

CHAPTER THREE

THE INSIDER TRADING ACT, 135 OF 1998: INTERPRETATION AND APPLICATION.

3.1. INTRODUCTION.

A new regime aimed at curbing the insider trading problem in South Africa was introduced on 17 January 1999.¹ The Insider Trading Act, 135 of 1998 repealed and replaced the inadequate provisions of the Companies Act, 61 of 1973 in an effort to broaden the scope of the insider trading prohibition. In addition to treating insider trading as a criminal offence, an attempt was made to provide more effective civil remedies to those who would suffer prejudice as a result of insider trading activities. Furthermore, more severe criminal sanctions were introduced and the insider trading ban was extended to a wide spectrum of financial instruments other than securities of companies.

This Chapter seeks to analyse the provisions of the 1998 Act. The analysis is divided into three parts. Firstly a closer look will be taken at the meaning of insider trading and related concepts through an analysis of the definitions thereof. Secondly the provisions that relate to the prohibition on insider trading and penalties will be discussed. Lastly the adequacy and effectiveness of the civil remedies will be examined, as well as the defences as provided in the Act.²

¹ This is when the Insider Trading Act, 135 of 1998 (hereinafter referred to as the 1998 Act) came into force as a separate statute to regulate and control all insider trading activity in South Africa. It was made applicable to a wide range of insider trading activities which includes tipping. See Benade M L and others *Entrepreneurial Law* 3rd ed Lexis Nexis Butterworths Durban 2003 130.

² The analysis is made in reaction to an assumption held by many persons that the 1998 Act like its predecessors failed to address all the negative consequences of insider trading in clear and unambiguous terms. The relevant provisions will be scrutinized to confirm whether this is the case. See Benade M L and others *op cit* note 1 130. Botha argues that the process of language is not

3.2. DEFINITIONS AND CONCEPTS.

3.2.1. The concepts of insider trading and related activities.

Insider trading was not expressly defined in the 1998 Act. However sections 2 and 6 enumerate a number of practices that would respectively give rise to criminal and civil liability for insider trading. It would amount to insider trading if any individual knows that he has non public price-sensitive inside information and deals directly or indirectly for his benefit or for the benefit of any other person, in securities or financial instruments to which such information relates or where the price of such securities or financial instruments is likely to be affected by such dealing.³

This obviously suggested that “an individual” could only become involved in insider trading activity if he had actual knowledge of the inside information,⁴ either by virtue of being an insider as defined⁵ or otherwise as a tippee being tipped off. Therefore the tippee will only be liable for insider trading if he would *knowingly* deal in securities or financial instruments on the basis of inside information as contemplated in sections 2(1)(a), 6(1) and 6(2)(c). The tipper on the other hand would become liable, by virtue of the specific prohibitions that apply to him, for disclosing price-sensitive information to others, (tippees) or for encouraging another person to deal in the securities to which the information relates⁶ or for discouraging the other person from dealing in such securities.⁷ It should be noted however that in all these cases, it was required that the tipper *knew* that he had inside information and that he *had acted* on the basis of that information. His actions or those of an ignorant tippee could still however seriously prejudice ignorant sellers or purchasers of the securities or financial instruments in

complete if the message is not properly understood - see Botha C *Statutory Interpretation: An Introduction for Students* 3rd ed Juta and Company 1998 6.

³ See section 2(1)(a) and sections 6(1) and 6(2)(c) of 1998 Act.

⁴ See the definition of inside information as critically analysed in paragraph 3.2.3 of this Chapter.

⁵ See the definition of insider as discussed and analysed in paragraph 3.2.2 below.

⁶ See section 2(1)(b) and section 6(2)(b).

⁷ See section 2(2) and section 6(2)(a).

question, even where the tipper or tippee was unaware of the fact that the information amounted to inside information. The tippee could for instance be unaware of the fact that the inside information had not yet been made public or ignorant of the circumstances that caused the information to be price-sensitive.⁸

In cases of tipping or dealing on behalf of other persons, it was also not required that the tipper or the person so dealing had to receive any benefit from the transaction, or that he had to communicate the actual inside information and its potential impact to the tippee. A suggestion, encouragement or discouragement to deal or not to deal in securities or financial instruments would suffice.⁹ The tippee would involve himself in insider trading only if the inside information had been communicated to him and he would deal on the basis thereof. The other persons who did not have access to the same information, could still be seriously prejudiced.

The 1998 Act did not contain a clear definition of the term “dealing”,¹⁰ although dealing, directly and indirectly in securities or financial instruments for personal benefit

⁸ It is not clear whether section 6 left room for the prospect of holding a tipper and a tippee jointly and severally liable for insider trading. This section was defective in so far as it implied that some persons could be innocently liable for the insider trading activities of other persons who could even escape liability. This was possible if a tippee would know the facts and circumstances but at the time of dealing on the basis thereof, he was ignorant of the confidentiality of the information or its price-sensitiveness.

⁹ Cognizance was not taken of the fact that not all insider trading affected the price of securities or financial instruments immediately after completion of the insider trading transaction. Therefore any premature and unauthorised disclosure of inside information should have been prohibited irrespective of whether such disclosure directly affected or was likely to affect the price of any securities or financial instruments.

¹⁰ This was a major deficiency in the 1998 Act. The failure to define “dealing” could contribute to ignorant insider trading. See sections 2(1)(a) and 6(1)(a). Unlike the position in South Africa, the term “dealing” was defined in the English Law to cover any direct or indirect acquisition or disposition of securities, either as principal for one’s own account or for another. See section 55 of the English Criminal Justice Act of 1993. Also see Beuthin R C and Luiz S M *Beuthin’s Basic Company Law* 3rd ed Butterworths 2000 235.

or for the benefit of another person, was expressly prohibited. A number of situations require closer scrutiny.

If A, on the basis of inside information about the affairs of X Limited, would acquire an option to purchase its shares at R10 per share and cede the option to B, the option would clearly fall within the definition of “securities” or “financial instruments”.¹¹ However it is not clear whether all instances of *dealing* in such an option would amount to “dealing” as contemplated in the Act. The following situations can be considered:

- (a) Suppose A does not exercise the option himself, but cedes the rights under the option to B before the information is made public and has any effect on the price or value of the shares and without disclosing such information to B. It is not clear whether a cession for no consideration (for example to a relative) would amount to “dealing” as contemplated even where it would enable B who was ignorant of the inside information, to obtain shares in X Limited at R10 a share at a time when the market value was for instance R100 per share.
- (b) Even if the above situation been covered by the provisions of the Act, the question remains whether A would incur civil or criminal liability in terms of sections 2 or 6, either before or after B had dealt in the securities or financial instruments in question.

