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TOPIC: CRITICAL ANALYSIS OF THE INSIDER TRADING FRAMEWORK OF  
TANZANIA

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## PLAGIARISM DECLARATION

I, **Ghati Williamu**, do hereby declare that the work presented in this Mini-thesis is original. It has never been presented to any other University. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine.

Signature (student).....

Signature (supervisor).....



## **DEDICATION**

I dedicate this Mini-thesis with immense love to my husband, Mr. Telesphory David Magogo who has been patient, tolerant and always available for consultations and to the support I needed to the completion of this work. To my beloved baby girl, Experantia Telesphory Magogo.



## ACKNOWLEDGEMENTS

Appeal of great attitude to the almighty God for the blessings to the completion of this important academic step.

The completion of this study has been a result of great contribution from several people, who sacrificed their time and gave their generosity in this work. Their enthusiasm and insights in the study have inspired this work. But because it is not possible to mention all of them, hereunder are the only few mentioned names representing all others for their great contributions.

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My classmates in corporate governance and corporate finance law 2014/2015 at the University of the Western Cape for their arguments, views and contributions in the course of my study.

May the good Lord bless you.

## **LIST OF STATUTES**

### English Legislation

The Criminal Justice Act, of 1993.

The Financial Services and Markets Act, of 2000.

### South Africa Legislation

The Financial Markets Act, 19 of 2012.

### Tanzania Legislation, Regulations and Guideline

The Capital markets and Securities Act, 79 of 1994 [R. E 2002].

The Companies Act, 212 of 1999 [R.E 2002].

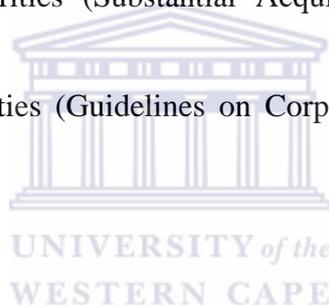
The Fair Competition Act, 8 of 2002.

The Capital Markets and Securities (Register of interests in securities) Regulations, of 1996.

The Capital Markets and Securities (Collective Investment Schemes) Regulations, of 1997.

The Capital Markets and Securities (Substantial Acquisitions Takeovers and Mergers) Regulations, of 2006.

The Capital Markets and Securities (Guidelines on Corporate Governance) Guidelines, of 2002.



## ACRONYMS

BOT	Bank of Tanzania
Cap	Chapter
CEO	Chief Executive Officer
CISs	Collective Investment Schemes
CMSA	Capital Markets and Securities Authority
DSE	Dar es Salaam Stock Exchange
EAC	East African Community
EU	European Union
EGM	Enterprises Growth Market
FSA	Financial Services Authority
FSB	Financial Services Board
MIS	Management Information System
R.E	Revised Edition
SADC	Southern African Development Community
UK	United Kingdom



## **KEY WORDS**

Insider

Inside information

Insider trading

Insider dealing

Securities/Stock Market

Investor confidence



## TABLE OF CONTENTS

PLAGIARISM DECLARATION.....	i
DEDICATION.....	ii
ACKNOWLEDGEMENTS.....	iii
LIST OF STATUTES.....	iv
ACRONYMS.....	v
KEY WORDS.....	vi
ABSTRACT.....	x
CHAPTER ONE.....	1
INTRODUCTION TO INSIDER TRADING FRAMEWORK OF TANZANIA.....	1
1.1 Background to Insider Trading.....	1
1.2 Problem Statement.....	7
1.3 Significance of the Study.....	8
1.4 Research Question.....	8
1.5 Research Objectives.....	8
1.6 Methodology.....	9
1.7 Chapter Outline.....	9
CHAPTER TWO.....	11
OVERVIEW OF INSIDER TRADING LAW IN TANZANIA.....	11
2.1 Introduction.....	11
2.2 The Legal Regime on Insider Trading in Tanzania.....	11
2.3 Prohibition, Enforcement and Defences including Remedies on Insider Trading.....	13
2.4 Criminal and civil liabilities under the Capital Market and Securities Act.....	17
2.5 Conclusion.....	18
CHAPTER THREE.....	20
THE CAPITAL MARKETS AND SECURITIES AUTHORITY (CMSA).....	20
3.1 Establishment, Vision and Mission of the CMSA.....	20
3.2 Roles, Functions and Powers of the CMSA.....	24

3.3 The CMSA Board .....	26
3.4 Management of CMSA .....	27
3.5 Achievements of the CMSA .....	27
3.5.1 Establishment of the Dar es Salaam Stock Exchange (DSE) .....	27
3.5.2 Public Education Programme .....	29
3.5.3 Research Programs.....	29
3.5.4 Market Supervision.....	32
3.5.5 Regulations and Guidelines .....	32
3.6 Challenges that CMSA Faces .....	33
3.7 Conclusion .....	35
CHAPTER FOUR.....	36
REGULATION OF INSIDER TRADING IN THE UNITED KINGDOM (UK) AND SOUTH AFRICA: A COMPARATIVE PERSPECTIVE.....	36
4.1 Introduction.....	36
4.2 Insider Trading Regulation: the UK Perspective.....	36
4.2.1 The Concept of Inside Information in the UK.....	37
4.2.2 Who is an Insider? .....	38
4.2.3 Prohibition, Defenses and Enforcement of Insider Trading in the UK.....	39
4.3 Insider Trading Regulation: a South African Perspective .....	42
4.3.1 The Concept of Inside Information in South Africa .....	43
4.3.2 Who is an Insider? .....	44
4.3.3 Prohibition, Defences and Enforcement of Insider Trading in South Africa .....	45
4.4 Lessons to be learnt from English and South African Insider Trading Regulation .....	47
4.5 Conclusion .....	48
CHAPTER FIVE .....	49
CONCLUSIONS AND RECOMMENDATIONS ON IMPROVING THE TANZANIAN INSIDER TRADING REGULATORY FRAMEWORK.....	49
5.1 General Observation .....	49

5.2 Recommendations.....50  
Bibliography .....53



## **ABSTRACT**

This study is on the insider trading framework of Tanzania. The researcher has made enquiries whether the Tanzania legal framework governing insider trading provides strong enough enforcement mechanisms, including remedies and measures against malpractices found on the securities market to attract investor confidence. Critical analysis is done of the Capital Markets and Securities Act, 79 of 1994(R.E 2002) in conjunction with an investigation into the Capital Markets and Securities Authority (CMSA) a body corporate charged with the duties among others, of protecting the integrity of the securities market and maintaining surveillance over securities to ensure orderly, fair and equitable dealings in securities. The researcher uses a comparative approach from other jurisdictions considered as international best standards of the English and South African insider trading legislation. Discussions on the study are presented in chapters.

Chapter one is the general introduction to the Study. It is the reproduction of the research proposal. Chapter Two is on the overview of insider trading framework of Tanzania. An analysis is made on the provisions of the Capital Market and Securities Act, 79 of 1994 (RE 2002). It is revealed that the enforcement mechanisms are inadequate and ineffective. The Capital Market and Securities Act, 79 of 1994, (R.E 2002) neither defines nor provides the interpretation to legal concepts such as insider, inside information and publication. Civil remedies and criminal penalties provided in the Tanzania Capital Market and Securities Act, 79 of 1994, (R.E 2002) are inadequate for deterrent purposes to combat insider trading practices.

In chapter three the researcher examines the Capital Market and Securities Authority (CMSA) in terms of fulfillments of its roles, functions, and powers. It is submitted that the CMSA and the DSE have never contributed much to resolving the problem of securities market abuses. Chapter four extend the study to the English and South Africa insider trading legislation considered as international best practice and therefore comparable. The researcher has observed that flaws in areas of prohibition, enforcements, defences and the lacuna on identified concepts of insider trading make the Tanzanian insider trading legislation remain more symbolic than real in terms of its efficiency to combating insider trading practices.

Chapter five provides the conclusions and recommendations on the study. The researcher has provided recommendations on curbing the problem of insider trading in Tanzania, including repealing and enacting a new strong and effective insider trading legislation.

## CHAPTER ONE

### INTRODUCTION TO INSIDER TRADING FRAMEWORK OF TANZANIA

The purpose of the study is to enquire whether the Tanzanian legal framework governing insider trading provides strong enough enforcement mechanisms, including remedies and measures against malpractices found at the securities market. The researcher analyses the existing insider trading legislation, the Capital Market and Securities Act, Chapter 79 of 1994(R.E 2002) in conjunction with an investigation into the Capital Market and Securities Authority (CMSA) which was established as a body corporate charged with the duties among others, of protecting the integrity of the securities market and maintaining surveillance over securities to ensure orderly, fair and equitable dealings in securities. The regulatory framework is also examined in view of its applicability to all companies, financial instruments and financial markets investing in Tanzania. The researcher has adopted a comparative approach into other jurisdictions (South African legislation and the English legislation) and their regulation of insider trading to suggest ways which can make the Tanzanian framework stronger and more competitive.

#### 1.1 Background to Insider Trading

Insider trading is a practice by which one person armed with price or value sensitive non-public (confidential) information, concludes a transaction in securities to which that information relates without sharing that piece of information with others.<sup>1</sup> Also, insider trading includes tipping off others when you have any sort of non- public information.<sup>2</sup> Insider trading is composed of the following elements: there is an informationally advantaged party possessing information that the trading partner could not possibly have accessed through the exercise of diligence or the expenditure of financial resources; the informationally advantaged party is able to achieve abnormal profits or avoid losses in an extraordinary fashion; and the perpetrators of insider trading are usually persons whose use of the securities related information they possess in securities trading violates some legal (contractual/ fiduciary) or moral duty.<sup>3</sup> Insider trading is also a malpractice in that trade in a company's securities is undertaken by people who by virtue of their work have access to the

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<sup>1</sup>Arshadi N&Eyssell T H *The Law and Finance of Corporate Insider Trading: Theory and Evidence* (1993) 240.

<sup>2</sup> Available at <http://www.businessdictionary.com>(accessed 22/10/1014).

<sup>3</sup> Cassim FHI et al *Contemporary Company Law* (2011) 944-946.

otherwise non -public information which can be crucial for making investment decisions while the other stock holders are at a great disadvantage due to lack of important insider non-public information.<sup>4</sup> Directors are not the only ones who have the potential to be convicted of insider trading; other people, such as, brokers and even family members, can be guilty.<sup>5</sup>

Insider trading is also frequently used to refer to a practice in which an insider or a related party trades based on material non-public information obtained during the performance of his duties at the company, or in breach of a fiduciary duty, in most cases such a practice is conducted fraudulently, where the person who has obtained the information has a fiduciary duty to share it but fails to exercise it.<sup>6</sup>

The term 'insider' under the Capital Market and Securities Act, Chapter 79 of 1994, (R.E 2002) is not defined and is not even given any interpretation. Insider is only referred to under section 112 of the Capital Market and Securities Act, Chapter 79 of 1994 which establishes generally the offence of insider trading, as a prohibition of dealing in any securities. This lack of a clear legal limit on who is an insider is a weakness in the insider trading law of Tanzania and it provides a loophole to open interpretations. Singh is of the view that if a statutory provision is open to more than one interpretation the task for the court is not an easy one and the difficulties arise of borderline cases falling within or outside the connotation of a word.<sup>7</sup>

Dooley defines an insider as any person who makes illegal disclosure of confidential information to any other person against the company to which that person owes the fiduciary duty to refrain from self-dealing in confidential information.<sup>8</sup> Studies have categorised insiders into two groups; primary insiders also referred to as traditional insiders, who include corporate insiders such as executives, board members, officers, and controlling shareholders, and secondary or constructive insiders like lawyers, accountants, investment bankers and brokers and dealers who may be privy to private information by virtue of a contractual relationship with the firm or its shareholders.<sup>9</sup> It is suggested further that relatives, personal

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<sup>4</sup> Cassim FHI et al *Contemporary Company Law* (2011) 833.

<sup>5</sup> Available at <http://www.businessdictionary.com>(accessed 22/10/1014).

<sup>6</sup> Massawe H T & Kadilu M on 'Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/ 3/2015).

<sup>7</sup> Prasanna S G *Statutory Interpretation* 12 Ed (2010) 3 & 4.

<sup>8</sup> Dooley M P 'Enforcement of insider trading restrictions' (1980) 66 *Virginia Law Review* 1-66:89.

<sup>9</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 5.

and political associates may also be classified as insiders so long as they might have received information unavailable to the rest of the public for their benefit.<sup>10</sup> Primary insiders generally gain from insider trading, and there is evidence suggesting that insider trading on the basis of private information is highly profitable in the context of corporate takeovers in the world.<sup>11</sup>

The need for regulation of insider trading is envisioned in the very potential contribution that stock markets can offer to economic growth if insider trading practices are well regulated. Insider trading practices undermine the integrity of the investing system and therefore discourage non-insiders from investing unless they believe they are operating on the same footing as insiders who are investing. Allowing insider trading to go unchecked would reduce a number of investors willing to invest their capital and therefore could potentially harm the economy as a whole.<sup>12</sup>

Scholars are of different views about insider trading regulation; some have argued in support of insider trading practices while others have argued against. There are those who argue that trading on inside information lessens investors' confidence in the market's shares, by diminishing the integrity of the market, rendering it useless and therefore detrimental to the economy as a whole.<sup>13</sup> Different papers have discussed pros and cons of insider trading regulation.<sup>14</sup> The regulation of insider trading is necessary to have accurate and strong financial markets. Manne<sup>15</sup> is of the view that a ban of insider trading regulation would adversely affect market efficiency and it would impede an effective way to compensate managers. Economic arguments are based on the view that a ban would reduce adverse selection costs and increase liquidity, improve confidence in the market, reduce interference in corporate plans, improve investments and welfare, and motivate large shareholders to

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<sup>10</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 6.

