issuer's activities that are not publicly known and which might lead to material movements of the reference price of such issuer's listed securities. Disclosure of trading statements is dealt with in terms of section 3.4(b). All issuers other than those who publish quarterly

³⁶ It appears that mere possession of knowledge is enough to impute criminal liability on any person for contravention of section 73(3)(a). The required degree of knowledge before any person could be held liable for a criminal offence is however not stated. Because of this obscurity some persons who disclose inside information to others could possibly escape liability on the basis that they are ignorant of its price-sensitive nature.

³⁷ See section 3.27 of the JSE listing requirements.

results must comply with requirements of paragraph 3.4(b)(i) to (vi). Paragraph 3.4(b)(i) states that issuers must publish a trading statement as soon they are satisfied that a reasonable degree of certainty exists that the financial results for a period to be reported upon next will differ by at least 20% from the most recent of the financial results for a previous corresponding period or of a profit forecast previously provided to the market in relation to such a period. Paragraph 3.4(b)(ii) provides that the determination of a reasonable degree of certainty referred above is a judgmental decision taken by the issuer and its directors excluding the JSE. Paragraphs 3.4(b)(iii) to (vi) deal with specific and accurate dissemination of price-sensitive information relating to trading statements by issuers. They also provide procedures that must be followed during and after publication of trading statements.³⁸

In terms of paragraph 3.5, price-sensitive confidential information may not, subject to paragraphs 3.6 to 3.8, be released to any third party, an analyst, printer or media during JSE trading hours until it is published in accordance with paragraph 8 of schedule 19 or outside of JSE trading hours until such information has been authenticated or proved in accordance with paragraphs 6 and 7 of schedule 19 and arrangements have been made before the next business day's opening of JSE trading hours. Price-sensitive information may, in the strictest confidence, be disclosed in terms of paragraphs 3.6 to 3.8 to persons such as government departments, South Africa Reserve Bank, SRP, FSB, investment analysts or any other statutory or regulatory body and may not be published unless there is a breach of confidentiality and the market is made aware of such information.

Disclosure of cautionary announcements and periodic financial information by issuers are provided for in paragraphs 3.9 and 3.11 respectively. Issuers may also give similar announcements and reports in terms of paragraphs 3.12 to 3.22. Issuers who fail to comply with these disclosure requirements, particularly to disclose annual financial statements, may risk suspension or possible termination or delay of their securities from the JSE in terms of paragraph 3.23. Issuers must, by way of notice and in writing inform the JSE immediately of any proportion of listed securities in the hands of the public

³⁸ See also paragraphs 3.4(b)(vii) to (viii).

which might have been affected or fallen below shareholder spread requirements in accordance with paragraphs 3.42 and 3.43. They must also disclose all relevant information in terms of paragraph 3.44 to holders of securities, to enable them to exercise their rights. Furthermore, paragraphs 3.63(a) and (b) state that issuers must disclose all the details of their transactions in securities relating to the issuer by or on behalf of the director, company secretary, any associate of the issuer or any independent entity, if such issuer may derive a beneficial interest.³⁹

4.3.4. Criminal liability and penalties.

The criminal sanctions for insider trading and related market manipulative practices such as tipping have been increased. Persons who contravene section 73 and fail to rely on any available defences may in terms of section 115, be sentenced to a fine not exceeding R50 million or imprisonment for a period not exceeding 10 years or both. The legislature raised the fine significantly from R2 million to R50 million. While this appears to be significant, it is submitted that standing alone, even the R50 million fine and a 10 years imprisonment term cannot be an effective deterrent. It is still possible that prospects of enormous profits may outweigh the deterring effect of the fine or prison sentence.

The fact that the actual perpetrators may plead guilty and be convicted of lesser offences also has a negative effect on any impact a criminal sanction might have. Consequently, very few successful prosecutions for insider trading have been recorded and this is unlikely to be different in future.

³⁹ See also paragraph 3.83.

