UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

A MINI-THESIS TO BE SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE LLM DEGREE: MERCANTILE LAW AND INTERNATIONAL TRADE (MODE II)

Name of Candidate:	**Hilton Packies**
Student Number:	**2755731**
Degree:	**LLM**
Department:	**Mercantile Law and Labour Law**
Title of Study:	**The market abuse control legislative regime of South Africa, Nigeria and the United Kingdom - an approach to regulation and monitoring in relation to certain aspects of the financial markets of South Africa**
Supervisor:	**Professor Riekie Wandrag**
Date:	**25 November 2015**

DECLARATION

I declare that 'The market abuse control legislative regime of South Africa, Nigeria and the United Kingdom - an approach to regulation and monitoring in relation to certain aspects of the financial markets of South Africa' is my own work, that it has not been submitted before for any degree or examination in any other university and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Hilton Packies

Signature: …….

Date: ……

Supervisor: Professor MS Wandrag

Signature: ……

Date: ……

ACKNOWLEDGEMENTS

Completion of this mini dissertation was made possible through the guidance, support and help of many people. In this respect, I would like to express my sincere gratefulness to the following persons for their significant contributions:

• God Almighty, the source of my strength and power as well as blessings. All honour and praises be unto Him.

• My dear wife Shelley Jacobs-Packies, thank you for all the prayers, love and encouragement.

• My mother, thank you for your constant prayers and love.

• My sisters, Erica Packies, Patricia Packies and Debra Cordom thank you so much for bringing me up in love, and in the Knowledge of God.

My parents in law, Stafford and Wendy Jacobs, thank you for your constant love and encouragement to pursue my degree and to see it through to the end.

• All my ministers of the New Apostolic church, thank you for your encouragement, guidance and prayers.

• Professor Riekie Wandrag, my supervisor. Thank you so much for your patience, most trusted guidance, support and constructive criticism. May God bless you.

• Professor Patricia Lenaghan, Law Faculty. Thank you for being a supportive lecturer and for affording me this scholarship to pursue my degree.

• Mrs Hazel Jeftha, Faculty of Law Senior Administration Officer. Thank you for all the assistance, guidance and encouragement.

• My colleague and dear friend Chrizanne Fouche, thank you for all your support throughout this period, my constant encouragement and guidance, for being my research partner and all your unceasing prayers.

• My friends Tersia Tremble, Tracy Tremble, thank you for your support, love and prayers.

• My friends and colleagues Jennilee van Doorsen, Zimasa Qolohle, Akunna Onwu and Giselle Grewe, thank you for your enduring love and valuable support.

• My friends Mamoneuwa Maduna and Raquel Carrasco, thank you for your support, editorial guidance and constant prayers.

• My friend Morwesi Mashego, thank you for assisting me in gaining access to research facilities and portals at the University of Johannesburg library.

• The library staff at the University of the Western Cape and Johannesburg. Thank you for allowing me to use your well-resourced and updated library.

ABSTRACT

The regulation of market abuse is currently an ever evolving subject, to such an extent that it has been placed as a high priority for regulators worldwide.[1] The Financial Markets Act 19 of 2012 (FMA) of South Africa[2] prohibits improper practices and is aimed at ensuring that market participants operate in a market that is free, safe and fair. In light of the above and as per example, all members of the stock exchange ensure that they accordingly adhere to the aims of the FMA by exercising functions such as due diligence and having a shared goal in embedding the values entrenched in the FMA.[3] The purpose of this dissertation is aimed at assessing the key elements of the transformation process that the South African financial markets have embarked on, since the introduction of the FMA. More specifically, the paper aims to focus on the elements in relation to market abuse practices.[4] The paper seeks to:

1. provide an overview analysis of the current market abuse control enforcement framework in relation to some selected aspects of the financial markets in South Africa.
2. look at the regulation employed in one of the biggest trading products namely, equities and current lacuna, the legislation that governs high frequency trading under these trading products and in general.
3. review whether regulation in South Africa on market abuse practices are robust enough to deal with key market abuse practices such as insider trading and market manipulation that manifested during the recent global financial crisis.
4. provide a comparative review of the current market leaders regulatory mechanisms on market abuse.

[1] Regulators in question include *inter alia The Financial Services Board, The South African Reserve Bank, the Financial Conduct Authority of the United Kingdom and the Securities Exchange Commission of the US.*
[2] Financial Markets Act 19 of 2012.
[3] Preamble of the Financial Markets Act 19 of 2012.
[4] S 78 – 81 of the Financial Markets Act 19 of 2012.

ACRONYMS

SRO Self-Regulatory Organisations
BDA Broker dealing accounting system
FSB Financial Services Board
DMA Directorate of Market Abuse
EC Enforcement Committee
JSE Johannesburg Stock Exchange
NSE Nigeria Stock Exchange
SEC Securities Exchange Commission
FSA Financial Services Authority
BESA Bond Exchange of South Africa
CCSA Competition Commission of South Africa
CFTC Commodities Futures Trading Commission
SENS Stock Exchange News Services
SARB South African Reserve Bank
DTI Department of Trade and Industry
TRP Takeover Regulation Panel
CBN Central Bank of Nigeria
NCM Nigeria Capital Market Authority
CIC Capital Issues Committee
IOSCO International Organisation of Securities Commission

KEY TERMS AND CONCEPTS

1. Market abuse

2. Insider trading

3. Market Manipulation

4. Prohibited trading practices

5. Securities

6. Equity trading

7. Financial markets

8. Market abuse control

9. Regulation

10. Monitoring

11. South Africa

12. Nigeria

13. United Kingdom

14. Material non-public information

15. Price – sensitive information

16. Inside information

17. High frequency trading

18. Surveillance

19. Market abuse surveillance

20. Exchange traded products

TABLE OF CONTENTS

CONTENTS PAGE

CHAPTER 1

1. INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The term market abuse became a commonly used term in South Africa after the advent of the Securities Services Act of 2004 and the Financial Markets Act 19 of 2012.[5] Market abuse covers improper trading practices relating to insider trading,[6] prohibited trading practices such as market manipulation[7] and the making of false, misleading or deceptive statements.[8] Market abuse control objectives were designed in order to compliment the twin peaks model of market conduct and prudential regulation as introduced by the Minister of Finance in the twin peaks model policy document aimed at regulating the financial sector, in order to make it a safer sector to serve South Africa better.[9] Together with the Basel III [10] objectives and the King III Report on corporate governance, there was a need to ensure that the financial sector is armed in order to weather the storm of a crash in the market. It is submitted that a safer financial sector would reflect that South Africa's robust macro-economic fundamentals and financial regulatory framework would shield the sector against a drastic turn of events such as the global financial crisis.[11] A contravention of the market abuse legislation provisions would invoke civil liability in the form of excessive fines or in light of criminal liability imprisonment, in the form of long prison sentences coupled with significant fines.[12]

---

[6] Section 78 of the Financial Markets Act 19 of 2012.

[7] Section 118 of the United Kingdom's Financial Services and Markets Act 2000 in relevant part states that market abuse is behaviour whether by one person alone or by two or more persons jointly or in concert—

> "(a) which occurs in relation to qualifying investments traded on a market to which this section applies;
> (b) which satisfies any one or more of the conditions set out in subsection (2); and
> (c) which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.
> . . ."

[8] S 78 – 81 of the Financial Markets Act 19 of 2012.

[9] Minister of Finance *Implementing a twin peaks model of financial regulation in South Africa* (2013).

[10] Basel III is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector. To mention a few, they are aimed at minimizing the probability of a recurrence of crises to greater extent; improving the banking sectors ability to absorb shocks arising from financial and economic stress; improving risk management and governance, and to strengthen banks transparency and disclosures .

[11] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

[12] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at

The regulatory framework governing the global markets arena and securities services is further strengthened and enhanced by a broader framework encompassing:

1. The Companies Act 71 of 2008;
2. Bank Acts regulations;
3. The Financial Services Board Act No 97 of 1990;
4. The Financial Institutions (Protection of Funds) Act No 28 of 2001; and
5. The Financial Markets Act 19 of 2012.

all of which reinforce the Registrar's regulatory and supervisory powers in respect of inspections, curatorship and other enforcement measures.[13]

The Financial Services Board Act also provides individuals which are currently being regulated, the right of appeal against any decision made by the regulator. The Financial Services Ombuds Schemes Act allows for alternative dispute resolution mechanisms for users of Self-Regulatory Organisations (SROs) and their clients.[14] All of these mechanisms are aimed at ensuring that market abuse practices are carefully monitored and controlled in order to ensure that there is a safer financial sector which in turn compliments a safer economy where investors' interests are protected.[15]

The enactment of the Financial Markets Act is a positive indication that the South African policy makers and Legislature acknowledged that a severe threat is posed by the effects of market abuse and that regular developments around market abuse regulation needed to be

---

http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf (accessed on 20 May 2014).

[13] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

[14] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

[15] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

maintained. Market abuse practices undermines investor confidence,[16] it undermines the objectives of a free and fair market in which all customers are treated fairly. [17]

This research will determine and investigate whether the current legislative framework competently ensures that market abuse practices are well regulated and that it as far as possible effectively regulates prohibited trading practices such as insider trading, market manipulation and the making of false and misleading statements. The research conducted in this dissertation will focus on the gaps in the current legislative framework, which fails to provide guidance on the issue of high frequency trading in the equities market. This issue will be explored in more detail in Chapter 3.

Chapter 3 will also highlight the existing technological developments that streamline trading practices in the equity market, and how these developments are continuously improved in contradistinction with the rule of law which remains static and unmodified to compliment or regulate the technological developments in accordance with the law. In order to ascertain whether the concerns highlighted above are valid, the following questions ought to be outlined and answered in this dissertation:

1. Is the South African market abuse legislation adequate enough to ensure equity trading is efficient and well regulated? If not, what can be done to enhance or offer a solution to market abuse regulation?
2. Is the South African market abuse legislation geared or designed in a manner to create an efficient market, in which investor confidence and standards are maintained. If not, what can be offered to enhance it?
3. Comparatively, is the South African market abuse legislation aligned with international best practices such as those of the United Kingdom?
4. Does the market abuse legislation serve as a mechanism to enhance international trading through the Johannesburg Stock Exchange (JSE)?

[16] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

[17] Treasury, 'Reviewing the regulation of Financial Markets in South Africa - Policy document explaining the Financial Markets Bill, 2011' available at *http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf* (accessed on 20 May 2014).

This paper therefore seeks to explore:

1. the adequacy and effectiveness of market abuse legislation in the current day and age;
2. the role of the regulator/s to ensure that controls are in place to combat market abuse;
3. the various remedies available to aggrieved parties to a suit of an alleged market abuse practices investigated by the Financial Services Board (FSB).

Chapter Four and Five of this dissertation will also provide a comparative analysis of the current legislative frameworks which pertain to market abuse and which are applied by the United Kingdom ("UK") and Nigeria. This analysis can potentially be used as a comparative tool to provide guidance and suggested measures to further develop the regulatory standards in place in South Africa and also provide guidance on the effectiveness and extent of South African legislation and how it can be potentially aligned to adjust to international best practice.

The research is also aimed at providing a systemic framework for market abuse regulation. Borrowing from the United Kingdom and Nigeria, the comparative analysis will assist in enhancing and answering questions regarding how South Africa will keep abreast with the changes in activities within the equity markets, especially activities that have traces of financial crime and suspicious activities. The researcher believes that the paper will also serve to provide insight and guidelines on the regulatory interaction that should be maintained and followed into the future to ensure that South Africa never falls behind in regulating improper trading practices.

1.2. BACKGROUND

Financial markets can be defined as the institutional arrangements, mechanisms and conventions that exist for the issuing and trading - buying and selling of financial instruments.[18] A financial market is not a single physical place but millions of participants, spread across the world and linked by vast telecommunications networks that bring together buyers and sellers of financial instruments and sets prices of those instruments in the

[18] Goodspeed I, 'Introduction to Financial Markets - The South African Institute of Financial Markets' available at *http://www.virtualexamcentre.co.za/saifm/downloads/files/Introduction_to_Financial_Markets.pdf* (accessed on 21 May 2014).

process.[19] For every economy it is important to have a functioning and operative financial market wherein the interplay of trading activity is monitored, maintained and enhanced through governing rules and mechanisms. At the heart of each trading activity, the seller wishes to exchange a product in anticipation of receiving a payment for this either immediately or within a time period. However a corresponding obligation exists between these parties.

In a perfect world the activity demonstrated above would occur free from any hindrance and, a client would receive the best price or deal and the seller would receive payment timeously and in the correct manner. To the contrary improper dealings can creep in and this type of practice is called a market abuse. Market abuse is a global problem that has adverse effects on emerging and developed markets.[20] Failing to regulate such practices could lead to reputational and operational risks. It will affect any economy, undermine the integrity of the financial markets, as well as undermine the financial sector or any private sector, and undermine investor confidence.[21]

1.3. AIMS AND OBJECTIVES

1.3.1 AIM

The thesis aims to provide a clear account of the market abuse regulative framework currently employed in South Africa. It aims to advocate for a safer and regulated financial market in which market abuse practices are efficiently and adequate controlled. It is aimed at providing ways to ensure that proper controls and measures are followed by all financial institutions in order to manage improper trading practices. In turn this will ensure that South Africa's legislation is in line with international best practices countries such as the United Kingdom and other market leaders in Africa such as Nigeria.

1.3.2 OBJECTIVES

It is important to identify the following objectives for the purposes of the research review conducted by the researcher:

[19] Goodspeed I, 'Introduction to Financial Markets - The South African Institute of Financial Markets' available at *http://www.virtualexamcentre.co.za/saifm/downloads/files/Introduction_to_Financial_Markets.pdf* (accessed on 21 May 2014).
[20] Singh-Muchelle A, 'MIFID, MMT and European Market Reform available at *http://fixglobal.com/home/mifid-mmt-and-european-market-reform/* (accessed on 25 May 2014).
[21] Singh-Muchelle A, 'MIFID, MMT and European Market Reform available at *http://fixglobal.com/home/mifid-mmt-and-european-market-reform/* (accessed on 25 May 2014).

a) To review and recommend better procedures in order to implement the market abuse regulations within South Africa.
b) To review and recommend the deployment of more stringent fines and penalties for corporates and persons guilty of market abuse.
c) To provide a recommendation for the implementation of specific legislation governing high frequency trading.[22]
d) To recommend the deployment of stricter sanctions for breaches of market abuse surveillance mechanisms employed by companies and brokers dealing on the securities markets.
e) To recommend appropriate amendments to the Financial Markets Act to ensure that the provisions in the Act are more applicable to trade and prohibition on trading on all traded products.
f) To encourage the regulators to employ stricter controls and mandates for companies to have internal controls in place to regulate market abuse and to control improper practices.

1.4. PROBLEM STATEMENT AND HYPOTHESIS

1.4.1 Problem Statement

Market abuse poses grave threats to the confidence in the financial markets and the notion of free and fair investment through the trading platform.[23] There is definitely a need to review the current scheme regulating this type of practice. Locally there are several investigations and cases that have been closed out and several pending on market abuse - either investigations into insider trading or market manipulate or more commonly known in South Africa as a prohibited trading practice.[24] There are not many reports on instances of finding of insider trading and therefore it is appropriate to review the strengths and weaknesses of the regulatory universe of South Africa. The following problems identified require urgent remedial redress in order to ensure that our country is geared towards a freer and safer financial sector:

[22] High Frequency Trading (HFT) refers to a program trading platform that uses powerful computers to transact a large number of orders at very fast speeds. High-frequency trading uses complex algorithms to analyze multiple markets and execute orders based on market conditions.
[23] 'Market abuse regime: Prioritisation and Proportionality' available at *http://www.fsac.org.uk/library/communication* (accessed on 27 July 2014).
[24] Directorate of Market Abuse Past Investigations available at *https://www.fsb.co.za/Departments/marketAbuse/Pages/pastInvestigations.aspx* (accessed on 29 July 2014).

a) The current legislative framework adequately provides for the main market abuse practices identified internationally and provides a framework of adequate redress and recourses available to the aggrieved and imposes severe penalties and excessive prison sentences to abusers of the markets. There is however still a need to provide adequate rules that would address the concerns of effectiveness and appropriate sanctions for instances not covered such as the dawn of high frequency trading through algorithmic mechanisms that pose the threat of manipulating the market. Also deterrence has not always been appropriate measure to combat market abuse instances.

b) There is a need to ensure that implementation and monitoring and surveillance measures are to be covered in the rule of law. More stringent provisions need to be incorporated into the legislation to force brokerages and dealers to employ market abuse regulations, guidelines and rules within the financial markets of South Africa.

c) There should be constant reviews and developments around ensuring that the laws governing market abuse are designed in way to regulate over the counter trades that are not on an exchange and occurs on unregulated markets. The National Treasury of South Africa and international regulators have started to engage with market participants on this. The South African National treasury published a Policy document[25] regarding the regulations issued under the FMA.

d) Another weakness prominent in South African market abuse legislation is that it fails to adequately provide for stringent rules that govern trade on dual listed stocks via the JSE and a foreign exchange.

1.4.2 Hypothesis

The following hypotheses are assumed in order to assist in the investigation into the regulation of market abuse in the South African financial markets:

a) Although the legislative framework adequately provides for principles governing market abuse, there is a need for redress in order to meet the developmental demands of technology that has taken the forefront on automated trading on the financial markets arena.

b) Ensuring that there is a legislative framework in place would not ensure that the processes are followed through efficiently. There is a need for stringent rules for

[25] Regulating Over-The-Counter (OTC) Derivatives Markets in South Africa: This policy document informs the proposed regulatory framework relating to the over-the-counter (OTC) derivatives market in South Africa and is drafted in accordance with s107(2)(iv) of the Financial Markets Act, No.19 of 2012 (FMA), effective 3 June 2013.

enforcement purposes and also to make people aware of the effects of market abuse on the economy.

c) Unregulated markets are also prone to market abuse; therefore redress in the legislative framework is a welcomed endeavour.
d) Investment into South Africa is likely to assist and boost the country's economy. Heightening investor confidence and efficiency within the market, where the regulatory capabilities measure up to those of foreign jurisdiction, will add on to the emergence of our markets and growth prospects.

1.5. LIMITATIONS OF THE STUDY

This study will only review the current framework incorporated into the Financial Markets Act, together with the JSE directive on Market Abuse. The historic frameworks will be discussed in brief in order to provide background on the developments around the control of market abuse. This dissertation is only focused on one instrument which is the second largest exchange traded product, due to space and scope limitations the review of the equity market of South Africa will be clear and concise in order to capture the main ideas the author wishes to highlight for purposes of the study. The comparative review that will be discussed in detail in Chapters Four and Five respectively will only provide guidance and support for the recommendations identified.

1.6 SIGNIFICANCE OF THE RESEARCH

In light of the dangers that market abuse can pose to the financial and economic health of a state and moreover the global economy, it is important that the combat against market abuse should be a joint venture, whether continentally or globally. The fact that the current legislation does not adequately provide for worst case scenario market abuse practices is the reason for this research. Market efficiency, public investor confidence are important factors that drive growth and investment. In order to enhance the current framework the gaps and flaws need to be identified in order to minimize the effects of improper trading practices. This research will contribute to the awareness of the effects of market abuse, provide guidelines and recommendations to manage high frequency trading and advocate the need for more stringent provisions to govern market abuse. Unless these issues are appropriately reviewed, the emergence of market abuse will be felt for many more years and emerging markets like South Africa will suffer and fall by the wayside.

1.7 RESEARCH METHODOLOGY

For purposes of addressing the problems as highlighted and making appropriate recommendations for an effective insider trading regulatory framework in South Africa, the following research methods will be used. The researcher will refer to relevant academic writings on the topic of market abuse. There has not been a lot of research and investigation conducted on this topic. The researcher will also make use of websites, seeing that this matter has not been researched in South Africa, a lot of the information will be based on lessons learnt from the United Kingdom (UK) and the United States of America (USA), specifically the Securities Exchange Commission in USA and the Financial Conduct Authority in the UK.

A number of libraries will be visited to access relevant books, case law, journals, statutes and other relevant materials. An examination and analysis of relevant case law and judicial precedents will be conducted. This research will focus on the Financial Markets Act 19 of 2012, Securities Services Act, 36 of 2004 and Insider Trading Act, 135 of 1998. Other relevant statutes from South Africa and other selected countries will be referred to for purposes of historical and comparative analysis.

An historical analysis will also be followed in Chapter Two of this dissertation. The main objective is to investigate the evolution of insider trading legislation in South Africa and to compare it with the current provisions. The researcher will employ comparative studies between South African insider trading laws and those of selected countries that may have more effective regulatory frameworks in place, to learn from their experiences and for purposes of possible application in South Africa.

1.8 STRUCTURE

This paper consists of six chapters:

1. Chapter 1

   This is the introductory part, which includes the definition of market abuse, provides a general background to market abuse, the research problem, the hypothesis, significance of the study and the methodology to be employed in the study.

2. Chapter 2

The discussion will be centralised around the legislative developments on market abuse in South Africa. The discussion will review the important legislation and the idea around the developments. It will investigate the regulation on market abuse in the Insider Trading Act of 1998, the Securities Services Act of 2004 and the Financial Markets Act of 2012.