<sup>11</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 6.

<sup>12</sup> Massawe H T & Kadilu M on 'Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/3/2015).

<sup>13</sup> Cassim FHI et al *Contemporary Company Law* (2011) 930: 'Insider trading is perceived by its opponents as harmful to the integrity of the securities market because it adversely affects the public confidence in that market.'

<sup>14</sup> Hamez D 'The world price of insider trading' available at [https://ciber.fuqua.duke.edu/~charvey/Teaching/BA453\\_2005/BD\\_The\\_world.pdf](https://ciber.fuqua.duke.edu/~charvey/Teaching/BA453_2005/BD_The_world.pdf) (accessed 22/10/1014).

<sup>15</sup> Manne H G 'In defence of insider trading' (1966) 44 *Harvard Business Review* 113-122.

monitor management instead of seeking to profit from inside information.<sup>16</sup> The legal arguments for a ban have been converging to the view that inside information may be a property of the corporation, and trading on that may be theft.<sup>17</sup> Insider trading amounts to theft of a company's or corporation's property, and must be prohibited by law to diminish and avoid the consequences it may have for companies and financial markets. It is an open question whether the regulation of insider trading should be restricted to regulated markets. As it is also argued by Beny,<sup>18</sup> recent empirical studies address the economic implications of insider trading laws and enforcement. These studies support the claim that insider trading legislation is efficiency enhancing. Barring insider trading is a superlative means of safeguarding property and is important for any company to continue to be competitive and resourceful.<sup>19</sup> This view is supported by Dooley who states that illegal disclosure of confidential information by an insider to any other person is an offence against the company to which that person owes the fiduciary duty to refrain from self-dealing in confidential information.<sup>20</sup> The proprietary rights in relation to its confidential information accrue to the company which should have in place an internal insider trading regulatory framework that prohibits insiders and others from selectively dealing with it at the company's expense.<sup>21</sup> The basic argument against insider trading is that insiders should not be permitted at the expense of uninformed traders.<sup>22</sup> This argument is also supported by Cassim et al who state that insider trading is unfair because there is no equality of information to investors.<sup>23</sup> Bainbridge argues that the goal of insider trading laws, which is to uphold a fair stock market, is misguided.<sup>24</sup> Every day stock market participants trade securities based on imperfect information. In virtually every transaction, one party's information is superior to that of the

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<sup>16</sup> Manne H G 'In defence of insider trading' (1966) 44 *Harvard Business Review* 113-122.

<sup>17</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 1-2.

<sup>18</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 1-2

<sup>19</sup> Bainbridge S M 'The insider trading prohibition: a legal and economic enigma' (1986) 38 *University of Florida Law Review* 35: 38.

<sup>20</sup> Dooley M P 'Enforcement of insider trading restrictions' (1980) 66 *Virginia Law Review* 1-66:89.

<sup>21</sup> Dooley M P 'Enforcement of insider trading restrictions' (1980) 66 *Virginia Law Review* 1-66:89.

<sup>22</sup> 'Insider trading' available at <http://www.econlib.org/library/> (accessed 30/8/2014).

<sup>23</sup> Cassim FHI et al *Contemporary Company Law* (2011) (2011) 930.

<sup>24</sup> Bainbridge S M & Dooley M P on "How insider trading should be regulated" available at <http://www.genesisanalytics.com> (accessed 30/8/2014).

other. Furthermore, it is only possible to enforce insider trading laws when a trader decides to buy or sell a security. However the decision *not to* trade a security is sometimes equally important. If you are an inside source at a company whose stock you do not own and you see a financial statement, and it is disappointing, you will make a decision not to buy that security.<sup>25</sup> That decision is illegal, but can never be established. He further argues that insider trading laws prevent the market from reflecting all available information about securities. By preventing those who know more about a stock from acting on that information, you impede the natural tendency of markets to set prices.<sup>26</sup>

It is not easy to appreciate how insider trading can be an efficient disclosure mechanism since the trading mostly takes place before publication of the information. Manne further argues that because insider trading is based on the use of non- public information it will, whenever it occurs cause prices to alter and to replicate the value of the securities more accurately.<sup>27</sup> However Beny support on the claim that insider trading legislation is efficiency enhancing.<sup>28</sup> He further poses a question that if insider trading legislation promotes efficiency, why was insider trading legal for so long in so many countries, and why do insiders (and their associates) continue to trade with impunity in many markets in which insider trading has long since been illegal?

The arguments expressed above exposes the conflicting scholarly views on insider trading regulation and such is the result of existing theories on insider trading legislation. Public

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<sup>25</sup> Bainbridge SM & Dooley M P ‘How insider trading should be regulated’ available at <http://www.genesisanalytics.com> (accessed 30/8/104).

<sup>26</sup> ‘Why-is-insider-trading-even-illegal’ available at <http://business.time.com> (accessed 1/9/2014).

<sup>27</sup> Manne H G ‘In defence of insider trading’ (1966) 44 *Harvard Business Review* 113-122. Also see Calton D W and Fischel D R ‘The Regulation of insider trading’ (1983) 35 *Stanford Law Review* 857-866. The proponents of the deregulation of insider trading submit that it promotes market efficiency because the persons who possess inside information will not trade in securities or financial instruments without practically disclosing it. Calton and Fischel as well as Manne, are of the view that the regulation of insider trading will worsen the manager-shareholder conflict. Hence it is both undesirable and unnecessary to regulate it. Furthermore they maintain that insider trading is a victimless offence, hence enforcing insider trading laws discourages corporate investments and is not cost effective.

<sup>28</sup> Beny L N ‘The political Economy of Insider Trading Legislation and Enforcement: International Evidence’ (2002) 348 *Harvard Law School Discussion Paper* 1-2.

interest theories of insider trading regulation, for example, suggest that governments undertake reforms in order to correct market failures and to enhance economic efficiency.<sup>29</sup> In that sense insider trading regulation is seen as an attempt by the government to correct a socially inefficient market failure that market participants are unwilling or unable to solve through private contracting. The critique to public interest theories of regulation is that the theories seem to be weak in that they are vague about the mechanism(s) through which the need for regulatory remediation is translated into public policy.<sup>30</sup> The theories leave the question about when the government has the requisite political will to undertake efficiency-enhancing reforms unanswered. As a matter of fact market inefficiencies often persist for long periods without governmental intervention, sometimes on the reason of effective opposition to reform arising from the entrenched political and economic elite. Observation has generally been made that whether opponents or proponents of insider trading legislation prevail, in other words, whether insider trading legislation is efficiency enhancing (as the evidence suggests) or simply an inefficient redistributive policy, the dynamics of insider trading policy is an interesting research question to be attempted by other researchers.<sup>31</sup>

Many countries despite their differences in financial, legal, political, and institutional frameworks have expressed the disapproval of the illegal practices of insider trading. Tanzania treats the practice of insider trading as both a criminal offence as well as a cause for civil action. It is submitted that active enforcement of insider trading legislation helps investment companies to have a broader market base and aids countries to maintain viable economies. The researcher agrees on the view that insider trading must be treated as an offence against the company or the issuer of affected securities and the prejudiced investors. But treating the practice of insider trading as an offence alone does not suffice for the purpose of establishing a strong and reliable securities market. The legal framework regulating the practices of insider trading should strongly address how established offences can be enforced. Furthermore remedial measures against committed offences must be adequately addressed by

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<sup>29</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 15.

<sup>30</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 15.

<sup>31</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 15.

insider trading legislation. In this manner the insider trading framework will be protecting investors trading on the securities market.

The enactment of the Tanzania Capital Market and Securities Act, Chapter 79 of 1994 was a positive indication that the Tanzanian authorities and policy makers acknowledge that insider trading undermine public investor confidence, reduce market efficiency, negatively affect company's performance and that these affect the economy. It is against this view that this study is conducted. The study seeks to investigate whether the Tanzanian legal framework governing insider trading provide strong enforcement mechanisms, including remedies and measures against malpractices found on the securities market.

## 1.2 Problem Statement

Insider trading is identified as one of the major problems in many financial markets worldwide, particularly in Africa's growing financial markets.<sup>32</sup> In Tanzania, insider trading appears to be a common practice due to lack of a strong regulatory framework.<sup>33</sup> This in turn has hindered market efficiency and has lowered investor confidence. It has accelerated problems, such as, illiquidity, irregular trading, and fewer listing of companies, which limit the attractiveness of the capital market for both domestic and foreign investors. There are an increasing number of stock exchanges at the global level and in Africa at the regional level. Tanzania is one of the East African states that have agreed to integrate their financial sectors including capital markets and securities.<sup>34</sup> There is a need for Tanzania to have a strong regulatory framework regarding insider trading to enhance investor confidence and to facilitate competition among investors trading and those wishing to trade in securities on the Tanzania capital market. The flaws, duplications and ambiguities found in the Tanzania insider trading legislation, the Capital Market and Securities Act,<sup>35</sup> however, need to be addressed. The definition of 'insider trading' including the elements of the offence and who qualifies as an insider,<sup>36</sup> and the absence of strong enforcement mechanisms and remedial

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<sup>32</sup> Beny L N 'The political Economy of Insider Trading Legislation and Enforcement: International Evidence' (2002) 348 *Harvard Law School Discussion Paper* 15.

<sup>33</sup> Hamez D 'The world price of insider trading' available at [https://ciber.fuqua.duke.edu/~charvey/Teaching/BA453\\_2005/BD\\_The\\_world.pdf](https://ciber.fuqua.duke.edu/~charvey/Teaching/BA453_2005/BD_The_world.pdf) (accessed 22/10/1014).

<sup>34</sup> Article 85 of the Treaty for the Establishment of the East African Community, 1999.

<sup>35</sup> Capital Market and Securities Act Chapter 79 of 1994(RE 2002).

<sup>36</sup> Section 112 (1) of the Capital Market and Securities Act Chapter 79 of 1994(RE 2002) defines 'insider' as 'a person who is, or has at any time in the preceding six months prior to a specific deal been connected with a body

measures in the Capital Market and Securities Act are among the problems that should be addressed in regulating insider trading. Such are the problems for which this study endeavours to find solutions by examining the existing regulatory framework to ensure adequate and competitive trading in securities in Tanzania.

### **1.3 Significance of the Study**

The study makes suggestions to provide a clear roadmap for a strong, effective, efficient, adequate and internationally competitive insider trading regulatory framework for Tanzania; and for the existence and enforcement thereof. The study is intended to eliminate or at least reduce as far as possible insider trading activities in order to protect the economy by promoting and building public investor trust and confidence. Awareness about insider trading activity and market efficiency ensure confidence and is fair to other investors who do not have access to information, and this establishes a perfect competition model for Tanzania. The study is also of great significance to a country's economic growth and capital market development in the liberalised market economy.

### **1.4 Research Question**

Is the Tanzanian legal framework governing insider trading providing strong enforcement mechanisms, including remedies and measures against malpractices found on the securities market?

### **1.5 Research Objectives**

The general objective of this research is to analyse the Tanzanian insider trading framework with the purpose of providing strong enforcement mechanisms, including remedies and measures against malpractices found in the market to ensure market efficiency and to build investor confidence.

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corporate shall not deal in any securities of that body corporate if by reason of his association, he is in possession of information that is not generally available but, if it were, might materially affect the price of those securities.'

### **Specific Objectives of the Research are:**

- (i) To examine the Tanzanian insider trading framework in view of its applicability to all companies, financial instruments and financial markets investing in the country.
- (ii) To investigate whether the Tanzanian insider trading regulatory framework can adopt, and even be amended to align with the latest developments in other jurisdictions.
- (iii) To offer a solution for the insider trading problems in Tanzania.

### **1.6 Methodology**

This research is a qualitative type, and desktop and library based study. It critically analyses the legal framework governing insider trading in Tanzania, and also examines the law necessary to ensure a good environment for investing in securities. The researcher has employed both primary and secondary data resources to explore relevant information. The researcher has reviewed legislation, directives, rules, regulations, policies, reports and information from relevant case law as primary resources. The secondary resources used include books, journal articles, conference papers, theses and an extensive range of internet resources. The researcher used the explanatory method to analyse the data obtained from both primary and secondary resources. A comparative study has also been used as a way of drawing upon the wisdom of other jurisdictions considered as best international standard on insider trading of the South African and UK legislation. The UK and South African legislation align to the international best practice, and they provide strong and reliable frameworks in regulating insider trading for market efficiency as compared to the Tanzanian insider trading framework.

### **1.7 Chapter Outline**

**Chapter one** together with this chapter outline provides the background to insider trading, the problem statement, and the objectives of the study, the significance of the problem, the research questions and the research methodology.

**Chapter two** contains an analysis of the Tanzanian insider trading legislation by providing a general overview of the development of insider trading law in Tanzania. The chapter analyses the provisions of the Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002), including: the meaning and interpretation of the concepts of ‘insider and insider trading’. This chapter examines insider trading acts under the Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002); whether there have been prosecution under insider trading law

(successfully /unsuccessfully); the prescribed penalties and defences; and the civil remedies and criminal sanctions in terms of the Tanzanian Act. The chapter further discusses whether or not the current regulatory framework has successfully fulfilled its objectives viz to protect the integrity of the securities market against any abuses arising from the practice of insider trading, as well as to maintain surveillance over securities, and to ensure orderly, fair and equitable dealings in securities.