4.4. CIVIL LIABILITY IN TERMS OF THE NEW ACT.⁴⁰

In addition to the provisions that impose criminal liability on those who were involved in insider trading activities, section 77 of the New Act like its predecessor also provides for civil liability. At a glance, it appears as if section 77 corrected some of the flaws left in section 6 of the 1998 Act, but its provisions are still grossly inadequate and ineffective.

Section 77(1) imposes civil liability on an insider who knows that he has inside information and who deals directly or indirectly or through an agent for his own account in securities listed on a regulated market to which the information relates or which are likely to be affected by it and who makes profit or would have made a profit if he had sold the securities at any stage, or avoids a loss through such dealing unless he proves one of the defences set out in section 73(1)(b). Such a person is then liable at the suit of the FSB in any court of competent jurisdiction, for the amounts as stipulated in section 77 (1).

This provision imposes liability on persons who practise insider trading for their personal benefit. One of the notable changes brought about by section 77(1)(a), is the introduction of the term “through an agent” to cover the situation where a principal (the insider) deals in securities through another person as his agent.⁴¹ However it may not seem logical to include such a term since the principal-agent transactions are already covered by the term “indirectly”.⁴² For instance, situations where an insider deals in

⁴⁰ Chesterton G K once said “Thieves respect property, they merely wish the property to become their property so that they may more perfectly respect it”. This statement attempts to explain why some persons practise insider trading to the detriment of other innocent investors. See Loubser R *op cit* note 28 19 for a full discussion of this quotation and the sanctions for insider trading.

⁴¹ See Loubser R *supra* note 28.

⁴² The New Act did not define the term “indirectly” but according to the *Oxford English Dictionary Online*, it is defined to mean an indirect action, means, connection, agency or instrumentality through some intervening person or thing, mediately. Assuming this definition is adopted it would appear that section 77(1)(a) prohibits indirect insider dealing in securities through a nominee as well as through an agent. See Whiting A “Civil liability for insider trading: A comparison of the Insider Trading Act of

securities through a nominee⁴³ may fall in ambit of both “indirect dealing” as well as dealing “through an agent”. It is submitted that this ambiguity could weaken this provision.

Instances where an insider practises insider trading and makes a profit or avoids a loss for personal benefit or for the benefit of any other person are now prohibited in terms of section 77(1)(b). This is probably aimed at stopping insiders from avoiding liability on the basis that they would not actually have dealt in the securities in question, hence they would in the first instance, not have profited or avoided losses in any event.

In terms of section 77(1)(c), the person involved will be liable to pay the FSB an equivalent to the profit made or loss avoided or as a penalty for compensatory and punitive purposes, an amount as determined by a competent court⁴⁴ but not exceeding three times the amount of the profit made or loss avoided plus interest and legal costs as determined by the court. The prejudiced persons who prove their claims in terms of the Act will only get their compensation after the FSB has recouped its costs and expenses in relation to the successful litigation.⁴⁵

Section 77(2) of the New Act imposes liability on an insider who abuses price-sensitive inside information by dealing directly or indirectly for another person, in securities listed on a regulated market to which that inside information relates or which are likely to be affected by it and who makes profit or would have made profit for that other person or avoids a loss through such dealing. Seemingly, like many other provisions of the New Act, it fails to adequately provide guidelines to establish when dealing is “likely” to have a material effect on securities listed on a regulated market.⁴⁶

1998 with the Securities Services Act of 2004” (2005) *Responsa Meridiana* 99 106-110. Also see Jooste *R op cit* note 7 450; Cassim *R op cit* note 12 58 and comments in note 31.

⁴³ See the definition of a “nominee” in section 1.

⁴⁴ These are the High Courts and regional courts - see section 79.

⁴⁵ See Whiting *A op cit* note 42 116-117.

⁴⁶ The New Act should have defined the term “likely” to avoid any ambiguity which may enable persons to evade civil liability. See also Jooste (2000) *op cit* note 32 300.