3. Chapter 3

   This chapter examines the role the various role-players ought to fulfil in regulating the financial markets, but with a specific focus on the securities market in light of an ever growing sophistication around various trading practices that are constantly being introduced into this market. Emphasis will be placed on the fact that market participants fail to conduct an impact assessment or alignment to regulatory requirements. It will then focus on the regulation within the securities market in regard to the prevalent market abuse practices within this market. The author will introduce an ever evolving form of trading that traders are actively trading in that are not adequately regulated in South Africa, namely high frequency trading.

4. Chapter 4

   This chapter will provide a comparative perspective of the regulation of market abuse in the United Kingdom and South Africa, for purposes of examining whether the integration of some of the UK market abuse principles into the South African regulatory framework has worsened or improved the regulation of insider trading in South Africa.

5. Chapter 5

   Chapter Five provides a comparative analysis of the regulation of market abuse control in Nigeria and South Africa and investigates whether the South African legislature should not also have taken note of some developments in Nigeria.

6. Chapter 6

   The final chapter comprises of recommendations, guidelines and conclusions to address the issue of market abuse in South Africa.

CHAPTER 2

THE LEGISLATIVE DEVELOPMENTS OF MARKET ABUSE REGULATION IN SOUTH AFRICA

2.1 INTRODUCTION

As highlighted the integrity of South Africa's financial markets needs to be maintained, in order for investors to have confidence and for direct investment to flow into the country. This will be achieved through the proper regulation of market abuse. Discussions around this topic date back to the early nineties - however the regulation of Insider Trading in South Africa was only promulgated in the Companies Act of 1973(Companies Act), which recognised it as a statutory offence.[26] Insider trading was only recognised as a prohibited practice after the Van Wyk de Vries Commission of Inquiry into the Companies Act where it was confirmed that insider trading should be recognised as a malpractice.[27] This Act was later amended on two occasions in order to address the lacuna.[28] Even after these amendments, a gap in the law to deal effectively with the evil of insider trading remained.[29]

It was in September 1995, that a task force namely the King Task Group was formed on the request of the Minister of Finance at the time, to delve into the issue of insider trading in an attempt to address the gaps in the South African financial markets regulation.[30] The King Task Group recommended the enactment of a separate piece of legislation that would help to curtail the insider trading problem.[31] The Insider Trading Act[32] was enacted following the adoption by the legislature of the final King Report.[33]

[26] Insider trading regulation finds it origins in the Companies Act 61 of 1973. Section 233 of this Act was the founding provision which governed the prohibition on insider trading. This resulted in the adoption by the legislature of the various recommendations made by the Van Wyk de Vries Commission of Inquiry into the Companies Act in its Main Report.
[27] Meskin P M (ed) *Henochsberg on the Companies Act* 4 ed (1985) 367. See also Van Wyk de Vries Report paragraph 44.57. The Van Wyk de Vries Commission treated insider trading as a malpractice and a difficult problem that called for legislative intervention to combat its negative effects.
[28] Companies Amendment Act 78 of 1989 and the Second Companies Amendment Act 60 of 1990.
[29] Luiz SM 'Insider Trading: A Transplant to Cure a Chronic Illness?' (1990) 2 *SAMLJ* 59.
[30] The King Task Group and the King I Report.
[31] The Report by the King Task Group.
[32] Insider Trading Act 135 of 1998.
[33] The Report by the King Task Group. See also Henning JJ and Du Toit S *The regulation of false trading, market manipulation and insider dealing* (2000) 25(2) *Journal for Judicial Science* 155 -163. There were generally gaps in this legislative development namely; a lack or no timeous settlement was recorded in civil cases. There was only one case reported for prosecution since the inception of the insider trading ban. Penalties were still significantly low, defences were inadequate and generally speaking its provisions still reflected several shortcomings.

The new act still did not adequately address the most crucial aspects of insider trading regulation and was repealed and replaced by the Securities Services Act 36 of 2004. After being in operation for close to ten years this Act too, was repealed and replaced by the Financial Markets Act 19 of 2012. This law currently in operation is the governing legislation operative in South Africa and regulates market abuse. The Act covers insider trading, prohibited trading practices namely - market manipulation and the publishing of false and deceptive statements, the three main prohibited market abuse practices recognised globally.[34]

2.2 THE DEVELOPMENT OF MARKET ABUSE - INSIDER TRADING REGULATION IN SOUTH AFRICA

As part of this discussion the researcher aims to provide an overview of the scope of the Acts in relation to the scope of the guidelines and rules on prevention, detection, enforcement and regulation of these Acts.

2.2.1. Van Wyk De Vries Commission Inquiry

The Van Wyk de Vries Commission of Inquiry (Van Wyk Commission) treated insider trading as a malpractice and a difficult problem that called for legislative intervention to combat its negative effects.[35] The Van Wyk Commission made the following conclusions and identified that insider trading activity is not only practised by directors, but also by officers, employees or other persons; and that insider trading takes place in South Africa although its extent is difficult to determine.[36]

It is further submitted that insider trading is not limited to listed shares but also extended to other interests in a company and unlisted securities. In relation to unlisted securities it was discoursed that the identity of the parties is usually known and legislative intervention would not be necessary.[37] While a director (as an insider) does not owe fiduciary duties to individual shareholders, any person who was in possession of inside information however, owed a positive duty of disclosure on the basis of the involuntary reliance on the part of the other party on such disclosure.[38]

[34] Chapter X of the Financial Markets Act 19 of 2012.
[35] Rider B & French L *The Regulation of Insider Trading* (1979).
[36] Rider B & French L *The Regulation of Insider Trading* (1979).
[37] Rider B & French L *The Regulation of Insider Trading* (1979).
[38] Rider B & French L *The Regulation of Insider Trading* (1979).

The Commission found that different considerations applied to listed securities, because these transactions are anonymous and it was confirmed that, at that time, it was impossible for the JSE to identify the parties involved.[39] It was concluded further that a civil remedy would not be feasible, but that insider trading in respect of listed shares should be made an offence with a substantial penalty.

2.3 The Insider Trading Act of 1998

In January 1999 new provisions regulating insider trading was introduced by the Insider Trading Act.[40] Section 17 of this Act repealed section 440F of the Companies which previously regulated insider trading. [41]

The preamble to the Insider Trading Act of 1998 stated that the Act was enacted to prohibit individuals who have inside information relating to securities or financial instruments from dealing in such securities or financial instruments; to provide for criminal and civil law penalties for such dealing; to empower the FSB to investigate matters relating to such dealing, to institute proceedings in relation thereto and to administer the proof of claims and distribution of payments received as a result of any such proceedings; to establish the Directorate as a committee of the FSB for exercising the power to institute proceedings; to repeal a section of the Companies Act of 1973; and to provide for matters connected therewith.[42]The offences were listed in section two of this Act.[43]

The first recognised offence covered persons who dealt directly or indirectly as an agent (client trading), for his or her own account or proprietary trading - on behalf of the company. Previously section 440F only provided for an instance where it will be an offence if someone dealt on a security on unpublished price sensitive information in respect of the security which they traded on whether acquired as a result of certain relationships or wrongful methods. This Act introduced an instance where prosecution no longer needed to show that the offender dealt on the basis of information. Prosecution only had to prove that the offender knew that

[39] Rider B & French L *The Regulation of Insider Trading* (1979).
[40] Okpaluba C Defending the Regulation of Insider Trading on the Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory, *Law in Contemporary South African Society* (2004) New Africa Books 303. See also SM Luiz 'Insider Trading Regulation – If at First You Don't Succeed' (1999) 11 *SAMLJ* 136 at 138.
[41] SM Luiz 'Insider Trading Regulation – If at First You Don't Succeed' (1999) 11 *SAMLJ* 136 at 138.
[42] Preamble to the Insider Trading Act 135 of 1998 (the Act).
[43] Section 2 of the Act.

she was in possession of inside information[44] and that she or he acted on this information and dealt in the relevant security. An accused could only escape liability if he or she proved that they were acting on inside information on behalf of a client, this would allow a broker to raise the defence that it was acting on the instruction of a client unless such information was disclosed to the broker prior to trading.[45]

The second offence related to the encouraging or discouraging trading on the basis of inside information.[46] It is now an offence for any person who knows that he or she has inside information to encourage or cause another person to deal or to discourage such a person from dealing in securities or financial instruments to which such information relates or which would likely be impacted by it.[47] This was however only for the courts to adjudicate that the alleged conduct amounted to an encouragement or discouragement.[48]

Improper disclosure or tipping-off was recognised as the third offence by the new Act. It recognised it as an offence where any individual who knows that he or she has inside information and discloses such information to another person.[49] The individual could escape liability if he or she proved that on a balance of probabilities that the disclosure was made in the proper performance of their function in respect of their employment, office or profession and that such information was also disclosed as inside information.[50] The individual could also prove that that they held the reasonable belief that no person would deal in the securities or financial instruments as a result of the disclosure.[51]

The enforcement of insider trading laws in South Africa was generally difficult and can be viewed as an unsuccessful remedy in pursuit of punishing those guilty of the crime.[52] South Africa was the first country to introduce civil remedies and in spite of all the efforts made by the legislature to enhance the enforcement thereof, it was still not effective enough.

[44] Section 1(vii) provided that "inside information" means specific or precise information which has not 20 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 securities or financial instrument;
[45] Section 4 of the Act.
[46] Section 4 of the Act.
[47] Section 4 of the Act.
[48] Section 4 of the Act.
[49] Section 2(2) of the Act.
[50] Section 4(2)(b).
[51] Section 4(2)(a) of the Act.
[52] The prosecution or civil claim success rate indicates that the Act was not that effective.

Our lawmakers should however not be faulted for its efforts to prohibit and improve the regulation of insider trading in its entirety. The author is of the view that the 1998 Act was a welcomed step in the right direction that paved the way to effective regulation for insider trading in South Africa and to address the widely putative belief that insider trading was an accepted practice in South Africa.

2.4 The Stock Exchange Control Act 1 of 1985.

Initially section 40 of the Stock Exchange Control Act[53] regulated manipulative practices; however this section was substituted by section 37 of the Amendment Act of 1995[54] and later substituted by the Amendment Act of 2001.[55] The amendment of section 40 provided for the regulation regarding the prohibition on manipulative practices as well as price stabilisation.[56]

There is however no evidence that this enactment was ever invoked in any prosecution of manipulative trading practices and that anyone was ever convicted of such a practice.

2.5 Financial Markets Control Act 55 of 1989.

This Act designated two sections to regulate market manipulation and false and deceptive statements which is now recognised as a market abuse practice. Section 20 covered false trading and market manipulation and section 21 regulated false or misleading statements. There is no indication in literature whether the Act was successful or not.

2. 6 Securities Services Act 36 of 2004

The Securities Services Act 36 of 2004 (SSA) came into operation on 1 February 2005 repealing the Stock Exchanges Control Act 1 of 1985, the Financial Markets Control Act 55 of 1989, the Custody and Administration of Securities Act 85 of 1992, and the Insider

[53] Stock Exchanges Control Act 1 of 1985.
[54] Stock Exchanges Control Amendment Act of 1995.
[55] Stock Exchanges Control Amendment Act of 2001.
[56] Section 40 of the Amendment Act.

Trading Act 135 of 1998 (the 'ITA') and consolidated them into one measure.[57] It amended the repealed laws in many important respects in order to correct and improve some of their provisions. In addition to this it added a significant number of new provisions to the previous measures.[58] Chapter VIII of the Act regulated the broader offence of market abuse. [59]The aims of the SSA were to enhance confidence in the South African financial markets by contributing to the maintenance of a stable financial market environment and by promoting the international competitiveness of securities services in South Africa.[60] The researcher aims to provide a concise discussion on the improvements introduced by the new Act that were deemed necessary as a result of the challenges posed by the ITA. The author will recognise that the SSA considerably tightened the regulation of insider trading in South Africa, but may in so doing have gone too far in regulating the offence of insider trading.

2.6.1 Introduction of market manipulation as a form of market abuse

The introduction of market manipulation in the SSA certainly had the potential of achieving the object of promoting the international competitiveness of securities services in South Africa and of enhancing confidence in the South African financial markets.[61] This offence was tightened up in the SSA and the legislation generally in harmonised with other comparable cross border regulation, but had the effect of being even more far-reaching than foreign legislation.[62] Section 75(1) of the SSA imposed strict liability for the offence of using a prohibited trading practice. Section 76 of the SSA was also wider than the equivalent measures in America, the European Union and the United Kingdom in that it not only prohibited the making or publishing of false statements in respect of listed securities, but also prohibited such statements being made in respect of the past or future performance of a

[57] Cassim R 'Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too far?' (2007) 19 *SAMLJ* 44.
[58] Cassim R 'Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too far?' (2007) 19 *SAMLJ* 44.
[59] In addition to the offence of insider trading, two other offences constitute market abuse, viz, engaging in a prohibited trading practice and the making or publishing of false, misleading or deceptive statements, promises and forecasts. Also note that it is generally accepted practice that there is no comprehensive or satisfactory definition of market abuse that exists to date. See also Chitimira H 'An analysis of the General Enforcement Approaches to combat Market Abuse (Part 1)' (2012) 33 *Obiter* 548-565.
[60] Preamble of the Securities Services Act 36 of 2004.
[61] Securities Services Act 36 of 2004.
[62] Cassim R 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 19 *SAMLJ* 177-199.

public company.[63] Lastly, the SSA prohibited both the making of false, misleading or deceptive statements, promises or forecasts as well as the omission or concealment of a material fact that renders a statement, promise or forecast false, misleading or deceptive.[64]

2.6.2 Extension of person to juristic persons

The SSA defined an 'insider' in section 72 as a 'person who has inside information'. The word 'Person' included a partnership and a trust.

2.6.3 Criminal Liability

In terms of the SSA, a person committed a criminal offence by contravening the provisions of section 73 of the Act. Section 115 set out the stiffer penalties which could be imposed upon successful prosecution and conviction of an accused. However, the provisions of section 80(1) required the court to take into account when imposing criminal sanctions any award previously made for civil remedies under section 77 arising out of the same cause.

2.6.4 Civil liability

Section 77 granted the FSB more power to institute civil action against an insider who contravened the provisions of section 73, if it considered that it was in the public interest to do so.

2.6.5 Enforcement

The SSA established the Directorate of Market Abuse (DMA) to replace the Insider Trading Directorate (ITD) of the Insider Trading Act 135 of 1998.[65] The functions of the ITD were now carried out by the DMA. The scope of the mandate of the DMA was wider than that of the ITD as the DMA deals with all forms of market abuse in addition to insider trading cases.[66]

[63] Cassim R 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 19 *SAMLJ* 177-199.
[64] Cassim R 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 19 *SAMLJ* 177-199.
[65] Section 82 of the SSA.
[66] Section 82 of the SSA.

The SSA certainly tightened-up the regulation of insider trading in South Africa. Considerations that should have been made to improve the SSA should have included the following. The regulator should rather have made it mandatory for all juristic persons to make full and prompt disclosure of all material corporate information. It is further submitted that juristic persons ought to be obliged to maintain a restricted list of securities, which would assist in reducing instances of insider trading. Moreover, it is suggested that companies which engage in share repurchases should be considered insiders of themselves in relation to their own shares.

It is submitted that the SSA had gone too far in narrowing down the defences to the insider-trading offence. For instance, the SSA has repealed certain defences which had existed in the ITA, and that may now have the effect of exposing certain innocent groups of persons to criminal prosecution under the SSA. The Act seemed to have introduced an anomaly into the law in respect of the defence to the disclosure offence, and it has completely eradicated the defences to the offence of encouraging or discouraging dealing.

2.7 The Financial Markets Act 19 of 2012.

2.7.1 Introduction

An evaluation of the regulation of financial markets in South Africa culminated into the enactment of a new Financial Markets Act 19 of 2012 (FMA),[67] which replaced the Securities Services Act 36 of 2004 (SSA) with effect from 3 June 2013.[68] The law makers preferred the institution of a new Act over complex amendments to the SSA, to enhance legal certainty and simplicity.[69] The three core objectives against which securities regulation can be measured are the protection of investors, ensuring that markets are fair, efficient and transparent, and the reduction of systemic risk.[70]

2.7.2 Changes introduced by the FMA to the provisions regulating insider trading

[67] Financial Markets 19 of 2012.
[68] Current law regulating market abuse in South Africa.
[69] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458.
[70] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458.

The definition of securities in section 1 of the FMA now also includes unlisted securities, which were not covered by the SSA.[71] Critics are however of the view that the market abuse provisions do not necessarily always apply to unlisted securities as well[72] as the insider trading offences relate only to securities listed on regulated markets. This is evident from the statement of the various offences.[73]

In the light of the requirement of publication - section 74(1)(a) of the SSA stated that information was considered to have been made public if it was published in accordance with the rules of the relevant regulated market 'for the purpose of informing clients and their professional advisers'.[74] Important information relating to a listed company must now be published on the Securities Exchange News Service (SENS).[75] The new provision is an improvement because it excludes any possible debate as to the purpose of a specific publication.

2.7.3 Offences and defences under the FMA for insider trading

The insider trading offences are now provided for in section 78 of the FMA.[76] The offences have been expanded, and some of the defences changed. Dealing in one's own account was formulated in the same way as the provisos under section 73(1)(a) but the defence ordinarily available in this section had been formulated rather restrictively, because it seems to imply that the instruction to deal must be given directly to the authorised user.[77] Although 'dealing' is defined in section 77 of the FMA as including 'conveying or giving an instruction to deal', the word 'trading' is not defined.[78] The FMA contains a definition of 'transaction' as

[71] Section 1 of the FMA.
[72] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458.
[73] See sections 78(1)(a), 78(2)(a), 78(3)(a) and 78(5)(a). Even though s 78(4)(a) does not expressly refer to securities listed on a regulated market, the definition of inside information makes it clear in this context.
[74] Section 74(1)(a) of the SSA.
[75] See Appendix 1 to Section 11 of the JSE Listings Requirements. SENS ensures the real-time dissemination of information ensuring that investors and their professional advisors are fully informed.
[76] Section 78 of the FMA.
[77] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 464.
[78] This can viewed as a flaw as the meaning of trading could be argued based on differing views of interpretation even though to anyone it would mean the same. The author is of the view that it could be assumed that the Legislature empowered the courts to determine the extent of the meaning of trading and to adjudicate it on the basis of the facts of each prosecution.

meaning a contract of purchase and sale of securities.[79] However, as the transaction envisaged in this defence is clearly something in pursuit of which trading can occur, it would seem that the word is not used in its defined meaning in this instance.[80] Certain types of affected transactions would clearly involve dealing in securities, but the defence is applicable in wider circumstances.[81] The transaction could be any commercial transaction that relies on trading for its implementation, provided it was not aimed at exploiting the price movement resulting from the inside information.[82]

A commentator opines that in order to raise the transaction defence provided for in section 78(1)*(b)*(ii), one has to show that all the parties had the same inside information and that the trading was limited to those parties. [83] Dealing for someone as covered in the SSA substantially remains the same except that dealing for another person through an agent is expressly covered.[84] The FMA requires such an authorised user to show to the contrary that she did not know that the client was an insider 'at the time'.[85]

The new Act now introduces a new offence for dealing for an insider. Section 78(3) of the FMA provides:

> '*(a)* Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence.
>
> *(b)* A person is, despite paragraph *(a)*, not guilty of any offence contemplated in that paragraph if the person on whose behalf the dealing was done had any of the defences available to him or her as set out in subsection (2)*(b)*(ii) and (iii).'

[79] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 463.
[80] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 463.
[81] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 464.
[82] Section 78(1)(b)(ii)(cc) of the Financial Markets Act 19 of 2012 (FMA).
[83] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 464.
[84] Section 78(2)*(b)*(ii) of the FMA.
[85] Section 78(2)*(b)*(ii) of the FMA.

The new offence differs in important respects from the second offence in section 78(2)(a)[86] of the FMA. First, the perpetrator need not be an insider herself. She merely has to know that she is dealing on behalf of an insider.[87] It is not necessary that the perpetrator knows the inside information itself, but she would have to know that the person on whose behalf she deals does have inside information, because an insider is defined as someone who has inside information.[88] This is in addition to knowing, for example, that the person is a director or employee of the issuer of the securities.[89] However, a person charged with the new offence in section 78(3)(a) of dealing for an insider can assert in defence that the insider on whose behalf the dealing was done had any of the defences in section 78(2)*(b)*(ii) or (iii) available to her.[90]

2.7.4 Administrative sanction

Section 82(1) of the FMA provides the details regarding the imposition of an administrative sanction.[91] It states the extent of an administrative sanction that can be imposed for contraventions of section 78(1), section 78(2), as well as section 78(3).[92] The administrative sanction imposed by the Enforcement Committee cannot exceed the sum that would be reached if one took into account the aggregate of the profit made (or which would have been made if the securities had been sold at any stage) or the loss avoided by the insider, person, or other person (as the case may be) through the dealing, and an amount of up to R1 million, plus three times the amount of the profit made or loss avoided, interest, as well the costs of the suit, including investigation costs on a scale decided by the EC.[93]

[86] Section 78(2)(a) provides that an insider who knows that he or she has inside information and who deals, directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.
[87] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 468.
[88] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 468.
[89] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 468.
[90] Section 78(3) of the FMA.
[91] Section 82(1) of the FMA.
[92] Section 82(1) of the FMA.
[93] Section 82(1)(b) of the FMA. This amount will be adjusted every year by the registrar to reflect the CPI.