The cessionary B would of course only become an insider if he, at some time before exercising the option, would become privy to the inside information and thereafter take advantage of the situation by exercising the option. This would amount to “dealing” as contemplated in sections 2(1)(a), 6(1)(a) and 6(2)(c). Suppose however, that B had originally taken cession of the option for consideration but without any knowledge of the inside information. Would B be precluded from exercising the option if the information would be communicated to him at a later stage? In that case, it would be wise not to exercise the option until public announcement of the information is made.

¹¹ See analysis in paragraph 3.2.5 of this Chapter.

Thus B cannot be said to have “dealt” *with the shares* on the basis of inside information even if he got them at a price that was lower than their market value at the time. Perhaps, only A should incur liability in this case, because he had dealt with the option (being a financial instrument) on the basis of inside information that he had at all relevant times.

The perception that only natural persons can be involved in or benefit from insider trading left room for *mala fide* and *selective disclosure* of price-sensitive information between companies in the same group, in relation to securities or financial instruments of any subsidiary or the holding company.¹² It could also result in insider trading by any company to the detriment of other innocent investors and there is no reason why the company should not, in addition to those who act on its behalf, be prosecuted and incur civil liability.

3.2.2. Who was an insider in terms of the 1998 Act?

There is less than full agreement as to who should qualify to be an insider, and there is considerable controversy on this issue, on the way in which, and the moment at which a person actually becomes an insider.¹³ In terms of section 1 of the 1998 Act, *insider* means “an individual who has inside information through:

- (a)(i) being a director, employee or shareholder of an issuer of securities or financial instruments to which the inside information relates; or
- (a)(ii) having access to such information by virtue of his or her employment, office or profession; or

¹² See paragraph 3.2.2 below. Insider trading can occur between departments of company, or benefit subsidiary companies who directly or indirectly deal in the securities or financial instruments. On the other hand another subsidiary company that does not have access to the price-sensitive inside information in relation to the relevant securities or financial instruments can be prejudiced in the event of *mala fide* selective disclosure. See the *Minority Report on Insider Trading* by The King Task Group into Insider Trading Legislation paragraph 3.4 as summarized Beuthin R C and Luiz S M Beuthin’s *Basic Company Law* 3rd ed Butterworths 2000 235-238.

¹³ See Loubser R “Insider Trading” (2002) <http://www.jse.co.za> 12 October 2006.

- (b) where such individual knows that the direct or indirect source of the inside information was a person contemplated in paragraph (a)".

Two categories of insiders were therefore contemplated under the 1998 Act. Firstly there were the *primary insiders* such as the directors, employees or shareholders of an issuer of securities or financial instruments to which the inside information relates, and which include *fortuitous insiders* or individuals who have access to the inside information by virtue of their employment, office or profession but who are not officers or employees of the company itself.¹⁴ Secondly there were *secondary insiders* or tippees, being individuals who know that their direct or indirect source of the inside information is a primary insider.

The focus in the definition on individuals as insiders clearly implies the exclusion of juristic persons. In this context the scope of the definition is too limited. Individuals can easily involve themselves in insider trading activities through juristic persons under their control. Should they be allowed to escape liability?¹⁵ Some insiders mentioned in the definition such as directors and employees may owe the issuer a fiduciary duty not to disclose confidential information about the affairs of the issuer to outsiders but at the same time be under a duty in terms of the Act to disclose the same information to others if the company or the issuer would involve itself in insider trading.¹⁶ This could easily

¹⁴ The guidelines provided in the Act for determining who qualifies to be an insider were inadequate. The pool of *individuals* who could become insiders was on the other hand large and included not only directors, employees and advisors but also many others, like advertising and production professionals engaged to compile and publish inside information for printing. See Loubser R *supra* note 13.

¹⁵ Vicarious liability only exists where it is provided for in terms of general principles of law and the exclusion of juristic persons from the definition seems to exclude any prospect of vicarious liability being imposed on either the juristic person or any individual who practised insider trading under the guise of a juristic person. See section 6(11); Loubser R *supra* note 13.

¹⁶ The Act was further silent on the question on whether insiders may be *liable to the issuer* of securities or financial instruments for breaching their fiduciary duties when merely disclosing confidential information to outsiders under these circumstances as opposed to abusing it for personal gain.

bring about tension between shareholders and management. The exclusion of companies and other juristic persons from the definition of an “insider” was therefore regarded by commentators as a serious flaw in the 1998 Act and a major compromise on the part of the legislature.¹⁷

Disclosure of inside information to a tippee could of course amount to a contravention of the provisions of the Act as well as a disclosure of confidential information to the detriment of the issuer to whom he may owe fiduciary duties as a result of which he would be liable to the issuer in terms of common law principles.¹⁸ However any statute which provides for juristic persons to be liable for insider trading activities, should exempt an issuer from liability where it did not authorise the disclosure.

Furthermore, a fortuitous insider or a tippee would not strictly speaking have inside information within the meaning of sections 2 and 6 if they knew the facts but not the background that caused the information to be price-sensitive. A tippee could also be unaware of the confidentiality thereof. These persons could however cause prejudice to others by anonymously dealing in securities on a regulated market.¹⁹

It is important to note that proof of knowledge of inside information on the part of an insider was required. Actual appreciation on the part of the alleged insider, of the price-sensitive nature of the inside information was however not clearly required but the provisions of the 1998 Act imply that he can only be liable if he appreciates the price-sensitive nature of the information and acts upon it. Constructive knowledge could not be attributed to any person simply because he occupied a position which might have given him access to it.

¹⁷ See Loubser R *supra* note 13.

¹⁸ *Ibid.*

¹⁹ See Heakal R “Defining Illegal Insider Trading” (2003) <http://www.investopedia.com> 18 June 2006. Also see Farrar J H and others *Farrar’s Company Law* 3rd ed Butterworths London 1991 426. See paragraphs 3.3 and 3.4 for a detailed discussion of sections 2 and 4.

3.2.3. What constitutes inside information?

Insider trading could only occur if there was a prospect of abuse of “inside information”. The definition of “inside information” must therefore be analyzed critically to establish whether it was adequate.

Inside information was defined as:

“specific or precise information which has not been made public and which (a) is obtained or learned by an individual 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 securities or financial instruments”.

Not all information could therefore be treated as inside information for purposes of regulating insider trading. Only accurate and factual non public inside information would fall in the ambit of the definition. Information therefore had to meet five requirements to qualify as inside information in terms of Act.

