

A historical overview of the regulation of market abuse under the Securities Services Act 36 of 2004*

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OPSOMMING

'n Historiese Oorsig van die Regulering van die Mark Misbruik Onder die Securities Services Act 36 van 2004

Die gevolge van die misbruik van die mark word reeds in 'n aantal van die wêreld se finansiële markte gevoel. Suid-Afrika is nie 'n uitsondering nie. 'n Reputasie van hoë vlakke van die mark misbruik praktyke wat verband hou met die Suid-Afrikaanse finansiële markte in die middel van die 1990's is 'n goeie voorbeeld. In 'n poging om die misbruik van die mark in Suid-Afrika te bekamp, is die Securities Services Act 36 van 2004 verorden ten einde al die gebrekkige bepalings van die Wet op Binnekennistransaksies 135 van 1998, te herroep en te verbeter. Dit is teen hierdie agtergrond dat hierdie artikel 'n oorsig bied sowel as 'n ontleding van die doeltreffendheid van die mark misbruik regulerende raamwerk in terme van die Securities Services Act 36 van 2004 te ondersoek ten einde vas te stel of dit openbare vertroue van beleggers in die Suid-Afrikaanse finansiële markte herstel het. Laasgenoemde word gedoen om bewustheid te verhoog aan die kant van die betrokke rolspelers ten aansien van die vraag of die Suid-Afrikaanse mark misbruik wetgewing behoorlik toegepas word. Die artikel bespreek ook ander maatreëls wat aangewand kan word, waar nodig, ten einde die betrokke Suid-Afrikaanse mark misbruik wetgewing sowel as die toepassing daarvan te verbeter.

1 Introduction

The effects of market abuse have been felt in a number of financial markets globally.¹ South Africa is not an exception.² A reputation of high

* Influenced in part, by Chitimira *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (LLD Thesis 2012 NMMU) 51-71. In this regard, I wish to thank Professor Lawack.

1 Myburgh & Davis "The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board" (2004-03-25) 8 <http://www.genesis-analytics.com/public/FSBReport.pdf> (accessed 2013-02-09); generally see Bhattacharya & Daouk "The World Price of Insider Trading" http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA455_2004/BD_TheWorld.pdf (accessed 2013-06-19) & Van Deventer "Anti-Market Abuse Legislation in South Africa" (2008-06-10) 1-5 <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf> (accessed 2013-05-05).

2 Myburgh & Davis 8-13, Van Deventer 1-4.

levels of market abuse practices associated with the South African financial markets in the mid 1990s is a case in point.³ In an attempt to effectively combat market abuse in the South African financial markets, the Securities Services Act⁴ was enacted to repeal all the flawed provisions of the Insider Trading Act⁵ and improve the enforcement of the market abuse prohibition in South Africa. It is against this background that this article provides an overview analysis of the effectiveness of the market abuse regulatory framework under the Securities Services Act to investigate whether it has enhanced market integrity and public investor confidence in the South African financial markets. This is done by examining whether the relevant market abuse legislation is being properly enforced.⁶ This is also aimed at increasing awareness on the part of the relevant stakeholders. To this end, the article discusses other additional measures that can, where necessary, be incorporated into the relevant South African market abuse legislation to improve its enforcement.⁷ Notably, three forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements relating to listed companies (disclosure-based market manipulation), are prohibited in South Africa.⁸ However, notwithstanding the anti-market abuse efforts introduced by the Securities Services Act, more may still need to be done to increase the number of convictions and settlements in cases involving market abuse in South Africa.

3 *Idem* 11.

4 36 of 2004, hereinafter referred to as the Securities Services Act and it came into effect on 1 February 2005.

5 135 of 1998; hereinafter referred to as the Insider Trading Act.

6 See sub-paragraphs under paragraphs 2.1 & 2.2 below.

7 In spite of the paucity of convictions and settlements in civil and criminal cases involving market abuse, the legislature has relatively managed to improve and raise the South African financial markets up to a level that would make them more comparable to the highest standards of similar markets in the developed world and international best practice by enacting some definitions as well as civil and administrative sanctions against market abuse.

8 Ss 73; 75; 76 & 77 of the Securities Services Act; also see clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill B-2011 (hereinafter referred to as the Financial Markets Bill); clauses 80; 82; 83 & 84 of the Financial Markets Bill B12-2012, hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term "clause" to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012) & ss 78; 80; 81 & 82 of the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act and it came into effect on 03 June 2013.