Section 82(2) regulates the administrative sanction that may be imposed for contraventions of section 78(4) and section 78(5).[94] The offender may be held liable for an administrative sanction calculated in terms of section 82(1), but with reference to the profit made or loss avoided by the person to whom the information was disclosed or who was encouraged or discouraged.[95]

2.7.5 Regulation of prohibited practices

Section 80(1)(b) of the FMA has the effect of prohibiting persons who ought reasonably to have known that they are participating in a prohibited practice from doing so.[96] Notably the contravention of the prohibition under this section is not crafted to impute criminal liability though any contravention of the FMA can still be investigated and may be referred to the EC for the imposition of an administrative penalty.[97]

The FMA further expands the range of effects that the practice might include. In addition to an artificial price or a false or deceptive appearance of trading activity in connection with the security, it might include a false or deceptive appearance of the demand for or supply of a security.[98] This makes sense, because a false appearance of demand or supply could already be harmful to the market, even if not acted upon so as to result in actual trades.[99] Another change was that instead of the list of deemed prohibited trading practices in section 75(3) of the SSA, the FMA has opted to include in section 80(3) a list of specific contraventions of section 80(1), however concerns have been raised in light of this change.[100]

The requirement of knowledge is not mentioned in any of the seven specific contraventions.[101] Instead, two of these offences require an 'intention' to create a false or deceptive appearance of trading activity or an artificial market price, three of them focus on

[94] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 474.
[95] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 474.
[96] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 478.
[97] Section 6A(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 as it reads after being amended by the FMA (Act 28 of 2001).
[98] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 478.
[99] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 478.
[100] Section 80(3) reads: 'Without limiting the generality of subsection (1), the following are contraventions of subsection (1).'
[101] Section 80(3)*(a)* and *(b) of the FMA.*

the 'purpose' of either creating a false or deceptive appearance of trading activity or an artificial market price, while the remaining two make no mention of intention or purpose.[102]

2.7.6 The prohibition on the publishing of false, misleading or deceptive statements; promises and forecasts.

This offence has been re-enacted in section 81 of the FMA in substantially the same form as in section 76 of the SSA. [103] However, while the SSA offence referred to false, misleading or deceptive statements, promises and forecasts in respect of the past or future performance of a public company, the FMA makes it clear that it must be a company whose securities are listed on a regulated market.[104] A further offence has been created in section 81(2) of the FMA.[105] This is committed where someone has made a false, misleading or deceptive statement whilst unaware of the fact that it is false, misleading or deceptive, and subsequently becomes aware that it was so but fails to publish without delay a full and frank correction with respect to that statement.[106] For this new offence, there is no possible liability if the person was unaware but ought to have become aware of the false, deceptive or misleading nature of the statement.[107]

2.7.7 Liability in respect of Prohibited trading practices and the publication of false statements or forecasts

Any person who contravenes the prohibited trading practice provision in section 80(1)(a)[108] of the FMA and any person who contravenes the false statement prohibition in section 81(1) or who fails to publish a correction statement as required by section 81(2)[109] commits an offence and is exposed to the possibility of a fine of up to R50 million and/or 10 years'

[102] It should be noted that the general prohibition in s 80(1)*(a)* of the FMA prohibits practices that create or might create 'an artificial price', whereas the contraventions in s 80(3) mainly refer to the creating of an 'artificial market price'.
[103] Section 81 of the FMA.
[104] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 485.
[105] Section 81(1) of the FMA
[106] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 485.
[107] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 485.
[108] Section 80(1)*(a)* of the FMA must be read with s 80(2). As mentioned, it is not a criminal offence for a person who ought reasonably to know that he is participating in a prohibited trading offence: see s 80(1)(*b)* of the FMA.
[109] Section 81(1) of the FMA read with s 81(3).

imprisonment.[110] These sections to do not provide for the imposition of an administrative penalty, however such claims could be referred by the DMA to the EC under section 6A(2) of the Financial Institutions (Protection of Funds) Act (Protection of Funds Act),[111] or by the Registrar of Securities Services in terms of section 99 of the FMA. If the EC determines that there has been a contravention of the law, it may impose a penalty payable to the FSB in terms of section 6D(2)*(a)* of the FI (P of F) Act, and could also order the respondent to pay a compensatory amount to any person who suffered patrimonial loss as a result of the contravention. In such a case, the EC would decide on the compensatory amount, taking into account the factors enumerated in section 6D(3) – the amount is not calculated in terms of section 82 of the FMA. The penalty is payable to the FSB, and is to be used for consumer education or the protection of the public. The compensatory payment is to be made directly to the other person or persons who suffered loss because of the contravention.

2.7.8 Concluding remarks on the FMA

The efforts made to protect investors and to ensure that markets are fair, efficient and transparent are noticeable through the current framework governing market abuse regulation in South Africa. The author agrees with views by critics that the current remedies are still very few and/or less dissuasive for the purposes of combating market abuse practices in the South African financial markets and comparatively.[112] Limiting the remedies to those only mentioned in the Acts or subordinate legislation does not afford victims of markets a wide scope of recourse avenues.[113] Market abuse remedies such as private rights of action, specific civil pecuniary penalties, punitive damages and class actions are not expressly provided for in the Financial Markets Act.[114] Accordingly, it is submitted that the Financial Markets Act should be amended to expressly provide for the aforementioned remedies and other coercive

[110] See s 109 of the FMA. When the court assesses the penalty to be imposed, it must take into account any administrative sanction imposed: Section 6I(2) of the Protection of Funds Act. See also s 84(10) of the FMA, which allows the FSB to bring a criminal action if the DPP fails to prosecute.
[111] Act 28 of 2001.
[112] Chitimira H 'Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012' (2014) 5 *Mediterranean Journal of Social Sciences* 124 at 129.
[113] Chitimira H 'Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012' (2014) 5 *Mediterranean Journal of Social Sciences* 124 at 129.
[114] Chitimira H 'Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012' (2014) 5 *Mediterranean Journal of Social Sciences* 124 at 129.

market abuse remedies such as injunctions; specific performance orders; cease and desist orders; mandatory orders; order for the freezing of assets and name and shaming.[115]

There is thus a need to make available more market abuse remedies and to not only limit it to insider trading cases. The following considerations should be effected to improve the effectiveness of the FMA. With the inclusion of the new offence under section 78(3) where a person is dealing for an insider may create issues when it concerns as to what the person needs to know before they can be considered to have contravened the Act.[116] Difficulties may present themselves where a person on whose behalf the dealing was done was an 'indirect' insider: that is, a person whose source of information was, for example, a director and who knows this.[117] In addition, the dealing must be in securities to which the inside information relates.[118] There is lack of consistency in the use of terminology in that the offences in section 78(1)(a) and section 78(2)(a) of the FMA refer to 'dealing' while the defences in section 78(1)(b)(ii) and section 78(2)(b)(iii) refer to 'trading' and the distinction between the 'transaction' and 'trading' in the defence is unfortunate.[119]

An additional provision is to be made available in the FMA in respect of sanctions for a contravention of the prohibited trading practices and false statement prohibitions, although the August 2011 Bill included a civil liability provision in this regard.[120] Though it is clear that the provisions of the Protection of Funds Act will be available and the EC can impose an administrative sanction for a contravention of these provisions it is better suited to craft this in the FMA as primary regulation.[121]

[115] Chitimira H 'Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012' (2014) 5 *Mediterranean Journal of Social Sciences* 124 at 134.
[116] Section 78(3) of the FMA.
[117] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 485.
[118] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 488.
[119] Section 78 of the FMA.
[120] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 488.
[121] Luiz S and Van der Linde K, 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458 at 488.

2.8 Conclusion

After having reviewed the degree of legislative developments made on the issue of market abuse it is only fair to commend the current framework that South Africa has in place. The changes to the market abuse provisions of the FMA do not open up the door for major new policy considerations. The original insider trading offence as identified by the Insider Trading Act still contains its key elements with a few moderations to reflect international trends and best practice.

There is certainly also evidence of a careful reconsideration of the offences and defences relating to market abuse – the offence which was originally introduced by the SSA. In general, the contraventions have been expanded through the introduction of a new insider trading offence of dealing on behalf of an insider and also by extending the prohibition on using or participating in a practice that the perpetrator ought to have known was a prohibited trading practice. A general tightening of the defences is also apparent. The introduction of market manipulation and prohibited trading practices in the SSA assists in achieving the object of enhancing confidence in the South African financial markets.[122]

Therefore, the FMA should be welcomed as a piece regulation that will enable South Africa to comfortably manage the risks of market abuse for our economy. Chapter 3 introduces us to the effectiveness of the market abuse regulatory framework with a specific reference to the equities market of the financial market of South Africa.

[122] Securities Services Act 36 of 2004.

Chapter 3

AN OVERVIEW OF THE VARIOUS ROLE-PLAYERS IN THE INVESTIGATION, DETECTION AND ENFORCEMENT OF MARKET ABUSE REGULATION FOR THE EQUITY TRADING MARKET OF SOUTH AFRICA

3.1 Introduction

Although market abuse regulation in South Africa has developed significantly,[123] serious challenges regarding the enforcement and regulations which address the practice of market abuse still remains an area of great concern.[124] It is therefore necessary to discuss the roles of the various role-players in the investigation, detection and enforcement phases of market abuse control, because the enforcement of market abuse legislation has been inconsistent and problematic. Chapter 2 briefly introduced the various key regulators and regulatory bodies. The objective of this chapter is to discuss the role the various role-players ought to fulfil in regulating the financial markets, but with a specific focus on the securities market – in light of an ever growing sophistication around various trading practices that are constantly being introduced into this market. Emphasis will be placed on the fact that market participants fail to conduct an impact assessment or alignment to regulatory requirements.

The discussion will commence with an overview of the roles the FSB and the Directorate of Market Abuse (DMA) within the FSB have to play in the enforcement of market abuse regulation as well as the role of the JSE as a self – regulatory organisation (SRO).[125]

Lastly, this chapter will focus on the regulation within the securities market in regard to the prevalent market abuse practices in this market. The author will introduce two burning active forms of trading that are not adequately regulated in South Africa. This discussion will examine the gaps in the current rules governing the Equity market introduced by the JSE, to supplement the main legislation in South Africa namely the FMA. The author will summarise

[123][123] The Van Wyk de Vries Commission of Inquiry into the *Companies Act* of 1973; *Companies Act* 61 of 1973; *Companies Amendment Act*, 78 of 1989; *Second Companies Amendment Act*, 69 of 1990; *Insider Trading Act* 135 of 1998; *Securities Services Act* 36 of 2004 and the *Financial Markets Act* 19 of 2012.

[124] See the functions of the Directorate of Market Abuse as contained in s 85 of the *Financial Markets Act*. See also Chitimira H 'Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Sciences* 272.

[125] Geoffrey D & Oliver G (2009) 'International Guide to developing a self-regulatory organisation' International edition available at *www.easa-alliance.org (accessed on 31 April 2014)* An SRO is an organisation that actively regulates itself, and exercises regulatory authority over an industry or profession.

the differing views of academics, critics of the profession and conclude with a recommendation as to how to manage the current dilemma of high frequency trading.

3.2 The role of the FSB

As highlighted before the FSB is an independent board established in terms of the Financial Services Board Act.[126] The FSB has ostensibly wide powers to ensure proper supervision and enforcement of the prohibition on insider trading and other market related manipulative practices in terms of section 84 of the Financial Markets Act. This section resembles both sections 82 and 11 of the Securities Services Act (SSA)[127] and the Insider Trading Act.[128] For purposes of the discussion under this section the author will highlight specifically the provisions that deal with the regulation of market abuse in South Africa. Section 84 provides for the powers and duties of the FSB. The FSB is entrusted with a supervisory, full prosecutorial and rule making powers as entrenched in section 84 of the FMA.[129]

Further to this, the FMA also conferred upon it the powers to assist foreign regulators with investigations pertaining to any cross-border market abuse cases; 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; and to enter or search any premises in relation to market abuse investigations during the day and ensure that such investigations could be assisted by a police officer, in an orderly justifiable manner with due regard to the accused person's right to dignity, privacy, freedom and security.[130]

3.2.1 The current capabilities of the FSB

The current capabilities of the FSB include staff resources with forensic and prosecutorial skills as well as expertise relevant to the financial markets.[131] Despite being equipped with staffing skills including investigative and prosecutorial skills, its lacks the sophistication of monitoring and surveillance capabilities matching current trading platforms and systems in

[126] Financial Services Board Act 97 of 1990.
[127] See Sec 82 of the Securities Services Act no 36 of 2004, which was repealed by the Financial Markets Act stipulates the functions and powers of the FSB.
[128] . See section 11 of the Insider Trading Act No 135 of 1998, also stipulates the powers and duties of the FSB.
[129] Section 84 of the Financial Markets Act 19 of 2012.
[130] Section 84(2)(b) of the Financial Markets Act 19 of 2012.
[131] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.

order to curb market abuse activities.[132] Their counterparts in the United States are currently using sophisticated market abuse surveillance solutions in order to detect insider dealing and market manipulation cases.[133] Much reliance is still placed on the JSE Surveillance department to detect market abuse activities. This is worrying due to the fact that the FSB together with the DMA are the entrusted regulators that ought to manage the regulation around market abuse in South Africa. Not having surveillance and monitoring capabilities - which are currently seen as mechanisms or techniques of enforcement worldwide, creates the impression that the regulator is lagging behind the curve and shows no seriousness towards the move of capital markets regulation.[134] The FSB together with the DMA should be applauded for the current strength of South African regulation, however regulation is one way of curbing the abuse of the markets, strengthening their technological capabilities will assist the regulators in curbing the threat of market abuse which threatens investor confidence and market transparency in South Africa.[135]

Academic research indicates that the FSB is currently using the following ways of detecting and enforcing market abuse regulation.[136] It is noted that the FSB is currently utilising the JSE's Surveillance Division to detect suspicious trading volumes and trading patterns.[137] It further relies on the broker-dealer accounts system to extract relevant information from other market participants such as brokers by investigating their trading history for purposes of detecting market abuse practices.[138] The FSB is therefore enabled to check the brokers' trading history through scrutinizing telephonic conversations, bank records and other relevant trading records to detect unusual or abnormal trading patterns which could be a signal of market abuse activity.[139] The FSB uses the auction process system in an attempt to curb

[132] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[133] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[134] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[135] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[136] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[137] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[138] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.
[139] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.

market manipulation activities.[140] It examines trading volumes executed through the JSE trading platform at the close of auctions. These trades are kept on record as part of the requirements for trading. The trading records of all market participants are also recorded by the JSE in order to easily identify and detect unusual trading activities. The JSE has a dedicated surveillance capability and staff compliment that conducts daily surveillance on all exchange traded activities.[141] The role of the JSE is discussed in more detail below. One of the notable powers granted to the FSB is the role of adjudicator for all cases of possible market abuse practices reported to it by various financial institutions and those reported by the JSE.[142] The FSB is therefore authorised to publish or disclose the details of pending investigations and provide explicit details of those allegedly identified as market abuse offenders on its websites and through communications.[143] The practice of naming and shaming is viewed to be a technique that receives much more recognition as it is a current deterrent that prevents persons from engaging in market abuse activities because of the fear of losing their jobs and suffering severe reputational risks.[144]

The FSB has also entered into numerous agreements to regulate cross border market abuse activities. Authorities namely the Securities and Exchange Commission of the United States of America and the Financial Services Authority are authorities with whom the FSB has fostered such a relationship.[145] This relationship will be further discussed at a later stage in this Chapter. The need for a stronger relationship both nationally and internationally will also be discussed in more detail.

[140] This information was obtained from an interview that was conducted at the FSB by Howard Chitimira, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse or the DMA) on 05 May 2009.
[141] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.
[142] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.
[143] Section 84(6) to (9) of the FMA.
[144] Section 84(6) to (9) of the FMA.
[145] Loubser "Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)" 2 October 2006 *Insider Trading Booklet* final draft 2006 26-27 http://www.jse.co.za/public/insider/JSEbooklet.pdf (accessed 2008-10-10).

3.3 The role of the DMA

Section 85 deals with the composition and functions of the directorate of market abuse, a creature of statute.[146] The Directorate was established by section 12 of the Insider Trading Act, 1998 (Act 135 of 1998), and continued to exist under the Securities Services Act, 2004 (Act 36 of 2004), under the name Directorate of Market Abuse, despite those Acts being repealed. A reference to the Insider Trading Directorate in any law must, unless clearly inappropriate, be construed as a reference to the Directorate of Market Abuse. Subsection (c) provides that the directorate exercises the powers of the board—

(i) to institute any civil proceedings as contemplated in this Chapter;

(ii) to investigate any matter relating to an offence referred to in section 84(2)(a) and (b); and

(iii) to institute proceedings contemplated in section 84(2)(c) in the name of the board.

It is stated in section 85(1)(d) that the directorate is not intended to act as an administrative body when exercising its powers.[147]

Subsection (2) (a)[148] provides that the directorate should consist of the chairperson and other members and alternate members appointed by the Minister. Subsection (b) states that a member and an alternate member hold office for such period, not exceeding three years, as the Minister may determine at the time of his or her appointment and is eligible for reappointment upon the expiry of his or her term of office: Provided that if on the expiry of the term of office of a member reappointment is not made or a new member is not appointed, the former member must remain in office for a further period of not more than six months.

Section 85(2)(c) provides that the Minister may remove the chairperson from his or her office or terminate the membership of any other member on good cause shown and after having given the chairperson or member, as the case may be, sufficient opportunity to show why he or she should not be removed or why his or her membership should not be terminated.

It is stated in section 85(3) that the Minister must appoint the following persons as members of the directorate—

(a) the executive officer of the board or his or her deputy, and may appoint both;

[146] The Financial Markets Act No.19 of 2012
[147] Details of the powers of the DMA.
[148] Act 19 of 2012.

(b) one person and an alternate from each of the licensed exchanges in the Republic;

(c) one commercial lawyer of appropriate experience and an alternate;

(d) one accountant of appropriate experience and an alternate;

(e) one person of appropriate experience and an alternate from the insurance industry;

(f) one person of appropriate experience and an alternate from the banking industry;

(g) one person of appropriate experience and an alternate from the fund management industry;

(h) one person of appropriate experience and an alternate nominated by any organisation that represents shareholders' rights or any other similar organisation chosen by the Minister;

(i) one person of appropriate experience and an alternate nominated by the South African Reserve Bank; and

(j) two other persons of appropriate experience and alternates.

Subsection four provides that the persons referred to in subsection three are nominated by reason of their availability and knowledge of financial markets and may not be practising authorised users.

Subsection fives states that the directorate must designate from its members a deputy chairperson who performs the functions of the chairperson when the office of chairperson is vacant or when the chairperson is unable to perform his or her functions.

It is stated in subsection six that the members of the directorate may co-opt one or more persons as additional members of the directorate.

Subsection seven provides that all members of the directorate, other than the additional members, have one vote in respect of matters considered by the directorate, but an alternate member only has a vote in the absence from a meeting of the member whom the alternate is representing. The further subsections of the section provides that - the meetings of the directorate are held at such times and places as the chairperson may determine, but four members of the directorate may by notice in writing to the chairperson of the directorate demand that a meeting of the directorate be held within seven business days of the date of such notice. Subsection ten provides that the chairperson must determine the procedure of a meeting of the directorate. Furthermore, that the decision of a majority of the members of the directorate constitutes the decision of the directorate. It is further provided for in section 85 that no proceedings of the directorate are invalid by reason only of the fact that a vacancy

existed on the directorate or that any member was not present during such proceedings or any part thereof. The section concludes by stating that the directorate is, in the performance of its functions, assisted by an executive director who is appointed by the board after consultation with the directorate and who may attend all meetings of the directorate but may not vote at such meetings.