Section 77(2) is further subject to section 77(5). Section 77(5) provides that “if the other person referred to in subsections (2), (3) and (4) is liable as an insider in terms of subsection (1), the insider referred to in subsections (2), (3) and (4) is jointly and severally liable together with that other person to pay the amounts set out in subsection (2) (i), (iii) and (v), (3) (i), (iii) and (v), or (4)(a), (c) and (d), as the case may be”. Therefore this joint and several liability is contingent upon a tippee’s liability as an insider. It appears that there will be no liability for a party, who for instance deals in the securities in question but is not an insider as contemplated in section 72.⁴⁷

Section 77(3) imposes civil liability on an insider who knows that he has price-sensitive inside information, for *improper disclosure* of such information to other persons. However as discussed earlier, incidences of contravention of this section can be reduced if provision is made for mandatory and timeous disclosure of the information to ensure that all interested persons are given equal access to it. The Act does not, for instance provide how companies can lawfully disclose price-sensitive inside information to relevant persons such as investment analysts so that they would not be practising or falling victims to insider trading.⁴⁸

Lastly, section 77(4) imposes liability on an insider who encourages or causes another person *by tipping* to deal in securities listed on regulated markets. Discouragement of others from dealing in securities by a person who knows that he has inside information, is omitted from this subsection. A person who discourages another from dealing will therefore not incur any civil liability although he may be guilty of an offence in terms of section 73(4).⁴⁹ Any person who deals in securities on the basis of the advice is not

⁴⁷ See Jooste R *op cit* note 7 454 – 455.

⁴⁸ In some instances discussions between company executives and investment analysts may give rise to insider trading. Although the Johannesburg Securities Exchange introduced additional listing requirements in an attempt to reinforce the prevention of improper disclosure of inside information, they are yet to make a significant contribution due poor implementation by companies. See Loubser R *op cit* note 28 14 – 16. It must be noted however that this research is limited to the statutory dispensation excluding the listing requirements of the JSE

⁴⁹ See Jooste R *op cit* note 7 455.

necessarily an insider and only incurs liability in terms of section 77(1) or (2) if the information has in fact been communicated to him. It should be noted that no provision is made for any defences in relation to sections 73(4) and 77(4).

4.5. DEFENCES AND ADEQUACY THEREOF.

A critical evaluation of the adequacy of the defences provided for in the New Act is also necessary.

Firstly, any person charged with insider trading for his own benefit may escape liability if he proves on a balance of probabilities that:

- he was acting in pursuit of the completion of an affected transaction as defined in section 440A of the Companies Act, 61 of 1973; or
- he became an insider after having given the instruction to deal, to an authorised user and such instruction was not changed in any manner after he has become insider.⁵⁰

The first mentioned defence could have given rise to abuse by unscrupulous insiders in relation to the offeror or offeree company through dealing in securities of the affected companies at an early stage of the negotiations.⁵¹ The Securities Regulation Panel Rules (SRP) pertaining to disclosure of price-sensitive information are aimed at reducing abuse in this respect. In terms of the General Principles, all parties to an offer relating to an affected transaction are obliged to take all reasonable steps to prevent the making of misleading statements and creation of false markets, and directors of the offeror and the offeree companies are under a duty to disregard their own interests and those of their families when giving advice to holders of securities.⁵² Before the announcement of an intention to make such an offer, secrecy shall be observed by all persons who are privy to confidential information, whether price-sensitive or otherwise and all persons

⁵⁰ Section 73(1)(b) of the New Act.

⁵¹ See *S v Western Areas Limited and others* (2004) *supra* note 12 606.