2 The Regulation of Market Abuse under the Securities Services Act 36 of 2004

2.1 Definitions of Selected Terms and Concepts

2.1.1 *The Concept of Market Abuse*

“Market abuse” was not expressly defined in the Securities Services Act. However, a number of practices that could give rise to criminal and civil liability for market abuse were simply stated in the Securities Services Act.⁹ Three forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation relating to listed securities were prohibited under the Securities Services Act. These market abuse practices were also outlawed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act but nonetheless the concept of market abuse was not defined in this Act and the afore-said Bills.¹⁰

Insider trading was specifically prohibited in the Securities Services Act.¹¹ For example, any person who knew that he had non-public price-sensitive information and who improperly disclosed it or encouraged or discouraged another person from dealing or who dealt directly or indirectly for his benefit or for the benefit of any other person in securities to which such information relates or where the price of such securities was likely to be affected by such dealing could incur criminal or civil liability for insider trading.¹² The same practices were outlawed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.¹³

Trade-based market manipulation was further prohibited in the Securities Services Act.¹⁴ Examples of activities that were deemed to be manipulative include executing a transaction with no beneficial change of ownership of the securities and entering orders into the market near the close of the market or during the auctioning process for the purpose of creating a deceptive appearance in that market.¹⁵ The same approach was employed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act and accordingly, similar conduct that

9 Ss 73; 75; 76 & 77.

10 Clauses 81; 82; 84; 85; 86 & 87 of the Financial Markets Bill; clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012 & ss 78; 80; 81 & 82 of the Financial Markets Act.

11 Ss 73 & 77; also see clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.

12 Ss 73 & 77 respectively.

13 Clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.

14 S 75.

15 A brief discussion on each of the sub-sections under s 75 will be carried out later.

amounts to, or that may be deemed to constitute trade-based market manipulation is outlawed.¹⁶ Disclosure-based market manipulation was also prohibited under the Securities Services Act.¹⁷ This prohibition on the making or publication of false, misleading or deceptive statements, promises and forecasts can be welcomed because such information often distorts the market price of securities, giving rise to direct or indirect prejudice to innocent market participants. The same practices were prohibited in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act,¹⁸ but nonetheless Internet-related manipulative disclosures were still not expressly outlawed in the aforementioned Act and Bills.

Notwithstanding the relatively new changes briefly stated above and the fact that the Securities Services Act was enacted as a separate piece of legislation that consolidates all previous market abuse laws, the regulation and enforcement of the market abuse ban in South Africa have remained scant and inconsistent to date.¹⁹ This could have been *inter alia* aggravated by the fact that it would only amount to market abuse if the accused person knew that he contravened, directly or indirectly, the relevant provisions of the Securities Services Act. This suggests that the knowledge of the market abuse offence in question was required on the part of the offenders before any liability can be imputed on them. Nonetheless, the Securities Services Act, the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act did not provide any presumptions which could be used to enhance the prosecution of market abuse cases in South Africa. It is suggested that enacting a statutory provision for a definition of the concept of “market abuse” involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa. Moreover, notwithstanding the difficulties that might have been encountered in relation to factors like repetition of same provisions, double jeopardy and over-criminalisation of market abuse practices in different statutes, the mere consolidation of the market abuse provisions into the Securities Services Act on its own did not sufficiently improve the enforcement of the market abuse ban in South Africa.²⁰ Given the fact that the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Market Act’s market abuse provisions duplicated some of the flaws contained in the Securities Services Act, it remains to be seen whether the Financial Markets Act’s market abuse prohibition will enhance the combating of market abuse in South Africa.

16 Clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

17 S 76.

18 Clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.

19 Van Deventer 1-4.

20 *Ibid.*

2 1 2 The Meaning of “Market Corner” and “Market Abuse Rules”

“Market corner” was defined as any arrangement, agreement, commitment or understanding involving the purchasing, selling or issuing of securities listed on a regulated market by which a person, or a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of securities listed on a regulated market; and where the effect of the arrangement, agreement, commitment or understanding is or is likely to be that the trading price of the securities listed on a regulated market, as reflected through the facilities of a regulated market, is or is likely to be abnormally influenced or arbitrarily dictated by such person or group of persons in that the said trading price deviates or is likely to deviate materially from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded.²¹ This definition discourages market manipulation through the creation of a false impression of the volumes traded in securities or abnormal and artificial trading prices in listed securities. Even so, a “market corner” could only be formed after an arrangement or agreement in respect of the selling, issuing or purchasing of securities listed on a regulated market was made by a person or the persons involved. Instances where a “market corner” could have been formed in respect of, and/or influenced by securities traded in the over the counter markets were not expressly outlawed under the Securities Services Act. This flaw was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.²²