Firstly, the information was required to be factually specific or precise. Inaccurate and any unconfirmed information, speculation about whether information might be true, rumours or promises were excluded. Trading on the basis of rumours or speculation about the value of securities or financial instruments could, however, still occur and harm ignorant outsiders.²⁰ The Act did not define the terms “specific” or “precise” and it was left to the courts to determine what would constitute specific or precise information. Although it can be assumed that all persons should have a broad understanding of the general meaning of these terms, everybody might not appreciate

²⁰ Such persons could trade on the basis of rumours or speculation at their own peril while those responsible for the rumours could make enormous gains without incurring any liability for insider trading - see Loubser R “Insider Trading” (2002) <http://www.jse.co.za> 24 June 2005.

the degree of specificity or precision required for information to qualify. This obscurity may offer an opportunity to practise insider trading without incurring liability.²¹

Secondly, the inside information must have been information which could only be accessed by insiders, or where the source of the information was an insider. A consultant geologist who does prospecting work for his client, a mining company, would qualify as an insider by virtue of his profession as contemplated by section 1(a)(ii) and should incur liability if he would deal in shares of the company on the basis of price-sensitive inside information he had obtained while performing his duties. He knew that he had inside information. However, instances where the information originated in financial markets or sources other than the company were not included in the definition. This exclusion however also left room for abuse.²²

It is therefore submitted that *any person* who would leak the inside information knowing that it was not yet made public (and not even communicated to the company) should be held liable to those prejudiced by his or her actions on basis of disclosing inside information as a tipper, to others.²³ Whatever the situation, the fact remains that price-sensitive information that is leaked *unintentionally* by insiders was not covered by the definition and could still have been abused recklessly by others.

²¹ For example comments like “we are enjoying a good year” would probably not qualify, but the researcher contends that the absence of a definition leaves room for abuse in the form of rumour mongering.

²² Unscrupulous persons could take advantage of this and engage in insider trading without incurring liability - see Myburgh A and Davis B “The impact of South Africa’s Insider Trading Regime on Market Behaviour” <http://www.genesis-analytics.com> 11 November 2006; Osode P C “Defending insider trading regulation on ethical and scientific grounds: The inequality of legal access theory” (1999) 62 *Journal of Contemporary Roman-Dutch Law* 20.

²³ See the definition of “insider”. Although insiders are the main sources of inside information, the Act ought to have recognized other potential sources of inside information to ensure effective combating of insider trading. See Fishe and Robe “The Impact of Illegal Insider Trading in Dealer and Specialist Markets: Evidence from a Natural Experiment” (2002) <http://www.som.yale.edu> 12 August 2005; Luiz S M “Insider Trading Regulation - If at First You Don’t Succeed...” (1999) 11 *SA Merc LJ* 139.

Thirdly, the information must not have been made public. Various ways in which such information was deemed to have been published were enumerated in section 3. These will be analyzed below in paragraph 3.2.4.

Fourthly, the non public inside information *was required to be likely* to have a material effect on the price or value of the securities or financial instruments after having been made public. Appointment or resignation of a person as a director may for instance be considered as material in many instances but can it automatically be regarded as precise and likely to influence other persons *directly* or *indirectly* to deal, or discourage them from dealing in securities or financial instruments of the company concerned? The term “material effect” was not defined. This is another shortcoming because the degree of materiality might well be a mystery to many persons.²⁴ It was probably intended to be left in the discretion of the courts to decide whether a transaction resulted or was likely to result in having a material effect on the price of securities or financial instruments in a given situation.

²⁴ According to the United States of America securities laws non public inside information is treated as information that have a material effect on the price of securities or financial instruments only if a reasonable investor was likely to consider it significant in making an investment decision or if it was reasonably certain to have a substantial effect on the market price of a company’s securities. See <http://www.sec.gov> 12 July 2006. No similar definition would be found in section 1 of the 1998 Act and it cannot be stated with certainty that the same test would apply in South Africa. The researcher therefore alludes to the fact that the term “inside information” was not defined sufficiently and adequately for purposes of effectively curbing the insider trading problem in South Africa. For such a definition of inside information to be adequate it should be applicable to all non public inside information, *irrespective* of whether it actually had a material effect on the price of securities or financial instruments, as long as it was likely to have such a material effect.

3.2.4. The meaning of “publication”.

Inside information seizes to be inside information for purposes of the Act upon its publication. The term “publication” was not defined and must be analyzed 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. This is therefore also a controversial issue.

The researcher contends that the Act in section 3 simply narrated so-called guidelines for publication without actually explaining how such guidelines were to be used to ensure proper and timeous publication. This list of guidelines was also not exhaustive.²⁵ These guidelines can however be commended as at least an attempt to provide guidance as to what exactly constitutes publication without excluding other possible instances that were overlooked.

Section 3(1) provided that non public inside information shall be deemed as having been made public if:

- (a) it is published in accordance with the rules of the relevant regulated market for purposes of informing investors and their professional advisors; or
- (b) if it is contained in the records maintained by the relevant statutory regulator which by virtue of any enactment are open to inspection by the public; or
- (c) if such information can be readily acquired by those likely to deal in any securities or financial instruments,
 - (i) to which such information relates; or
 - (ii) of an issuer of securities or financial instruments to which the instrument relates; or
- (d) it is derived from information which has been made public.

Inside information was further deemed to have been made public where:

²⁵ See section 3.

- (a) it can only be acquired by persons exercising diligence or expertise or by observation; or
- (b) if it is communicated to a sector of the public and not to the public at large; or
- (c) communicated only on payment of a fee; or
- (d) if it was only published outside the Republic.²⁶

One commentator however submitted that, although it was now clearer that the non public nature of inside information terminates upon its publication, there were still no mandatory disclosure requirements to encourage companies and other persons to effect a timely publication.²⁷

The provisions of section 3(2) can however be criticized for being too simplistic and that they could easily be circumvented by persons who wanted to abuse inside information. For example it was still possible to publish the inside information in an unpopular local newspaper or a financial gazette that may not be read by the general public and escape liability on the basis that it was published to a section of the public. If the terms “public” or “a section of the public” are not defined, contravention of the Act is too easy and the researcher recommends a provision that is similar to the requirements for disclosure as embodied in Rule 2.4.1 of the SRP Rules which will be discussed in the next Chapter.²⁸

3.2.5. The meaning of “securities” and “financial instruments”.

Another important term that was defined in the provisions of the 1998 Act was “securities”,²⁹ as *including* securities defined in section 1 of the Stock Exchanges

²⁶ See section 3(2).

²⁷ See Osode P C “The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?” (1999) 44 *Journal of African Law* 239.