**Chapter three** focuses on the Capital Market and Securities Authority, it examines whether it has fulfilled its purposes in terms of the Capital Market and Securities Act, chapter 79 of 1994, which is promoting and facilitating the development of an orderly, fair and efficient capital market and securities industry in Tanzania, and to make provisions with respect to stock exchanges, stockbrokers and other persons dealing in securities, and for connected purposes.

**Chapter four** is a comparative study on the regulation of insider trading in other jurisdictions with good inside trading legislation: South Africa and the United Kingdom. It also investigates whether Tanzania's insider trading regulatory framework can adopt and learn to amend legislation and to provide strong and reliable legislation that aligns with the latest developments elsewhere.

**Chapter five** is the conclusion and recommendations. This chapter makes suggestions as to what should be done to deal with the weaknesses of Tanzania's insider trading legislation.

## CHAPTER TWO

### OVERVIEW OF INSIDER TRADING LAW IN TANZANIA

#### 2.1 Introduction

This chapter contains an analysis of the Tanzanian insider trading legislation by firstly providing a general overview of the development of insider trading law in Tanzania. The chapter analyses the provisions of the Capital Market and Securities Act, Chapter 79 of 1994 (R.E 2002), including an examination of insider trading acts under the Capital Market and Securities Act, Chapter 79 of 1994; whether there have been prosecution in terms of insider trading law (successfully /unsuccessfully); the prescribed penalties and defences; and the civil remedies and criminal sanctions in terms of the Tanzanian Act. The arguments attempt to answer the question as to whether or not the current insider trading regulatory framework has successfully fulfilled its objectives viz to protect the integrity of the securities market against any abuses arising from the practice of insider trading, as well as to maintain surveillance over securities, and to ensure orderly, fair and equitable dealings in securities.

#### 2.2 The Legal Regime on Insider Trading in Tanzania

The Tanzanian legal regime on trading in securities which encompasses insider trading is not as old as it can be compared from other jurisdictions.<sup>37</sup> The Tanzania legal regime on trading in securities dates from 1994, when the first legislation on trading in securities was enacted, the Capital Market and Securities Act, Chapter 79 of 1994 (R.E 2002). This legislation is a result of the efforts that the government of Tanzania is making in its investment sector for the purpose of raising its economy and making it internationally competitive. The government of Tanzania has with some rapidity been adopting changes in its economy, from constraints of centrally planned economy to more open market based regime. Dynamic economic policies, legal and institutional frameworks have been adopted for the purpose of coping with the ongoing changes in the world economic system- the free market economy.<sup>38</sup> The shift from a state centered economy to a market oriented economy also referred to as a liberalized

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<sup>37</sup> The US is the first country to have a legal framework on insider trading practices under the Securities Exchange Act of 1934. See Massawe H T & Kadilu M on '*Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002*' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/ 3/2015).

<sup>38</sup> Report of Legal and Human Rights Centre on: Uranium Mining Impact on Health and Environment available at [www.humanrights.or.tz](http://www.humanrights.or.tz) (accessed 5/8/ 2014).

economy<sup>39</sup> has had significant impacts, in particular the need to control insider trading practices on the stock markets. From 1994 various reform paths in the economy including reforms in the investment sector where capital markets fall have been taking place.<sup>40</sup> These changes have resulted in the establishment of only one stock exchange, the Dar es Salaam Stock Exchange, hereafter referred to as DSE which was established in 1996.<sup>41</sup> DSE became operational in 1998.<sup>42</sup> However, since its establishment only a few companies are listed on the DSE despite many companies operating in Tanzania.<sup>43</sup>

The Capital Market and Securities Act, Chapter 79 of 1994, (RE 2002) establishes the Capital Market and Securities Authority, referred to as CMSA, which is a body corporate for promoting and facilitating the development of orderly, fair and efficient capital stock exchanges, stockbrokers, and other persons dealing in securities.<sup>44</sup> Among the prescribed functions of CMSA include; protecting the integrity of the securities market against any abuses arising from the practice of insider trading, maintaining surveillance over securities to ensure orderly, fair and equitable dealings in securities and creating the necessary environment for the orderly growth and development of capital market.<sup>45</sup>

The Capital Market and Securities Act of 1994, has been amended several times to incorporate the needs of the securities market in the country. The first amendment was in the year 1997 which incorporated changes that were related to market players and operators for the purpose of giving more protection and security to the securities investors.<sup>46</sup> The second amendment was in the year 2002 which was done in view of coordinating with the changes in

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<sup>39</sup> Massawe H T & Kadilu M on 'Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/ 3/2015).

<sup>40</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/.../tanzania-capital-markets-report](http://www.tanzaniainvest.com/.../tanzania-capital-markets-report).

<sup>41</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/.../tanzania-capital-markets-report](http://www.tanzaniainvest.com/.../tanzania-capital-markets-report).

<sup>42</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/.../tanzania-capital-markets-report](http://www.tanzaniainvest.com/.../tanzania-capital-markets-report).

<sup>43</sup> Massawe H T & Kadilu M on 'Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/ 3/2015).

<sup>44</sup> Section. 6 of the Capital Market and Securities Act, Chapter 79 of 1994, (RE 2002).

<sup>45</sup> Section 10 of the Capital Market and Securities Act, Chapter 79 of 1994, (RE 2002).

<sup>46</sup> 'Capital Markets and Securities Authority (CMSA)' available at [www.cmsa-tz.org](http://www.cmsa-tz.org) (accessed 3/7/2015).

other laws related to the securities industry in the country and, which have a direct impact on the operation of securities market, the Companies Act<sup>47</sup> and the Fair Competition Act.<sup>48</sup>

### **2.3 Prohibition, Enforcement and Defences including Remedies on Insider Trading**

The discussion of this part is against the submission laid down in the background information to this chapter, which generally seeks to establish stronger, more effective, adequate and internationally competitive legislation to protect the Tanzanian securities market from illicit practices such as insider trading, and to recommend practical measures to reduce deficiencies to attract investors' confidence. Supporting arguments on this part are established on the major premise that although some amendments have been done (the 1997 and the 2002 amendments) to the 1994 Capital Markets and Securities Act, many deficiencies still exist in the Act including inadequate and ineffective enforcement mechanisms and lack of clear limits to some important legal concepts. And one of the recommended practical measures that may be taken to resolve the problem of insider trading in Tanzania is the enactment of new legislation that is strong and effective to combat insider trading practices on the securities market. An analysis is done of the provisions of the Capital Market and Securities Act, 1994 as to whether the Act has successfully fulfilled its objectives, which are purportedly aimed at protecting the integrity of the securities market against any abuses arising from the practice of insider trading. Further discussion is developed in terms of a critical examination of the penalties, defences and remedies proscribed in the Capital Market and Securities Act of 1994.

Insider trading falls under part ix of the Capital Market and Securities Act, Chapter 79 of 1994. The Act<sup>49</sup> prohibits dealings in securities by insiders. In Tanzania insider dealing is treated as both a civil wrong and a criminal offence.<sup>50</sup> The offence of insider trading is established under section 112 of the Capital Market and Securities Act, mainly with the view to securing the integrity of the securities market from abuses by insider trading practices, to attract both domestic and foreign investors to trade on the Tanzanian securities market. Regarding acts that amount to insider trading, the Capital Market and Securities Act, 1994

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<sup>47</sup> The Companies Act Chapter 212 of 1999 (R.E 2002).

<sup>48</sup> The Fair Competition Act Chapter 8 of 2002.

<sup>49</sup> The Capital Market and Securities Act Chapter 79 of 1994 (RE 2002).

<sup>50</sup> The Capital Market and Securities Act Chapter 79 of 1994 (RE 2002).

provides under subsection (1) and (2) of section 112 of the Capital Market and Securities Act inter alia that;

“(1) A person who is, or has at any time in the preceding six months prior to a specific deal been connected with a body corporate shall not deal in any securities of that body corporate if by reason of his association, he is in possession of information that is not generally available but, if it were, might materially affect the price of those securities. (2) A person who is, or has at any time in the preceding six months prior to a specified deal been connected with a body corporate shall not deal in any securities of another body corporate if by reason of his being; or having been connected with the first-mentioned body corporate he is in possession of information that; (a) is not generally available but, if it were, would be likely to affect materially the price of those securities; and (b) relates to any transaction (actual or expected) involving both those bodies corporate or involving one of them and the securities of the other.”

From the above provisions, an insider can be defined to mean a person who is connected to a body corporate and being so connected, he has obtained inside information not available to the public that if it were, might materially affect the price of the securities. Subsection (8) of section 112 provides that persons connected with a body corporate as to acquire inside information includes, a natural person such as an officer of that body corporate or of a related body corporate; a substantial shareholder in that body corporate or in a related body corporate; or any occupier of a position that may reasonably be expected to give him access to inside information about a body corporate. It also includes any professional or business relationship existing between himself (or his employer or body corporate of which he is an officer) and that body corporate or a related body corporate; or an officer or a substantial shareholder in that body corporate or in related body corporate or a dealer's licence. And an "officer", in relation to a body corporate is defined by the Capital Market and Securities Act of 1994 to include;

(a) director, secretary, executive officer or employee of the body corporate; (b) a receiver, or receiver and manager, of property of the body corporate; (c) an official manager or a deputy official manager of the body corporate; (d) a liquidator of the body corporate; and (e) a trustee or other person administering a compromise body corporate and another person.

The scope of the definition of insider in this regard is wide. It covers various categories of insiders like primary insiders such as directors, employees or share holders 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 profession. Secondary insiders such as tippees are also covered. The researcher agrees with Cassim on the view that a company which repurchases its own shares is an insider to itself.<sup>51</sup>

The Capital Market and Securities Act of 1994 does not provide a definition as to what amounts to inside information of a body corporate. It is only from the provision of section 112 subsections (1) and (2) that one can interpret to the extent that inside information refers to any information that is not generally available to the public but, if it were, might materially affect the price of the securities at the market. This would mean that not all information is treated as inside information for the purposes of regulating insider trading. Cassim et al define inside information as specific or precise information which has not been made public and which (a) is obtained or learned as an insider, and (b) 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.<sup>52</sup> In order for the information to qualify as inside information in the view of Cassim, the information must be specific or precise, not have been made public, must be obtained or learned as an insider and 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.<sup>53</sup> The Capital Market and Securities Act defines security very widely. It provides that securities include:

- (a) debentures, stock, shares, bonds, or notes issued or proposed to be issued by a body corporate and any right, warrant or option in respect thereof; (b) bonds or other loan instruments of the Government of Tanzania or of any other country; (c) rights or interests, whether described as units or otherwise under any collective investment scheme; (d) such other rights, interests or instruments as the Minister may prescribe by notice in the *Gazette*.

It is submitted that the definition provided by the Act has excluded other interests such as instruments based on an index, derivative instruments, depository receipts in public companies and other equivalent equities other than shares from the meaning of securities.

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<sup>51</sup> Cassim FHI et al *Contemporary Company Law* (2011) 944.

<sup>52</sup> Cassim FHI et al *Contemporary Company Law* (2011) 940.

<sup>53</sup> Cassim FHI et al *Contemporary Company Law* (2011) 940.

The Capital Market and Securities Act of 1994 defines a stock market to mean a market, exchange or other place, at which, or a facility by means of which, securities are regularly offered for sale, purchased or exchanged.

Dealing in securities in terms of the Capital Market and Securities Act means whether as principal or agent making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into;

(a) any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities; or

(b) any agreement the purpose or the intended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities.

Dealing in securities by an insider is prohibited, especially on information that is not published but, if it were, might materially affect the price of those securities.<sup>54</sup> The Capital Market and Securities Act does not provide the meaning of the term “publication.” However, 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 failure of the Act to provide the meaning of the term “publication” is a weakness in law because publication of inside information carries a heavy weight to the establishment of the offence of insider trading. As it is discussed by Cassim et al the legislation should clearly state circumstances in which information is to be regarded as having been made public so that the moment it is published, dealing is permissible.<sup>55</sup>

Again it is submitted that even the method through which inside information is purported to have been possessed does not preclude other methods of having received inside information so as to cause the commission of the offence of insider trading. Inside information can still be acquired through other methods such as espionage, theft, bribery, fraud, misrepresentation or any other wrongful method to affect materially the price of securities on the market. The Act does not provide for information obtained by theft as an offence. This is a loophole in the Act.

The Capital Market and Securities Act of 1994 has established other offenses related with dealing in securities such as false trading and market rigging transactions, stock market

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<sup>54</sup> Section 112 subsections (1) and (2) of the Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002).

<sup>55</sup> Cassim FHI et al *Contemporary Company Law* (2011) 941.

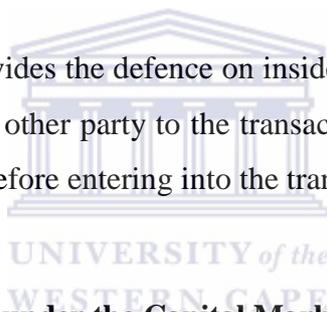
manipulation, false or misleading statements, fraudulently inducing persons to deal in securities, dissemination of information about illegal transactions, employment of manipulative and deceptive devices.<sup>56</sup>

Subsections (4) and (6) of section 106 of the Capital Market and Securities Act of 1994 provide defences regarding false trading and market rigging transactions as follows;

that it is a defence if the defendant establishes that the purpose for which he did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on the stock exchange. Subsection 6 of section 106 provides the defence if the defendant establishes that the purpose for which he purchased or sold the securities was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.