“Market abuse rules” was defined to include the duties of the Financial Services Board to make relevant rules concerning the administration of market abuse by the Financial Services Board and the Directorate of Market Abuse; the manner in which investigations of market abuse are to be conducted; the notification of any civil monetary compensatory amounts received; the procedure for the lodging and proof of claims; the administration of trust accounts and the distribution of payments in respect of claims; the meetings of the Directorate of Market Abuse which are generally designed to ensure that the Financial Services Board and the Directorate of Market Abuse are able to perform their functions dealing with the manner in which inside information should be disclosed and with the conduct expected of persons with regard to such information.²³ The Financial Services Board has discretion to make such “market abuse rules” only after consulting with the Directorate of Market

21 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

22 Clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

23 S 82(2)(g)(i) – (vi) of the Securities Services Act; also see clause 91(2)(f)(i) – (vi) of the Financial Markets Bill; clause 86(2)(f)(i) – (vi) of the Financial Markets Bill 2012 & s 84(2)(f)(i) – (vi) of the Financial Markets Act.

Abuse. Besides this, no express provision was made in the Securities Services Act to empower the Financial Services Board to make its own market abuse rules pertaining to the enforcement of criminal and administrative sanctions for market abuse offences. This flaw was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.²⁴

2 1 3 The Meaning of “Person” and “Regulated Market”

The term “person” was defined in the Securities Services Act to include a partnership and any trust.²⁵ This implies that market abuse offences could now be committed by an insider or a “person” as defined who misuse inside information and not by “individuals” alone. Accordingly, an “insider” means a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates;²⁶ or having access to such information by virtue of employment, office or profession;²⁷ or where such person knows that the direct or indirect source of the information was an insider as contemplated in the Securities Services Act.²⁸ Inside information means specific or precise information which has not been made public and which is obtained or learned by an insider and which, if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.²⁹ However, Jooste argues that the definition of “person” leaves some doubt as to whether it also includes a corporate³⁰ or any other legal entity.³¹ The author agrees in part with Jooste, and submits that the confusion is caused by the employment of the phrases “he or she” in some market abuse provisions of the Securities Services Act.³² This employment of the phrases “he or she” could imply that the definition of “person” is still limited to natural persons alone. This flaw

24 Clause 91(2)(f)(i) – (vi) of the Financial Markets Bill; clause 86(2)(f)(i) – (vi) of the Financial Markets Bill 2012 & s 84(2)(f)(i) – (vi) of the Financial Markets Act.

25 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

26 S 72(a)(i); also see clause 81(a)(i) of the Financial Markets Bill; clause 79(a)(i) of the Financial Markets Bill 2012 & s 77(a)(i) of the Financial Markets Act.

27 S 72(a)(ii); clause 81(a)(ii) of the Financial Markets Bill; clause 79(a)(ii) of the Financial Markets Bill 2012 & s 77(a)(ii) of the Financial Markets Act.

28 S 72(b); also see clause 81(b) of the Financial Markets Bill; clause 79(b) of the Financial Markets Bill 2012 & s 77(b) of the Financial Markets Act.

29 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

30 S 332(1) of the Criminal Procedure Act 51 of 1977 in this regard.

31 See the definition of “person” in s 2 of the Interpretation Act 33 of 1957. This doubt was probably caused by the reference to “he or she” in some provisions like ss 73 & 77 of the Securities Services Act. Also see Jooste “A Critique of the Insider Trading Provisions of the 2004 Securities Services Act” 2006 *SALJ* 437 438.