⁵² See respectively General Principles 6 and 9.

concerned must take all reasonable steps to minimize the prospects of such information being leaked accidentally.⁵³

Whenever an offeree company is subject to rumours or speculation or there are abnormal movements in the price of its securities or the volume of such securities traded on the JSE, or whenever the negotiations are extended to include more than a very restricted number of persons other than those in the company, a cautionary announcement shall be made.⁵⁴ An announcement of a firm intention to make an offer is required to be made when the board of the offeree company receives notice of such intention or when an obligation arises to make a mandatory offer under Rule 8 because the specified percentages of securities have been acquired by the offeror as stated in Rule 2.3.1. Rule 2.4 states that these announcements shall be published in daily newspapers circulating in Johannesburg and any other regions, where registered offices of the parties are, as well as to Reuters, the South African Press Association and the JSE. Rules 16.1 and 16.4 stipulates further that all shareholders are entitled to equal access to information as nearly as possible at the same time and in the same manner. Rule 4 provides that during an offer period, the offeror or a mandatory offeror under Rule 8 and persons acting in concert with it may not sell any securities except after the prior consent of the SRP and after 24 hours' public notice as prescribed in Rule 7.1. Rule 7.1 requires notice to the SRP, further notice by way of a press release and if the company is a listed company, also to the JSE. Similar notice is required in terms of Rule 7.2 if the transaction is concluded on behalf of a client. Immediate announcement of any amendments to the terms of the mandatory offer is required in terms of Rule 8.

Secondly, persons who allegedly abused inside information directly or indirectly by dealing in securities on behalf of other persons will be exempted from liability if they prove on a balance of probabilities any of the defences provided for in terms of section 73(2)(b). These defences are the following:

⁵³ Rule 2.1. News releases may only take place with the prior approval of the SRP.

⁵⁴ Rule 2.2.2.

- the accused or defendant is an authorised user⁵⁵ and was acting on specific instructions from a client, save where the inside information was disclosed to him by that client; or
- the accused or defendant was acting on behalf of a public sector body in pursuit of monetary policy, policies in respect of exchange rates, management of public debt or external reserves.

However, the latter of these defences is also prone to manipulation and abuse by persons who work in government and semi-government departments. Securities or bonds of the public sector are furthermore, not necessarily listed on regulated markets and consequently insider trading in these instruments does not lead to any liability at all.

Thirdly, the defendants or persons accused of improper disclosure of price-sensitive information to other persons may avoid liability by proving on a balance of probabilities any of the defences provided for in terms of section 73(3)(b). These include that:

- such disclosure was necessary for purposes of proper performance of the functions of their employment; or
- office; or
- profession in circumstances *unrelated to dealing in any security listed* on a regulated market and that the accused or defendant at the same time disclosed that the information was inside information.

However the inherent subjective nature of this defence seems to suggest that the same problems may be encountered under the New Act as were found in section 4(1)(b) of the 1998 Act. Persons who disclose price-sensitive information to others may abuse this defence and escape liability by merely showing that they *believed* that such disclosure

⁵⁵ An authorised user is a person authorised by an exchange in terms of exchange rules to perform such securities services as the exchange rules may permit for example brokers or any other person permitted to perform these services by the Registrar of Securities Services in terms of the Act. See sections 1, 18 and 19.

was necessary for *proper performance* of their duties. Perhaps, as discussed earlier, more specific provisions relating to mandatory disclosure of price-sensitive inside information in relation to listed securities should at least offer a partial solution to this problem. For instance, where a company has issued a cautionary or trade update notice, a broker or an intermediary acting in good faith should be allowed to advise on his interpretation thereof, provided he does not disclose any other information he might have received from other sources.⁵⁶

Fourthly, the New Act omitted to include Chinese Wall defences to protect bigger companies having adequate measures in place to avoid the flow of, and manipulation of inside information between its different divisions. The Chinese Wall defence essentially entails the creation within a multi-functioning organisation, of a physical and an operational segregation of functions to prevent the flow of price-sensitive inside information from one department to another. A bank or a multi-financial services company may for instance put in place such barriers to prevent the flow of information from its *investment banking department* which in the course of its activities gets non public price-sensitive information from its corporate clients, to its *retail brokers section* which makes trade recommendations to investor customers.⁵⁷ If such an arrangement is put in place in an organisation *and* is operating effectively, it should constitute a defence to any allegation of insider trading against that organisation.