It is clear that the DMA, a committee of the FSB formerly known as the Insider Trading Directorate is afforded wide powers and these powers may be delegated or entrusted with the FSB. The Directorate of Market Abuse is made up of representatives of the regulated markets, the Share Holders' Association of South Africa, the fund-management industry, the insurance industry, the South African Reserve Bank, the bankers, and the accounting and legal professions.[149] These persons are appointed by the Minister of Finance on the basis of their availability, expertise and knowledge of the financial markets.[150]

The Directorate of Market Abuse is empowered to institute any civil proceedings as contemplated in the Financial Markets Act and to investigate any matter relating to market abuse.[151] Similar to the FSB if it obtains an appropriate warrant, it has the powers to summon, interrogate, and search and seize any documents in possession of suspected persons.[152] Moreover, the Directorate of Market Abuse may withdraw, abandon or compromise any civil proceedings instituted as contemplated in the regulation on market abuse. Particularly, in terms of the FMA, the Directorate of Market Abuse may withdraw, abandon or compromise any civil proceedings in respect of both insider trading and market manipulation.[153] Lastly, the Directorate of Market Abuse may, on behalf of the FSB, publish a list of market-abuse cases under investigation and proposed action, if any, in the press after every one of its meetings.[154] Thus, the scope of the mandate and functions of the Directorate of Market Abuse

[149] Section 83(3)(a) to (j) of the Securities Services Act.
[150] Section 83(4) of the Securities Services Act.
[151] Chitimaia H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[152] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[153] S 78(1) of the Securities Services Act.
[154]Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.

is considerably wider because it deals with all the forms of market abuse as provided for in the FMA.[155]

Furthermore, the Directorate of Market Abuse may, on behalf of the FSB, decide whether to refer a matter to the Enforcement Committee or to institute derivative civil proceedings or to refer a matter to the Director of Public Prosecutions.[156] In addition, the Directorate of Market Abuse may only institute civil proceedings in the name of the FSB and may settle any matter only after confirmation from the FSB or a competent court.[157] This may rather indicate that the Directorate of Market Abuse exercises only certain specific powers in the name of the FSB.[158] The Directorate of Market Abuse does not operate in isolation. It may further investigate any suspected market-abuse cases forwarded to it by the JSE's Surveillance Division.[159] To the contrary, the investigation team of the Directorate of Market Abuse undertakes full forensic investigations into alerts on the JSE's radar screen to detect market-abuse activities.[160]

Noteworthy to mention in this section is the fact that there is no mention of whether the JSE's Surveillance Division is statutorily obliged to report incidents of market abuse to the Directorate of Market Abuse.[161] This issue was also never addressed in any of the Acts on market abuse regulation; the inference can therefore be drawn to the fact that the surveillance capabilities of the FSB are not capable of detecting the practice of market abuse.[162] It is in the interest of proper monitoring and enforcement that it should be inferred that as an SRO and assistive regulatory body to the FSB that the JSE should report instances of alleged market abuse to the FSB in order to prosecute further.[163] This will assist in curbing the effects of

[155] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[156] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[157] Loubser 2 October 2006 *Insider Trading Booklet* final draft 2006 26 http://www.jse.co.za/public/insider/JSEbooklet.pdf (accessed 2008-10-10).
[158] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[159] Loubser 2 October 2006 *Insider Trading Booklet* final draft 2006 26 http://www.jse.co.za/public/insider/JSEbooklet.pdf (accessed 2008-10-10).
[160] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[161] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[162] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[163] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.

market abuse in South Africa especially market transparency and investor confidence will benefit from this type of initiative.[164]

3.4 The role of the Enforcement Committee (EC)

The Enforcement Committee, similar to the DMA is established as another committee of the FSB that administers and adjudicates on all the forms of market abuse referred to it by the Directorate of Market Abuse or the Registrar of Securities Services.[165] The FSB extended the jurisdiction of the Enforcement Committee to all the industries it regulates under the FMA in terms of section 99 of the Financial Markets Act. The Enforcement Committee is made up of members who are appointed by the FSB.[166] The FMA does not provide for any composition requirements; however the SSA required that at least two of the members appointed must be legally qualified.[167] It stated further that the Enforcement Committee may further appoint additional members with appropriate knowledge and experience.[168] The functions of the EC are not expressly provided for in the FMA, it can be accepted that such powers and functions highlighted in terms of the SSA are inherent to this function.[169] The functions of the Enforcement Committee include powers to deal with any matter referred to it in accordance with the relevant provisions of the SSA.[170] The Enforcement Committee is also required to submit to the FSB an annual report on the activities of the Enforcement Committee during the preceding calendar year within the period and containing the information specified by the FSB.[171]

A referral of any matter relating to market abuse may be referred to the EC in terms of the Protection of Funds Act and the DMA.[172] The FMA now also affords the Registrar of Securities the power to refer a matter to EC for review.[173] It is noted that cases where the

[164] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[165] See http://www.fsb.co.za/enforcementCommittee/Pages/aboutUs.aspx (accessed on 21 April 2015).
[166] See s 94(e) and s 97 of the Securities Services Act; and see further Luiz "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151 155–172.
[167] 36 of 2004.
[168] S 98 of the Securities Services Act.
[169] S 99; and s 102 to s 105 of the Securities Services Act.
[170] S 99; and s 102 to s 105 of the Securities Services Act.
[171] S 99(2) of the Securities Services Act.
[172] S 94(e) of the Securities Services Act.
[173] See further s 6A read with s 6B to s 6I of the Protection of Funds Act.

Registrar of Securities has the power to impose penalties cannot be referred to EC.[174] A referral will be heard by a panel consisting of the chairperson and deputy chairperson of the EC together with at least two other members of the committee.[175] This panel determines its own procedure for the performance of its functions and these proceedings are open to the public.[176] The decision of the panel must be given in writing with reasons, and the decision of the majority of the members of the panel is regarded as the decision of the EC.[177]

The hearing of any matter by the Enforcement Committee gives all the parties involved an opportunity to argue their case.[178] In other words, the Enforcement Committee may order the parties involved or any other person to be examined and cross-examined so as to determine whether any market-abuse offence was committed.[179] The Enforcement Committee may therefore impose administrative sanctions such as a penalty for punitive purposes by ordering the respondent (offender) to pay a sum of money to the FSB and a compensatory penalty by ordering the respondent (offender) to pay any affected person an amount of money determined by the Enforcement Committee for the damage or patrimonial loss suffered.[180] The Enforcement Committee may further impose a compensatory penalty by ordering the respondent who engaged in insider trading practices to pay the FSB an amount of money calculated in accordance with relevant provisions of the Securities Services Act.[181]

This compensatory penalty is usually paid by the insider-trading offenders and distributed to the affected persons by the FSB. Additionally, the Enforcement Committee may impose unlimited administrative penalties on any respondent who admits that he contravened the market-abuse provisions or when it determines that he actually contravened such provisions.[182] Furthermore, the Enforcement Committee may impose compensatory orders on the market-abuse offenders in cases where there is a link between the unlawful conduct and calculable damages suffered by the affected party or the applicant. The Enforcement Committee may also impose cost orders on the market-abuse offenders for the investigation and preparation costs of the FSB. The Enforcement Committee may yet again order such

[174] Van Deventer 2009 *FSB Bulletin* 3.
[175] S 100(1) of the Securities Services Act read with s 94(e) of the same Act.
[176] S 100(2) and (3) of the Securities Services Act.
[177] S 100(4) and (5) of the Securities Services Act; and also see s 6D(4) of the Protection of Funds Act.
[178] S 6C(1) and (2) of the Protection of Funds Act.
[179] S 6C(3) to (5) of the Protection of Funds Act.
[180] S 6D(2) of the Protection of Funds Act.
[181] S 77(1); (2); (3) or (4) of the Securities Services Act.
[182] S 103 and s 104 of the Securities Services Act; and also see s 6D of the Protection of Funds Act.

offenders to pay the remuneration costs of its panel members. Any order made by the Enforcement Committee has legal force as if it was made by the High Court and may be enforced by the FSB in cases of non-payment by lodging a certified copy of the order with the High Court or any competent court.[183]

When determining an appropriate administrative sanction, the Enforcement Committee may give regard to other factors such as the nature, duration, seriousness and extent of the contravention; any loss or damage suffered; the extent of the profit derived or loss avoided by the respondent; the effect of the unlawful conduct on the relevant sector of the financial services industry; previous penalties or compensation paid on the same set of facts; the degree to which the respondent co-operated with the applicant and the Enforcement Committee; any mitigating factors submitted by the respondent that the Enforcement Committee considers relevant and the deterrent effect of the administrative sanction.[184] A respondent or any person not happy with the market-abuse sanctions or any order made by the Enforcement Committee may appeal to the High Court. In light of this, the appellant does not need to apply to the Enforcement Committee for leave to appeal. Moreover, the launching of appeal proceedings does not suspend the operation or execution of a decision made by the panel of the Enforcement Committee. The appellant may still apply to the chairperson of the Enforcement Committee for such suspension.[185] The Enforcement Committee's market-abuse proceedings do not affect any person's right to seek a legal redress in other appropriate forums. It is therefore possible for a respondent to be penalized by the Enforcement Committee and also to be sued by the affected person in the civil courts.[186]

It should be noted that administrative sanctions imposed by the Enforcement Committee against the market-abuse offenders do not limit the possibility of further criminal prosecution or other appropriate disciplinary proceedings to be effected against such offenders.[187] This

[183] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[184] Barrow "Insider Trading Directorate" 28 July 2004 *Business Report*.
[185] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[186] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[187] Loubser 2 October 2006 *Insider Trading Booklet* final draft 2006 26 available at http://www. jse.co.za/public/insider/JSEbooklet (accessed 2008-10-10).

does not amount to double jeopardy as the latter court or tribunal is required to take into account any previous administrative sanctions imposed by the Enforcement Committee.[188]

The discussion above has only been a description of the referral process that was followed when the SSA was operative.[189] The current FMA does not provide for any process that must be followed, it is also silent on the aspects of formation, the referral process and scope of the Enforcement Committee.[190] If the legislature was of the opinion that the initial process as highlighted in the SSA should prevail this should have been clearly stated so.[191] It is rather ambiguous not to provide details on the role of the Enforcement Committee in the current legislation.[192] This is clearly a flawed process and ought to be rectified to afford the EC its powers. Only being afforded powers of investigation, administration and adjudication that stem from a referral process is not an appropriate operating model that the EC is operating on.[193] It should operate similarly to the process followed with the DMA in order to curb market abuse practices.[194]

The discussion will now turn to the regulation around the equity market of South Africa by starting with a brief introduction into the operations within this market. It will continue to highlight the regulations adopted to regulate trading activity on the equity market through the JSE. The discussion will then move onto the newly develop trading methods currently operative in South Africa, one such method is high frequency trading. The author will then revisit the issue of regulation and determine whether the regulatory sphere of South Africa adequately regulates high frequency trading.

[188] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[189] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[190] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[191] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[192]Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[193] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[194] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.

3.5 Equity Market defined

The equity market is the financial market which consists of the mechanisms and conventions for the issuing, investing in and trading of shares. The equity market together with the bond (and other long-term debt) market comprise the capital market.[195] Capital markets are markets in which institutions, corporations, companies and governments raise long-term funds to finance capital investments and expansion projects.[196]

Equity represents ownership in a business or company, thus shareholders or share owners own the company through the purchase of shares in the company.[197] A share is one of a number of equal portions of the capital of a company and gives the owner rights in respect of the company.[198] Ownership of a share usually affords a person, typically a shareholder the right to a share in the profits of the company; share in the assets of the company if it goes into liquidation and the appointment of directors of the company; and voting rights at shareholders' meetings.[199]

Usually the equity market is considered to be synonymous to a stock exchange.[200] A stock exchange is defined as a place – physical or virtual – where buyers and sellers (the users or members of the exchange) can meet and trade under rules that are mandated by a regulator such as the FSB in South Africa, the Securities and Exchange Commission in the United

[195] https://www.jse.co.za/trade/equity-market (accessed on 22 April 2015).
[196] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[197] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[198] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[199] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[200] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).

States and the Financial Services Authority in the United Kingdom.[201] Most industrialised nations have at least one major stock exchange, such as the JSE in South Africa.[202]

There are two major sub-divisions of a stock market: the primary market and the secondary market. The primary market is where new share issues are sold while secondary markets are where previously issued shares are bought and sold.[203]

As mentioned before South Africa has one stock exchange namely the JSE which is an exchange licensed in terms of the Securities Services Act.[204] It regulates the trading, clearing and settlement of inter alia equities, warrants and Krugerrand coins.[205] The JSE is governed externally by the FMA, which is administered by the FSB.[206] The exchange is governed internally by its own rules and directives, which must be approved by the FSB.[207] The primary functions of the exchange is to generate risk capital, that is, provide a means for companies to issue new shares in order to raise primary capital; and to provide an orderly market for trading in shares that have already been issued.[208]

Only qualified shares can be traded on stock exchanges and only by members of the exchange.[209] The JSE operates an order-driven, central order book trading system with opening, intra-day and closing auctions.[210] The JSE operates broker deal accounting system (BDA) that its members are obliged to use.[211] The system facilitates trade confirmation, the clearing and settlement of trades between members and their clients, back office accounting, drawing up financial statements and compiling client portfolio statements.

---

[201] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[202] Equity market defined available at *http://corporateandinvestment.standardbank.co.za/cib/products/finance/Equity-capital-markets* (accessed on 23 April 2015).
[203] Equity market available at *https://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[204] Equity market available at *https://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[205] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[206] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[207] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[208] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[209] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[210] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[211] JSE Equity Market: Broker Dealer Accounting System: Compiled: March 2010 available at *http://www.whodunnit.co.za/jse_mailshots/tip/jse%20bda%20brochure%20a4.pdf* (accessed on 22 April 2015) The BDA system deals among others with the loading of clients, agents and stock accounts. BDA allows the user full control over details regarding supplementary addresses which are specific to the user, thereby providing for maximum independence.

The equity market is regularly developed and new trading methods are constantly introduced in order to make the market more competitive and viable. In any global equities market, the hotly debated risks continue to feature high frequency trading, dark executions and crossing networks.[212] The regulators' dilemma is to ensure that any newly imposed safeguards and controls, such as quote life spans, can mitigate the risks of crashing the market without destabilising the current trading ecosystem.[213]

Market participants can expect that any resulting changes to the market dynamics will almost certainly impact where and how market abuse is perpetrated and detected.[214] For example, if a minimum 'life span' is enforced for all market quotes, the market may see a decrease in cases of quote stuffing (a form of spoofing) by algorithmic traders.[215] Of course, there will likely be a new to-be-determined variation of abuse that takes its place.[216] It is now necessary to turn to the discussion of high frequency trading.

3.6 High Frequency Trading

High frequency trading is a manipulative practice that involves persons such as brokers, issuers and financial analysts who act in a proprietary capacity to employ sophisticated computerised algorithmic decision-making systems in order to obtain advantage from some minute discrepancies in the financial markets stock prices and then quickly trade in such stocks in large quantities to gain profit.[217] It is stated that high frequency trading by investment banks and hedge funds contributed about 60% to 70% of all stock traded in the US's financial markets during the global financial crisis and in relation to this, high frequency trading profits of between US$8 billion and US$21 billion were recorded in 2008.[218]

[212] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[213] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[214] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[215] Equity market available at https*://www.jse.co.za/trade/equity-market* (accessed on 22 April 2015).
[216] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[217] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[218] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).

The Commodity Futures Trading Commission and the SEC formed a committee which recommended the adoption of minimum regulatory requirements such as restrictions on direct access and co-location, the imposition of penalties for rapid order cancellation and basic quoting requirements for high frequency trading related practices.[219] However, it is reported that the enforcement of high frequency trading regulations remains challenging for many regulators because the offenders usually have highly sophisticated and automated algorithmic trading mechanisms that are capable of offering high speed stock order responses and to trade on such stock price movements after a certain threshold is reached.[220] It is submitted that lax or inconsistent regulation of high frequency trading can unfairly allow large financial institutions to engage in market abuse activities and related financial markets systemic risks to the detriment of small investors.[221] The financial markets flash crash of 06 May 2010 is a case in point. In response to this flash crash, the SEC proposed rules to combat risks associated with high frequency trading related practices like erroneous flash orders and naked accesses.[222] Nonetheless, as is the case in the EU and Australia, the SEC has not yet adopted a specific rule to curb high frequency trading related to market abuse activities.[223]

Notwithstanding its fairly wide market abuse prohibition, the Financial Markets Act does not specifically discourage high frequency trading, Internet-based market manipulation, program trading and other related technologically perpetrated market abuse activities. Likewise, the Companies Act 2008 does not specifically discourage high frequency trading and other related practices. Although the Financial Markets Act provide inexhaustible instances where some practices may be deemed to be trade-based market manipulation, it is submitted that additional provisions should be enacted to expressly prohibit high frequency trading, Internet-based market manipulation and program trading to enable the FSB to combat technologically related market abuse activities in the South African financial markets.

The JSE has reportedly boosted its information technology department to enhance its efficiency especially with regard to its clearing systems, Yield-X interest transactions and

[219] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[220] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[221] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[222] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[223] Goodman B 'Tapping the Brakes on High-Speed Trading' *Barrons* 6 May 2015.

Equities derivatives by requiring its members to use the Broker Deal Accounting system to enable it to detect market abuse practices involving certain beneficial ownership trades.[224] Nonetheless, it is suggested that the JSE and the FSB should consider employing practically applicable proposals from other jurisdictions such as the back testing process, real-time risk monitoring and market surveillance measures to combat high frequency trading related market abuse activities.[225] It is submitted that the legislature should not just blindly adopt regulatory principles from neighbouring jurisdictions without adequate measures in place to enforce them. The legislature should therefore place more emphasis on procuring adequate technological surveillance machinery, training of competent personnel and educational awareness programmes to combat insider trading and not to duplicate the mistakes from other jurisdictions regulatory framework.

3.7 The JSE Listing Rules

Listed companies must invest in management and information systems and take a vigorous approach to compliance procedures.[226] Moreover, it is advised that listed companies are bound by the provisions of the King Code on Corporate Governance, namely the King III Code.[227] It is stated further that listed companies must ensure that all necessary facilities and information is available to holders of its equity securities in order for them to be able to exercise their rights.[228] Significant events affecting the listed company must be announced through the Stock Exchange News Service (SENS) and certain announcements must also be published in the press.[229]

---

[224] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[225] High-Frequency Trading: Background, Concerns, and Regulatory Developments available at *https://www.fas.org/sgp/crs/misc/R43608* (accessed on 22 April 2015).
[226] Equity market available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules*. (accessed on 22 April 2015).
[227] Equity market available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules.* (accessed on 22 April 2015).
[228]Equity market available at https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules. (accessed on 22 April 2015).
[229] Equity market available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules*. (accessed on 22 April 2015).

All listed companies must also comply with the rules regarding disclosure and approval of subsequent transactions in accordance with the categories specified in the Equity Listings Requirements.[230] These requirements vary according to the size of the transaction in question, from merely making an announcement in respect of the transaction to a requirement to obtain shareholder approval in a general meeting.[231] As regards general disclosure obligations, in general, with the exception of trading statements and unless the information is subject to a confidentiality obligation, the listed company must release an announcement providing details of "any development(s) in the listed company's sphere of activity that is/are not public knowledge and which may, by virtue of its/their effect(s), lead to material movement of the reference price, in the listed company's listed securities".[232]

A listed company is also obliged to issue cautionary announcements once it has acquired knowledge of any material price sensitive information and the degree of confidentiality required either cannot be maintained or the listed company suspects that confidentiality may or has been breached.[233]

The above mentioned guidelines provided for in the listings rules are interpreted as mechanisms or guidelines for brokerages, financial institutions with dealing facilities and asset management firms to align their practices to be market abuse compliant as introduced by the Financial Market Act 19 of 2012. It is important to note that the JSE Listing rules are silent on the salient principles of market abuse.[234] The topics are discussed in more detail in the Johannesburg Stock Exchange (JSE) Equity rules[235], Interest Rate and Currency rules[236] and the Derivatives rules. [237] For purposes of this dissertation, the author will focus on the regulation provided for in the equity rules.[238] Section 7 deals with the prevention and detection of market abuse and places a duty of market participants to ensure that market

[230] Equity market available at ht*tps://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules.* (accessed on 22 April 2015).
[231] Equity market available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE/Equities/Rules.* (accessed on 22 April 2015).
[232] Rule 3.4(a) of the Equity Listings Requirements of the JSE Rules.
[233] Equity Listing Requirements.
[234] See the JSE Listing Requirements available on *https://www.jse.co.za/content/JSEEducationItems/Service%20Issue%2017.pdf* (accessed on 22 February 2016).
[235] JSE Equity rules of 18 January 2016.
[236] JSE Interest rate and Currency rules of 24 February 2015.
[237] JSE Derivatives rules of 25 November 2015.
[238] The Johannesburg Stock Exchange Equity, Interest Rate and Currency and Derivatives rules available on *https://www.jse.co.za/services/market-regulation* (accessed on 22 February 2016).

conduct mechanisms are adopted by these participants.[239] The rules provides that each member must give consideration to the circumstances of orders placed by clients before entering such orders in the JSE equities trading system and must take reasonable steps to satisfy itself that such orders and any resultant trades will not result in a breach of the provisions of section 80 of the Act (Prohibited trading practices).[240] In this regard it is recommended that firms must invest in adopting internal policies and procedures that caters for these nuances.[241] Investing more in the development of pre and post trade surveillance techniques are the key controls big financial institutions are implementing and embedding at this stage.[242]

It is further submitted that members must ensure that all of its employees who are involved in the receipt of orders from clients and the execution of transactions in equity securities on the JSE equities trading system are familiar with the market abuse provisions in sections 77 to 80 of the Act.[243] To also ensure that those employees receive adequate training and guidance to enable them to recognise and avoid entering into any transaction on behalf of the member or its clients which will result in, or is likely to result in, a breach of those provisions.[244] In this regard brokerages and financial institutions are required to develop internal training material and to conduct regulation interactive sessions with dealing and trading staff on the principles of market abuse.[245] Brokerage firms are required to foster awareness around market, one such example is ensuring that annual compliance training on market abuse principles are conducted by each staff member of the firm or bank.[246] A dedicated compliance function or officer needs to be appointed to focus on market abuse.[247] Their day to day duties would include embedding a compliance culture where market conduct principles are developed and embedded.[248]

[239] Section 7.10.1 of the JSE Equity Rules of 18 January 2016.
[240] Section 7.10.1 of the JSE Equity Rules of 18 January 2016.
[241] Section 7.10.2 of the JSE Equity Rules of 18 January 2016.
[242] The author's previous role was focused on the detection and prevention of the market abuse. Information obtained from the Market Abuse Control function of Standard Bank South Africa.
[243] Section 7.10.2 of the JSE Equity Rules of 18 January 2016.
[244] Section 7.10.2 of the JSE Equity Rules of 18 January 2016.
[245] Section 7.10.2 of the JSE Equity Rules of 18 January 2016.
[246] Section 7.10.3 of the JSE Equity Rules of 18 January 2016.
[247] Section 7.10.3 of the JSE Equity Rules of 18 January 2016.
[248] Section 7.10.3 of the JSE Equity Rules of 18 January 2016.