32 Ss 73 & 77.

remains unresolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.³³

“Regulated market” means any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.³⁴ This suggests that market abuse provisions had extra-territorial application. For example, any person who commits market abuse on a regulated foreign market say, by manipulating share prices or dealing on the basis of non public price-sensitive information relating to securities listed on such market while domiciled in South Africa, could be prosecuted in South Africa.³⁵ The application of the market abuse prohibition under the Securities Services Act was surprisingly not limited to situations where there is a territorial link between the actual commission of market abuse offences and South Africa. This status quo was retained under the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.³⁶ Thus, even though this extra-territorial application appears to be a sound move for curbing cross-border market abuse activities, it has not been used more regularly, probably due to lack of adequate resources.³⁷ From a comparative perspective, one can argue that a restricted and more practical approach should have been adopted to meritoriously combat market abuse in South Africa.³⁸ Moreover, the market abuse prohibition should apply to transactions on foreign markets where a territorial link is present by virtue either of the fact that the offender is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa or by virtue of the prohibited conduct occurring in South Africa.³⁹

Nonetheless, the timeous enforcement and recognition of foreign judgements in cross-border market abuse cases is another challenge that could be associated with the extra-territorial application of market abuse provisions in South Africa. Consequently, it is submitted that the South African courts should recognise, where necessary, the relevant international law and foreign law as enshrined in the constitution.⁴⁰ Apparently, if a South African citizen who is an insider but is domiciled in New York, contacted a broker in South Africa to purchase any security

33 Clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 82 of the Financial Markets Bill 2012 & ss 78; 80 & 82 of the Financial Markets Act.

34 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

35 Jooste 2006 *SALJ* 453.

36 Clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act.

37 Loubser “Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)” in the *Insider Trading Booklet* final draft (2006-10-02) 26-27 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 2012-10-10).

38 Jooste 2006 *SALJ* 453.

39 Cassim “Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?” 2007 *SA Merc LJ* 44 67.

40 S 39(1)(b) & (c) of the Constitution.

listed on the Johannesburg Stock Exchange Limited (the JSE) in order to conceal the illegal nature of such dealing, the Financial Services Board and/or the relevant court can co-operatively rely on the United States Securities and Exchange Commission to investigate and prosecute such person for market abuse. Moreover, when a judgement relating to such market abuse is handed down in South Africa, it will have extra-territorial force in the United States of America.

2 2 Prohibited Trading Practices and Penalties

2 2 1 Prohibition on “Trade-based Market Manipulation”

A number of trade-related manipulative practices were prohibited under the Securities Services Act.⁴¹ For example, any person who directly or indirectly used or knowingly participated in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, either for such person’s own account or on behalf of another person, where such practice creates or might create a false or deceptive appearance of the trading activity in connection with or an artificial price for that security could be guilty of an offence.⁴² Additionally, any person who placed an order to buy or sell listed securities which, to his knowledge could, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with or an artificial price for such securities could be guilty of an offence.⁴³ Other examples of trading practices that were deemed to be manipulative include, among others, executing a transaction with no beneficial change of ownership of the securities;⁴⁴ entering an order to buy or sell a security on a regulated market knowing of a similar opposite order that has been entered, or will be entered,⁴⁵ with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that security;⁴⁶ entering on a regulated market, orders to buy or sell a security listed on that market at successively higher or lower prices for the purpose of improperly

41 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

42 S 75(1)(a)(i) & (ii); also see clause 84(1)(a)(i) & (ii) of the Financial Markets Bill; clause 82(1)(a)(i) & (ii) of the Financial Markets Bill 2012 & s 80(1)(a)(i) & (ii) of the Financial Markets Act.

43 S 75(1)(b) & (2); also see clause 84(1)(b) & (2) of the Financial Markets Bill; clause 82(1)(b) & (2) of the Financial Markets Bill 2012 & s 80(1)(b) & (2) of the Financial Markets Act.

44 This practice is sometimes called a “wash trade”. S 75(3)(a); also see clause 84(3)(a) of the Financial Markets Bill; clause 82(3)(a) of the Financial Markets Bill 2012 & s 80(3)(a) of the Financial Markets Act. See further Alcock “Market Abuse” 2002 *The Company Lawyer* 142 143.

45 S 75(3)(b); also see clause 84(3)(b) of the Financial Markets Bill; clause 82(3)(b) of the Financial Markets Bill 2012 & s 80(3)(b) of the Financial Markets Act.

46 The false trading practice need only create the false appearance of trading or artificial price and it need not actually have had the defined effect. See Luiz “Market Abuse II – Prohibited Trading Practices and Enforcement” 2002 *Juta’s Business Law* 180 180 for related comments.

influencing the market price for that security;⁴⁷ entering on a regulated market an order at or near the close of the market to change or maintain the closing price of a security listed on that market;⁴⁸ entering on a regulated market an order to buy or sell a security listed on that market during any auctioning process or pre-opening session and cancelling such order immediately prior to the opening of the market to create a deceptive or false appearance of demand for or supply for that security;⁴⁹ maintaining an artificial price for dealing in securities listed on a regulated market;⁵⁰ employing any device, scheme or artifice to defraud other persons as a result of a transaction effected through the facilities of a regulated market;⁵¹ engaging in an act, practice or course of business in respect of dealings in any listed securities which is deceptive or which is likely to have such effect⁵² and effecting a market corner.⁵³