Cassim submits that the disadvantages of a Chinese Wall defence outweigh its advantages and that it should not be introduced in South Africa. She argues that juristic persons can be adequately protected if the legislature imposes a mandatory duty on them to make prompt and full disclosure of all material non public price-sensitive information

⁵⁶ Moreover, if the prohibition on insider trading is to be extended to *unlisted securities* or *financial instruments*, companies should again be obliged to keep registers of insiders, their interests and dealings in respect of such interests as was previously provided for in sections 230-232 of the Companies Act 61 of 1973.

⁵⁷ See Cassim *R op cit* note 12 46-47. Also see Chapters 5 and 7 for statutory provision for such a defence in other jurisdictions.

at their disposal,⁵⁸ and banks, financial service companies and brokers should maintain a restricted list of securities whenever they are entrusted with non public price-sensitive information about customers.⁵⁹ Although the researcher supports the proposal for prompt disclosure of inside information⁶⁰ and is not opposed to the introduction of a restricted list of securities, it is submitted that these measures do not render a Chinese Wall defence superfluous.

Basically Cassim's objections to a Chinese Wall defence are the following:

- Its effectiveness will inevitably decrease and it will be extremely difficult to monitor.⁶¹ However, the mere introduction of a Chinese Wall defence without effectively managing it, will certainly not constitute a defence for juristic persons. Furthermore, the submission that it would not be effective in smaller firms is contradicted by the case of *Rakusen v Ellis Munday and Clark*⁶² quoted by Cassim herself, even though it was considered to be an uncommon arrangement where each "partner" kept his part of the business separate from the other's.
- A Chinese Wall defence, even if it is effectively in operation so that it could *reasonably be expected to ensure*⁶³ that inside information would not be communicated, will not prevent internal disclosure of inside information, whether by accident or by unscrupulous employees.⁶⁴ Its effectiveness would therefore depend entirely on the integrity of management, the honour system and the ethical values of those involved.⁶⁵ It should however be noted that a

⁵⁸ See Cassim R *op cit* note 12 53.

⁵⁹ See Cassim R *op cit* note 12 54.

⁶⁰ See paragraph 4.3.3 above.

⁶¹ See Cassim R *op cit* note 12 50-51.

⁶² [1912] 1 Ch 831 (CA).

⁶³ As is required in terms of the Australian and American statutory provisions quoted by Cassim R *op cit* note 12 48-49. These provisions will be discussed in Chapters 5 and 7.

⁶⁴ See Cassim R *op cit* note 12 51.

⁶⁵ *Ibid.*

Chinese Wall defence is intended to be available to a juristic person that has admittedly put it in place as a precautionary measure⁶⁶ and not to discourage insider trading as such.⁶⁷ Moreover, this defence is available to juristic persons only. Employees and members of management who disclose information or otherwise contravene the provisions of the Act will still incur liability. Therefore juristic persons would probably be encouraged, by the mere fact that provision is made for such a defence, to put it in place and rigorously monitor their own internal regulatory framework as was previously advocated by the researcher.

- The organisation may lose out on advantages that might be gained from collective thinking.⁶⁸ It is however not intended to make this arrangement compulsory and any organisation may decide for itself, whether to put it in place or not.
- A Chinese Wall defence may compromise fiduciary duties in the sense that clients may deal in securities to their disadvantage because the broker-dealer section was not allowed to advise them on the basis of non public inside information that was available to another department.⁶⁹ It should however be noted that the mere fact that disclosure of inside information is prohibited in the first instance, means that such clients are in any event statutorily precluded from having any access to that information until it is made public. It would therefore *not* be wrongful to withhold the information from clients and clients would not have had any right of action against that organisation in the first instance.