As alluded to by the author in a preceding paragraph, a higher reliance is placed on the internal compliance function of all market participants.[249] The rules provides that a member's compliance monitoring procedures must specifically include procedures to monitor orders entered into, and transactions executed on, the JSE equities trading system by the member and its employees, with the objective of identifying and taking appropriate action in relation to orders or trades that, in the reasonable opinion of the member, may constitute a breach of the provisions of sections 78 and 80 of the Act.[250]

In formulating and implementing the compliance monitoring procedures referred to above, a member is not expected to monitor every order entered into, and every trade executed on, the JSE equities trading system by the member, for the purpose of identifying potential market abuse.[251] Nevertheless, whilst members are encouraged to implement monitoring procedures to detect any activity undertaken by the member's employees or its clients which may constitute a breach of the provisions of sections 78 and 80 of the Act, the procedures should, as a minimum, aim to detect activity which, to a reasonable person observing or reviewing such activity, would constitute a blatant breach of the provisions of sections 78 and 80 of the Act taking into account all relevant factors such as:

- the identity of the parties to the transaction;
- the perceived intention of the parties to the transaction;
- the frequency and pattern of transactions over a period of time;
- the effect of the transaction on market prices or volumes;
- the size and timing of the transaction; or
- a combination of two or more of these factors.[252]

Market participants are regularly engaging surveillance vendors in order to obtain the most appropriate infrastructure to implement an internationally recognised surveillance capability.[253] One such surveillance tool is SMARTS Broker NASDAQ OMX, this is a post trade surveillance tool deployed by the JSE and certain banks in South Africa to do market abuse surveillance.[254] The surveillance capability provides post trade reports or alerts on a

[249] Section 7.10.3 of the JSE Equity Rules of 18 January 2016.
[250] Section 7.10.4 of the JSE Equity Rules of 18 January 2016.
[251] Section 7.10.4 of the JSE Equity Rules of 18 January 2016.
[252] Section 7.10.4 of the JSE Equity Rules of 18 January 2016.
[253] Information obtained from the Market Abuse Control function of Standard Bank South Africa.
[254] Information obtained from the Market Abuse Control function of Standard Bank South Africa.

trading day plus one (T plus 1) basis.[255] The alerts are developed and customised by compliance and business analysts who are subject matter experts on market abuse monitoring.[256] The framework consists of a surveillance, investigation, escalations, and reporting on potential market abuse contraventions in relation to client, employee and bank trading activity across a range of products and jurisdictions and is based on a risk based approach as well as improving the general control framework in relation to market abuse.[257]

3.7 Conclusion

Regulatory enforcement is crucial to determine and test whether any new piece of legislation has been successfully implemented. In order to investigate whether the FMA had been successfully implemented to curb market-abuse practices in South Africa, it was necessary to review the role-players involved in the investigation and prevention of market-abuse activity in South Africa, namely, the FSB, the Directorate of Market Abuse and the Enforcement Committee.

In this regard it was noted that significant progress has been made in the enforcement of the market-abuse prohibition in South Africa. The Directorate of Market Abuse was established as an investigatory arm of the Financial Services Board, while the Enforcement Committee was empowered to hear cases of market abuse and to impose unlimited administrative sanctions against anyone who violates the market-abuse provisions in South Africa. With regard to the detection of market-abuse activities, the FSB depends mainly on the JSE's Surveillance Division.[258]

There were however, various shortcomings noted in the enforcement of the market-abuse provisions in South Africa. Notably, the criminal penalties imposed against market-abuse offenders are still very little for deterrence purposes.[259] Furthermore, the establishment of additional structures such as the Enforcement Committee to hear market-abuse cases on a

[255] Information obtained from the Market Abuse Control function of Standard Bank South Africa.
[256] Information obtained from the Market Abuse Control function of Standard Bank South Africa.
[257] Information obtained from the Market Abuse Control function of Standard Bank South Africa.
[258] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[259] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.

referral basis, and the introduction of administrative sanctions has not been able to encourage all persons to comply with the market-abuse prohibition in South Africa.[260]

It was also indicated that the Directorate of Market Abuse does not have the power of its own to make market-abuse rules and this could be affecting the execution of its duties negatively. In relation to this, it was suggested that the Directorate of Market Abuse (which is a committee of the FSB) should be allowed to execute its duties without prior confirmation from the FSB in order to curb potential bureaucracy.

It was also suggested that the Directorate of Market Abuse should have its own surveillance systems in place to detect, investigate and prevent the occurrence of market-abuse practices in the South African financial markets.[261]

A noteworthy enforcer has been the JSE, as a self-regulatory organisation, it has well embedded the FMA framework into its operations.[262] It has also been a leading trend setter in that it has made sure that all market participants making use of its platforms and operations are well aligned to the purport and objects of the FMA.[263] It has developed world class surveillance capabilities and market leaders such as Standard Bank of South Africa offering brokerage services to clients has also well embedded a culture of compliance and adherence to the market abuse principles as stipulated in the Insider Trading Booklet prepared and managed by the JSE.[264]

Having noted this, it is clear that the enforcement role-players have interrelated roles to play in combatting market abuse and that it is a cooperative venture in which each stakeholder is to give their full support and guidance. The enforcement framework is clear as to what it prescribes and the guidance set out therein. It is the prerogative of each enforcer to ensure that they improve their internal processes and to align their framework.

[260]Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[261] Chitimira H and Lawack V 'Overview of the Role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200.
[262] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.
[263] Chitimira H 'Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa' 2014 *Speculum Juris* 107.
[264] Formal discussions with the Market Abuse Control - Compliance function of Standard Bank South Africa on 14 June 2015.

The objective of each enforcer should be to manage the effects of insider trading and market manipulation on the economy and dealings with international counterparts. This can only be done through proactive investigation and constantly working at conformance and align its operations to mirror the statutory obligations as set out in the FMA. All affected should work closely together to combat market abuse that is from the small investment firm to the regulator as each stakeholder can learn and leverage off their experiences and exposure with the law governing the financial markets and that speaks to market abuse control. A comparative review between South Africa and the United Kingdom will follow in Chapter Four.

Chapter 4

THE REGULATION OF MARKET ABUSE IN THE UNITED KINGDOM: A COMPARATIVE PERSPECTIVE.

4.1 Introduction

The integrity of the market is essential for confidence, and consequently the proper operation of the markets for financial instruments and for the protection of investors.[265] If confidence is lacking, this undeniably means that investors and those seeking to raise capital will no longer be prepared to actively trade in these markets. Therefore a robust and relatively effective market abuse control regime had to be fostered in the United Kingdom, a well-developed large economy and trading hub.[266]

Regulation on the area of market abuse in the United Kingdom (UK) came with the advent of the Financial Services and Markets Act 2000, which was designed to preserve the criminal and regulatory aspects of its previous market misconduct regime.[267] The redress sought through the enactment of the FSMA was further aimed at addressing the weaknesses in the enforcement of its civil regulatory framework and criminal law by creating a civil offence of market abuse.[268] The market abuse regulatory framework of the United Kingdom is perhaps one that most accurately mirrors the framework adopted by South Africa.

Therefore in this Chapter, a brief comparative analysis of the regulatory frameworks in these two countries will be carried out. The chapter will focus more broadly on a comparative overview of the role-players in the detection, investigation and enforcement of the market

[265] European Union Directive on Insider Dealing and Market Manipulation, the Directive of the European Parliament and Council of 28 January 2003 on insider dealing and market manipulation (market abuse) - Article 2(1) of Directive 2003/6/EC of the European Parliament and of the Council.
[266] Swan EJ & Virgo J *Market Abuse Regulation* 2ed (2010).
[267] Financial Services and Markets Act of 2000 (FSMA).
[268] Swan EJ & Virgo J *Market Abuse Regulation* 2ed (2010).

abuse prohibition in the UK. The researcher will focus on the broader aspects of market abuse for the purpose of this mini-dissertation.

Furthermore, this Chapter will examine whether integration of the UK market abuse principles into the South African regulatory framework has worsened or improved the regulation of insider trading in South Africa. Therefore relevant UK legislative developments will be reviewed in light of many cases which have been pursued under this regulatory scheme and where necessary contrasted with similar cases and provisions in South Africa.

4.2 The Market Abuse Regime of the United Kingdom

4.2.1 The legislative framework and case law of the UK

The UK's insider trading regime commenced in 1980.[269] Prior to this, two legislative attempts to outlaw insider trading in the early 1970s were unsuccessful.[270] The legislature enacted the Companies Act 1980, however, this Act made insider trading a criminal offence only in certain specified circumstances.[271] The Act also provided some requirements for directors, members of their families and substantial shareholders to report any dealings in shares of their companies to discourage the misuse of non-public inside information.[272] The Act was later revised and consolidated into the Companies Act 1985, which was later revised into the Company Securities (Insider Dealing) Act 1985.[273] This Act prohibited individuals

[269] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[270] For instance in 1973, the Conservative government published a Companies Bill that would have prohibited insider trading, but it collapsed when the said government was defeated in the February 1974 general election. A similar Bill was proposed by the Labour government in 1978 and it suffered the same fate when the Labour government lost the May 1979 general election.
[271] The Companies Act of 1980.
[272] Notwithstanding the fact that these disclosure and reporting duties were probably useful and justified in many respects, it is debatable whether such duties had the practical effect of prohibiting insider trading and other related illicit trading practices. See further Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 44.
[273] Company Securities (Insider Dealing) Act of 1985.

(insiders) who had access to material non-public inside information by virtue of their position within a company from dealing in the securities of the company while having such information.[274] The Insider Dealing Act however, only provided criminal sanctions for insider trading violations, making its application somewhat restricted and narrow.[275] In 1986 the legislature introduced the Financial Services Act; the provisions of this Act were still applicable only to individuals and offered no civil remedy for such individuals who were prejudiced by insider trading.[276] The Criminal Justice Act was introduced in 1993 and prohibited individuals from engaging in approximately three forms of conduct that would amount to insider trading.[277] Individuals were prohibited from dealing in price-affected securities on the basis of non-public material inside information.[278] Secondly, individuals were prohibited from encouraging (tipping) other persons to deal in price-affected securities on the basis of non-public material inside information.[279] Lastly, the Criminal Justice Act prohibits individuals from knowingly and improperly disclosing non-public material inside information to other persons.[280]

The prohibition on market manipulation in the UK was made by the Larceny Act 1861.[281] This Act criminalised fraudulent misrepresentations intended to create a false market.[282] The second attempt to regulate market manipulation in the UK was possibly introduced under the Prevention of Fraud (Investments) Act 1939.[283] However, this Act was repealed by the Prevention of Fraud (Investments) Act 1958.[284] The Prevention of Fraud (Investments) Act

[274] Company Securities (Insider Dealing) Act of 1985.
[275] Company Securities (Insider Dealing) Act of 1985.
[276] Financial Services Act of 1986.
[277] Criminal Justice Act of 1993.
[278] Rider, Alexander, Linklater et al Market Abuse and Insider Dealing 45.
[279] Criminal Justice Act of 1993.
[280] Criminal Justice Act of 1993.
[281] Larcency Act of 1861.
[282] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[283] Prevention of Fraud (Investments) Act of 1958.
[284] Prevention of Fraud (Investments) Act of 1958.

1958 prohibited dishonest concealment of material non-public inside information relating to any securities for personal gain or the benefit of others.[285] However, its purported market abuse ban was extremely difficult to enforce, especially where the wrongful conduct was committed outside the UK.[286] As a result the legislature enacted a new market manipulation prohibition under the Financial Services Act.[287] In order to align the market abuse legislative framework with best practice, the Financial Services and Markets Act came into effect on 1 December 2001.[288] The provisions were extensively revised on 1 July 2005 after the adoption of the Treasury's Market Abuse and Investment Recommendation (Media) Regulations to implement the EU Market Abuse Directive and its so-called Level 2 Implementing Measures. Market manipulation was further indirectly made a criminal offence under the Fraud Act.[289]

The author will provide a general overview of the development of market abuse legislation in the UK followed by a comparison with developments in South Africa. The market abuse regime of the UK applies to all persons, whether or not authorised or approved under the FSMA of 2000.[290] Hence, all major UK markets have been subject to the provisions of the FSMA which prohibits market abuse, a practice which may be penalised with unlimited fines imposed the Financial Services Authority (FSA) or a court order for restitution to compensate

[285] Prevention of Fraud (Investments) Act of 1958.
[286] Financial Services Act of 1986.
[287] Financial Services Act of 1986.
[288] Financial Services and Markets Act of 2000.
[289] Prevention of Fraud (Investments) Act of 1958.
[290] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).

investors who have suffered losses as a result of market abuse.[291] Any such orders are however subject to a right of appeal to the Financial Services and Markets Tribunal.[292]

The Act as originally enacted under Part VIII, section 118 made provision for three types of market abuse practices namely – the misuse of non-public information; the creation of false or misleading market impressions and market distortion.[293] It also provided that no behaviour of these abovementioned descriptions would amount to market abuse unless contrary to the standards of a hypothetical 'regular user' of the market are proven.[294] Having been comprehensively amended by the Market Abuse Regulation (MAR), the Act also provide for the adoption of the Code and the procedure for imposing fines.[295] The definition of market abuse was therefore further developed, reflecting a policy decision to comply with the requirements of the European Unions' Market Abuse Directive (MAD).[296] The changes brought about in a response to this directive provisioned for seven types of behaviour which would amount to market abuse for the purposes of FSMA.[297] The practices of (i) insider dealing; (ii) improper disclosure of inside information; (iii) the misuse of relevant information not generally available, not provided for under (i) or (ii) and contrary to the

[291] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[292] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[293] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014). See also section 118 of the Financial Services and Markets Act 2000.
[294] Section 118 of the Financial Services and Markets Act 2000 in relevant part provides that - "behaviour" includes action or inaction; "investment" is to be read with section 22 and Schedule 2; "regular user", in relation to a particular market, means a reasonable person who regularly deals on that market in investments of the kind in question".
[295] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[296] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[297] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).

standards of the regular user; (iv) transactions or orders to trade which create false market impressions or artificially support prices; (v) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance; (vi) disseminating false or misleading information; and (vii) behaviour creating false or misleading impressions or market distortions not caught under (iv) or (v) above and contrary to the standards of a regular user. This practice would be relevant to behaviour which does not amount to a transaction under (iv) in an investment.[298]

As mentioned before, the FSA was obligated to issue a Code that provides guidance to those determining whether or not behaviour amounts to market abuse.[299] It empowered the Regulator to punish both regulated and unregulated market participants whose market conduct falls below the acceptable standards of market conduct as defined by a reasonable user of the market.[300] The MAD introduced a common EU approach for preventing and detecting market abuse and ensuring that the flow on information to the market is equally accessible to all participants.[301]

The market abuse offence is triggered *when behaviour occurs* in relation to *qualifying investments* or *related investments* that are traded on a *prescribed market*.[302] This essentially captures four elements in the determination of the offence. In determining the prescribed market it is emphasised that the UK Treasury authorises these prescribed markets to which

[298] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[299] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014). See also the section 119 of the *Financial Services and Markets Act* 2000. You cannot write a whole section from one source – find other sources to refer to in between.
[300] Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014).
[301] Financial Services Authority 'Why market abuse could cost you money' available at http://www.fca.org.uk/your-fca/documents/fsa-market-abuse-factsheet (accessed on 15 June 2014).
[302] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).

this market abuse regime applied to.[303] The prescribed markets include the London Stock Exchange; the International Petroleum Exchange, the London Metal Exchange, the Euronext-LIFFE, Virt-x and the EDX London. This list may however be amended by the HM Treasury as it has the authority to prescribe markets which are located in other jurisdictions.[304] Hence, the test for a prescribed market is that it may either be located within the UK or be accessible electronically from within the UK.[305]

The HM Treasury authorised by the FSMA, qualified investments. The Treasury references investment instruments that are listed in article 1(3) of the MAD, which covers a broad number of financial instruments.[306] Also included are any other investments admitted to trading on a regulated market in an EEA state or for which a request for admission to trading has been made for such market.[307] It further covers offences for which the UK recognised investments exchanges (RIEs) are the primary traded markets. The practice of insider dealing and the improper disclosure of inside information apply to related investments of qualifying investments that are traded on prescribed markets. Related investments refer to any financial instrument admitted to trading (or where such request for admission has been made) on a regulated market situated or operated in the UK or EEA state. It is crucial to highlight that under the FSMA, no penalty will be applied for market abuse if a person can be said to have taken all reasonable precautions and exercised all due diligence to avoid committing, and reasonably believed that he had not committed, market abuse.[308]

[303] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[304] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[305] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[306] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009). See also section 118(5) of the Financial Services and Markets Act 2000 (Market Abuse) Regulations of 2005; and Financial Services Authority's Market Abuse Directive Instrument 17 March of 2005.
[307] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[308] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).

A case that clearly highlights a situation in which these four elements were relied upon is the *Jabre case*.[309] Mr. Phillipe Jabre entered into agreements to short sell the stock of the Japanese bank Sumitomo Mitsui Financial Group a few days after receiving price-sensitive information about the bank from a Goldman Sachs salesman.[310] Jabre argued that as a matter of law that his conduct was contrary to the purports of section 118 because his trades in the SMFG shares occurred on the Tokyo Stock Exchange and could not be recognised as qualifying investments on a prescribed market.[311] The FSA however found that Jabres' behaviour did occur in relation to qualifying investments of a corporate body that were traded on a prescribed market.[312] The matter also highlighted a duty that market participants have to the market and that is to maintain transparency and the overall market confidence.[313]

The EU Insider Dealing and Market Manipulation Directive defines insider dealing as a form of market abuse which can constitute both a civil and criminal offence.[314] The Directive recognises both primary and secondary insiders. Under primary insiders, the scope of personal liability for primary insiders has been expanded by excluding any requirement that they have full knowledge of the facts in order for criminal or civil liability to be imposed.[315] By repealing this notion, it is now recognised that primary insiders may have access to insider information on a daily basis and are aware of the confidential nature of the information they receive.[316] Secondary insiders are recognised as any person who with full knowledge of the facts possess inside information.[317]

[309] Phillip Jabre and the Financial Services Authority (Decision on Market Abuse), the Financial Services and Markets Tribunal (10 July 2006). See also Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[310] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[311] Swan, Virgo Market Abuse Regulation 2ed (2010).
[312] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[313] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[314] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[315] Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[316] Swan, Virgo Market Abuse Regulation 2ed (2010).
[317] Swan, Virgo Market Abuse Regulation 2ed (2010).

In comparison to the UK, the legislative regime followed by South Africa is much in congruence with that of the UK.[318] The South African prohibition on insider trading ban has an extra-territorial application in contrast to the UK's insider trading regime which only applies to any dealing that takes place on a regulated market which operates in the UK. Furthermore, although the words "through an agent" are used in some provisions that discourage insider trading under the Financial Markets Act, this Act does not expressly provide a statutory definition for the term "agent". Lastly, unlike the UK, South Africa recognises insider trading as both a civil and criminal offence.

A test that could possibly be applied in South Africa is the regular user test – which is effectively a reasonable persons test. This will assist the FSB in assessing in behaviour and action which is below this standard of any person who ordinarily deals and understands trading in the financial markets.