²⁸ See Chapter 4 paragraph 4.5. Failure to make a timely publication could well result from ignorance in relation to the meaning of concepts of “public” or who belonged to “a section of the public”.

²⁹ See section 1.

Control Act, 1 of 1985 and any instruments or rights bearing substantially similar characteristics to such securities and which are dealt in on a regulated market. It can be argued that this definition was too restricted, because it only applied to securities or financial instruments traded on a regulated market.³⁰

The term “financial instruments”³¹ was defined as a financial instrument as defined in section 1 of the Financial Markets Control Act, 55 of 1989 and any instrument or right bearing substantially similar characteristics to any such financial instrument and which is dealt in on a regulated market. This definition could also be criticized for being *rigidly* and *narrowly* applicable, only to financial instruments dealt with on regulated financial markets.

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

3.3.1. Prohibition on actual insider dealing in securities or financial instruments.

The 1998 Act provided that “any individual who knows that he or she has inside information and who deals directly or indirectly, for his or her own account or for any other person, in securities or financial instruments to which such information relates or which are likely to be affected by it, would be guilty of an offence”.³² Four requirements had to be met before any person could be liable for contravening section 2(1)(a):

³⁰ In terms of section 1, a regulated market was any market whether domestic or foreign which was regulated in terms of the relevant legislation of the country in which that market conducted business as a market for dealing in listed securities or financial instruments.

³¹ See section 1.

³² Section 2(1)(a).

Firstly, the prohibition in section 2(1)(a), unlike the prohibition found in repealed provisions of the Companies Act, 61 of 1973,³³ only extended to natural persons. This implied that juristic persons were not prohibited from becoming involved in insider trading.³⁴

Secondly, such an individual must have been aware of the fact that he or she had inside information. Thus knowledge was a prerequisite for criminal liability in terms of section 2(1)(a). Mere apprehension in the mind of the accused that he or she had inside information was sufficient for that person to commit the offence.³⁵

Thirdly, it was immaterial whether the accused individual actually dealt in securities or financial instruments for personal benefit or for the benefit of another person. Dealing directly or indirectly for making a profit or avoiding a loss for oneself as well as for any other person was therefore prohibited in terms of section 2(1)(a). However the absence of a definition of the term “deal” or an explanation of what constituted “dealing” could cause an individual to become involved in insider trading innocently and ignorantly.

Lastly, dealing in securities or financial instruments was prohibited, only if the individual concerned had information which had a material effect or was likely to have a material effect on the price of those securities or financial instruments. The meaning

³³ Previously the offence of insider trading could be committed by any “person” - see section 440F (1) of the Companies Act 61 of 1973. The definition of “person” in terms of the Interpretation Act 33 of 1957 includes natural and juristic persons. This means that in terms of section 440F (1) the insider trading offence could be committed by both natural persons (individuals) and juristic persons (companies or institutions). The researcher argues that the reference to “individual” instead of person in the 1998 Act might have been a step in the wrong direction.

³⁴ The failure to impose criminal liability on juristic persons who engaged in insider trading was one of the major weaknesses in the Act. See Beuthin R C and Luiz S M *op cit* note 12 235-238; Chanetsa B “Insider is notoriously hard to prosecute” *Business Report* 26 April 2004.

³⁵ The onus of proof was on the prosecution to prove beyond reasonable doubt that the accused was aware that he was in possession of inside information. A plea of ignorance or lack of knowledge by the accused even in the slightest degree was sufficient for acquittal, even where the accused had made enormous personal gains or had assisted another person to acquire such gains.

of the term “material effect” and the exact moment at which such *material effect* had to be present was however not stated and it was apparently left to the courts to decide.³⁶ The same seems to have applied to the *unanswered* question as to what was the required degree of materiality for purposes of section 2(1)(a).

3.3.2. Prohibition on encouraging or discouraging another person to use inside information when dealing in securities or financial instruments.

The 1998 Act also prohibited tipping. Section 2(1)(b) provided that “any individual who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in securities or financial instruments to which such information relates or which are likely to be affected by it, shall be guilty of an offence”.

This prohibition was aimed at discouraging persons who were privy to non public price-sensitive information to incite others to deal or to refrain from dealing in securities or financial instruments to the detriment of innocent outsiders (public investors) who were at an informational disadvantage.³⁷ Contravention of section 2(1)(b) was only possible if the following requirements were met:

Firstly, the prohibition again applied only to natural persons and unlike the position under repealed provisions of the Companies Act, 61 of 1973,³⁸ juristic persons were not

³⁶ It was therefore possible that a person could escape criminal liability on the basis of ignorance although he had in fact dealt on the basis of information that *has or was likely to have a material effect* on the price of securities or financial instruments. See Bridge S and Morris R “Saambou bosses face fraud charges” *Business Report* 15 September 2005.

³⁷ This follows the assumption that tippers usually tip off their relatives and friends irrespective of whether it takes place for mutual benefit or merely to benefit the relatives or friends. As a result of receiving tips from the tippers (insiders), the tippees stand a better chance of avoiding a loss or making enormous profits at the expense of investors who are ignorant of such price-sensitive information - Heakal R *supra* note 19.

³⁸ See the comments on section 440F(1) of the Companies Act, 61 of 1973 in paragraph 3.3.1.

covered. Therefore only individuals and not juristic persons on behalf of which they might act, could be convicted in terms of section 2(1)(b).

Secondly, the individual must have been aware that the information he had was inside information. The prosecution was not required to prove for purposes of subsection (1)(b) that he had actually communicated the inside information concerned to the tippee. A mere suggestion to buy or sell or to retain the securities or financial instruments would suffice. The tippee would be guilty of an offence, only if he, as a result of the tip, knew that he actually had inside information and traded on the basis thereof as contemplated in section 2 (1)(a). It appears that mere apprehension in the mind of the accused that he was armed with non public inside information was also in this situation, sufficient to incur criminal liability.

Thirdly, liability for contravening section 2(1)(b) was solely based on the encouraging to deal or discouraging another person from dealing in securities or financial instruments irrespective of whether the tippee actually acted on the tip. Section 2(1)(b) did not proscribe what constituted illegal conduct on the part of the tippee.³⁹ Thirdly, it was immaterial for the purpose of incurring criminal liability, whether the tipper had made profit or avoided some loss. Substantial prejudice could of course still be caused to ignorant third parties, even where the tippee would merely deal or refrain from dealing in securities or financial instruments in reaction to a tip-off.

Lastly, section 2(1)(b) specifically prohibited tipping in relation to dealing in listed securities or financial instruments and not tipping in relation to other securities or instruments. This was another glaring omission in the 1998 Act.