⁶⁶ See Cassim R *op cit* note 12 46-47.

⁶⁷ That is the purpose of the prohibition itself.

⁶⁸ See Cassim R *op cit* note 12 51-52.

⁶⁹ See Cassim R *op cit* note 12 52-53.

4.6. ENFORCEMENT OF THE INSIDER TRADING PROVISIONS.

4.6.1. The role of the Financial Services Board (FSB).

The FSB has ostensibly wide powers to ensure proper supervision and enforcement of the prohibition on insider trading and other market related manipulative practices in terms of section 82(1). This section resembles section 11 of the 1998 Act which dealt with same functions of the FSB.⁷⁰

In terms of section 82(2), the FSB may investigate any matter relating to insider trading, and subject to section 83, summon any suspected person to furnish relevant information on the subject matter of any investigation, interrogate persons, search and seize any property which is believed to be of help in its investigations, administer proof of claims and distribute payments of claims, to make market abuse rules after consultation with the Directorate for Market Abuse (DMA) and after consultation with the relevant markets in South Africa, require such markets to implement such systems as are necessary for effective monitoring and identification of insider trading and related market abuses.⁷¹

The FSB has limited authority in relation to the prosecution and settlement of insider trading cases except where a matter is settled out of court. The actual profit made or loss avoided in civil matters is determined by competent courts.⁷² The FSB may itself prosecute criminal cases relating to insider trading, only if the Director of Public Prosecutions (DPP) declines to prosecute them.⁷³ Moreover, the backlog that characterizes our courts is well known, and this has grossly impeded the effective enforcement of the criminal sanction in relation to insider trading in South Africa.

It has been stated that the FSB is staffed with persons who have forensic and prosecutorial skills as well as relevant expertise in relation to financial markets.

⁷⁰ The FSB is an independent board established in terms of Financial Services Board Act, 97 of 1990.

⁷¹ See section 82(2)(a) - (h).

⁷² See section 79.

⁷³ See section 82(9); Barrow R “Insider Trading Directorate” *Business Report* 28 July 2004 and Chanetsa B “Insider is notoriously hard to prosecute” *Business Report* 26 April 2004.

Furthermore, it has also been stated that the FSB has sufficient sophisticated equipment in place to detect any suspected illegal trading and to provide the details of the beneficial owners of securities held in nominee accounts.⁷⁴ In spite of this, however, very few cases of successful prosecutions have been recorded. This suggests that these statements might not reflect the true situation in relation to the staffing and resources of the FSB. If the FSB has such good infrastructure and expertise, more cases should have been reported. An institution such as the FSB should be adequately resourced to fulfill its functions and care should be taken that its effectiveness is not undermined by bureaucracy.

It is generally submitted that interrogations⁷⁵ of persons and search of premises⁷⁶ is only possible upon application by the board, to a judge or magistrate who has jurisdiction in the area where the premises in question are located.⁷⁷ This implies that not all persons will be timeously summoned by the FSB. Perhaps, the FSB should have more offices in different regions of South Africa to increase awareness⁷⁸ and to function more effectively.

4.6.2. The role of the Directorate for Market Abuse (DMA).

The Directorate for Market Abuse is established as a committee of the FSB in terms of section 83(1)(b). It is interesting to note that apart from the changing of the name of the Insider Trading Directorate to Directorate for Market Abuse (DMA), this provision resembles section 12 of 1998 Act in several respects.

⁷⁴ See Barrow R *supra* note 73.

⁷⁵ See section 82(2)(e).

⁷⁶ See section 82(2)(f).

⁷⁷ See section 82(3)(a); Cokayne R “Setback for South Africa’s first insider trading case” *Business Report* 28 April 2004.

⁷⁸ Although the FSB is entitled to publish notices of any insider trading or related market abuses in terms of section 82(5) to increase awareness, it has failed to implement this provision successfully due to suspected inadequate availability of resources.