Subsection (2) of section 109 provides the defence on the offence of fraudulently inducing persons to deal in securities.

Subsection 10 of section 112 provides the defence on insider trading that it is a defence if the person satisfies the court that the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction.



#### **2.4 Criminal and civil liabilities under the Capital Market and Securities Act**

Section 113 (1) provides generally that any person who contravenes any of the provisions of this Part is liable on conviction to a fine of not less than five million shillings or to imprisonment for a term of not less than five years or to both such fine and imprisonment.<sup>57</sup>

Subsection (2) of section 113 imposes civil liability on an insider who, in a transaction for the purchase or sale of securities entered into with him or with a person acting for or on his behalf, suffers loss because of the difference between the price at which the securities were dealt in and the price at which they might have been dealt in at the time when the transaction took place if the contravention had not occurred.<sup>58</sup>

It is submitted that the 5 million Tanzanian shillings fine and a 5 years imprisonment term or both cannot be an effective deterrent. It is still possible that prospects of enormous profits

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<sup>56</sup> Sections 106, 107, 108, 109, 110 and 111 of the Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002).

<sup>57</sup> The Capital Market and Securities Act Chapter 79 of 1994(RE 2002).

<sup>58</sup> The Capital Market and Securities Act Chapter 79 of 1994(RE 2002).

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. In Tanzania insider trading practices at the securities market is rampant and nothing like prosecution has been put into criminal records. It is submitted that despite the fact that the practice of insider trading is rampant on the securities market nobody has been prosecuted, successfully or unsuccessfully for insider trading in Tanzania.

Subsection (3) of section 113 requires the amount of compensation for which a person is liable under subsection (2) of section 113 to be the amount of the loss sustained by the person claiming the compensation.<sup>59</sup>

The Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002) under subsection (5) of section 113 allow the operation of any other laws to enforce any liability that a person may incur due to the practice of insider trading. This is a flaw in the Capital Market and Securities Act. Instead of regulating the securities market, the Capital Market and Securities Act invites other laws to supplement it. Therefore for any investor to be able to invest in the Tanzania securities industry he must have knowledge of other Tanzanian laws than relying on the Capital Market and Securities Act alone something which discourages investors.

Furthermore, criminal sanctions as discussed in this chapter can 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. In addition to the inadequacies relating to enforcement, the Capital Market and Securities Act contains a number of inconsistencies and ambiguities that lead to uncertainties that were put forward in this chapter.

## **2.5 Conclusion**

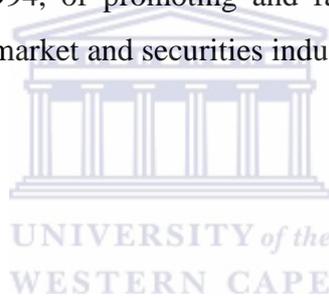
The analysis of the provisions of the Capital Market and Securities Act, Chapter 79 of 1994 (RE 2002) which is a result of an attempt to adequately resolve the problem of insider trading on the Tanzanian securities market has revealed that the current enforcement mechanisms are inadequate and ineffective. The Capital Market and Securities Act of 1994, (R.E 2002) neither defines nor provides the interpretation of the term ‘insider.’ Insider is only referred to under section 112 of the Act as a prohibition of dealings in securities. However

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<sup>59</sup> The Capital Market and Securities Act Chapter 79 of 1994(RE 2002).

there has never been prosecution in terms of insider trading legislation successfully in spite the existence of illicit practices on the securities market. Civil remedies and criminal penalties provided in the Tanzanian Capital Market and Securities Act of 1994, (R.E 2002) are inadequate for deterrent purposes. The application of the Act is limited to insider trading activity in respect of securities listed on the Dar es Salaam Stock Exchange, the only regulated market in the country.<sup>60</sup> It is submitted that the Capital Market and Securities Act of 1994, (R.E 2002) which is the Act established to regulate insider trading is still inadequate and ineffective for purposes of combating insider trading in Tanzania. There is an urgent need to introduce more effective practical measures to ensure speedy enforcement of insider trading legislation and to eliminate insider trading practices on the Tanzania securities market.

In the next chapter, which is chapter three, the researcher examines the Capital Market and Securities Authority, whether it has fulfilled its purposes in terms of the Capital Market and Securities Act, chapter 79 of 1994, of promoting and facilitating the development of an orderly, fair and efficient capital market and securities industry in Tanzania.



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<sup>60</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/.../tanzania-capital-markets-report](http://www.tanzaniainvest.com/.../tanzania-capital-markets-report) (accessed 8/7/2015).

## CHAPTER THREE

### THE CAPITAL MARKETS AND SECURITIES AUTHORITY (CMSA)

This chapter focuses on the Capital Markets and Securities Authority (CMSA). In this chapter the researcher examines the CMSA in view of its roles, functions and powers conferred by Section 10 of the Capital Markets and Securities Act, Chapter 79 of 1994. The roles, functions and powers of the CMSA include: to protect integrity of the securities market against any abuse arising from the practice of insider trading and other market related manipulative abuses. To ensure proper supervision and enforcement of prohibition of insider trading, to maintain surveillance over securities and to ensure orderly, fair, equitable and efficient dealings in securities. It is against this that the researcher has raised the question whether the CMSA fulfils its purposes in terms of the Capital Markets and Securities Act, including promotion and facilitation of the development of a strong, efficient, effective, equitable and internationally competitive securities legal framework in Tanzania.

#### 3.1 Establishment, Vision and Mission of the CMSA

The formation of the CMSA is a result of comprehensive financial sector reforms that were aimed at, among others, developing capital markets to provide appropriate mechanisms for mobilising long term savings and ensuring their efficient allocation to productive sectors, thus fuelling economic growth.<sup>61</sup> Tanzania, like other African countries, was badly affected by the economic crises of the 1970s and 1980s which reached a critical level, especially after the oil price shock of 1979.<sup>62</sup> In an effort to reform its economy, in the early 1980s, the government launched two stabilisation programs, namely the National Economic Survival Program (NESP) in 1980/81 and the Structural Adjustment Program (SAP) of 1982/83.<sup>63</sup> Among the objectives of these programs were; (a) to restore the national output to the pre-1978 level, (b) improve the public sector finances, (c) reduce inflation, (d) improve the balance of payments, and (e) restructure the economic activities through a system of

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<sup>61</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

<sup>62</sup> Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

<sup>63</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

incentives and prices.<sup>64</sup> These programs were also designed to improve capacity utilisation and labour productivity in Tanzania. The objectives were to be achieved through the removal of inter-regional trade barriers and abolishing price controls caused by the adoption of the Arusha declaration in 1967 as a way to implementing *ujamaa* policy.<sup>65</sup> The government of Tanzania adopted *ujamaa* policy soon after independence which empowered the government to nationalise all private owned financial institutions. This policy was aimed at providing credit to the private sector in order to promote growth and make the country self-reliant. As also argued by Ziorklui, the repressive policies of the government had its own seeds of destruction.<sup>66</sup> By 1979, the distress in the Tanzanian economy was clearly visible. Analysis of the Tanzania economy revealed the shortcoming that constrained the development of a well functioning capital market in Tanzania.<sup>67</sup> One of the major miscalculations was the expectation of foreign capital inflows, which never materialised. As a result, not much was achieved at the end of the reform program and there was the need for another adjustment program.<sup>68</sup>

Thus, in 1986 Tanzania adopted another comprehensive and major economic reform namely, Structural Adjustment Programs under IMF/World Bank supervision with the following objectives; to attain broad fiscal and monetary stability demand management policies, to achieve sustainable growth, and to open the Tanzanian economy to the outside world by adopting an attractive foreign investment code and through economic liberalization.<sup>69</sup> Given the problems of the financial system and its overall limitations in operation, there was the need to carry out a comprehensive restructuring of the financial institutions in order to enable the sector to function efficiently. It is also submitted by Ziorklui that the performance of the financial sector in terms of resource mobilisation, credit allocation, quality of service, and

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<sup>64</sup>Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

Nyerere J K *UJAMAA- Essays on Socialism* (1986) 12

<sup>66</sup>Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

<sup>67</sup>Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

<sup>68</sup>Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

<sup>69</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

profitability were a major source of concern and dissatisfaction within the sector.<sup>70</sup> A review of the financial sector by the Presidential Financial Sector Reform Commission of 1990 revealed that savings mobilization declined continuously between 1979 and 1986 and financial assets, which were equivalent to nearly 50% of GDP in 1979, had fallen to 28% of GDP in 1986.<sup>71</sup> Thus, following the findings of the Presidential Commission, the Government ushered in a comprehensive financial sector reform that aimed at achieving the following goals and objectives of; liberalisation of interest rates and exchange rates, restructuring of existing formal financial institutions through write-offs of non-performing assets, reforming the policy environment in which the existing institutions were operating, to foster competition by encouraging the establishment of domestic and foreign-owned private banks including joint ventures with Tanzanian interests, to strengthen adequate provision of Bank of Tanzania's prudential regulatory and supervisory roles of other financial units operations, and to foster an efficient money market by creating new instruments.<sup>72</sup>

Due to the adopted financial sector reforms it became necessary to enact new legislation to restructure the legal framework in order to match with the new changes. The new legislation introduced since 1991 include the Banking and Financial Institutions Act 1993, which repealed and replaced the Banking Ordinance 1960, and which provides for the licensing of banks and other financial institutions, capital adequacy requirements, central bank supervision, regulation of financial institutions, and a deposit insurance fund. The other legislation is the Loans and Advances Realisation Trust Act of 1991. This provides for acquisition of non-performing assets of financial institutions, and machinery for their expeditious recovery. The third piece of legislation is the Foreign Exchange Act of 1992, which provides for elimination of exchange controls and establishment of a free foreign exchange market and foreign exchange *bureau dechange*.

The fourth Act is the Capital Markets and Securities Act, Chapter 79 of 1994, which provides for the establishment of the Capital Markets and Securities Authority, which is the subject matter of this chapter. Section 6 of the Capital Markets and Securities Act, Chapter 79 of 1994 provides for the establishment of CMSA as an autonomous governmental

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<sup>70</sup>Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

<sup>71</sup>Ziorklui S Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

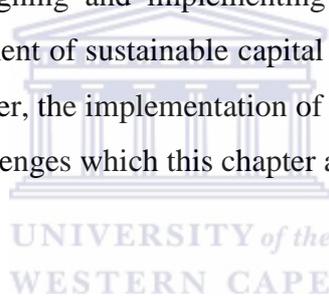
<sup>72</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' Available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

body.<sup>73</sup> CMSA became operational in July 1995, at the beginning of the 1995/1996 financial year and before this date; it started operating as a unit under the Bank of Tanzania (BOT) in April 1994.<sup>74</sup>

CMSA was established mainly to regulate all activities pertaining to dealings in securities in the country.<sup>75</sup> The Capital Markets and Securities Act is also a result of the recommendations of the 1990 study on the securities market in Tanzania as an effort to liberalise the financial sector.<sup>76</sup>

The vision of CMSA is to develop and regulate a sustainable capital market, which is efficient and transparent.<sup>77</sup> As a Government Agency, CMSA has been discharging its function in view of regulating and promoting securities business in the country and in ensuring that there is established a strong, efficient, stable, effective, equitable and internationally competitive securities legal regime on which both, domestic and foreign investors can rely.

CMSA has the mission of designing and implementing purposeful measures which will enable the creation and development of sustainable capital markets that are efficient, orderly, fair and equitable to all.<sup>78</sup> However, the implementation of such vision and mission of CMSA has been encountering some challenges which this chapter addresses.



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<sup>73</sup> A body corporate with perpetual succession and a common seal, capable in its corporate name of— suing and being sued; taking, purchasing or otherwise acquiring, holding, charging and disposing of both movable and immovable property; borrowing and lending money; entering into contracts; and doing or performing all such other things or acts necessary for the proper performance of its functions under the Capital Markets and Securities Act which may lawfully be done by a body corporate.

<sup>74</sup> Ziorklui S. Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper* 79.

<sup>75</sup> Sections 6 to 24 of the Capital Markets and Securities Act, chapter 79 of 1994.

<sup>76</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/.../tanzania-capital-markets-report](http://www.tanzaniainvest.com/.../tanzania-capital-markets-report). (accessed 8/7/2015).

<sup>77</sup> Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>78</sup> Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

### 3.2 Roles, Functions and Powers of the CMSA

The general legal framework for the regulation of the securities industry is the Capital Markets and Securities Act, chapter 79 of 1994. Section 10 of the Capital Markets and Securities Act of 1994 provides for the main functions of CMSA. These functions are:

- (a) To develop and promote capital markets in Tanzania;
- (b) To license stock exchanges, market professionals including brokers, dealers and their agents, investment advisers, authorized dealers' representatives, investment advisers' representatives as well as authorizing collective investment schemes;
- (c) To supervise capital markets and market professionals; and
- (d) To advise the Government on matters related to the securities industry.