South Africa broadly characterises the offences of market abuse as insider trading, market manipulation and the direct or indirect publishing of false and deceptive statements.[319] Under the commission of insider dealing in the UK and which is referred to as insider trading in South Africa it is interesting to note that the legislature has failed to define what is meant by the commission of insider trading, this term is borrowed from the US which also refers to the commission of insider dealing.[320] Another development that is noted in the UK is that the FSMA placed an obligation on the FSA to produce a code containing guidance on whether

[318] See the *Financial Services and Markets Act* of 2000 and the *Financial Markets Act* 19 0f 2012.
[319] See the *Financial Markets Act* 19 of 2012 of South Africa and the UK *Financial Services and Markets Act* of 2000.
[320] See the *Financial Markets Act* 19 of 2012 of South Africa and the UK *Financial Services and Markets Act* of 2000.

behaviour amounts to market abuse.[321] The FMA of South Africa in terms of section 85(2) provides that the FSB may make market abuse rules after consultation with the directorate - (i) concerning the administration of the Chapter XI (deals with the offence of market abuse) by the board and the directorate; (ii) concerning the manner in which investigations in terms of this Chapter XI are to be conducted.[322] This places a discretionary instead of a mandatory obligation on the FSB to manage and enforce the anti-market abuse regime.[323]

The UK recognises about seven types of market abuse which are statutorily prohibited, only three forms of market abuse practices, namely insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive promises, statements or forecasts (disclosure-based market manipulation) are statutorily discouraged in South Africa.[324] A practice would be deemed market manipulation and/or other market abuse offences in terms of the Financial Services and Markets Act if it occurs in the UK or in relation to any qualifying investments which are mainly traded on a prescribed market in the UK or the relevant EU member states.[325] In essence market manipulation and other market abuse practices have a restricted extra-territorial application. In South Africa, conduct may amount to market manipulation or insider trading if it was made in relation to securities listed on a regulated market (whether domestic or foreign) which is run in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.[326] This implies, in contrast to the

[321] See section 119 of the FSMA. The *Financial Markets Act* of South Africa does not in any provision place such an obligation on the Regulator namely the FSB. Section 85(2) of the Financial Services Board Act does not have an equivalent section.
[322] *Financial Services Board Act* 97 of 1990.
[323] Section 85(2) of the *Financial Services Board Act* 97 of 1990.
[324] This conduct is also criminally prohibited under the Criminal Justice Act.
[325] Chitimira H 'Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[326] S 77 of the Financial Markets Act, for the definition of "regulated market".

position in the UK, that the South African market abuse prohibition is unlimitedly applicable to securities listed on any regulated foreign market and to both natural and juristic persons.[327]

The FSA was conferred more powers as a single administrative regulator to ensure that the prohibition on market manipulation and related practices is consistently complied with; it issued a Code of Market Conduct.[328] The FSA has, for instance, issued the Code of Market Conduct to guide all the relevant persons on conduct that amounts to market manipulation and related practices (including factors to be considered when determining whether such conduct amounts to market abuse) in the UK.[329] This 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.[330] Although such market conduct is also prohibited by the Financial Markets Act, it is not quite clear whether the FSB has a similar Code or booklet containing the guidelines regarding the behaviour that amounts to market manipulation or related practices in South Africa.[331]

A new regulation namely, the Market abuse regulation (MAR), which will apply from 3 July 2016 will strengthen the existing UK market abuse framework by extending its scope to new

[327] Sections 77; 78; 80; 81& 82 of the Financial Markets Act. Also see generally Jooste 2006 SALJ 453; Cassim "Some Aspects of Insider Trading – Has the Securities Services Act, 36 of 2004 Gone too Far?" 2007 SA Merc LJ 44 66-67.
[328] Article 11 of the EU Market Abuse Directive. See further Cassim 2008 SA Merc LJ 38; paragraph 3 above.
[329] This Code of Market Conduct was revised on 1 July 2005 in accordance with s 119 of the Financial Services and Markets Act. The Code of Market Conduct is usually referred to as the "MAR".
[330] See MAR 1.6.10E.
[331] See MAR 1.6.10E.

markets, new platforms and new behaviour.[332] It contains prohibitions for insider dealing and market manipulation, and provisions to prevent and detect these.[333]

4.3 Enforcement of market abuse prohibitions in the UK and South Africa

The discussion that will follow will be a review of the enforcement capability of South Africa in contrast to that of the UK. Similar to the UK where the FSA is the main single body which administers and has the mandate to enforce the market abuse prohibition, SA too entrusts such a responsibility to the FSB.[334] The powers of the FSA amongst others include the power to investigate or refer a matter to its Regulatory Decisions Committee (the RDC); impose unlimited monetary penalties; make a public statement that a person has engaged in market abuse, and to apply to the courts for an injunction to claim restitution or restrain continued market abuse.[335] The FSA may further make market abuse rules and determine the general policy and principles to govern the performance of particular functions in the relevant financial markets.[336] In order to enhance its enforcement, the FSA is divided into several divisions such as the Supervision, Markets and Enforcement Divisions.[337] The FSA may furthermore, appoint additional persons as investigators of certain market abuse cases and can also act as a quasi-judicial and quasi-legislative regulatory body.[338]

[332] Market Abuse Regulation available at *https://www.fca.org.uk/firms/markets/market-abuse/mar* (accessed on 15 September 2015).
[333] Market Abuse Regulation available at *https://www.fca.org.uk/firms/markets/market-abuse/mar* (accessed on 15 September 2015).
[334] Section 85(2) of the *Financial Services Board Act* 97 of 1990.
[335] Financial Services Board Act 97 of 1990; Financial Markets Act 19 of 2012; and the Financial Services and Markets of 2000.
[336] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[337] Swan EJ & Virgo J *Market Abuse Regulation* 2ed (2010).
[338] See sections 97; 167; 168; 173 and 175 of the Financial Services and Markets Act of 2000. See also Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).

The FSB bears the sole responsibility and function to oversee the enforcement of the securities and market abuse provisions in South Africa.[339] Nonetheless, unlike the position in the UK, where the Bank of England's regulatory mandate does not include banks because they are regulated by the FSA, the South African Reserve Bank (SARB) and not the FSB oversees the regulation of banks in South Africa.[340] In this regard, the FSA's regulatory powers are broader than those of the FSB. However with the development of the twin peaks model of regulation, a new regulator namely a market conduct regulator will be introduced and will in all likelihood be entrusted with the mandate to cover conduct.[341] Prudential regulation will still be with the SARB, but only to manage prudential related issues.[342]

Nevertheless, like the FSA, the FSB administers and enforces the civil market abuse provisions in South Africa.[343] It can be said that the FSB is also not as fortunate as the FSA to be staffed and adjudicated by sufficient and competent persons to enhance its cross-border market abuse enforcement efforts in South Africa considering the low prosecution rate insider trading and market manipulation cases reported in South Africa.[344] The FSA and the FSB both have quasi-legislative (rule-making) powers.[345] Although this is a commendable achievement and welcomed, the regulatory interaction and engagement by the FSB has to date not been so visible.[346]

[339] Section 84 of the Financial Markets Act.
[340] Section 84 of the Financial Markets Act.
[341] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[342] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[343] Section 84 of the Financial Markets Act 19 of 2012.
[344] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[345] Section 84(2)(f) of the Financial Markets Act 19 of 2012.
[346] There are currently only 25 cases pending with the FSB on possible market abuse cases as at September 2015.

Unlike the FSA's Code of Market Conduct which supplemented and defined market abuse conduct in the UK, such conduct is merely outlined, mainly in Chapter X of the Financial Markets Act, an area where much development is still required from a South African perspective.[347] All investigations instituted by the FSB are escalated to it by the JSE as well as on a rare basis through tip- offs.[348] This is however not the position in the UK as the FSA is authorised to appoint additional skilled persons to provide it with reports or relevant information relating to any suspected market abuse violations.[349]

Notably, in order to enhance compliance and the general enforcement of the market abuse prohibition in South Africa, the FSB has also purportedly entered into co-operation agreements with other international regulatory bodies such as the FSA, the SEC and the IOSCO.[350] However, it remains to be seen whether these co-operation agreements will be fully exploited by the FSB to combat cross-border market abuse activities in South Africa.[351]

In the detection phase of market abuse, the FSA in conjunction with the London Stock Exchange (the LSE) relies on the Stock Exchange Automated Quotation market marking system to detect all possible market abuse activities in the relevant financial markets.[352] Moreover, all listed UK equities and other investments listed on a subsidiary market known as the Alternative Investment Market could further rely on the Stock Exchange Alternative Trading System or Stock Exchange Automated Quotation or another trading system known as

[347] However, the FSB has to date issued several booklets and bulletins with general information regarding the regulation of market abuse practices in South Africa.
[348] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[349] Section 82 read with s 84 of the Financial Markets Act.
[350] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[351] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[352] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.

the Stock Exchange Alternative Trading System Plus to detect and curb market abuse practices.[353] The collaboration in South Africa is not as strong as in the UK as currently there is only a cooperation with the JSE and BESA to ensure that the capability to combat market abuse is strengthened, it would be advisable that the FSB, JSE, BESA and market participants all collaborate in the fight to combat market abuse.[354]

In the UK, several self-regulatory organisations (the SROs) have made a significant contribution to the supervision and regulation of the securities and financial services industry to date.[355] During the 1970s and the early 1980s, the SROs such as the Bank of England, the Personal Investment Authority, the Investment Management Regulatory Organisation, the Securities and Investments Board (the SIB) and the Securities and Futures Authority (the SFA) played a leading role in the prevention, investigation and prosecution of securities and market abuse cases in the UK.[356]

It appears as if the importance of the role of such organisations has to some extent been overlooked in South Africa.[357] This may be reflected, in part, by the fact that only a few SROs, namely the JSE, the EC, the Directorate of Market Abuse (the DMA) and the Takeover Regulation Panel (the TRP), are either directly or indirectly involved in the enforcement of the securities and market abuse laws in South Africa.[358] Nevertheless, apart from the JSE, there are no other SROs that are statutorily, specifically and mainly responsible

[353] An opinion expressed by the author in relation to a collaborative and harmonised regulatory approach followed in the UK.
[354]Avgouleas The Mechanics and Regulation of Market Abuse 309.
[355] Avgouleas The Mechanics and Regulation of Market Abuse 309.
[356]Avgouleas EE 'The Mechanics and Regulation of Market Abuse' available at *http://ukcatalogue.oup.com/product/9780199244522.do* (accessed on 20 July 2014).
[357]Avgouleas EE 'The Mechanics and Regulation of Market Abuse' available at *http://ukcatalogue.oup.com/product/9780199244522.do* (accessed on 20 July 2014).
[358]Avgouleas EE 'The Mechanics and Regulation of Market Abuse' available at *http://ukcatalogue.oup.com/product/9780199244522.do* (accessed on 20 July 2014).

for enforcing market abuse laws in South Africa.[359] As a result, not many SROs have been actively involved in the enforcement of the market abuse prohibition to supplement the efforts of the FSB in South Africa to date.[360] South Africa seems to have blindly adopted some of the enforcement methods that are employed in the UK by empowering the FSB as the only main regulatory board that oversees the enforcement of its market abuse ban.[361] In relation to this, it is suggested that South Africa should consider practically implementing only the relevant principles of the UK's single regulator model because it is economical and less complex.[362] This could increase the number of settlements and convictions in market abuse cases in South Africa.[363] Additionally, it is not certain whether other SROs in South Africa have the same or similar statutory leverage available to the FSB to make their own decisions, rules and appropriate regulations in relation to market abuse offences.[364] However, it is important to note that the DMA and the EC have functions almost similar to those of their UK counterparts, the RDC and the FSMT respectively.[365]

The relevant courts and the Department of Trade and Industry (DTI) have played an important role in the enforcement of securities and market abuse laws in the UK as its main prerogative was to prosecute all criminal cases involving market abuse.[366] Being afforded the power to prosecute market abuse cases of its own volition, the FSA still relies on the courts

[359] The JSE is the only self-regulatory organisation assisting the FSB with the enforcement of the market abuse prohibition in South Africa.
[360] The JSE is the only self-regulatory organisation assisting the FSB with the enforcement of the market abuse prohibition in South Africa.
[361] Financial Markets Act 19 of 2012.
[362] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[363] According to the statistics available on the website of the FSB has closed 250 investigations out of court as at March 2015. Internationally numerous court cases have been heard involving market abuse. See Swan EJ & Virgo J *Market Abuse Regulation* 2ed (2010).
[364] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[365] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[366] The DTI was previously responsible for enforcing the insider trading prohibition in the UK. Precisely, about 15 cases involving 19 individuals were prosecuted for insider trading during the period between 1984 & 1996 in the UK. However, no convictions were obtained in all these 15 cases.

for further investigations and prosecution.[367] Despite the fact that some weaknesses and irregularities still exist in the criminal enforcement of the market abuse prohibition, the courts have to date successfully prosecuted a considerable number of cases involving market abuse in the UK.[368] For instance, cases like the *Chase Manhattan Equities v Goodman*[369] have been adequately prosecuted. In this case Knox J held that any transaction or dealing based on the misuse of inside information was against public policy, unenforceable and consequently resulted in criminal liability on the part of the offenders.[370] Moreover, in the *Scott v Brown*[371] case, the Court of Appeal held that an agreement to stabilise the price of shares while a number of certain shares were brought into the financial market was illegal and unenforceable.[372]

When one considers the position in the UK, it appears that apart from the FSB and the Enforcement Committee (the EC), only the High Courts or Regional Courts have the jurisdiction to hear market abuse cases under the Financial Markets Act.[373] Nonetheless, the high evidentiary burden employed in criminal cases of market abuse remains probably the main contributory factor of the paucity of convictions obtained in such cases in both the UK and South Africa.[374] Therefore, it remains to be seen whether the Financial Markets Act's market abuse provisions will enhance the combating and prosecution of market abuse cases

[367] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[368] *Chase Manhattan Equities v Goodman* [1991] BCLC 897
[369] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[370] See related cases such as *R v Rigby, Bailey & Rowley* (2005) FSA/PN/106/2005 2005-10-07; *R v Ghosh* [1982] QB 1053 & *SIB v Pantell SA* (No 2) [1993] BCLC 146 (CA). Generally see section 62(2) of the Criminal Justice Act.
[371] *Scott v Brown* [1892] QB 724
[372] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[373] Section 84 read with sections 77; 78; 80; 81 and 82 of the Financial Markets Act 19 of 2012.
[374] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.

in South Africa.[375] Additionally, unlike the position in the UK, it is not quite certain whether the relevant courts in South Africa may also rely on any skilled persons from the FSB itself or on persons who are assigned to them by the FSB to adjudicate in market abuse cases.[376] A great deficiency that South Africa is burdened with is the absence of sufficient persons with the relevant expertise to adjudicate in matters involving market abuse remains a significant challenge for the competent courts in South Africa.[377]

4.4 Conclusion

The UK employs a rigorous enforcement and prosecution framework from which South Africa could learn many lessons.[378] The adoption of some principles from the UK regulatory framework shows a significant effort by our legislature to broaden and develop an adequate market abuse banning in South Africa.[379] It should be noted that while this should be commendable many deficiencies such as inconsistent enforcement of these provisions and related enforcement mechanisms directly impedes the efforts by our regulator, the courts and those fighting the ban of market abuse.[380]

The author therefore submits that the legislature should not just blindly borrow and adopt principles and lessons learnt from the UK regulatory framework without adequately

[375] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[376] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[377] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.
[378] See Slaughter and May 'The EU/UK Market Abuse Regime – Overview' available at *http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-euuk-market-abuse-regime---overview.aspx* (accessed on 10 June 2014); Swan EJ & Virgo J *Market Abuse Regulation* 2ed (2010); and Rider, Alexander, Linklater et al *Market Abuse and Insider Dealing* 2ed (2009).
[379] See FMA 19 of 2012 and FSMA of 2000.
[380] The current reliance placed by leading financial institutions to obtain top technology for surveillance purposes.

evaluating the applicability of these principles to the South African market infrastructure, South Africa's current capability to enforce such principles and what the effect of such measures would be on market participants and dealing members.[381] It is noteworthy to mention that it is evident that South Africa has placed more attention and efforts on procuring adequate technological surveillance machinery.[382] However it should align its efforts to upskill South Africa's current regulatory competency, developing a code of conduct for market participants and further educational awareness programmes to combat market abuse.[383]

In the next Chapter the researcher will review the current regulatory landscape of Nigeria against South Africa's, in order to gain more insight into market abuse regulation and enforcement in Nigeria.

[381] Chitimira H '*Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom*' (2014) 20 *Mediterranean Journal of Social Sciences* 272.

[382] This is a reference to the current negotiations by most leading banks and financial institutions that are rolling out the surveillance capability developed by NASDAQ OMX for monitoring and surveillance purposes. Standard Bank South Africa, my current employer is currently utilizing this surveillance capability in the Market Abuse Compliance function.

[383] The manpower and size of the DMA, the department within the FSB focusing of market abuse detection, investigation and enforcement is still under developed and there is room for much growth in regard to size and competency levels of the current staff.

Chapter 5

MARKET ABUSE REGULATION AND ENFORCEMENT IN NIGERIA: A COMPARATIVE PERSPECTIVE.

5.1 Introduction

Nigeria boasts with a well-developed market abuse regulatory framework with a focus on securities regulation second to South Africa on the African continent. The enforcement of the regulation on market abuse in Nigeria is still in its infant stages but there are certainly lessons' that could be learnt from a country where there is a centralised regulatory approach is followed as well as an active and engaging regulator constantly reviewing regulations.[384]

It is against this background that an insightful comparative analysis on the enforcement of the market abuse regulation will be carried out in this Chapter. Any meaningful lessons that can be learnt and innovations that can be recommended for adoption in South Africa will be identified. Relevant Nigerian cases and provisions on market abuse will be analysed and contrasted with their South African counterparts.

5.2 Securities regulation in Nigeria

Authors on the regulation of securities market are of the opinion that securities market regulation is principally aimed at protecting investors from unfair, unprofessional and improper practices as well as fostering a competitive innovative and efficient market with

[384] According to the mandate which stems from the Central Bank of Nigeria Act of 2007 of the Federal Republic of Nigeria, the Central Bank is charged with the overall control and administration of the monetary and financial sector policies of the Federal Government. In light of its mission it aims to be proactive in providing a stable framework for the economic development of Nigeria, through effective, efficient, and transparent implementation of monetary and exchange rate policy, and management of the financial sector. See also http://www.cenbank.org/AboutCBN/mission.asp (accessed on 17 January 2015). One of the core functions of the Financial Policy and Regulation department is the development and implementation of policies & regulations aimed at ensuring financial system stability. Regular circulars, directives and policies are developed by the CBN to regulate the banking and financial institutions sector.

active and wide investor participation.[385] Securities regulation is derived from the Companies and Allied Matters Decree of 1990 (CAMA) and the Securities and Exchange Commission Act (SEC Act).[386] The Securities and Exchange Commission ('the SEC'), the apex regulator is a creature of statute in the Nigerian capital market and lays down the regulatory framework for the primary and secondary securities markets.[387] The SEC Act resembles and derives its substance from the U.S. Securities and Exchange Act of 1934.[388] A consequence of the dual laws is that there are sometimes unintended overlaps between these statutes.

The CAMA prescribes the prospectus requirements for public issues and contains the regulatory framework for unit trusts and tender offers including takeover bids.[389]

The Nigerian Investment Promotion Council Decree 16 of 1995 (NIPC) and the Foreign Exchange (Monitoring and Miscellaneous) Decree 17 of 1995, abolished the Nigeria Enterprises Promotion Decree and the Exchange Control Act to pave the way for direct foreign investment in the market.[390] As a result of these new regulations, the Nigerian economy is now open to everybody, Nigerians and non-Nigerians equally in any enterprise.[391] Furthermore participants to the market have equal rights, privileges and opportunities to invest in securities in the Nigerian capital market.[392] The Nigerian Stock Exchange dealing members (stockbroking firms) can now accommodate foreign shareholders in their equity capital or go into any form of partnership with foreign stockbroking firms: and Nigerian companies are now allowed multiple and cross border listings on foreign markets

[385] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.
[386] *Companies and Allied Matters Act* of 1990 and the *Securities and Exchange Commission Act* Cap 406 of 1988 of the Federation of Nigeria.
[387] *Securities and Exchange Commission Act* Cap 406 of 1988 of the Federation of Nigeria.
[388] *Securities and Exchange Act* 1934, of the United States of America.
[389] *Companies and Allied Matters Act* of 1990 of the Federation of Nigeria.
[390] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 29.
[391] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 29.
[392] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 29.

subject to the NSE "Memorandum of Understanding" with such international stock exchanges.[393]

5.2.1 The Nigerian Securities and Exchange Commission

As a starting point it is necessary to highlight the regulatory approach followed by Nigeria. It is stated that Nigeria follows a so-called Hybrid Approach to financial regulation.[394] The principal regulator for the Nigerian Capital Market is the Central Bank of Nigeria (CBN) with other regulatory support by the Securities and Exchange Commission (SEC) and the Nigeria Deposit Insurance Corporation as well as the Nigerian Stock Exchange as a self-regulatory organisation.