³⁹ Section 2(1)(b) focused only on the liability of tipplers and overlooked the fact that not only tipplers (insiders) were the perpetrators of insider trading. See Loxton L “Deutsche saga ends in R24m fine” *Business Report* 8 April 2004.

3.3.3. Prohibition on disclosure of inside (confidential) information.

Section 2(2) provided that: “subject to section 4(2), any individual who knows that he or she has inside information and who discloses that information to another person, shall be guilty of an offence”. It prohibited improper disclosure of non public price-sensitive inside information. The use of the term “individual” in section 2(2) once again implied the exclusion of juristic persons and a natural person could only be guilty of the offence if he was fully aware that he was in possession of inside information.⁴⁰ The prohibition did not extend to innocent disclosure by an individual who was *ignorant* of the fact that the information had not yet been made public.⁴¹ On the other hand *mere disclosure* of information by a person *who knew* that it was inside information, was sufficient to constitute an offence in terms of the section, irrespective of whether it was acted upon or not.⁴²

3.3.4. Criminal liability, penalties and effectiveness of the criminal sanction.

Any individual convicted of an offence in terms of section 2 could be sentenced to a fine not exceeding R2 million or imprisonment for a period not exceeding 10 years or both such fine and such imprisonment.⁴³ It appears as if the Act only stated the

⁴⁰ That is if the accused could not prove any defences proscribed in section 4(2).

⁴¹ For instance a receptionist of a company who overheard the directors celebrating the company’s good financial results and later innocently and ignorantly disclosed that to her friend who then purchased shares on the basis thereof, could not be convicted under section 2(2).

⁴² For example if a director while addressing a family gathering at a party, accidentally disclosed his company’s good results before they were made public. Even though his conduct was not intentionally aimed at inciting any person to deal in the company’s securities or financial instruments, he may find it difficult to prove that he had reasonable grounds to believe that no person would react and deal in the company’s shares to constitute a defence in terms of section 4(2)(a). The provision can in this situation be regarded as rather draconian but it would on the other hand discourage directors or officers from making careless statements. Perhaps the legislature should have added more defences to avoid conviction of innocent persons, who did not intentionally abuse inside information for gain. See Osode P C *op cit* note 27 239.

⁴³ See section 5.

maximum penalty for insider trading and did not impose maximum penalties separately, for any of the other offences created in terms of section 2. This, on the one hand could be regarded as rather absurd, considering the fact some of the offences could be regarded as offences of a less serious nature. For instance it was irrelevant whether the person simply encouraged or discouraged another person from dealing or whether he actually dealt in securities or financial instruments. The courts could impose the same sentence in such cases. This indicates that careful consideration was not given to the appropriateness of penalties for different offences.

There can, on the other hand, be little doubt that the legislature had deterrence in mind as its main tool to combat insider trading in South Africa. Its focus on deterrence came under fire from commentators who submitted that the policy goal of deterrence alone, was not sufficient to curb the insider trading problem. It was further submitted that the R2 million fine and the 10 years term of imprisonment were not sufficient to deter persons from getting involved in insider trading activities.⁴⁴ Other commentators however argued that the criminal penalties were too severe and even draconic in nature. The researcher supports the view that the penalties were too low for deterrence purposes.⁴⁵

The onus of proof was on the prosecution to prove beyond reasonable doubt the elements stated in section 2. Criminal liability was not contingent on the accused making any profit or avoiding a loss, but merely on the fact that he had knowingly dealt in securities or financial instruments for personal benefit or for the benefit of another person.

⁴⁴ It is widely accepted that gains from insider trading activity will often be substantially more than the maximum penalty. Offenders might well pay the R2 million fine or go to prison and still enjoy their ill-gotten gains. See Van der Lingen B “Tougher Legislation to Combat Insider Trading” (1997) Fourth Quarter *FSB Bulletin* 10.

⁴⁵ The researcher contends that although there was an apparent increase in the number of *investigations* since the inception of the Act, this was no reflection of the criminal sanction being effectively enforced in the courts but rather an indication that many persons were still practising insider trading without any fear of incurring criminal liability. See Van der Lingen B *op cit* note 44 10.

Credit must be given to the legislature for adopting an intolerant and strong stance against the practice of insider trading and for imposing significantly increased penalties on guilty offenders. One can easily be tempted to conclude that the criminal sanction would be effective, but the absence of reported successful prosecutions suggests otherwise. Perpetrators could still thrive on insider trading with impunity. The researcher alludes to the fact that the success of any legislation must be measured by the level of its effective enforcement in the courts. It is against this background that a thorough analysis of the criminal sanction in terms of the 1998 Act must be made. It must be noted also that after its inception, only a few cases were reported and no one was successfully prosecuted. Several reasons can be given for the fact that the criminal sanction seemed to be ineffective.

Firstly, provision should have been made for separate maximum sentences for persons who actually traded on the basis of inside information for personal benefit or for the benefit of others and those who merely encouraged or discouraged others from dealing in securities or financial instruments or disclosed inside information to others.

Secondly, the fact that the prosecution had to prove beyond reasonable doubt all the elements in section 2, especially that the accused knew that he had inside information placed an extreme onerous burden of proof on the prosecution. This might well be the reason for the absence of many reported convictions. Perhaps, provision could have been made for presumptions similar to those under the repealed section 440F.

Thirdly, the courts and the Director of Public Prosecutions did not have the capacity to conduct effective and timeous prosecutions. Although the FSB was empowered in terms of the Act to regulate insider trading, the prosecuting function vested in the courts. The everlasting backlog in our criminal courts must surely have delayed criminal prosecutions for insider trading as well. Therefore the FSB ought to have been empowered to initiate prosecutions in insider trading cases, in special courts that specifically deal with matters related to insider trading.

3.4. CIVIL LIABILITY, CIVIL REMEDIES AND CIVIL PENALTIES.

3.4.1. Liability for actual dealing in securities or financial instruments for own account.

In terms of section 6(1)(a), “any individual who knows that he has inside information and who deals directly or indirectly, for his or her own account in securities or financial instruments to which such information relates or which are likely to be affected by it” could be ordered to pay to the FSB an amount as provided for in section 6 (4) (a).⁴⁶

Section 6(1)(a) was enacted to enable the FSB to assist prejudiced persons to be compensated by any individual who practised insider trading for his own benefit. The onus of proof was on the FSB to prove on a balance of probabilities that:

- (a) the individual concerned knew (was aware),
- (b) that he had inside information, and that
- (c) he directly or indirectly dealt in securities or financial instruments,
- (d) that the information related to those securities or financial instruments or that the price was likely to be affected by it and
- (e) that he had dealt in those securities or financial instruments for his own account.