The DMA is made up of representatives of the regulated markets, the Share Holders' Association of South Africa, the fund management industry, the insurance industry, the Reserve Bank of South Africa, the bankers, the accounting and legal professions. These persons are appointed by the Minister of Finance⁷⁹ on the basis of their availability, expertise and knowledge of financial markets.⁸⁰

The powers and functions which the DMA may exercise and perform on behalf of the FSB are set out in section 83(1)(c) of the New Act. It is empowered to institute any civil proceedings as contemplated in the Act and to investigate any matter relating to insider trading or other market abuses. If it produces appropriate warrant, it has the powers to summon, interrogate and to search and seize any documents in possession of suspected persons.⁸¹

The DMA does not operate in isolation. It is submitted that it may also investigate any suspected insider trading cases forwarded to it by the Johannesburg Securities Exchange's Surveillance Division. The New Act could have provided for, that the JSE's Surveillance Division is statutorily obliged to report any suspected insider trading activity to the DMA. It can be noted that even at the present stage, not a single person has been convicted in a criminal case although a few settlements with the FSB in civil cases are pending.⁸²

Furthermore the DMA may decide whether to refer a matter to the Enforcement Committee or to institute civil proceedings or to refer a matter to the prosecuting authorities (DPP) on behalf of the FSB. For instance, "it may only institute civil proceedings in the name of the FSB and may settle any matter only after confirmation from the FSB or a competent court". The DMA therefore only exercises specific powers

⁷⁹ See section 83(3)(a)-(j).

⁸⁰ See section 83(4).

⁸¹ See generally section 83(1)(c) read with section 82(2).

⁸² Nineteen cases of insider trading were investigated by the DMA between November 2004 and April 2007. Three of these cases were abandoned (closed) and the remaining sixteen are still pending. Perhaps this shows that the DMA is not performing its functions effectively. See the Directorate for Market Abuse Report *Media Release* <http://www.fsb.co.za> 13 June 2007.

in the name of the FSB and does not have extended powers that it may exercise in its own name.

4.6.3. Effectiveness of the current enforcement mechanism.

The success of any piece of legislation is usually determined by the adequate and effective enforcement of its provisions. It is against this background that it has to be examined whether the provisions of the New Act are adequate to effectively combat insider trading in South Africa. This includes an incisive analysis into the effectiveness of the courts, FSB, Enforcement Committee (EC) and the DMA as enforcing mechanisms.

Firstly, the New Act expressly imposes the responsibility of enforcing and monitoring of the insider trading provisions on the FSB in terms of section 82. As discussed earlier in paragraph 4.6.1, the FSB is failing to effectively enforce the insider trading provisions in many ways. Moreover, the New Act does not provide for *a right of action* for affected persons who can afford the legal costs. Although it can be argued that it is cheaper to claim compensation through the FSB, it can, on the contrary, also be said that these flaws have *deterred* many persons from claiming their damages through the FSB because of fears that such a strategy would not produce any results.

Secondly, the DMA has also not produced the desired results.⁸³ This is possibly because of its limited authority (powers). It does not carry out any duty without confirmation from the FSB and the courts.⁸⁴ Despite submissions by Rob Barrow,⁸⁵ that the DMA has sufficient sophisticated equipment and competent personnel to ensure effective enforcement of insider trading provisions, the few prosecutions and settlements suggest otherwise.

Thirdly, the EC was established in terms of section 97 in an attempt to improve the enforcement of insider trading and other related market abuses. Unfortunately, it also

⁸³ See paragraph 4.6.2.

⁸⁴ See sections 78 and 83(1)(c).

⁸⁵ See Barrow *R op cit* note 73.

has limited powers in the execution of its functions. For instance, it may only institute civil proceedings in a court of law against any person who violates sections 73 and 77 on a referral basis⁸⁶ and where no compensation was paid by the defendant in terms of section 77.⁸⁷ This has weakened the effectiveness of the EC. No cases of insider trading have been successfully settled with the EC up to date.