The CMSA considers that one of its core functions is to promote and maintain a high level of market integrity in the interests of market participants and the broader economic community.<sup>79</sup> CMSA is also obliged to ensure that its market is orderly and fair and have adequate arrangements for investigating complaints by investors relating to the transaction of the business of investors on its market.<sup>80</sup>

The CMSA is also obliged to protect the integrity of the securities market against any abuses arising from the practice of insider trading,<sup>81</sup> and to advise the Minister for finance on all matters relating to the securities industry.<sup>82</sup> The CMSA is charged with the duties of maintaining surveillance over securities to ensure orderly, fair and equitable dealings in securities,<sup>83</sup> to adopt measures, to minimise and supervise any conflict of interest that may arise for dealers,<sup>84</sup> to create the necessary environment for the orderly growth and

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<sup>79</sup>Section 10(b) of the Capital Markets and Securities Act, chapter 79 of 1994. See also Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>80</sup>Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>81</sup>Section 10(g) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>82</sup>Section 10(a) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>83</sup>Section 10(b) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>84</sup>Section 10(h) of the Capital Markets and Securities Act, Chapter 79 of 1994.

development of the capital market,<sup>85</sup> and to formulate principles guiding the securities industry.<sup>86</sup>

Other functions of the CMSA include; to protect the integrity of the securities market against any abuses, to maintain surveillance over securities business to ensure orderly, fair and equitable dealings in securities; to register, license and regulate Stock Exchange, Investment Advisors, Securities Dealers and their agents and representatives and to control and supervise their activities with a view to maintaining proper standards of conduct and professionalism in the securities business.<sup>87</sup> It is the responsibility of the CMSA to determine the minimum capital requirements for license holders given the size of operations and risk and to monitor their solvency and take other measures which will protect the interest of investors where solvency of such license holders is in doubt.<sup>88</sup>

It is within the mandate of the CMSA to adopt measures that are likely to minimize conflict of interest that may arise for dealers, brokers and other market players; to review, approve and regulate takeover bids, mergers, acquisitions and all forms of business combinations in accordance with any existing rules and practice; to advise the Minister for finance on all matters relating to securities business for growth and development of the capital markets and to do anything which is calculated to facilitate the discharge of its functions or is incidental or conducive to their discharge under the Act.<sup>89</sup>

In terms of section 10 of the Capital Markets and Securities Act the CMSA has ostensibly wide powers to ensure proper supervision and enforcement of prohibitions on insider trading and other market related manipulative practices. Again in terms of sections 30 and 31 of the Capital Markets and Securities Act the CMSA has powers to issue directions to a stock exchange and to prohibit trading in particular securities respectively. The CMSA in terms of sections 21 and 22 of the Capital Markets and Securities Act has powers to investigate and to inspect any matter relating to insider trading where it has a reason to suspect that a person has committed an offence under the Capital Markets and Securities Act. And for the purposes of

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<sup>85</sup>Section 10(j) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>86</sup>Section 10(d) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>87</sup> 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>88</sup> 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>89</sup>Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

investigations pursuant to section 21 of the Act, the CMSA may require the presentation and inspection of the books, accounts, documents and transactions of a stock exchange, a dealer or an investment adviser. The powers of inspection may be exercised by the CMSA itself or by any person appointed in writing by the CMSA to exercise those powers.<sup>90</sup> The CMSA may also make application to the Court of issuing an order to a person who has committed an offence in terms of section 23 of the Capital Markets and Securities Act. According to section 22(5) any person who is guilty of an offence shall be liable on conviction to a fine of not less than one million shillings or to imprisonment for a term of not less than five years or to both such fine and imprisonment.

### **3.3 The CMSA Board**

The Board of Directors is the governing body of the CMSA. The Capital Markets and Securities Act refer to this body as the Authority.<sup>91</sup> The Board has a total of ten members who are appointed in accordance with Section 6, subsection 3 of the CMS Act. The Chairman of the CMSA Board is appointed by the President of the United Republic of Tanzania on the recommendation of the Minister responsible for finance.<sup>92</sup> Four other members of the Board are appointed by the Minister responsible for finance considering their relevant experience and expertise in either legal, finance, business or administrative matters.<sup>93</sup> Five members are appointed by virtue of their positions. These are ex-officio members appointed based on their official capacities, and they include;<sup>94</sup> The Permanent Secretary – Treasury, The Governor of Bank of Tanzania, The Attorney General, and The Chief Executive Officer, Business Registration and Licensing Agency (Registrar of Companies). The role and powers of the Board is stipulated under section 10 of the CMS Act. Such role and powers include;

to maintain surveillance over securities to ensure orderly, fair and equitable dealings in securities. To protect the integrity of the securities market against any abuse arising from the practice of insider trading. To create the necessary environment for the orderly growth and development of the capital market, to formulate principles for the guidance of the securities industry, and to conduct investigations in areas pertaining to securities business.

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<sup>90</sup>Section 22(2) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>91</sup>Section 6 of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>92</sup> Section 6 (3)(a) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>93</sup> Section 6 (3)(b) of the Capital Markets and Securities Act, Chapter 79 of 1994.

<sup>94</sup>Section 6 (3)(c),(d),(e),(f) and (g) of the Capital Markets and Securities Act, Chapter 79 of 1994.

### 3.4 Management of CMSA

Section 8 (2) of the Capital Markets and Securities Act, chapter 79 of 1994, confers power to the Chief Executive Officer (CEO) as the person responsible for the day to day activities of CMSA. The CEO is assisted by three Directors in charge of Research, Policy and Planning; Market Development and Supervision; and Legal Affairs and Enforcement.<sup>95</sup> Currently the Management is complemented by six managers who provide support to the Directors in the areas of finance, human resources, internal audit, legal affairs, market supervision and market development.<sup>96</sup>

### 3.5 Achievements of the CMSA

This part attempts the question as to whether the CMSA fulfils its purposes in terms of the Capital Markets and Securities Act, Chapter 79 of 1994, including the promotion and facilitation the development of a strong, efficient, effective, equitable and internationally competitive securities legal regime in Tanzania. This is generally an evaluation of the objectives of the CMSA. The researcher critically discusses the effect and value of what have been done by the CMSA in terms of the level of achievements.

It is now 20 years since the establishment of CMSA. Within these years the CMSA has initiated several activities aimed at developing the Tanzanian capital market, but these activities have failed to ensure a more competitive and to develop the market professionals. Some achievements can be seen, including:

#### 3.5.1 Establishment of the Dar es Salaam Stock Exchange (DSE)

The establishment of the Dar es Salaam Stock Exchange (DSE) forms one of the greatest achievements of the CMSA. After the Capital Market and Securities Act was passed in 1994, the need to have an organised market became apparent. Stock Exchanges are normally established by the private sector and can prosper in the presence of a well developed private sector. Tanzania did not have a developed private sector. In its absence, it was necessary for CMSA to facilitate the establishment of the market. CMSA facilitated the incorporation of

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<sup>95</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' Available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

<sup>96</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

the DSE in 1996 as a private company limited by guarantee.<sup>97</sup> The establishment of the DSE in 1996 marked an important milestone in the effort towards the development of the capital market for mobilization and allocation of long-term credit to the private sector.<sup>98</sup> Even though the DSE was incorporated in September 1996, trading did not start until April 15th 1998 with the listing of the first company, Tanzania Oxygen Limited (TOL).<sup>99</sup>

The DSE is governed by the Council of the Exchange. Currently there are 15 listed equities, including 4 foreign listings; 7 corporate bonds and 168 Government of Tanzania bonds of two, five, seven and ten years tenors.<sup>100</sup> The DSE Council consists of 10 members representing various interest groups as follows: (a) three licensed dealing members, (b) two associate members who represent listed companies, (c) one associate member who represents institutional investors and (d) one member representing the public.<sup>101</sup> The chief executive of the DSE is an ex-officio member who is in charge of policy implementations and the day-to-day operations of the Exchange.

The fact that Tanzania was not having a well developed private sector during the establishment of the DSE has caused significant impacts in the development of the securities market. Of course, Stock Exchanges prosper in a well developed private sector. During the establishment of the DSE, state economy was in a transformation stage from a centralised economy to a more liberalised economy.<sup>102</sup> The decision to have established a private company to regulate the securities industry came out of an undeveloped environment for privatisation. Since its official operation, the DSE has been facing challenges regarding its efficiencies in ensuring strong and competitive securities market. The researcher submits that in terms of enforcement, the success of the DSE compared to other developing markets is

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<sup>97</sup>Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA-Academia.edu' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/ 7/2015).

<sup>98</sup>Ziorklui S. Q 'Capital Market Development and Growth in Sub-Saharan Africa: the Case of Tanzania, African Economic Policy' (2001) *Howard University Discussion Paper 79*.

<sup>99</sup> Frederick E F on 'Security Market History in Tanzania and Investment Protection' 'CAPITAL MARKETS IN TANZANIA' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 5/7/2015).

<sup>100</sup> Capital Market and Securities Authority and Trade Automation at the Dar es Salaam Stock Exchange available at [www.webtechnologies.co/cmsa4/.../file](http://www.webtechnologies.co/cmsa4/.../file) (Accessed 20/7/2015).

<sup>101</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

<sup>102</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

lagging behind. The Companies Act, of 2012 of Tanzania which regulate all companies operating in Tanzania does not provide for prohibition of insider trading. It is difficult therefore to combat insider trading practices in this situation where the company law is silent on the prohibition of insider trading practices. But again the Council of Exchange lacks enough funds to conduct its activities. The DSE lacks clear policy for implementation. It has failed to create awareness to other investors, shareholders as well as to the general public who can be considered in this case as whistle blower when it comes to insider trading practices on the securities market. The effect of all these challenges is that the DSE has remained marked as untrustworthy, inefficiency and unregulated market with only few listed companies. Discussed challenges have limited the attractiveness of the capital market for both domestic and foreign investors.

### **3.5.2 Public Education Programme**

CMSA in collaboration with other stakeholders, which include brokers, Ministry of finance and the Privatization Trust, carried out public education programmes throughout the country on the roles, procedures, risks and benefits of participating in capital markets.<sup>103</sup> Presentations have also been made to Members of Parliament, Members of the House of Representatives for the case of Zanzibar, academics, and various professionals including Accountants, Lawyers, and Journalists have participated several times in the annual international trade fair and agricultural fairs and the National Public Service Week.<sup>104</sup> The researcher submits that to witness positive contribution of public education programme it is necessary to have audiences that have direct engagement in the securities, such as companies, shareholders and the public. It is presented that the Public Education Programme has failed to bring up a trickledown effect to the development of the securities industry in Tanzania.

### **3.5.3 Research Programs**

As part of capital markets development and improvement of supervisory functions, CMSA has carried out a number of research projects in various topics including economic empowerment of indigenous Tanzanians; fiscal study; legal study; regional study on monetary and fiscal policies; management information system (MIS); mergers and acquisitions; legal framework for the establishment of collective investment schemes (CISs)

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<sup>103</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

<sup>104</sup> 'Capital Markets and Securities Authority (CMSA)' Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

and appropriate capital markets structure in Tanzania.<sup>105</sup> The studies conducted include the following.<sup>106</sup>

### 3.5.3.1 Policy Study on Economic Empowerment of Tanzanians

Several recommendations are made in this study on how Tanzanians can be empowered including the establishment of the National Empowerment Council. These recommendations have been successful in adding inputs into the Tanzania National Empowerment Policy.<sup>107</sup> However it is important to note that the policy is not law as to be enforced, the policy is not enforceable, but a roadmap. The implementation of this study has failed especially in terms of its level of achievements in eradicating insider trading practices.

### 3.5.3.2 The Fiscal policy as it relates to capital markets and securities business

This study has come up with a number of recommendations including fiscal incentives for capital market development in Tanzania. Some of the incentives in place that resulted from the study are the reduction of withholding tax on dividends from listed companies from 15% to 5%, complete elimination of tax on interest for long-term bonds of at least three years, elimination of stamp duty on transfers of listed securities and inclusion of IPO cost as deductible expense.

### 3.5.3.3 Legal study to assess the impact of existing and proposed legislation on the development of capital markets and securities industry in Tanzania

This study reviewed the capital market regulatory framework and identified areas for improvement. Among the improvements suggested by the study are issues of collective investment schemes and public offers of securities. The suggested issues of improvement have not yet implemented. This study really aimed at bringing positive change in the development of the securities industry in Tanzania, but the CMSA has failed to implement it. The regulatory framework which was found weak during this study is still the same being implemented.

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<sup>105</sup> ‘Tanzania Capital Markets Report/TanzaniaInvest’ Available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

<sup>106</sup> ‘Tanzania Capital Markets Report/TanzaniaInvest’ Available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

<sup>107</sup> ‘Tanzania Capital Markets Report/TanzaniaInvest’ Available at [www.tanzaniainvest.com/tamzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tamzaniacapitalmarketsreport) (accessed 8/7/2015).

#### **3.5.3.4 A Roadmap for the Establishment of Collective Investment Schemes**

Like the study on Legal study to assess the impact of existing and proposed legislation on the development of capital markets and securities industry in Tanzania, A Roadmap for the Establishment of Collective Investment Schemes recommended step by step procedures for establishing Collective Investment Schemes in Tanzania. The recommendation has not been implemented.

#### **3.5.3.5 A study on a road map for modernization of the capital markets management information system including automation of the DSE trading activities.**

The study has recommended modernization of CMSA information system and automation of trading activities at the DSE. Implementation of this is in progress.

#### **3.5.3.6 A study on mergers and substantial acquisitions**

This study has proposed regulations for systematic takeovers, mergers and substantial acquisitions of companies in Tanzania. The objective being to protect minority interests in the companies involved with Mergers and Acquisition. No steps that have been taken to implement this proposal.

#### **3.5.3.7 A study on incorporation of unit trusts in Tanzania**

The study recommends an appropriate legal framework for establishing unit trusts and how to regulate them. Nothing has been done as a way to implementing this study.