The SEC's origin dates back to 1962, when an ad hoc consultative and advisory body, known as the Capital Issues Committee (CIC), was established under the guidance of the Central Bank of Nigeria (CBN).[395] Its mandate was to examine applications from companies seeking to raise capital from the capital market and recommend the timing of such issues to prevent issues clustering which could overstretch the market's capacity.[396] As a result the Committee operated within the Central Bank of Nigeria unofficially as a capital market consultative and advisory body having no regulatory framework.[397]

Economic activities increased and coupled with the promulgation of the Nigerian Enterprises Promotion Decree in 1972, it necessitated the establishment of a body backed by law to

[393] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 29.
[394] This is evident in regard to the operations of the financial regulatory landscape and enforcement framework followed in Nigeria. The Central Bank of Nigeria, available at *http://www.cenbank.org/* (accessed on 20 January 2015). See also Africa Banking Survey available at http://www.kpmg.com/Africa/en/IssuesAndInsights/ArticlesPublications/Documents/Africa%20Banking%20Survey.pdf (accessed on 13 January 2014).
[395] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[396] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[397] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).

regulate capital market activities hence the creation of the Capital Issues Commission in terms of the Capital Issues Commission (the Commission) Decree of March 1973, to take over the activities of the Capital Issues Committee.[398]

The Commission had a board of nine members which included a representative of the Central Bank of Nigeria who served as Chairman, whereas the other eight members were drawn from some Federal Ministries, the industrial and financial sectors of the economy.[399] In order to review the capital markets activities a Financial System Review Committee was set up by the federal government to proffer ways of developing the market.[400] Following the promulgation of the Securities and Exchange Commission Decree 71 of 1979, the Securities and Exchange Commission was set up to supersede the Capital Issues Commission in 1979.[401] Its powers were broader the its predecessor and included powers to regulate and develop the Nigerian capital market, in addition to determining the prices of issues and setting the basis for allotment of securities.[402] The SEC Decree was re-enacted as SEC Decree No. 29 of 1988 with additional provisions to address observed lapses in the previous arrangement and to enable the Commission to pursue its functions more effectively.[403]

To further enhance the Commission's pursuit of its objective of investor protection, a review of the capital market was carried out in 1996 by a seven - man panel headed by Chief Dennis

[398] 'Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[399] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[400] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[401] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[402] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).
[403] Securities Exchange Commission, available at *http://www.sec.gov.ng/our-history.html* (accessed on 13 January 2014).

Odife.[404] The panel's recommendations, further led to the enactment of a new Act known as "SEC Decree No. 29 of 1988" that was promulgated on May 26, 1999.[405] The Act repealed the SEC Act of 1988. The new Act was expected to promote a more efficient and virile capital market, pivotal to meeting the nation's economic and developmental aspirations.[406] The Investment and Securities Act (ISA) was further reviewed, amended and subsequently passed into law in 2007. The SEC currently derives its powers from the ISA 29 of 2007.[407]

The SEC became a member of the International Organisation of Securities Commissions (IOSCO) in June 1985.[408] The IOSCO is a body of Securities Commissions with the goal of cooperating in developing, implementing and promoting adherence to internationally recognised and consistent standards of securities market regulation.[409] The Nigerian SEC qualified as an Appendix 'A' Signatory to the IOSCO MMOU in 2006 and has continuously been benchmarking its market rules and regulations against those of IOSCO, the global international standards setter.[410] As a government agency it is mandated to regulate and develop the Nigerian capital market coupled with this it fulfils a large array of functions.[411]

[404] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[405] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[406] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[407] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[408] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[409] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[410] Securities Exchange Commission, available at *http://www.sec.gov.ng/index.php/bulletins/templates/Modern/styles/files/images/files/CMO%20DATA/what-we-do.html* (accessed on 20 January 2014).
[411] The Commission undertakes various activities in order to protect investors, ensuring that the proper registration for securities are followed; conducting surveillance on all exchange traded activities and having proper enforcement mechanisms in place.

For the purposes of this paper, the focus will be on the surveillance, rulemaking and enforcement powers or functions of the SEC.

5.3 The origins of market abuse regulation

5.3.1 Insider trading regulation in Nigeria

Insider trading was broadly defined as "purchases or sales of securities of a company affected by or on behalf of a person whose relationship to the company is such that he is likely to have access to relevant material information concerning the company not known to the general public".[412] The view on which the prohibition of insider trading is based is that trading should be based on equal access to information.[413]

It is provided for under common law that insider trading only occurs in instances where a fiduciary relationship exists between the insider and the other party to the transaction would such person who deals with an insider in ignorance of the special facts are able to obtain any protections from the law.[414]

In the 1902 English case of Percival v Wright the Court of Appeal held that a director owed no fiduciary duty to a shareholder and therefore could purchase with impunity the latter's shares while in possession of favourable confidential information about the company.[415] As a result of the limitations of the common law most jurisdictions in a bid to protect investors adequately against insider trading expressly provide in their securities laws for regulations and sanctions.[416]

---

[412] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.
[413] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.
[414] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.
[415] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.
[416] Omonuwa O *Securities Regulation in an Emerging Market: A Comparison between Nigeria and Canada* (unplublished LLM thesis, University of Manitoba, 2000) 28.

The practice of insider trading was formally first proscribed under both Chapter V of Pan XVII of the CAMA and Regulation 7 in the SEC Act. While the CAMA establishes express civil and criminal liability the SEC Act does not.[417] Regulations 7(2) and 29 of the SEC Act stated that insider trading occur when a person or group of persons who are in possession of some confidential and price-sensitive information not generally available to the public utilise such information to buy or sel1 securities for the benefit of himself itself or any person whether knowingly or unknowingly.[418]

Both section 614 of CAMA and regulation 7(3) of the SEC Act provided a definition for an "insider".[419]

The offence of insider trading applied not only to dealings at a recognised stock exchange: but extends to off-market dealings in advertised securities.[420]

5.3.2 Liability for Insider Trading

The CAMA provided civil and criminal liability for the contravention of insider trading provisions. Section 620 of CAMA provided civil liability for insider trading and in terms of this section an insider found guilty is; (a) liable to compensate any person for any direct loss

[417] Regulation 7(2) and 29 of the Securities Exchange Commission Act.
[418] Regulation 7(2) and 29 of the Securities Exchange Commission Act.
[419] Section 614 of CAMA and regulation 7(3) of the SEC Act in relevant parts provided that -
(a) who is connected with the company during the preceding six months in one of the following capacities:
(i) a director of the company or a related company:
(ii) an officer of the company or a related company:
(iii) an employer of the company or a related company:
(iv) a person in a position involving a professional or business relationship to the company as above:
(v) a shareholder who owns five per cent or more of any class of securities or any person who can be deemed to be an agent of any of the above listed persons; and.
(b) who by virtue of having being connected with the company as mentioned above in (a) above has obtained unpublished price-sensitive information in relation to the securities of the company.
[420] Regulation 63 to the SEC Act further provided that so long as -
(a) the person who deals in these securities shall qualify as an insider:
(b) the person shall be an individual not a company:
(c) the person shall have knowingly been connected with the Company during the preceding six months:
(d) the person shall have obtained the information by virtue of having been connected with the Company:
(e) it shall be reasonable to expect the person not to disclose the information except for the performance of his duties:
(f) the information shall be unpublished price sensitive information in relation to securities.

suffered by that person as a result of the transaction unless the information was known or with the exercise of reasonable diligence could have been known to that person at the time of the transaction; and (b) accountable to the Company for the direct benefit or advantage received or receivable by him as a result of the transaction.

The implication of these provisions was that an insider needed not to have been a party to the securities transaction. If he counselled another person to deal in the securities he is liable to the other party. Section 621 of CAMA provided for criminal liability of either imprisonment for two years on conviction for insider trading or a fine of five thousand naira (N5. 000) or both such fine and imprisonment. Insider trading was also expressly characterised as a manipulative and deceptive act in regulation 7(1)(e). Under this regulation there were not many SEC prosecutions for violations. It can be submitted that it is clear that the enforcement capabilities on market abuse/ insider trading regulation on the securities market of Nigeria was not well developed and managed by the regulator.[421]

5.4 Market abuse regulation under the auspices of the SEC and the ISA of 2007

As a result of numerous governance problems within the Nigeria Stock Exchange and the media having published of these complaints the SEC in 2010 was mandated to reconsider the dealings of the NSE and had to effect changes to its governance. It is important to note that both the SEC and the NSE conduct market surveillance, but have not been effective in detecting, investigating and prosecuting market abuse, even though certain improvements have recently been achieved. This misalignment and defect stems from the fact that no regulatory requirements for pre- and post-trade transparency is currently in existence. While the securities settlement system effectively addresses the risk of non-delivery of shares, there

[421] Ndanusa SA 'Role of the Capital Market in National Development' *Investment and Securities Law Journal* 2006.

are no limits for the value of the cash settlement obligations of broker-dealers. In light of the IOSCO association the IMF undertook the task of investigation and recommending how these defects should be managed.

In a Report published it was highlighted that the regulation should be designed to detect and deter manipulation and other unfair trading practices. The regulatory framework prohibiting market abuse is in place in Nigeria.[422] However, the surveillance and enforcement activities conducted by the SEC and NSE do not appear to be effective in tackling market abuse, even though certain improvements have recently been achieved.[423]

It is recommended that the regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program. The regulatory system contains tools for inspection, investigation, surveillance and enforcement. On-site inspections are used mainly in relation to the issuance of new securities, and to verify compliance with the requirements relating to CIS. The SEC has comprehensive enforcement powers, but work remains to be done to ensure their effective and consistent use. In practice enforcement tools are primarily used to tackle minor issues, mostly delays in filing mandatory reports, rather than major violations of securities law and rules. However, the SEC has worked to improve its enforcement capabilities, including by obtaining assistance from a foreign regulator. It has also tried to

[422] Principle 36 of the IOSCO Principles, adapted from the Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).

[423] Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).

address its own capacity problems by outsourcing several enforcement cases to law and audit firms.[424]

5.5 Prohibition of market abuse

In summary the prohibition on market abuse is described in sections 103 and 105–111 of the Investments and Securities Act and rules 110 and 133 of the Securities Exchange Commission Rules and Regulations and it prohibits various types of market abuse: namely; front running a form of insider dealing, market manipulation; disclosure of false or misleading statements; use of fraudulent means; and insider dealing.[425]

Directors and other insiders of a company are subject to a requirement to notify their sales and purchases in the company's shares no later than 48 hours after the transaction (Section 111 ISA). Under Section 115 of the ISA, the criminal liability for contravening the above prohibitions would be a fine of at least ₦500,000 (for individuals) or an amount equivalent to double the amount of profit derived or loss averted by the use of the information obtained in contravention of any of the above provisions, or imprisonment for a term not exceeding seven years. For bodies corporate the minimum fine would be ₦1,000,000.

In addition, Section 116 of the ISA provides that a person found to be liable must pay compensation to any person who suffered a loss as a result of the contravention. The amount

[424] The SEC has a zero tolerance stance against corruption and market abuse has equally been widely acknowledged domestically and internationally, encouraging the active participation of international investors (who make up about 70 percent of daily buy side trading by value on the Nigerian Stock Exchange) in the Nigerian capital markets. This allegation is without basis, and was not mentioned to us by the assessors during their mission. The Director General of the Securities and Exchange Commission, since her assumption of duty in January 2010, has taken unprecedented steps to eliminate market abuse and corruption from the Nigerian capital market. She has not relented in the drive to root out corrupt practices despite push back from vested interests. These issues are widely reported [in the local and international media]. She took action to strengthen internal controls within the SEC, and has taken steps to initiate a whistle blowing policy." Steps are also being taken to establish an Ethics function and recruit an Ethics officer. We are extremely disappointed to note that while the final version of the report acknowledges the zero tolerance stance of the Director General against corruption, it still retains the weighty and unproven allegation against the Commission.

[425] Sections 105 -116 of the Investment and Securities Act 2007 in Part T XI (the Act) deals with trading in securities and the prohibition of certain activities. Please see Annexure 1 for more detail.

of compensation would be the amount of the loss sustained by the person claiming the compensation or any other amount as may be determined by the SEC or the IST.

5.6 Market surveillance by the SEC

The SEC has no automated system to identify unusual transaction on the NSE. It maintains permanently two members of its staff on the premises of the NSE that conduct market surveillance activities of the SEC and NSE.[426] At least during the past three and a half years (2009 to date), the market abuse cases that the SEC has taken to the IST or forwarded to the criminal authorities have been limited to those identified in connection with the work of the Joint Task Force with the CBN.[427] The SEC and NSE have not imposed administrative sanctions on market abuse. The SEC and NSE were not able to provide information on whether the NSE has referred any market abuse cases to the SEC for further investigation during the past few years.[428]

5.7 Conclusion

It is clear from the above that there are still many gaps in the enforcement of the market abuse regulation which is entrenched in the ISA of 2007. In agreement with the critics it is submitted that the regulator's powers of investigation and enforcement have been underutilised. The reliance that is placed on the reports from capital markets operations and exercising its powers of prosecution through administrative proceedings committee and the Securities Tribunal does not afford the SEC or the NSE the tools to better regulate the

[426] Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).
[427] Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).
[428] Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).

practice of market abuse.[429] Similar to the Financial Markets Act of South Africa, the Investment and Securities Act and the Securities Exchange Commission Rules and regulations need to be reviewed in order to provide the appropriate guidance around enforcement especially at the lowest levels and that is with broker deals. Unlike South Africa, the SEC and the NSE need to ensure that it upskills the current market surveillance capabilities. As a shortcoming of the current regulation, it needs to clearly provide guidance on what is required for market abuse surveillance and not just market surveillance as this could mean other types of monitoring. It could in all likelihood include market abuse surveillance together with trader limit surveillance, dealer mandate surveillance, and operational risk surveillance. However, guidance from both the NSE and SEC needs to be obtained in order for capital markets operators to effectively manage the practice of market abuse.

It would not be necessary for both the NSE and the SEC to invent or struggle with this process. By leveraging of cross border regulatory developments and guidance from regulatory guidelines on this matter it would just be a case of personalising such strategies to be suitable to the capital and securities market of Nigeria.[430]

The CBN, SEC and NSE should be commended for their good collaborative nature in regulating the financial institutions and banking sector. Furthermore, for being proactive and

[429] Blankson A 'Promoting market integrity and investor protection in Nigeria' available at *http://www.iflr.com/Article/3110460/Promoting-market-integrity-and-investor-protection-in-Nigeria.html (*accessed on 20 March 2015).

[430] The reviewers in the Nigeria: Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014) provides evidence that the SEC has already attempted the cross border cooperation with counterparties in order to improve its enforcement capabilities. It has obtained assistance from a foreign regulator to build its enforcement capacity and has outsourced several enforcement actions. Specifically, the collaboration with the Joint Task Force (JTF) in 2010. The JTF included private law firms and an audit firm. It was set up to identify deviations from the ISA and relevant SEC Rules and Regulations.

having issued a Code of Conduct for Capital Market Operators and their Employees to address failure of compliance with the conduct of business requirements, this is a sanction provisioned code. The NSE should be commended for creating a surveillance arm to carry out daily and routine surveillance of focused trading activities and the detection of market abuse practices such as false trading, market manipulation, rigging and the guarding against the circulation of price sensitive information.[431] The SEC should be commended for instituting an enforcement and compliance department and the implementation of detailed rules to regulate the activities of the capital market operators.

The reviewers[432] are however; wary of the SEC's compliance procedures[433] and its enforcement system as it does not in practice appear to be effective. They provide several reasons in support of this finding. Criticisms were, that it was not possible to confirm whether there is a proper audit trail of all the cases that the various SEC departments have investigated and that have then possibly been passed on to the Enforcement & Compliance Department and from there possibly to the criminal process. The involved departments do not seem to communicate directly, but the communication takes place through the senior management. Secondly, onsite inspections are currently not done on a routine basis, and there have been severe delays in the decisions to take action in potential enforcement cases.

It is clear from the above review the legislative framework between South Africa and Nigeria is differently structured. South Africa provides a more intrusive and extended market abuse

[431] Blankson A 'Promoting market integrity and investor protection in Nigeria' available at *http://www.iflr.com/Article/3110460/Promoting-market-integrity-and-investor-protection-in-Nigeria.html* (accessed on 20 March 2015).

[432] Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014).

[433] The reviewers in the Nigeria: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation of May 2013 available at *http://www.imf.org/external/pubs/ft/scr/2013/cr13144.pdf* (accessed on 15 January 2014) reports that the SEC requires market surveillance mechanisms that permit an audit of the execution and trading of all transactions made on the NSE.

regulation, whereas Nigeria pronounces on the various forms of insider trading or market manipulation practices. The next Chapter will provide review of the underlying research that was undertaken by the researcher. The author will provide recommendations to the current gaps in the regulation and enforcement of the market abuse legislative framework in South Africa.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS TO ADDRESS THE ENFORCEMENT AND REGULATION APPROACH OF MARKET ABUSE IN SOUTH AFRICA

6.1 GENERAL OBSERVATIONS

The current regulatory framework on market abuse has to a certain extent addressed the concerns raised by the investor on the street, namely fair markets, market transparency and investor confidence. It however, still faces serious challenges regarding the enforcement and adequate monitoring of such regulation. It is crucial to once again highlight that the financial markets are of central importance to the economic system, finding appropriate regulation is therefore crucial.[434] Market abuse is one of the greatest threats to the well-being of the financial markets and therefore a harmonised regulatory approach is required to address the evil of market abuse a practice that dominates trading in financial instruments.[435]

This Chapter seeks to recommend possible solutions to the market abuse problem in South Africa. It is hoped that such recommendations will help the legislature, regulatory bodies and market operators to succeed in its endeavours to curb the practice of market abuse.

6.2 RECOMMENDATIONS

A number of recommendations aimed at resolving the inadequacies in the market abuse regulation, enforcement and monitoring capabilities are made with suggestions as to how these recommendations can be best implemented and utilised to restrict market abuse and related practices.

a) The author recommends that the FSB of South Africa should collaborate with cross border regulators in order to improve and manage market abuse regulation.

Regulatory harmonisation will be a crucial step in order to combat the effects of market abuse practice on the financial markets of South Africa.[436] The market abuse regime is not just

[434] Soderstrom R 'Regulating Market Manipulation – An Approach to designing regulatory principles' available at *http://uu.diva-portal.org* accessed on 14 April 2014.

[435] To date the FSB is investigating 15 possible cases of market abuse – possible insider trading or market manipulation investigations as 23 September 2015. Information obtained from *https://www.fsb.co.za/NewsLibrary/Report%20by%20the%20Directorate%20of%20Market%20Abuse.pdf* accessed on 30 September 2015.

[436] FSB *Annual Report* (2011) at 99-101 and the FSB *Annual Report* (2013) at 128-130 which, *inter alia*, show the new, ongoing and completed investigations of market abuse cases between 2011 and 2013, respectively and

aimed at deterring the behaviour of market participants though criminalising the offence, but it is also aimed at apprehending behaviour that undermines the confidence in the market which is generally below reasonable expected standards. Cross border cooperation is required in order to successfully investigate and prosecute cross-border market abuse cases in South Africa or other states. A number of big corporations in South Africa have international presence and in some instances their main business are housed in foreign jurisdictions which also impacts the economy of South Africa.[437] There is also various gaps in South Africa's current regulation on market abuse as it does not provide for all forms of market abuse practices such as high frequency trading, short selling, credit default swaps and front running, as it is not expressly and statutorily outlawed under the Financial Markets Act.[438]

The enforcement of the insider trading prohibition involves many regulatory bodies in other jurisdictions, this is however only the responsibility, of the FSB and its functionaries.[439] To date it is submitted that it appears that there have been little to no cooperation and coordination between the courts and the FSB and its committees in combatting market abuse. Other relevant regulatory bodies in South Africa such as the Bond Exchange of South Africa (BESA), the Competition Commission of South Africa and other self-regulatory organisations should become more involved in complimenting the efforts of the FSB.[440] This will help the public regulator (FSB) to raise adequate resources for effective enforcement of the insider trading prohibition.

It is further submitted that as a member of the G20 and IOSCO, South Africa should place more reliance and cooperation efforts to work with these two associations which are instrumental in setting the international guidelines, policies and processes for financial

---

Directorate of Market Abuse "Report by the Directorate of Market Abuse" *FSB Press Release* 2 December 2014, which indicates that about 19 cases of market abuse were investigated by the DMA between March 2007 and September 2014. Nonetheless, only one case out of the 19 cases of market abuse was successfully investigated and completed while the rest of the cases are still ongoing. See also Chapter 3 of this dissertation for more information as to why it is important for cross border harmonisation and cooperation between regulators.

[437] All of the major big banks in South Africa have operations across the African continent, Europe and even the United States of America and China – Standard Bank, Barclays Bank, Nedbank Limited and First National Bank Limited. Various international banks and investment companies are also operating in South Africa.

[438] See sections 78; 80; 81 and 82 of the FMA.

[439] See Chapter 3 of this dissertation for more information. The DMA was initially established as the Insider Trading Directorate (ITD) in terms of s 12 of the Insider Trading Act and its main mandate was limited to investigating insider trading violations in South Africa. See also section 85 of the Financial Markets Act for an outline of the current functions of the DMA.