This onus of proof was arguably too severe and difficult for the FSB to discharge. Many victims of insider trading might have refrained from lodging their claims with the FSB because of the fact that they would only receive compensation if there was a

⁴⁶ It was argued that negotiations towards settlements may delay proceedings in civil cases. This was evidenced by the long protracted battle that started on 6 September 1999 between the Financial Services Board (FSB) and a cosmetics company called Beige (BG). Despite serious insider trading offences that were allegedly committed by some senior executives of BG, the court merely treated it as fraud. Only one of the directors (Sydney Rogers) paid R800 000 for the alleged fraud without admitting liability for insider trading. No compensation for the alleged insider trading was paid to FSB to date. See Gebhardt M “Beige, our own mini-Enron redeems itself” (2004) <http://www.busrep.co.za> 14 April 2006.

surplus after deduction of the costs charged by FSB in a successful suit.⁴⁷ Only the FSB was entitled to institute civil proceedings in a competent court and there was no provision in the 1998 Act for direct claims for compensation by victims against offenders.⁴⁸ This also discouraged many affected persons from claiming their compensation through the FSB.

In terms of section 6(1)(b), “any individual who knows that he or she has inside information and who profits or avoids a loss through such dealing” could be ordered to pay to the FSB an amount as provided for in section 6(4)(a).⁴⁹ The defendant would be liable to the FSB unless he could prove one of the defences proscribed in the Act. Section 6(4)(a) will be discussed later but it essentially provided that the FSB was entitled to sue for an amount equal to the profit the defendant had actually made or the loss he had avoided and in addition, a *penalty* not exceeding 3 times the profit made or loss avoided plus interest and legal costs. The onus was therefore on the FSB to prove on a balance of probabilities, the amount of the profit made or the loss avoided. The FSB was allowed to recoup its costs from any amount recovered before distributing any balance to the persons who had been affected by the transaction in question and who lodged their claims with it.⁵⁰ It is however submitted that to expect the FSB to prove the actual loss avoided or profit made, might well be an up-hill task.

3.4.2. Liability for disclosure of price-sensitive information.

In terms of section 6(2) “an individual who knows that he or she has inside information and who discloses that information to an individual referred to in subsection (1) and fails to prove on a balance of probabilities any one of the defences set out in section

⁴⁷ See section 6(4)(a). Although the defendant could also be ordered to pay the costs and interest, the FSB was entitled to its expenses before any balance was distributed to affected victims.

⁴⁸ The procedure for claiming compensation was provided for in sections 6(6)-(11). These sections will not be discussed in detail here but the role of the FSB will be analyzed in Chapter 4.

⁴⁹ See Van Deventer G “New Watchdog for Insider Trading” (1999) First Quarter *FSB Bulletin* 3.

⁵⁰ See Chanetsa B “Insider trading is notoriously hard to prosecute” (2004) <http://www.busrep.co.za> 13 January 2006.

4(2) or any other defence available to him or her” could be ordered to pay an amount as provided in section 6 (4)(a).

However, the researcher alludes to the fact that the 1998 Act did not adequately provide practical procedures and steps aimed at stopping the non public price-sensitive inside information from leaving companies and financial markets prematurely and unlawfully. The 1998 Act lacked mandatory disclosure requirements hence it was grossly inadequate. The onus of proof was on the FSB to prove on a balance of probabilities the elements of section 6(2)(a), especially that the defendant knew that he had inside information.⁵¹

Another shortcoming of section 6(2)(a) was that it did not state how the total amount of compensation was to be determined. The actual amount of compensation for the affected persons was not contingent upon the actual loss or harm that they had suffered and it was left to the courts to determine.⁵² Therefore in spite of the availability of some guidelines that were enacted to assist the courts in their determination of an appropriate amount for compensation, there was still a possibility that many affected persons would receive insufficient or no compensation at all.

Not many cases were settled through the FSB despite the fact that it was cheap and affordable, perhaps due to an alleged fear on the part of complainants that that they might fail to satisfy the FSB’s stringent requirements for lodging and proving their claims.

⁵¹ The tipper and tippee were jointly and severally liable for a civil penalty in terms of section 6(4)(a) if they had acted as provided in section 6.

⁵² See section 6(3)(b).

3.4.3. Liability for encouraging or causing another person to deal in securities or financial instruments.

The 1998 Act prohibited tipping and section 6(2)(b) provided further that an individual who knew that he had inside information and who deliberately encouraged or caused another person to deal in securities or financial instruments to which such information related, or which were likely to be affected by it and failed to prove on a balance of probabilities any one of the defences set out in section 4(1) or any other defences available to him, could be ordered to pay to the FSB the compensatory amount stipulated in section 6 (4)(a).⁵³

An interesting point to note is that the wording of section 6(2)(b) did not expressly refer to liability for individuals who *stopped* or *discouraged* other persons from dealing in any securities or financial instruments. In this section the emphasis was placed on individuals who caused or encouraged others to deal in any securities or financial instruments.⁵⁴

Notwithstanding the fact that both subsections (2)(a) and (2)(b) imposed civil liability for tipping and encouraging other persons to deal in securities or financial instruments, these provisions were still inadequate and ineffective. Moreover the FSB was possibly not adequately equipped and failed to effectively monitor and enforce these provisions.

⁵³ The Act imposed joint and several liability on the tippee and the tipper following an assumption that both these parties enjoyed illicit gains from tipping at the expense of other investors. See Myburgh A and Davis B “The impact of South Africa’s Insider Trading Regime on Market Behaviour” <http://www.genesis-analytics.com> 12 June 2006.

⁵⁴ The tipper may escape civil liability on the basis that he *did not* act contrary to section 6(2)(b) because it only prohibited *encouraging* such a person to deal in the securities or financial instruments concerned. See the “Report on the observance of standards and codes (ROSC), Corporate governance country assessment, Republic of South Africa” (2003) by the World Bank on <http://www.genesis-analytics.com> 13 May 2007.