The offender was required to know that he was taking part in a prohibited trading practice on a regulated market and the effect or possible effect of such practice before he could incur any liability.⁵⁴ This may imply that persons who engage in trade-based market manipulative practices in respect of any listed securities in South Africa could evade their liability if they prove that they ignorantly dealt in the affected securities.⁵⁵ Moreover, the prohibition on trade-based market manipulation was generally limited to transactions relating to securities listed on a regulated market.⁵⁶ Trade-based market manipulative practices are difficult to detect, investigate and prosecute.⁵⁷ Enforcement authorities around the world have surveillance systems and other

47 S 75(3)(c); also see clause 84(3)(c) of the Financial Markets Bill; clause 82(3)(c) of the Financial Markets Bill 2012 & s 80(3)(c) of the Financial Markets Act.

48 S 75(3)(d); clause 84(3)(d) of the Financial Markets Bill; clause 82(3)(d) of the Financial Markets Bill 2012 & s 80(3)(d) of the Financial Markets Act.

49 S 75(3)(e); also see clause 84(3)(e) of the Financial Markets Bill; clause 82(3)(e) of the Financial Markets Bill 2012 & s 80(3)(e) of the Financial Markets Act.

50 S 75(3)(g); clause 84(3)(g) of the Financial Markets Bill; clause 82(3)(g) of the Financial Markets Bill 2012 & s 80(3)(g) of the Financial Markets Act.

51 S 75(3)(h); clause 84(3)(h) of the Financial Markets Bill; clause 82(3)(h) of the Financial Markets Bill 2012 & no similar provision is found in the Financial Markets Act.

52 S 75(3)(i); also see clause 84(3)(i) of the Financial Markets Bill; clause 82(3)(i) of the Financial Markets Bill 2012 & no similar provision is found in the Financial Markets Act.

53 S 75(3)(f); also see clause 84(3)(f) of the Financial Markets Bill; clause 82(3)(f) of the Financial Markets Bill 2012 & s 80(3)(f) of the Financial Markets Act.

54 Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)" 2008 *SA Merc LJ* 33 33-43.

55 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

56 S 75; also see clause 84 of the Financial Markets Bill; clause 82 of the Financial Markets Bill 2012 & s 80 of the Financial Markets Act.

57 Cassim 2008 *SA Merc LJ* 46-49; Barnes *Stock Market Efficiency, Insider Dealing and Market Abuse* (2009) 19-125.

measures in place to detect and combat market manipulation.⁵⁸ Likewise, South Africa has mainly empowered the Financial Services Board and other bodies like the JSE to enforce the prohibition on market manipulation. For example, the JSE requires its members to comply with certain requirements to *inter alia* prevent all the forms of market manipulation by mandating them to give consideration to the circumstances of orders placed by clients before entering such orders in the JSE equities trading system and to be responsible for the integrity of such orders.⁵⁹ The JSE's Surveillance Division operates a system that identifies unusual price and trading volumes and when possible market manipulation is detected, an initial investigation is carried out and the results are handed over to the Directorate of Market Abuse. Regardless of this, up until now, very little success has been achieved in respect of the settlements and prosecutions of cases involving trade-based market manipulation.⁶⁰ Moreover, the Securities Services Act did not provide a civil remedy for trade-based market manipulation. Trade-based market manipulation was only treated as a criminal offence. This flaw was addressed by the Financial Markets Bill which provided a civil remedy for market manipulation⁶¹ but nonetheless this provision was not included in the Financial Markets Bill 2012 and the Financial Markets Act.⁶²

2 2 2 Prohibition on Insider Trading

2 2 2 1 Criminal Liability for Insider Trading

As earlier stated,⁶³ insider trading was prohibited in the Securities Services Act.⁶⁴ Any person who violated the relevant provisions of the Securities Services Act was liable for a criminal offence of insider trading.⁶⁵ For instance, actual dealing directly or indirectly or through an agent in securities listed on a regulated market by an insider who knew that he had inside information to which such securities relates or which

⁵⁸ Barnes 19-125.

⁵⁹ Rule 7.10.1 of the JSE's Listing Requirements.