[440] The Competition has become more intrusive into the affairs of certain market players in the FX derivatives and currency markets of South Africa as a result of the FX rigging probe internationally – during August and September 2015.

stability. South Africa has been following a light touch approach[441] maintaining the balance between the enforcement of the prohibition and guarding against limiting trading practices.[442] The United Kingdom on the other hand follows an approach to ensure that its investigation and enforcement capabilities have been tightened and that the regulation on the securities is well developed in order to meet technological and market trends.[443]

In order to further harmonise the regulatory scheme of South Africa, the regulators together with the legislature is urged to relook the current framework in regard to the market infrastructure available to meet the requirements of the regulation; sophistication of the corporate community; trading volume and client size as well as the IT infrastructure. These costs perspectives will allow the regulator and legislature to craft regulation that will best meet the current ambience of our financial markets as well as cost perspectives.[444]

Regulatory harmonisation can also be achieved through cooperating efforts in order to detect, investigate, monitor and report market abuse incidents or case. This will be achieved through dual regulatory inspections – on or off site inspections and market surveillance.

b) The requirement to educate and develop competencies across South Africa

The FSB should also equip its staff capability and competencies and this will also be enabled through a collaborative approach and intervention.[445] Certainly if such expertise lies cross border, it is recommended that it be utilised in order to facilitate skills development, cultivating local specialist that will provide the necessary guidance to corporates in the financial markets.

c) The author recommends that the FSB of South Africa should place more reliance and provide guidance on enforcement through the deployment of market surveillance and market abuse surveillance in order to tighten the anti-market abuse regime.

[441] The author refers to this as an approach of the regulation not to hamper trading in the financial markets with strict and intrusive regulation, but to rather balance the enforcement of regulation and prohibition of trading through strict market abuse regulation.
[442] See sections 78, 80, 81 and 82 of the FMA.
[443] The new regulation on Markets in Financial Instruments Directive, ESMA and the FCA mandate provides clear guidance on its approach.
[444] The author is of the opinion that regulators should consider IT infrastructure as well as general infrastructure aspects in South Africa when drafting new regulation.
[445] The Banking Association of South Africa (BASA) is the ideal platform to discuss the prospects of further education and training on market abuse.

It is important for organisations, the exchanges and regulatory bodies to enforce and promote the deployment of pre and post trade surveillance[446] solutions and capabilities. It is noted that the goals of market surveillance are primarily two-fold.[447] On the one hand it is to ensure that trading in the given market is fair and orderly.[448] To achieve this, market surveillance is undertaken to identify rule breaches, erroneous activity, an algorithm that malfunctions or general "fat finger" errors. It is also used to identify deliberate submissions of excessive numbers of orders and cancellations or disruptions to orderly trading like the "flash crash" of May 2010.[449] Such surveillance would be expected to provide the market authority with sufficient tools to halt the given problem in a timely fashion and to provide the information necessary for a Market Authority to understand within a reasonable time the underlying causes of a material market disruption.[450]

The other form of market surveillance is undertaken for market abuse purposes. In South Africa the JSE also currently provides this oversight. This includes the ability to detect possible instances or patterns of market abuse and to investigate referrals from market participants and the public. It is either undertaken in real-time through the utilization of alert functionalities built into surveillance systems to help flag suspicious activity or post trade surveillance that occurs trading plus 1 day.[451] Surveillance work that focuses on market abuse centres on gathering the key elements of the information, including an audit trail, necessary to investigate and bring cases. The following principles provide clear guidance as to what the surveillance capability should entail -

- Principle 10: The regulator should have comprehensive inspection, investigation and surveillance powers.
- Principle 12: The regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.

[446] Pre-trade surveillance programs can be employed to validate trade instructions, ensure trading thresholds are not breached, and prevent trades being conducted on restricted instruments. Post-trade surveillance can monitor for front-running, suitability, best-execution and regulatory transaction reporting.
[447] See the IOSCO principles. Market surveillance is a key component to attaining the IOSCO objectives and principles of securities regulation.
[448] This is currently executed by the JSE Surveillance department.
[449] See the IOSCO principles. Market surveillance is a key component to attaining the IOSCO objectives and principles of securities regulation.
[450] See the IOSCO principles. Market surveillance is a key component to attaining the IOSCO objectives and principles of securities regulation.
[451] That is non-real-time analysis, such as the running of periodic reports, or trend analysis to help detect unusual patterns of behaviour over the period of seconds, hours, days or even weeks. The investigation of alerts and allegations of abuse in response to tip-offs and referrals is similarly undertaken on a non-real-time basis.

- Principle 33: The establishment of trading systems including securities exchanges should be subject to regulatory authorization and oversight.
- Principle 34: There should be ongoing regulatory supervision of exchanges and trading systems, which should aim to ensure that the integrity of trading is maintained through fair and equitable rules that strike an appropriate balance between the demands of different market participants.
- Principle 36: Regulation should be designed to detect and deter manipulation and other unfair trading practices.
- Principle 37: Regulation should aim to ensure the proper management of large exposures, default risk and market disruption.

The main focus of trade surveillance is to prevent market abuse and market manipulation, which can severely damage a firm's reputation. Since the financial crisis, one of the many efforts by regulators to improve market transparency and investor confidence has been to improve trade surveillance, for example, in the area of pre-trade surveillance. Therefore regulators should mandate all financial firms, investment companies, stock brokers and exchanges to perform post trade surveillance by monitoring the trading activities of employees in order to identify potential violations such as insider or speculative trading.[452]

It is also crucial that compliance procedures set up by the financial institutions should be robust and pre-emptive to help detect and capture any rogue trading and inside trading activities.

d) The author recommends that the FSB of South Africa should manage the practice of market abuse control through investing its efforts in embedding and grooming the compliance functions' in order to assist in the enforcement of the market abuse regime

A key focus is placed on the compliance function to enforce best practices. It is submitted that the compliance function in any jurisdiction holds and manages the relationship with the regulator. A compliance officer has the responsibility to advise management and the board of all regulatory developments that may impact the organisation and what are the consequences of such non-compliance. Therefore the compliance function is best suited to provide

[452] Currently there are about four or five exchanges that are performing a surveillance function and have sophisticated solutions for this purpose, this includes amongst others South Africa – the JSE; Kenya (Nairobi Stock Exchange) and Nigeria (Nigeria Stock Exchange) on the African continent.

guidance to firms in establishing their internal policies and procedures and/or Codes of Conduct. A market that is free from manipulation is fundamental to fostering stability. Importantly, each market participant is obligated to refrain from market abuse. Regulated firms are also responsible for establishing a culture and practices that prevent, detect and deter market abuse. Therefore the author recommends that the compliance function should be mandated to ensure that market abuse practices are regulated and prevented in the organisation through conducting market abuse surveillance and compliance monitoring on the principles of the FMA.

e) The author recommends that more consideration and concerted effort should be made to improve market abuse regulation in the development of the new twin peaks regulation in South Africa that will add to international best practice on the topic of financial markets regulation.

There has been a strong emphasis on coordination and cooperation of financial sector regulators by many academics, in line with the overall intention of consolidating and streamlining regulation to promote better outcomes in the financial sector. South Africa appears to be in the process of implementing a regulatory framework in which a dedicated market conduct authority will underpin a stronger and more effective consumer protection framework for the financial services sector. The FSR Bill sets out primary objectives for a newly-created FSCA to best ensure that market conduct regulation works together with prudential regulation to support financial stability and protect financial customers. These objectives are -fair treatment of financial customers, efficiency and integrity of the financial system and financial literacy and capability.

This is a positive approach, however it should be noted that little emphasis and development has been placed on the regulation of market abuse within this new framework. It is important that market abuse regulation be placed as a high priority and that efforts should be gathered to combat this practice.

f) The government and all relevant stakeholders should be fully involved and be supportive in relation to the regulation and enforcement of the insider trading prohibition.

Consequently only the FSB is directly involved in the enforcement of the market abuse prohibition.[453] The researcher therefore recommends that government should put in place additional specialized units or courts, or regional offices to assist with the enforcement, detection and investigation of market abuse practices and be directly involved in the actual enforcement in the courts of the provisions relating to civil liability.

As a result the FSB would then only be responsible for monitoring market tendencies that may point towards insider trading or market manipulation activity and engage other bodies to investigate, prosecute and litigate. The FSB, with the assistance of the DMA and the EC, should concentrate on the initial monitoring function, out of court settlements where justified and administration of claims by the aggrieved investors. They should also focus their efforts on developing a culture of fair markets, developing its own competencies and educating society[454] on the effects of market abuse.

g) The policy makers should consider developing an adequate and effective corporate ethics culture that will be observed in companies and financial markets of South Africa.

This relates to market professionals, such as brokers, financial analysts, lawyers, accountants and also publishing and printing companies in South Africa. It would be misleading to argue that these persons have nothing to do with the regulation of insider trading. These role players often have access to unpublished price-sensitive information in the course of executing their duties and ample opportunity to engage in insider trading activities. Administrative sanctions such as forfeiture of licences, suspension from profession or disqualification to serve as directors should also in this context, be considered by the legislature to promote such a strong corporate and professional ethics culture.

Furthermore, the researcher recommends effective programmes based on best organizational culture of companies and other institutions. Such programmes could include developing effective anti-corruption measures and strategies, proper record keeping of compliance and

[453] Chitimira H 'An overview analysis of selected challenges in the enforcement of the prohibition of insider trading and market manipulation in the European Union and South African regulatory frameworks' (2015) 19 Law, Democracy and Development 94.
[454] Society is a reference to the investor on the street, brokerages, financial institutions and other regulatory bodies in South Africa.

adequate and effective auditing. The researcher recommends that the *company secretary* should be specifically responsible to the company for compliance with insider trading legislation and the internal regulatory framework of the company.

h) Stricter requirements for financial institutions to develop and manage internal policies

As a result of weak regulatory cooperation on the African continent it is imperative that as a leading regulated country, South Africa should implement stricter compliance requirements for financial institutions to manage compliance risks, more specifically market abuse. Across the African Union Member States, South Africa is the only country with a strong framework and it should therefore seek other avenues of enforcing compliance. Having no legislation, that is similar to the EU Market Abuse Directive which has been specifically enacted to harmonise the enforcement of the securities and market abuse laws in EU, so too should South Africa develop such regulation borrowing from countries with stronger regulation.

i) Increasing regulatory interaction and onsite investigations, inquiries and reviews\

Nigeria is a market leader in being very intrusive into the operations of its financial institutions. The Central Bank annually conducts 3 to 4 inspections and general engages banks, financial institutions and investment companies on a monthly to quarterly basis. The general focus is suspicious transactions and exchange control enquiries. There have been little or no inquiries into market abuse. Therefore as a market leader on the African continent it is crucial for South Africa to become more intrusive into to the dealings of large market players such as the big banks and brokerages dealing in securities trading on exchange. Such a cultural will not only curb market abuse but it will always assist in enhancing investor confidence, free and fairer markets and also inspire other regulatory bodies on the continent to focus more attention on curbing the effects of market abuse.

6.3 Conclusion

It can be said with no doubt that the enactment of the FMA has been a positive attempt by the legislature to improve the capability and enforcement of the market abuse provisions in South Africa. Coupled with this, various regulatory and enforcement efforts were made in an effort to enhance the combatting of market abuse practices in South African financial markets. Like

the EU, South Africa has introduced over the decades competent anti-market abuse legislation, committees, commissions and regulatory bodies were introduced from time to time to discourage all unscrupulous persons from indulging in market abuse and other illicit trading activities in South Africa, however it is recommended that the existing legislation be revised comprehensively with regard to the recommendations made in this research. It is hoped that this dissertation will make a *significant* contribution towards *banning* market abuse practices in South Africa.

BIBILIOGRAPHY

TEXT BOOKS

Alexander R *Insider Dealing and Money Laundering in the EU: Law and regulation* (2007) Ashgate Publishing Limited: England.

Ashe M and Counsell L *Insider Trading: The Tangled Web* Format Publishing London (1990).

Barnes P *Stock Market Efficiency, Insider Dealing and Market Abuse* (2009) Gower Publishing Limited: England.

Baxt R, Black A and Hanrahan P *Securities and Financial Services Law* 6th ed Lexis Nexis Butterworths Australia (2003).

Blair MQC & Walker GA (eds) Financial Services Law 1st ed (Oxford University Press Oxford United Kingdom (2006).

Bergmans B *Inside Information and Securities Trading: A Legal and Economic Analysis of the Foundations of Liability in the US and the European Community* (1991) Graham and Trotman: London

Benade M L (et al) *Entrepreneurial Law* 3ed (2003) Lexis Nexis Butterworths Durban.

Bewsey J and others *The Law of Investor Protection* 2nd (ed) Sweet and Maxwell Limited London (2003).

Beuthin R C and Luiz S M *Beuthin`s Company Law* 3rd ed Butterworths Durban (2000).

Botha C *Statutory Interpretation: An Introduction for Students* 3rd ed Juta and Company Cape Town (1998).

Farrar J H and others *Farrar`s Company Law* 3rd ed Butterworths London (1991).

Hannigan B *Insider Dealing* 2nd ed Longman Group Ltd London (1994).

Hopt K J and Wymeersch E (eds) *European Insider Dealing – Law and Practice Butterworths* London (1991).

Lewis M *Flash Boys – Cracking the money code* (2014) Penguin Group: United Kingdom.

Meskin P M (ed) *Henochsberg on the Companies Act* 4th ed Butterworths Durban (1985).

Mitchell P L R *Insider Dealing and Directors' Duties* 2nd ed Butterworths London (1989).

Okpaluba C (ed) *Law in Contemporary South African Society* New Africa Books Claremont (2004).

Patterson S *Dark Pools: The rise of A.I. trading machines and the looming threat to Wall Street* (2013) Random House Business Books: United Kingdom.

Pennington R Pennington`*s Company Law* 8th ed Butterworths London (2001).

Rider B & French L *The Regulation of Insider Trading* (1979).

Rider B A K *Insider Trading* Jordan and Sons Limited Bristol (1983).

Rider B (et al) *Market Abuse and Insider Dealing* 2ed (2009) Total Publishing: Great Britain.

Strydom E M L *Company Legislation Handbook* Lexis Nexis Butterworths Durban (2005).

Swan EJ *Market Abuse Regulation* 1st ed (Oxford University Press United States of America (2006).

JOURNAL ARTICLES.

Botha D "Control of Insider Trading in South Africa: A Comparative Analysis (1991) 3 *SA Merc LJ* 1.

Botha D "The Economics of the Crime and Punishment of Insider Trading in South Africa" (1992) 4 *SA Merc LJ* 145.

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

Cassim R "Some Aspects of Insider Trading – Has the Securities Services Act, 36 of 2004 Gone too Far?" (2007) 19 *SA Merc LJ* 44.

Cassim R "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)" (2008) *SA Merc LJ* 33-60.

Cassim R 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 19 *SAMLJ* 177-199.

Chitimira H & Lawack VA "Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" (2013) *Obiter* 200-217

Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" (2014) *Speculum Juris* 108-124

Chitimira H 'Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012' (2014) 5 *Mediterranean Journal of Social Sciences* 124.

Henning JJ and Du Toit S "The regulation of false trading, market manipulation and insider dealing" (2000) 25(2) *Journal for Judicial Science* 155.

Jensen M C and Meckling W H "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305.

Jooste R "Insider Trading: A new clamp-down" (1991) 20 *BML* 248.

Jooste R "Insider Dealing in South Africa" (1990) 107 *SALJ* 595.

Jooste R "The Regulation of insider trading in South Africa: another attempt" (2000) 117 *SALJ* 284.

Jooste R "A critique of the insider trading provisions of the 2004 Securities Services Act" (2006) 123 *SALJ* 437.

Kiernan P "The Regulatory Bodies Fraud: Its Enforcement in the Twenty-First Century" (2003) *The Company Lawyer* 293-299

Luiz SM 'Insider Trading Regulation – If at First You Don't Succeed' (1999) 11 *SAMLJ* 136.

Luiz S M "Prohibition against trading on inside information – the saga continues" (1990) 2 *SA Merc LJ* 328.

Luiz S M "Insider Trading Regulation - If at First You Don't Succeed…" (1999) 11 *SA Merc LJ* 139.

Luiz S M and Van der Linde K 'The Financial Markets Act 19 of 2012: Some comments on the regulation of Market Abuse' (2013) 25 *SAMLJ* 458.

Manne H G "In Defence of Insider Trading" (1966) 44 *Harvard Business Review* 113.

Osode P C "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" (1999) 11 *African Journal of International and Comparative Law* 688.

Osode P C "Defending insider trading regulation on ethical and scientific grounds: The inequality of legal access theory" (1999) 62 *Journal of Contemporary Roman-Dutch Law* 20.

Osode P C "Regulatory theory, Private Interests and the Rationality of Insider Trading Regulation in the United States and Canada" (1998) 3 *Journal of South African Law* 427.

Osode P C "The Regulation of Insider Trading in Canada: A Critical Appraisal" (1999) 28 *Anglo- American Law Review* 166. Osode P C "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" (2000) 44 *Journal of African Law* 239.

Rider BAK "Policing the City-Combating Fraud and Other Abuses in the Corporate Securities Industry" (1988) *Current Legal Problems* 47-68

Steinberg MI "Insider Trading Regulation–A Comparative Perspective" (2003) *The International Lawyer* 153-171

Van der Lingen B "Tougher Legislation to Combat Insider Trading" (1997) Fourth Quarter *FSB Bulletin* 10.

Van Deventer G "New Watchdog for Insider Trading" (1999) First Quarter *FSB Bulletin* 3.

Van Deventer G "New watchdog for insider trading" (1999) *FSB Bulletin* 2-3

Van Deventer G "Harnassing Administrative Law in Encouraging Compliance" (2009) *FSB Bulletin* 3-4

Van Zyl F H "The European Union directive on insider trading: a model for South Africa?" (1994) 6 *SA Merc LJ* 291.

Whiting A "Civil liability for insider trading: A comparison of the Insider Trading Act of 1998 with the Securities Services Act of 2004" (2005) *Responsa Meridiana* 99.

CASE LAW: SOUTH AFRICA.

Pretorius and another v Natal South Sea Investment Trust 1965 (3) SA 410 (W) 417.

S v Western Areas Limited and others 2004 (4) SA 591 (W).

UNITED KINGDOM

Bell v Lever Brothers Ltd [1932] AC 161

Chase Manhattan Equities v Goodman [1991] BCLC 897

Chaston v SWP Group Ltd [2003] 4 Current Law 78

El Ajovu v Dollar Holdings [1993] 1 BCLC 760

Financial Services Authority v Fitt [2004] EWHC 1669 ch

Financial Services Authority v Martin and Anor [2005] 1 BCLC 495

Financial Services Authority v (1) Sean Fradley (t/a Top Bet Placement Services) (2) Gary Woodward [2004] EWHC 3008 (Ch)

Philip Jabre v Financial Services Authority (2006) 36 fin 06/2006

R v Caldwell [1982] AC 341

R v Ghosh [1982] QB 1053

R v Kylsant [1932] 1 KB 442

R v Rigby, Bailey & Rowley (2005) FSA/PN/106/2005 2005-10-07

Scott v Brown [1892] QB 724

Seager v Copydex (No 2) [1969] 1 WLR 809

SIB v Pantell SA (No 2) [1993] BCLC 146 (CA)

CODES

European Union Market Abuse Directive

COMMISSIONS

Van Wyk de Vries Commission of Enquiry into the Companies Act Main Report, Pretoria, 15/04/1970.

COMMITTEES

The King Task Group into the Insider Trading Legislation Committee of 1995.

REPORTS

SOUTH AFRICA

The King Task Group into Insider Trading Legislation Minority Report 1997.

The King Report on Corporate Governance for South Africa 2002.

STATUTES

SOUTH AFRICA

Bank Act 94 of 1990.

Bank Act Regulations.

Consumer Protection Act 68 of 2008.

Companies Act, 61 of 1973.

Companies Amendment Act, 78 of 1989.

Companies Act Amendment Act, 37 of 1999.

Companies Act 71 of 2008.

Financial Intelligence Centre Act 38 of 2001.

Financial Advisory and Intermediary Services Act 37 of 2002.

Financial Markets Control Act 55 of 1989.

The Financial Services Board Act No 97 of 1990.

The Financial Institutions (Protection of Funds) Act No 28 of 2001.

Financial Markets Act 19 of 2012.

Insider Trading Act, 135 of 1998.

Second Companies Amendment Act, 69 of 1990.

Securities Services Act, 36 of 2004.

Stock Exchanges Control Act 1 of 1985.

JSE Equity rules of 18 January 2016.

JSE Interest rate and Currency rules of 24 February 2015.

JSE Derivatives rules of 25 November 2015.

FOREIGN STATUTES

UNITED KINGDOM

Companies Act of 1980.

Company Securities (Insider Dealing) Act of 1985.

Criminal Justice Act of 1993.

Financial Services Act of 1986.

Financial Services and Markets Act of 2000.

Larcency Act of 1861.

Prevention of Fraud (Investments) Act of 1958.

WEBSITES

http://www.treasury.gov.za

http://www.virtualexamcentre.co.za

http://fixglobal.com

http://www.fsac.org.uk

http://www.easa-alliance.org

http://corporateandinvestment.co.za

http://www.whodunnit.co.za

http://www.fas.org

http://www.slaughterandmay.com

http://www.fca.org.uk

http://ukcatalogue.oup.com

http://www.kpmg.com

http://www.sec.gov.ng

http://www.iflr.com

http://uu.diva-portal.org

http://www.fsb.co.za

http://www.jse.co.za

http://www.google.com

http://www.reservebank.co.za

http://www.imf.org

http://www.investopedia.com

http://www.genesis-analytics.com

http://www.bowman.co.za

http://www.businessday.co.za

UNIVERSITY of the
WESTERN CAPE