Its monitoring methods were allegedly too unsophisticated for purposes of stopping persons from being involved in these activities.⁵⁵

3.4.4. Liability for dealing in securities or financial instruments for another person's account.

The 1998 Act introduced civil liability for individuals who knowingly dealt directly or indirectly in securities or financial instruments on behalf of any other person in terms of section 6(2)(c). It provided that, “an individual who knows that he or she has inside information and who deals directly or indirectly in such securities or financial instruments for any person and fails to prove on a balance of probabilities any one of the defences set out in section 4(1) or any other defences available to him or her, shall be jointly and severally liable, together with the individual referred to in subsection (1), at the suit of the Financial Services Board to pay to the Financial Services Board the amounts set out in subsection (4)(a)(i),(iii) and (iv)”. Any person who entered into any unlawful dealing on behalf of any other person could therefore incur civil liability in terms of this subsection irrespective of his or her relationship with the latter person.⁵⁶

Although there was no definition in the Act of the term “dealing” in securities or financial instruments, one can assume that in this context it referred to the actual buying and selling of securities or financial instruments for the benefit of another person. Civil liability in terms of section 6(2)(c) was possible only if it was proved on a balance of probabilities that the defendant had knowingly involved himself in insider trading on behalf of another person. Liability was strictly based on actual dealing and any *attempt to deal* in securities or financial instruments seemed to fall outside the ambit of section 6(2)(c).

⁵⁵ See paragraph 3.4.7 below.

⁵⁶ It was no defence for a person to argue he had no relationship with or had no intention to benefit the other person.

3.4.5. The requirement of knowledge as the basis of civil liability.

Knowledge on the part of the defendant that he or she *had inside information* was a prerequisite for any civil liability in terms of section 6. This meant that the FSB had to prove on a balance of probabilities that the defendant was aware of the fact that the information he possessed was in fact inside information. Unfortunately this implied that even the slightest degree of ignorance on the part of the defendant was sufficient to enable him to escape civil liability and the uncertainties in relation to the meaning of publication which were pointed out earlier⁵⁷ aggravates the matter.

The knowledge had to pertain to non public inside information that related to or was likely to have a material effect on the price of the securities or financial instruments in question. Already published information did not attract civil liability unless such publication was not made in terms of section 3. Unlike insider trading legislation in some other countries, the 1998 Act merely required knowledge on the part of the defendant in the sense that he had accessed the non public inside information and was dealing on the basis thereof. Proof of *intent* to *abuse* such information or to benefit himself or some other person was not required.⁵⁸

Cognizance must be taken of the fact that insider trading was and will always be difficult to detect and many victims of insider trading are initially unaware of the fact that they act to their detriment or are being defrauded by anonymous insiders. Many persons were also ignorant of the consequences of insider trading.⁵⁹ Furthermore, unscrupulous persons could get away with insider trading activity. Others could innocently and ignorantly be involved in insider trading while under the impression that

⁵⁷ See paragraph 3.2.4 above.

⁵⁸ In the United States of America the plaintiff is obliged to prove that the defendant deliberately abused the non public inside information to which he was privy, through engaging in insider trading for his own benefit or for that of another person – see <http://www.sec.gov> 12 April 2007.

⁵⁹ Although the FSB and Johannesburg Securities Exchange (JSE) have played a pivotal role in educating investors about insider trading, a substantial number of persons are even today still ignorant of its negative effects.

the information which they had received as a tip had already been made public. These innocent persons could not incur civil liability, but their dealings could still prejudice outsiders. It could therefore be argued that the 1998 Act on the one hand overemphasized the requirement of knowledge and on the other failed to provide suitable civil remedies for all possible situations.

3.4.6. Liability for actual loss avoided or profit made.

Liability for actual loss avoided or profit made is stipulated in section 6(4)(a) as follows:

“The Financial Services Board shall be entitled to sue by way of civil proceedings in any court of competent jurisdiction for the payment of:

- (i) the amount by which the individual referred to in subsection (1) profited or the loss which he or she avoided as a result of such dealing; and
- (ii) a penalty, for compensatory or punitive purposes, in a sum determined in the discretion of the court but not exceeding three times the amount of the profit gained or the loss avoided as a result of such dealing; and
- (iii) interest; and
- (iv) costs of suit on such scale as may be determined by the court”.

Although the Act appeared to have empowered only the FSB with the powers to monitor and to enforce the civil remedy cheaply and effectively, such powers were insignificant insofar as they did not include powers to determine the compensatory amount for the prejudiced persons.

Moreover, only the courts had a discretion to determine the actual amount of the profit made or loss avoided in terms of section 6(4)(b), which provided that, “the amount of the profit gained or loss avoided shall be determined in the discretion of the court which shall have regard to factors such as the consideration for the dealing referred to in

subsection (1), the time between the relevant dealing and the publication of the inside information and any other relevant factors”.⁶⁰

Although it can be argued that any victim of insider trading activity may still proceed in terms of the common law principles of fraud or misrepresentation in any court, this apparently, has never happened due to a lack of evidence. Proceedings under section 6(4)(a)(i) may be instituted in any competent court. One can reasonably assume that they will be instituted in the High Court of South Africa. However the backlog in the various divisions of the High Court is well known and it is possible that many cases may be delayed or even abandoned. If provision is made for a specialist court, effective and timeous settlements of civil cases would be enhanced.

3.4.7. Effectiveness of the civil remedy.

Ineffective enforcement of the civil remedy has been a problem, as was the case with enforcement of insider trading laws in South Africa generally.⁶¹ In spite of the fact that South Africa was the first country to introduce civil remedies and in spite of all the efforts made by the legislature to enhance enforcement thereof, the flaws in section 6 undermined the successful enforcement of its provisions. The weaknesses of these provisions should be exposed to show the way forward in formulating effective rules to

⁶⁰ The researcher contends that in addition to the courts, an open approach ought to have been adopted to accommodate input from institutions like the JSE and BESA in the enforcement of the civil remedy, for it to be more successful and effective.

⁶¹ Very few settlements were recorded in civil proceedings since the enactment of the 1998 Act. It is generally believed that delays or failure to claim compensation was due to inadequate and ineffective enforcement of the legislation. This view was supported by Chanetsa who in his submissions cited a civil case that involved the Deutsche Securities (DS) and the Financial Services Board (FSB). The negotiations towards a settlement commenced on 13 April 2000 and ended in 2004. This meant that this case took about four years before it was settled for a fine of R24 million. See Chanetsa B “Insider trading is notoriously hard to prosecute” *op cit* note 50.

regulate and to enforce insider trading in South Africa.⁶² The failure and ineffective enforcement of the civil remedy was attributed to a number of factors which included the following:

Firstly, the onus of proof in terms of section 6 was on the FSB to prove on a balance of probabilities that the defendant knowingly exploited the non public inside information to deal in securities or financial instruments for his own benefit or for the benefit of another. It is however generally agreed that the FSB failed to effectively claim compensation on behalf of affected persons because the evidentiary burden was severe and difficult to discharge.

Secondly, although section 11(1) entrusted the FSB with the sole responsibility and with wide powers to monitor and to enforce the civil remedies⁶³ and although this was a noble move towards effective enforcement of the civil remedies, the FSB was probably not adequately equipped and financed to deal effectively and timeously with claims.