Lastly, the courts are empowered to deal with any matter relating to insider trading or other related market abuses in terms of section 79. This implies that the prosecutorial powers of insider trading cases lie with the DPP. The work load and pressure on the DPP might well be the reason for the absence of prosecutions. Many cases of insider trading may well be abandoned because of the back-log in the courts. The introduction of separate courts manned with specialists to deal with insider trading matters should enhance effective enforcement of the Act and should receive serious consideration.

In a nutshell, the current enforcement mechanism is inadequate and ineffective. There is an urgent need to introduce more effective practical measures to ensure effective and speedy enforcement of insider trading legislation in South Africa.

4.7. CONCLUDING REMARKS.

There can be no doubt that the New Act is a result of an attempt to adequately resolve some of the flaws that were evident in its predecessor. Notable examples of such attempts are:

- inclusion of a juristic person's liability,
- increase of the fine for insider trading activities from R2 million to R50 million and
- introduction of the Enforcement Committee (EC).

⁸⁶ See section 101(2).

⁸⁷ See section 105(5).

Problems that were previously experienced are however, still not adequately addressed. The legislature inconsistently dealt with a few concerns that were raised against the 1998 Act and in the process it has introduced more problems. The criminal penalties for insider trading are for instance *still inadequate* for deterrent purposes.⁸⁸ Furthermore, the establishment of additional structures such as the EC to resolve the problems relating to enforcement of insider trading legislation did not produce the desired results.⁸⁹

One of the major flaws of the New Act is that its application is limited to insider trading activity in respect of *securities* listed on a regulated market.⁹⁰ This also implies that other *money market instruments* that are not necessarily listed securities, are excluded from the auspices of the insider trading provisions and that any insider trading activity that is allegedly rife in unregulated markets is not covered.

The right to claim compensation is still exclusively given to the FSB and no provision is made for affected persons to claim directly from perpetrators.⁹¹ This rigid approach can easily result in a failure to effectively compensate many affected persons. Affected persons must have a right to claim compensation from any person who is convicted of insider trading directly if the FSB does not institute such proceedings timeously.

The absence of a rigorous mandatory disclosure mechanism and of a duty imposed on companies and other relevant institutions to disclose price-sensitive information about listed securities and financial instruments that frequently comes into their possession is another loophole in the New Act. This may lead to a host of problems, for example untimely disclosure of information, inaccurate information in relation to prices of listed securities and manipulation by unscrupulous persons who may make enormous profits.⁹² The New Act should have introduced mandatory disclosure or reporting measures to

⁸⁸ See section 115(a).

⁸⁹ See *supra* note 83 and the commentary in paragraph 4.6.3.

⁹⁰ See section 3(2)(a) and (b) and Jooste *Re op cit* note 7 451. Also see the discussion in paragraph 4.1.

⁹¹ See section 82(2)(c).

⁹² See Osode P C “The New Insider Trading Act: Sound Law Reform or Legislative Overkill?” (2000) 44 *Journal of African Law* 239.

require reporting through the Stock Exchange News Service and in the media as required in terms of SRP Rule 2.4

Because a criminal sanction will *on its own* never be an effective deterrent, consideration should be given, perhaps to other appropriate sanctions such as forfeiture or cancellation of business licences, professional accreditation or registration of financial advisors and disqualification for life of directors. This may deter many more persons from practising insider trading.

Lastly, in addition to the inadequacies relating to enforcement, the New Act contains a number of inconsistencies and ambiguities that lead to uncertainties that were highlighted in this Chapter. Another undermining factor is the prospect of reaching a settlement with the FSB without admitting liability.⁹³

It is therefore submitted that the current regulatory framework is still inadequate and ineffective for purposes of combating insider trading in South Africa.

⁹³ See Simpiwe Piliso *op cit* note 35 7 and the discussion in paragraph 4.3.2.