#### **3.5.3.8 The study on the appropriate market structure for the capital markets in Tanzania**

The study has observed reasons why many companies do not use capital markets for mobilization of financial resources and recommends for the establishment of Enterprise Growth Market Segment (EGM) as a market for start up and growth companies. The observations have not been implemented.

#### **3.5.3.9 The study on Fiscal and Monetary Policies for East African Capital Markets**

The study has explored and identified fiscal and monetary policies that hinder the development of East African capital markets including Tanzania and recommended reforms that will accelerate the development of capital markets in the region. It has also made recommendation on the operational aspects of East African Capital Markets.<sup>108</sup> The

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<sup>108</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' Available at [www.tanzaniainvest.com/tanzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tanzaniacapitalmarketsreport) (accessed 8/7/2015).

researcher submits that almost all suggested issues from the carried studies to improve the securities market have not implemented despite their goodness to effective contribution to the establishment of efficient, strong and competitive securities market. Therefore conducting such studies were of no use to improve the development of the securities industry in Tanzania.

### **3.5.4 Market Supervision**

The supervision of market professionals and the Exchange have been a key function of CMSA. Both on-site and off-site supervision have been carried out on a continuous basis.<sup>109</sup> If market supervision continues, there is likely positive development in the securities industry. But market supervision alone cannot ensure efficient and competitive securities market. It should be conducted with other suggested issues such as the change of the legal framework which generally ensures fair and equitable trade in securities.

### **3.5.5 Regulations and Guidelines**

More than 21 key Regulations and Guidelines have been developed by CMSA for regulating the securities industry in the country.<sup>110</sup> Some of these regulations and guidelines are:

(i) Capital Markets and Securities (Register of interests in securities) Regulations, of 1996. These Regulations require certain market players to maintain a register, in a prescribed format, of securities in which members of staff and other related parties may have interests. The register of interest in securities enables transactions to be traceable by the CMSA and other interested parties to provide the requisite transparency in securities transactions as well as monitoring insider trading.

(ii) Capital Markets and Securities (Guidelines on Corporate Governance) Guidelines, of 2002. These guidelines aim at improving and strengthening good corporate governance practices by issuers of securities through the capital markets and promote a standard of self-regulation so as to raise the level of governance in line with international best practices.

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<sup>109</sup> 'Tanzania Capital Markets Report/TanzaniaInvest' Available at [www.tanzaniainvest.com/tanzaniacapitalmarketsreport](http://www.tanzaniainvest.com/tanzaniacapitalmarketsreport) (accessed 8/7/2015).

<sup>110</sup> 'Capital Markets and Securities Authority (CMSA)' Available at [http://www.cmsa.tz.org/lagislation/rules\\_%20regulations.htm/fortuneofafrica.com/tanzania/capital-market-and-securities-authority](http://www.cmsa.tz.org/lagislation/rules_%20regulations.htm/fortuneofafrica.com/tanzania/capital-market-and-securities-authority) (accessed 20/7/2015).

(iii) Capital Markets and Securities (Collective Investment Schemes) Regulations, of 1997. These regulations provide guidance on the conduct of business on Collective Investment Schemes in relation to inducements, churning, customer rights, confidentiality, charges and execution. The above are in addition to the conduct of business requirements as mentioned in the CMS Act.

(iv) Capital Markets and Securities (Conflict of Interest) Guidelines, of 2002. These are guidelines which aim at giving members of the CMSA a framework within which to deal with conflicts of interest and other related matters. The guideline is also intended to protect board members and staff of the CMSA against any suggestion that personal interests have influenced regulatory decisions or that their investment decisions are made by using insider information. The Guideline includes general principles on conflict of interest, the policy on employees' interests, securities transactions by employees and board members, treatment of gifts and consequences of default.

(v) Capital Markets and Securities (Collective Investment Schemes) Regulations, of 1997. These regulations provide guidance on the conduct of business on Collective Investment Schemes in relation to inducements, churning, customer rights, confidentiality, charges and execution. The above are in addition to the conduct of business requirements as mentioned in the CMS Act.

(vi) Capital Markets and Securities (Substantial Acquisitions Takeovers and Mergers Regulations), of 2006. These regulations have been prepared to regulate and govern mergers and acquisitions. The objectives of these regulations is to ensure that in the Tanzanian capital markets, the critical process of mergers, acquisition and takeovers, which significantly influences corporate growth, take place within an orderly legal framework and that such framework, conforms with the principles of fairness, transparency, equity and the need to protect the rights of shareholders affected by such transactions.

### **3.6 Challenges that CMSA Faces**

It is submitted that the discharge of the powers of the CMSA provided in the Act has been limited in relation to the prosecution and settlement of insider trading cases. Except where a matter is settled out of court, no any officer of the CMSA can initiate the institution of a claim against any securities market abuses.

Furthermore, the actual profit made or loss avoided in illegal securities dealings is determined by the competent court in its own merit. The CMSA itself may not prosecute criminal cases

relating to insider trading. All criminal claims are directed to the office of Director of Public Prosecutions (DPP) to prosecute them. This may also decline the due process of law which required timely dispensation of justice due to the backlog of cases in Tanzanian courts. The backlog of cases has grossly impeded the effective enforcement of the criminal sanction in relation to insider trading in the country. Since the CMSA is staffed by persons of relevant experience and expertise, it would have been expected that these personnel would be competent to prosecute cases relating to securities dealing rather than taking them to the DPP chamber.

An institution such as the CMSA should be adequately resourced to fulfill its functions and care should be taken that its effectiveness is not undermined by bureaucracy. It should be also noted that investigations and inspections which may be conducted by the CMSA are only possible upon the grant of permission from the court of competent jurisdiction. There have been no serious measures taken to prohibit market fraud such as insider trading or price manipulation on the market. Conducted studies as observed in this chapter show that suggested issues including the change of the legal framework are not implemented. This denial of changing the legal framework to a more strong, effective and dynamic legal regime continues lowering the level of achievements of the CMSA especially when its role and functions are examined.

The regulation of securities business in Tanzania aimed at facilitating the development of an orderly, fair, equitable and efficient capital market.<sup>111</sup> To achieve this objective there is a need to review the Capital Markets and Securities Act of 1994. This could be in terms of the powers of the CMSA to ensure effective discharge of its functions to match with developments that have taken place in the market both, at national and international levels. The review is also intended at harmonising the CMSA with the developments of the securities industry at the regional levels to which Tanzania is a member, the East African Community (EAC) and the Southern African Development Community (SADC). The achievements discussed in this chapter do not reflect the past twenty years of CMSA in terms of its efforts to curb the weaknesses found in the regulation of the securities on the Tanzania market.

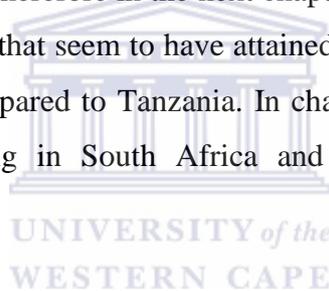
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<sup>111</sup>Capital Markets and Securities Authority (CMSA)<sup>3</sup> Available at <http://www.cmsa-tz.org/about/overview.htm> (accessed 3/7/2015).

### **3.7 Conclusion**

The establishment of CMSA aimed among others, to have an efficient capital markets legal regime which is, orderly, strong, adequate and fair, capital markets in Tanzania. It is presented that the authority, in this case the CMSA and its formulated regulations have not played a major role in insuring investment in the Tanzania capital markets and securities industry. This is evaluated in terms of the CMSA contribution to economic development and to the protection of the integrity of the securities market against any abuses arising from the practice of insider trading. Despite the contribution of the CMSA, including its facilitation to the obtainment of the DSE and the new regulations intending to strengthen the securities legal framework, there is nothing substantial that the CMSA has contributed to resolving the problem of securities market abuses.

The detection and prevention of insider trading, market manipulation and other forms of market abuse forms a major component of regulatory monitoring, investigation and enforcement activities globally. Therefore in the next chapter which is chapter four, the study is extended to other jurisdictions that seem to have attained high level of achievements in the regulation of insider trading compared to Tanzania. In chapter four the researcher discusses the regulation of insider trading in South Africa and the United Kingdom (UK) for comparative purposes.



## CHAPTER FOUR

### REGULATION OF INSIDER TRADING IN THE UNITED KINGDOM (UK) AND SOUTH AFRICA: A COMPARATIVE PERSPECTIVE

#### 4.1 Introduction

This chapter makes a comparative study on how other jurisdictions with good legislation on capital markets and securities regulate insider trading. The researcher has selected the English and South African insider trading legal frameworks for that purpose. Discussions are developed based on provisions prohibiting insider trading practices in these two jurisdictions. The researcher describes the experiences in the enforcement of insider trading legislation in the two selected countries, making their legal and regulatory frameworks the most adequate, effective and comparable to the highest standards. This chapter is concluded with guidelines for creating strong, efficient, effective and more competitive insider trading regulation. The investigations of this part have been useful to suggest whether Tanzania's insider trading regulatory framework can adopt and learn to amend its legislation to a more strong and reliable legislation as to align with the latest developments elsewhere. Something very important to note is that the study at this part does not explain the detailed historical perspectives of insider trading regulation in the chosen jurisdictions. The researcher examines and analyses the current pieces of legislation designed to regulate insider trading- their attempt to provide answers to questions such as: what is inside information? Who can be considered an insider? What activities related to using inside information are prohibited? How to prevent insider trading? What sanctions and enforcement measures should be implemented?

#### 4.2 Insider Trading Regulation: the UK Perspective

The UK's market abuse regime has a separate and specific statute that deals with insider trading and another statute which broadly deals with market manipulation and other related market abuse activities.<sup>112</sup> The UK's insider trading regime is formed by multiple pieces of legislation, overlapping and in many cases containing similar but not identical provisions and

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<sup>112</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

definitions. The researcher has found that market abuse legislation in the UK has been carefully formulated to incorporate some of the provisions of the EU Directive on Market Abuse.<sup>113</sup> Since June 1980 when the UK Companies Act<sup>114</sup> came into force, the UK's regime on insider trading has been attracting both criminal and civil liabilities. Some other pieces of legislation that regulate insider trading include the Criminal Justice Act, of 1993, The Financial Services and Markets Act, of 2000 which was enacted to improve and align the UK's market abuse legislation with the international best standards, and the Financial Services Act, of 2013.

#### **4.2.1 The Concept of Inside Information in the UK**

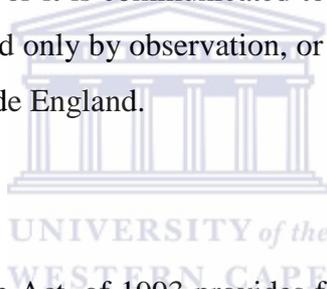
Section 118C (2) of Financial Services and Markets Act, of 2000 provides for the meaning of inside information as information; of a precise nature; which is not generally available; which relates, directly or indirectly to one or more issuers of the qualifying investments or to one or more of the qualifying related investments; and which would if generally available, be likely to have a significant effect on the price of qualifying investments or the price of related investments. Inside information for criminal purposes, is defined under section 56(1) of the Criminal Justice Act, of 1993 as information which relates to particular securities or to a particular issuer of securities and not to securities generally or to issuers of securities generally; is specific or precise, has not been made public, and if it were made public would be likely to have a significant effect on the price of any securities. Section 56(2) of the Criminal Justice Act provides clearly that securities are price-affected securities in relation to inside information. And inside information is price-sensitive information in relation to securities if and only if, the information would, if made public, be likely to have significant effect on the price of the securities. Section 118C(6) of the Financial Services and Markets Act, of 2000 provides further that information would likely to have significant effect on the price of the securities if and only if it is information of a kind which a reasonable investor

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<sup>113</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

<sup>114</sup> Peter TL 'Law and Practice with Respect to Insider Trading and Trading on Market Information in the United Kingdom'(2014), 4 J. Int'l L. 389 available at: <http://scholarship.law.upenn.edu/jil/vol4/iss4/6> (accessed 19/10/2015).

would be likely to use as part of the basis of his investment decision.<sup>115</sup> Regarding precise information, the Financial Services and Markets Act, of 2000 provides that information is precise if it; indicates circumstances that exist or may reasonably expected to come into existence, or an event that has occurred or may reasonably expected to occur, and is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the qualifying investments or related investments.<sup>116</sup> Information is considered as made public in terms of section 58 of the Criminal Justice Act, of 1993 if it is published in accordance with the rules of a regulated market for the purpose of informing investors and their professional advisers. Information can also be contained in records which by virtue of any enactment are open to inspection by the public, information can be readily to be acquired by those likely to deal in securities, or derived from information that has been made public. Under subsection 3 of section 58 of the Criminal Justice Act, of 1993 information may be treated as made public even though it can be acquired only by persons exercising diligence or expertise, or it is communicated to a section of the public and not to the public at large, or it is acquired only by observation, or it is communicated by payment of a fee, or it is published only outside England.



#### **4.2.2 Who is an Insider?**

Section 57 of the Criminal Justice Act, of 1993 provides for an insider as an individual who has inside information. An individual is considered as having an insider information if and only if it is, and he knows that it is inside information, and he has it, and he knows that he has it from an inside source.<sup>117</sup> Section 57 (1) and (2) of the Criminal Justice Act, of 1993 provides that an individual acquires information from an inside source if, and only if he has it through being director, employee or shareholder of an issuer of securities, or having access to the information by virtue of his employment, office or profession; or the direct or indirect source of his information is a director, employee or shareholder of an issuer of securities.<sup>118</sup>

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<sup>115</sup> Slaughter & May 'The EU/UK Market Abuse Regime- Overview' available at <https://www.slaughterandmay.com/media/39260/the-eu-uk-market-abuse-regime-overview.pdf> (accessed 19/10/2015).