Thirdly, the procedures to curb the insider trading activity are still inadequate and other regulatory bodies such as JSE and stakeholders should be statutorily engaged to participate in the enforcement of the civil remedies. The FSB should be adequately resourced and funded to acquire technologically advanced equipment needed to effectively detect and monitor occurrence of insider trading activities and to effectively enforce the civil remedies. Although the Insider Trading Directorate (ITD) was established in terms of section 12 to investigate all suspected insider trading in regulated financial markets, it failed to carry out its proscribed duties, perhaps because of insufficient resources.⁶⁴

⁶² Discussion of all the provisions of the Act in relation to enforcement of the civil remedies is beyond *the scope of this subheading*. Therefore sections 7-18 will be referred to only where necessary.

⁶³ The FSB was empowered to manage and to enforce the civil remedy to ensure that all persons affected by insider trading received compensation in terms of section 6(7). See section 11(1).

⁶⁴ Although the Insider Trading Directorate was established specifically to investigate all suspected cases of insider trading and was allegedly staffed with professional persons who had forensic and prosecutorial skills, it failed to settle many civil cases. This was evidenced by protracted delays in

3.5. AVAILABLE DEFENCES AND EFFECTIVENESS THEREOF.

A number of defences were made available for persons who allegedly violated the provisions of the Act.⁶⁵ No criminal or civil liability was imposed on any individual who proved on a balance of probabilities any of the defences that were provided in sections 4(1) and 4(2). It must be noted however that the statutory defences were not exhaustive and accused persons or defendants were also allowed to rely on any other defence that might have been available to them.⁶⁶ The statutory defences are the following:

Firstly, any individual would not incur any liability if he proved on a balance of probabilities that he was acting on specific instructions of a client unless it was actually that client who had disclosed the inside information to him. This meant that the accused or defendant was not liable if he was unaware of non public inside information that was relevant to the client's transactions. Professional negligence on the part of these persons would however exclude reliance on this defence.⁶⁷

arrests made and the unsuccessful claims for compensation in connection with the R640 million Saambou Bank saga. See Bridge S and Morris R "Saambou bosses face fraud charges" <http://www.busrep.co.za> 18 August 2006.

⁶⁵ The defences were contained in section 4.

⁶⁶ This was clearly stated in section 4(3) which allowed reliance on any other defence available for example in terms of common law. This provision was however received with mixed feelings. Some persons argued that the inexhaustible nature of defences was good because it afforded the accused or defendant a fair chance to defend himself while other commentators submitted that the failure to provide for a specific number of defences indirectly assisted some unscrupulous individuals to practise insider trading hoping that they could rely on some kind of defence to avoid liability. See Osode P C *op cit* note 27 239.

⁶⁷ Section 4 (1)(a). Where the non public inside information was disclosed to an accused or defendant who relied on this section it can reasonably be expected of him to refuse to carry out the principal's instructions. It is however submitted that this can only be the case if the accused or defendant actually knew that he (now) had inside information as stipulated in the Act. A person who received the non public inside information from a client and who reasonably executed his duties on the premise that the information would not have a material effect on the price of the securities or

Secondly, persons who proved on a balance of probabilities that they would have acted in the same manner even if the inside information was not disclosed to them were exempted from liability.⁶⁸ This defence would probably only suffice if the defendant or accused concerned could demonstrate a good track record of buying and selling securities or financial instruments in similar transactions. The veracity of this defence would probably depend on different individuals being implicated in different cases. It must therefore be conceded that very few persons if any, would have successfully relied on it.

Thirdly, any individual who proved on a balance of probabilities that he was acting on behalf of a public sector body in pursuit of a monetary policy, policies in respect of exchange rates, management of a public debt or foreign reserves would not incur any liability.⁶⁹ This defence allowed for dealing in securities or financial instruments in pursuit of matters relating to monetary policy or the public interest. Although it was intended to assist any person who might have innocently traded in securities or financial instruments without the intention of prejudicing any other person, it was prone to abuse by government officials.

Fourthly, an individual could escape liability if he or she proved on a balance of probabilities that his or her dealing was in pursuit of the completion or implementation of an affected transaction as defined in section 440A of the Companies Act, 61 of 1973. This defence was aimed at ensuring that lawful conclusion of mergers and acquisitions were not frustrated. Completion of an affected transaction was preceded by comprehensive disclosure of inside information in terms of section 440A, under the supervision of the Securities Regulation Panel.⁷⁰

financial instruments or who was brought under the impression that the information had already been made public, should also be allowed to rely on the defence in section 4(1)(a).

⁶⁸ Section 4(1)(b).

⁶⁹ Section 4(1)(c).

⁷⁰ See paragraph 4.5 of Chapter 4 for a discussion of the SRP Rules in relation to disclosure.

Fifthly, persons who allegedly disclosed non public inside information as contemplated by sections 2(2) and 6(2)(a) could escape liability by proving on a balance of probabilities that they reasonably believed that no person would deal in securities or financial instruments as a result of such disclosure.⁷¹ Thus unintentional and innocent disclosure of non public inside information could be a defence.

Lastly, no liability was imposed for disclosure of inside information if it was proved on a balance of probabilities, that the information was disclosed in the proper performance of the office, employment or profession of the person concerned and if at the same time it was disclosed that such information was essential in relation to that transaction.⁷² This defence protected all *bona-fide* disclosures of non public inside information made by a person in course of his employment or office on behalf of the company or in a professional capacity. The question remained what was meant by the term “proper performance” of functions. One can argue that this term was self explanatory. However if its meaning is not properly understood, reliance on this defence may fail due to ignorance.

3.6. CONCLUDING REMARKS.

The 1998 Act can be welcomed as a step in the right direction to effectively regulate insider trading in South Africa and to address the widely accepted belief that insider trading was a general practice in South Africa. Significant progress was therefore made in the battle against insider trading in this country. For instance, in an attempt to attain a proper regulatory regime, it introduced a more elaborate civil remedy, and the ITD was established as an investigatory arm of the FSB, while various definitions of concepts, as well as new penalties and defences were introduced.

⁷¹ Section 4(2)(a).

⁷² Section 4(2)(b).

It is, however, unfortunate to note that various gaps and flaws could still be found in the provisions of this Act.⁷³ No timeous settlement was for instance recorded in civil cases. Only one case was reported for prosecution since the inception of the insider trading ban. Penalties were still significantly low, defences were inadequate and generally speaking its provisions still reflected several shortcomings.

⁷³ Also see generally Gilmour C “Surveillance exchange shows its cleaner face” <http://www.free.financialmail.co.za> 16 May 2006.