<sup>116</sup> Section 118C(5) of the Financial Services and Markets Act , of 2000.

<sup>117</sup> Section 57 of the Criminal Justice Act, of 1993.

<sup>118</sup> Section 57 (1) and (2) of the Criminal Justice Act, of 1993.

An insider is also defined under section 118 B of the Financial Services and Markets Act, of 2000 as any person who possess inside information as a result of his membership of administrative, management or supervisory bodies of an issuer of a qualifying investment. Generally there are three groups of individuals (insiders) that are statutorily prohibited from committing insider trading as identified in the Criminal Justice Act, of 1993. These groups are; individuals who have direct knowledge of non-public inside information, also referred to as primary insiders, by virtues of their being directors, employees or shareholders of an issuer of securities or by virtue of their employment or office;<sup>119</sup> individuals who obtain information directly or indirectly from primary insiders, also referred to as secondary insiders;<sup>120</sup> and tippees.<sup>121</sup>

#### **4.2.3 Prohibition, Defenses and Enforcement of Insider Trading in the UK**

Insider trading usually involves the sale or purchase of company shares or securities by persons connected with a company, who have price-sensitive information not generally known by the public or by the persons with whom the insiders deal.<sup>122</sup> Herne delineates insider trading as an activity that many jurisdictions have sought to proscribe.<sup>123</sup> Section 52 of the Criminal Justice Act, of 1993, provides that an individual who has information as an insider is guilty of insider dealing if he deals in securities that are price-affected securities in relation to the information. The Criminal Justice Act, of 1993, provides circumstances that should be considered to convicting a person with the offence of insider dealing. The Act provides that an individual shall be guilty of insider dealing if the acquisition or disposal of information occurs on a regulated market or that the person relies on a professional intermediary or is himself acting as professional intermediary.<sup>124</sup> The law also convicts an individual, who has information as an insider when it is found that such an individual has encouraged another person to deal in securities that are price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take

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<sup>119</sup> Section 57(1)(a) & (2)(a) of the Criminal Justice Act, of 1993.

<sup>120</sup> Section 57(1)(b) & (2)(b) of the Criminal Justice Act, of 1993.

<sup>121</sup> Section 57 of the Criminal Justice Act, of 1993 also Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

<sup>122</sup> Stephen Herne 'Insider Information: Definitions in Australia, Canada, the U.K and the U.S' available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1665&context=jil> (accessed 20/10/2015).

<sup>123</sup> Stephen Herne 'Insider Information: Definitions in Australia, Canada, the U.K and the U.S' available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1665&context=jil> (accessed 20/10/2015).

<sup>124</sup> Section 52 of the Criminal Justice Act, of 1993.

place in the circumstances that attract the offence of insider dealing.<sup>125</sup> The law also provides for conviction of an individual, who discloses to another person the information otherwise than in the proper performance of the functions of his employment, office or profession.<sup>126</sup>

Section 53 of the Criminal Justice Act, of 1993 provides defences for the offence of insider dealing. An individual may be acquitted of the offence of insider dealing if he is able to prove beyond reasonable doubt that; he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was a price-sensitive information in relation to the securities; that at the time he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; and that he would have done what he did even if he had not had the information. These defences apply even to an individual accused of encouraging another person to deal in securities. Apart from defences that are expressly provided in the Criminal Justice Act, section 53(4) of the same Act makes further reference to special defences provided in schedule I which demonstrate the high level of knowledge or intention required for a successful prosecution.

There are criminal and civil penalties which can be employed in the UK to combat and discourage insider trading practices.<sup>127</sup> Criminal penalties may be imposed on all individuals convicted of insider dealings in the UK.<sup>128</sup> In terms of the insider trading provisions contained in the Criminal Justice Act, criminal penalties for insider trading under the Criminal Justice Act may only be imposed on individuals.<sup>129</sup> Criminal penalties that may be imposed on individuals for insider trading or market manipulation include a fine or imprisonment for a term not exceeding six months, or both on summary conviction; or upon

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<sup>125</sup> Section 52(2)(a) of the Criminal Justice Act, of 1993.

<sup>126</sup> Section 52(2)(b) of the Criminal Justice Act, of 1993.

<sup>127</sup> Directors' Dealings, Market Efficiency and strategic Insider Trading in German Stock Market'available at <http://www.d-nb.info/1006415319/34> (accessed 20/10/2015).

<sup>128</sup> Section 61 of the Criminal Justice Act, of 1993. See also Directors' Dealings, Market Efficiency and strategic Insider Trading in German Stock Market'available at <http://www.d-nb.info/1006415319/34> (accessed 20/10/2015).

<sup>129</sup> 'Directors' Dealings, Market Efficiency and strategic Insider Trading in German Stock Market'available at <http://www.d-nb.info/1006415319/34> (accessed 20/10/2015).

conviction on indictment, a fine or imprisonment for a term not exceeding seven years, or both.<sup>130</sup>

Apart from criminal penalties provided in the Criminal Justice Act of 1993, there are civil penalties provided under the Financial Services and Markets Act, of 2000 for insider dealings.<sup>131</sup> Civil penalties that the offender of market abuse, including insider trading may suffer under the Financial Services and Markets Act are such as unlimited monetary fines, disgorgement of profits and, or the payment of compensation, injunctions (including cease or desist orders) to take remedial steps, secure or freeze assets and to discourage a certain conduct.<sup>132</sup> It is submitted that court injunctions can also be imposed on any person who commits market abuse practices other than insider trading, regardless of whether such person is regulated by the Financial Services Authority.<sup>133</sup> There are a number of factors that need to be considered in the determination of the amount of the fine to be imposed on the offenders. Such factors include;

- (a) the adverse effect of the behaviour on the market in question,
- (b) whether the person on whom the penalty is to be imposed is an individual or a juristic person,
- (c) the amount of profits accrued or loss avoided,
- (d) the degree to which the conduct in question was deliberate or reckless and
- (e) the conduct following the behaviour of the alleged offender in question.<sup>134</sup>

Under section 129 of the Financial Services and Markets Act, of 2000 courts may at the request of the Financial Services Authority further impose monetary fines on a person who violates any market abuse provisions.<sup>135</sup>

There is established a single administrative regulator, the Financial Services Authority in the UK. The Financial Services Authority is vested with powers to ensure that the prohibition on

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<sup>130</sup> Section 61(1)(a&b) of the Criminal Justice Act, of 1993.

<sup>131</sup> Section 402 Financial Services and Markets Act, of 2000.

<sup>132</sup> Sections 380&381 of the Financial Services and Markets Act, of 2000.

<sup>133</sup> 'Directors' Dealings, Market Efficiency and Strategic Insider Trading in German Stock Market' available at <http://www.d-nb.info/1006415319/34> (accessed 20/10/2015).

<sup>134</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014)20 *Mediterranean Journal of Social Science* 5.

<sup>135</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014)20 *Mediterranean Journal of Social Science* 5.

market manipulation and related practices is consistently complied with.<sup>136</sup> The Financial Services Authority Code of Market Conduct has, for instance, stipulated some factors to be considered when determining whether a person dealing in any qualifying investment has created a false or deceptive appearance of a trading activity in relation to a certain security or an artificial price or value of the qualifying investment and the extent to which the price, rate or option volatility movements for the affected investment are outside their normal daily, weekly or monthly range.<sup>137</sup>

### **4.3 Insider Trading Regulation: a South African Perspective**

The Financial Markets Act, 19 of 2012 which was assented to on 30<sup>th</sup> January 2013 and came into force on 3 June 2013 is a piece of legislation that regulate among others, the prohibition of insider trading and other market abuses in South Africa. This Act was enacted to replace the Securities Service Act, 36 of 2004 as amended by the Financial Service Laws General Amendment Act, 2008. Among the objects of the Financial Markets Act, 19 of 2012 is to ensure that the South African financial markets are fair, efficient and transparent and to promote the international and domestic competitiveness of the South African financial markets and of securities services.<sup>138</sup> Insider trading is specifically found under part X of the Financial Markets Act, 19 of 2012, the part which regulates market abuse in South Africa. Findings have shown that essentially both the South African and the English insider trading regulatory frameworks prohibit individuals from committing insider trading offences, especially in relation to securities listed on regulated financial markets.<sup>139</sup> And both, the South African and English insider trading regulatory frameworks prohibit the three groups of insiders; namely, primary insiders, secondary insiders and their tippees, from knowingly dealing directly or indirectly in securities of the basis of non-public price-sensitive inside information for their own benefit or the benefit of others.<sup>140</sup>

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<sup>136</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

<sup>137</sup> Peter TL 'Law and Practice with Respect to Insider Trading and Trading on Market Information in the United Kingdom'(2014), 4 J. Int'l L. 389 available at: <http://scholarship.law.upenn.edu/jil/vol4/iss4/6> (accessed 19/10/2015).

<sup>138</sup> Section 2 of the Financial Markets Act, 19 of 2012.

<sup>139</sup> Section 61 of the Criminal Justice Act, of 1993 and section 78 of the Financial Markets Act, 19 of 2012.

<sup>140</sup> Section 77 of the Financial Markets Act, 19 of 2012 & Section 57 of the Criminal Justice Act, of 1993.

### 4.3.1 The Concept of Inside Information in South Africa

The concept of inside information is provided under section 77 of the Financial Markets Act, 19 of 2012. Under this section inside information means specific or precise information which has not been made public, and which is obtained or learned as an insider; and 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.<sup>141</sup> As it is also discussed by Cassim,<sup>142</sup> the provision of section 77 requires that to qualify as inside information, the information in question must be specific or precise, it must not have been made public, it must be obtained or learned as an insider, and 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.

Similar to the English legislators in the Criminal Justice Act, of 1993 where an attempt to introduce a measure of certainty to information to be regarded as having been made public was taken,<sup>143</sup> the South African legislators have taken the same approach in the Financial Markets Act, 19 of 2012.<sup>144</sup> Section 79 of the Financial Markets Act, 19 of 2012 provides four alternative circumstances, but which are not limited, through which information may be regarded as having been made public as follows;

- (a) When the information is published in accordance with the rules of the relevant regulated market, or
- (b) when the information is contained in records which by virtue of any enactment are open to inspections by the public, or
- (c) when the information can be readily acquired by those likely to deal in any listed securities to which the information relates or of an issuer to which the information relates, or
- (d) when the information is derived from information which has been made public.

Therefore, the provision of section 79 of the Financial Markets Act, 19 of 2012, permit dealing in securities after the information is being published as to the prescribed four circumstances, but which are not limited. The law on insider trading provides securities which qualify for protection against insider trading practices as those securities listed on a regulated market.<sup>145</sup> And a regulated market is defined under section 77 of the Financial Markets Act,

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<sup>141</sup> Section 77 of the Financial Markets Act. 19 of 2012.

<sup>142</sup> Farouk HI Cassim et al *Contemporary Company Law* (2011) 940.

<sup>143</sup> Section 58 of the Criminal Justice Act, of 1993.

<sup>144</sup> Section 78 of the Financial Markets Act. 19 of 2012.

<sup>145</sup> Section 77 of the Financial Markets Act. 19 of 2012.

19 of 2012 as any market, domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts the business as a market for dealing in securities listed on that market.

Unlike the English insider trading legal framework,<sup>146</sup> the South African insider trading legal framework extends the regulation of insider trading beyond its territorial jurisdiction.<sup>147</sup> The prohibitions of insider dealing extend to securities listed on a regulated foreign market.<sup>148</sup> The English insider trading regulation framework which expressly discourages dealing in securities on unregulated market,<sup>149</sup> but the South African insider trading regulatory framework does not expressly discourage dealing in securities on unregulated market. This is what Chitimira<sup>150</sup> has discussed as could be due to the fact that insider trading activities in the over the counter markets are probably very restricted since such transactions are mostly done on a face-to-face basis between persons who know each other quite well. The Financial Markets Act, 19 of 2012 does not provide the definition as to who is an agent. But for the purpose of improving the implementation of insider trading prohibition in South African, the Financial Markets Act, should have provided an adequate and clear definition of an agent as it is also discussed by Chitimira.<sup>151</sup>

#### **4.3.2 Who is an Insider?**

An insider is defined to mean a person who has inside information through either of the following ways;

- (a) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates, or
  - (b) having access to such information by virtue of employment, office or profession;
- or

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<sup>146</sup> Sections 60(1) & 62 of the Criminal Justice Act, of 1993.

<sup>147</sup> Section 77 of the Financial Markets Act. 19 of 2012.

<sup>148</sup> Farouk HI Cassim et al *Contemporary Company Law* (2011) 951.

<sup>149</sup> Sections 57 and 52(3) of the Criminal Justice Act, of 1993.

<sup>150</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

<sup>151</sup> Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

- (c) being of knowledge that a direct or indirect source of information is a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates.<sup>152</sup>

As it has been submitted in 4.3 above, the South African insider trading regulatory framework prohibits primary insiders, secondary insiders and their tippees from knowingly dealing directly or indirectly in securities on the basis of non-public price-sensitive inside information for their own benefit or the benefit of others.<sup>153</sup>

#### **4.3.3 Prohibition, Defences and Enforcement of Insider Trading in South Africa**

Inside dealing is prohibited and it attracts both criminal offense and civil liability in South Africa.<sup>154</sup> Section 78(1) of the Financial Markets Act, 19 of 2012 prohibits insider trading practices on a regulated market. It is an offense for an insider who is of knowledge on inside information but still deals directly or indirectly or through the agent in the securities listed on the regulated market to which the inside information relates or are likely to be affected by it.

The law specifies four kinds of conduct that an insider who has inside information is prohibited, and which if committed, creates an offense. These conducts are; dealing for one's own account,<sup>155</sup> dealing on behalf of someone else,<sup>156</sup> improper disclosure or tipping<sup>157</sup> and encouraging dealing or, causing dealing, or discouraging dealing.<sup>158</sup>

An insider who deals for one's own account is not guilty if such an insider proves on the balance of probabilities that;

- (a) one became an insider after had given the instruction to deal to an authorised user and the instruction was not changed in any manner after one became an insider.
- (b) one was acting in pursuit of a transaction in respect of which all the parties to the transaction had possession of the same inside information, and that trading was limited to the said parties, the transaction was not aimed at securing a benefit from exposure to movement in the price of the security or a related security resulting from the inside information.

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<sup>152</sup> Section 77 of the Financial Markets Act, 19 of 2012.

<sup>153</sup> Section 2 of the Financial Markets Act, 19 of 2012.

<sup>154</sup> Sections 77, 78 and 82 of the Financial Markets Act, 19 of 2012.

<sup>155</sup> Section 78(1)(a) of the Financial Markets Act, 19 of 2012.

<sup>156</sup> Section 78(2)(a) of the Financial Markets Act, 19 of 2012.

<sup>157</sup> Section 78(4)(a) of the Financial Markets Act, 19 of 2012.

<sup>158</sup> Section 78(5)(a) of the Financial Markets Act, 19 of 2012.

An insider who deals on behalf of someone else is not guilty if such an insider proves on the balance of probabilities that;

- (a) is an authorised user and was acting on specific instructions from a client and did not know that the client was an insider at the time
- (b) only became an insider after had given instruction to deal to an authorised user and the instruction was not changed in any manner after one became an insider, or
- (c) was acting in pursuit of a transaction in respect of which all the parties to the transaction had possession of the same inside information, and that trading was limited to the said parties, the transaction was not aimed at securing a benefit from exposure to movement in the price of the security or a related security resulting from the inside information.

An insider who knows of having inside information and discloses such inside information to another person (tipping) is not guilty if such an insider proves on the balance of probabilities that the disclosure of inside information was necessary for the proper performance of the functions one's employment or office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that one disclosed at the same time that the information was inside information.

The law does not provide any circumstances which may exempt an insider who encouraging dealing or, causing dealing, or discouraging dealing or stopping from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it from liability.

The maximum penalty for committing any offense of insider dealing is a fine of R50 million or imprisonment of ten years or both such fine and imprisonment.<sup>159</sup>

A person having committed an offense is also liable to pay administrative sanctions, which include; the payment of the amount not exceeding R1 million, the equivalent profit or loss that would have made to the securities through insider dealing, interest and cost of suit, including investigation costs.<sup>160</sup> The law recognises common law rights of any person aggrieved by any dealing or offense contemplated in the law to claim any amount unrecovered amount.<sup>161</sup>

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<sup>159</sup> Section 109 of the Financial Markets Act, 19 of 2012.

<sup>160</sup> Section 82 of the Financial Markets Act, 19 of 2012.

<sup>161</sup> Section 87 of the Financial Markets Act, 19 of 2012.

There is established the Financial Services Board<sup>162</sup> responsible for the supervision of compliance to the Financial Markets Act, 19 of 2012. Like the Financial Services Authority in the UK, the Financial Services Board in South Africa is allowed to publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure) if such publication is in the public interest.<sup>163</sup>

#### **4.4 Lessons to be learnt from English and South African Insider Trading Regulation**

Drawing examples from the English and South African insider trading legislation as discussed in this chapter, Tanzania can learn and amend its insider trading legislation to align with the international standards. Amendments can start in areas of prohibition, defences and enforcement of insider trading. Both the UK and South African insider trading legal frameworks establish strong criminal and civil liabilities, and administrative sanction to be employed to a person found guilty of the offense of insider dealing. Such strong penalties and sanctions are not provided in the Tanzanian insider trading legislation. In the two compared jurisdictions strong penalties and sanctions have helped to combat insider trading practices. With regard to criminal penalties for example, the South African legislation has provided for a fine of R50 million or imprisonment of ten years or both such fine and imprisonment.<sup>164</sup> This and other number of penalties that are available, in their respective pieces of legislation in UK and South Africa, have been useful to discourage and curb insider trading practices. Like the South African Financial Markets Act, 19 of 2012, the law on insider trading in Tanzania should provide no defences as to escape from liabilities to individuals who encourage dealing or, cause dealing, or discourage dealing or even stop from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it. Both the UK and South Africa insider trading legislation have established similar factors to be considered to determine appropriate civil compensatory fines and administrative sanctions which Tanzania can also learn and to adopt. Tanzania also can learn from the two established authorities, the Financial Services Authority of the UK and the Financial Services Board of South Africa -how they have managed to supervise compliance in dealing with insider trading practices in their respective jurisdictions. Furthermore the UK and South African insider trading pieces of legislation provide clear

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<sup>162</sup> Section 84(2) of the Financial Markets Act, 19 of 2012.

<sup>163</sup> Section 84 of the Financial Markets Act, 19 of 2012 also see Chitimira H 'A Historical Overview of Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Science* 5.

<sup>164</sup> Section 109 of the Financial Markets Act, 19 of 2012.

limits on basic concepts related to this study, such as the meaning of insider and inside information and publication to avoid ambiguities in interpretation. The Tanzania insider trading legislation does not provide limits to such basic concepts something which could invite many interpretations.

#### **4.5 Conclusion**

The researcher submits that the existing Tanzania insider trading piece of legislation, the Capital Markets and Securities Act, of 1994 ( with its amendments) as compared with other pieces of legislation in part 4.4 of this chapter, if not amended or repealed will have little effect on curbing abuses that exist on the Tanzania securities market. The inadequacy prevailing in areas of prohibition, defences and on the methods of enforcement and, the lacuna on the basic concepts of insider trading make the legislation remain more symbolic than real in terms of its efficiency to combating insider trading practices in the country.



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS ON IMPROVING THE TANZANIAN INSIDER TRADING REGULATORY FRAMEWORK

#### 5.1 General Observation

This chapter provides concluding remarks with recommendations emanating from the study. Detailed discussions advanced in the first four chapters involved an attempt to answer the question as to whether or not the current Tanzania insider trading regulatory framework has successfully fulfilled its objectives viz to protect the integrity of the securities market against any abuses arising from the practice of insider trading, as well as to maintain surveillance over securities, and to ensure orderly, fair and equitable dealings in securities. Detailed analysis of foreign legislation considered as best international standard and therefore comparable in the protection of securities markets was conducted of the English and South African insider trading legislation. The study reveals in chapters two, three and four that the legal and institutional frameworks on securities markets in Tanzania is characterised by flaws and duplications when it comes to combating insider trading practices.<sup>165</sup> The Capital Markets and Securities Act of 1994 is inadequate and ineffective especially in relation to prohibition of insider trading, defences and enforcement mechanisms. It is also inadequate in relation to investor protection from insider trading. Flaws discussed in this study particularly in chapters two and three have great impact in the regulation of insider trading on the securities market and are such as lack of strong, adequate and effective provisions on prohibition and enforcement mechanisms, including criminal and civil penalties and absence of administrative sanctions to be employed to offenders of insider dealing. The absence of definitions of some important terms such as insider, and inside information, and publication in relation to inside information, absence of circumstances in which information is to be regarded as having been made public and absence of clear provision on defences are problematic. Furthermore, and as it has also been presented under chapter three of this study, the CMSA in the discharge of its roles and functions has not been able to contribute to the

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<sup>165</sup> See also Massawe H T & Kadilu M on 'Combating insider trading in Tanzania: the adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' 'CAPITAL MARKETS IN THANZANIA-Academia.edu' available at [www.academia.edu/9630069/CAPITAL\\_MARKET\\_INTANZANIA](http://www.academia.edu/9630069/CAPITAL_MARKET_INTANZANIA) (accessed 18/3/2015).

protection of the integrity of the securities market in terms of its supervisory powers of compliance in eradicating the problem of insider trading. Thus, it is concluded that the existing insider trading regulatory framework is too weak to curb the problem of insider trading practices in the Tanzanian securities market.

Important developments however have been noted in the Tanzanian insider trading legal framework. Chapter three of this study has clearly shown that the financial sector reform policy has had positive impact on securities, intending to create an enabling environment for investment. This is demonstrated by the legislative body enacting the Capital Markets and Securities Act of 1994. The step which the Capital Markets and Securities Act of 1994 has taken, of opening the door for private sectors to participate in financial management, including capital markets and securities, has enabled the establishment of the Capital Markets and Securities Authority (CMSA) with supervisory powers of compliance with the Act and the establishment of the Dar es Salaam Stock Exchange (DSE) of 1998 though with few listed companies. The Capital Markets and Securities Act of 1994 has also been amended twice; the 1997 amendment, and the 2002 amendment. The aim of the amendments among others was to match with the economic changes in the global market.<sup>166</sup>

The researcher submits that even though the CMSA was established among other goals, to protect the integrity of the securities market against any abuses arising from the practice of insider trading, the CMSA has never achieved this goal to attract investor confidence.

## **5.2 Recommendations**

Herein below the researcher suggests a solution to combat the problem of insider trading practices. Arguments are based on the lessons developed in chapter four of this study to making the Tanzanian insider trading regulatory framework the most strong, fair, adequate, effective and competitive and comparable to international standards.

1. The researcher recommends that the legislature should consider the enactment of strong and effective insider trading enforcement mechanisms, including criminal and civil penalties.

One of the major purposes of having a regulated securities market in the country is to protect investors from insider trading practices. This goal is achieved where there are established strong, adequate, and effective enforcement mechanisms, including criminal and civil penalties to protect the integrity of the securities market. Severe penal sanctions should be

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<sup>166</sup> See paragraph 2.2 of chapter two of this study.

employed to perpetrators of insider trading acts. As earlier stated in paragraph 3.6 of chapter three of this study, in Tanzania it is only the court and its instituted organs such as the office of the DPP that is mandated to enforce measures against any claim on securities abuse. However, the actual profit made or loss avoided in illegal securities dealings is determined by the court. The established single regulatory body- the CMSA does not prosecute criminal cases relating to insider trading. The office of Director of Public Prosecutions (DPP) is responsible for prosecuting criminal matters and this has affected the due process of law which required timely dispensation of justice due to the backlog of cases in Tanzanian courts. The researcher recommends the adoption of strong enforcement measures including criminal and civil penalties from the compared jurisdictions, especially from the South African insider trading regulatory framework as discussed in paragraph 4.3.3 of chapter four above. A fine of not less than five million shillings or imprisonment for a term of not less than five years or both such fine and imprisonment as discussed in paragraph 2.3 of chapter two above cannot deter insider trading practices on the securities market.

2. The researcher recommends that the legislature should enact adequate provisions on administrative sanctions.

Unlike in the compared jurisdictions, the Tanzanian insider trading regulatory framework does not provide for administrative sanctions. The researcher recommends the adoption of administrative sanctions to combat the problem of insider trading as usefully applied in compared jurisdiction of South Africa as discussed in paragraph 4.4 of chapter four of this study.

3. The legislature should enact adequate provisions on defences and should provide clear clauses on exceptions.

The Capital Markets and Securities Act, of 1994, (with its amendments) does provide only one defence relating to insider trading practices. This is found under subsection 10 of section 112 of the Capital Markets and Securities Act, of 1994. That it is a defence if the person satisfies the court that the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction. This is also discussed in paragraph 2.3 of chapter two. Other defences as found in compared jurisdictions, as explained in paragraph 4.3.3 of chapter four are not found in the Capital Markets and Securities Act, of 1994. The researcher is of the view that the Tanzanian insider trading legislation should adopt such defences to strengthen its regulatory framework to ensure fair and equitable dealings in securities.

4. The legislature should consider putting strict boundaries to technical terms which are very fundamental to the protection of the integrity of the securities market.

Earlier discussions in paragraph 2.3 of chapter two and paragraph 4.4 of chapter four of this study have shown that basic concepts such as an insider, inside information and publication are not defined by the Capital Markets and Securities Act, of 1994. The absence of strict boundaries to technical terms creates a loophole for many interpretations. The researchers' view is that the Act should be amended to provide limits to basic concepts to avoid inconsistencies in the law.

5. A complete repeal of the Capital Markets and Securities Act, Chapter 79 of 1994.

The discussions developed in this study have portrayed that the Tanzania insider trading regulatory framework is flawed and inadequate. Despite the two amendments to the Capital Markets and Securities Act, of 1994, both, the content and application of the Act, including its established regulatory bodies such as the CMSA and the DSE, have remained a concern in regulated and unregulated markets. Basing on this study, the researcher therefore concludes by recommending the enactment of a new piece of legislation which has features of a strong, fair, equitable, adequate and effective provisions to ensure the protection of the integrity of the securities market against any abuses arising from the practice of insider trading and to promote investment in the securities industry of Tanzania.

It is believed that when these recommendations are implemented, Tanzania will have strong and robust insider trading system.

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