⁶⁰ Statutory administrative sanctions have been successfully obtained in minimal cases of trade-based market manipulation such as iFour Properties Limited (R2 million penalty), SA Retail Properties Limited (2) (R2 million penalty), Stratcorp Limited (R10 000 penalty), New Rand Warrants Limited (R750 000 penalty), Imperial Holdings Limited (R25 000 penalty), King Consolidated Holdings Limited (R10 000 penalty), SilverBridge Holdings Limited (R10 000 penalty) and Sunflower December 2007 to January 2008 Contract (R50 000 penalty). This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse "the DMA") on 05 May 2009.

⁶¹ Clause 87.

⁶² See the relevant clauses under Chapter X entitled "Market Abuse" in both the Financial Markets Bill 2012 & the Financial Markets Act.

⁶³ See 2 1 1 above.

⁶⁴ Ss 73 & 77; also see clauses 82 & 86 of the Financial Markets Bill; clauses 80 & 84 of the Financial Markets Bill 2012 & ss 78 & 82 of the Financial Markets Act.

⁶⁵ S 73; also see clause 82 of the Financial Markets Bill; clause 80 of the Financial Markets Bill 2012 & s 78 of the Financial Markets Act.

are likely to be affected by it for his own personal benefit could give rise to a criminal offence of insider trading.⁶⁶ Nevertheless, it is not certain whether this prohibition applied to any unlawful transactions that related to other money market instruments such as derivatives. This obscurity was not addressed by the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.⁶⁷ The words “through an agent” were introduced in some insider trading provisions under the Securities Services Act.⁶⁸ Therefore, any insider who knowingly and indirectly practised insider trading through an agent for his personal benefit could be expressly liable for a criminal offence. The extension of the criminal liability to dealing through an agent was a positive development, but it was not clear who exactly could be regarded as an agent for the purposes of this prohibition.⁶⁹ This confusion could have enabled other persons who knowingly dealt in listed securities through agents as well as such agents to escape liability for their insider trading offences. This flaw was retained in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.⁷⁰

Actual dealing in securities for the benefit of another person was further prohibited.⁷¹ Therefore, any insider who knew that he had inside information and who dealt directly or indirectly for the benefit of any other person in any listed securities to which such inside information relates or which were likely to be affected by it was liable for a criminal offence.⁷² Conspicuously, the absence of the words “through an agent” in this regard indicates the inconsistencies found in some of the insider trading provisions contained in the Securities Services Act.⁷³ This might have contributed to the skimpy convictions achieved in criminal cases involving insider trading in South Africa to date. The afore-said flaw is addressed in the Financial Markets Bill, the Financial Markets Bill 2012

66 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

67 Clause 82 of the Financial Markets Bill; clause 80 read with clause 82 of the Financial Markets Bill 2012 & s 78 read with s 80 of the Financial Markets Act.

68 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

69 S 73(1)(a); also see clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act. Also see Cassim 2007 SA Merc LJ 67. The term “agent” is defined in other jurisdictions like Australia and the United Kingdom, see s 1042B of the Australian Corporations Act 50 of 2001 (C’th) & s 62(1) & (2) of the English Criminal Justice Act 1993 (c 36).

70 Clause 82(1)(a) of the Financial Markets Bill; clause 80(1)(a) of the Financial Markets Bill 2012 & s 78(1)(a) of the Financial Markets Act.

71 S 73(2)(a); also see clause 82(2)(a) of the Financial Markets Bill; clause 80(2)(a) of the Financial Markets Bill 2012 & s 78(2)(a) of the Financial Markets Act.

72 S 73(2)(a); also see clause 82(2)(a) of the Financial Markets Bill & clause 80(2)(a) of the Financial Markets Bill 2012 & s 78(2)(a) of the Financial Markets Act.

73 *Ibid.*

and the Financial Markets Act, which expressly includes the words “through an agent” in the prohibition on dealing in securities for the benefit of another person.⁷⁴

An insider who knew that he had inside information and who encouraged or caused another person to deal, or discouraged or stopped another person from dealing in the securities listed on a regulated market to which the information relates or which were likely to be affected by it was liable for a criminal offence.⁷⁵ As earlier stated,⁷⁶ the accused must know that he has inside information and it was possible for an accused to plead that he was ignorant of the price-sensitive nature of the inside information at the time when he encouraged or discouraged others to deal in the securities concerned. This status quo was retained in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.⁷⁷ An insider who knew that he had inside information and who disclosed such information to another person could be liable for a criminal offence.⁷⁸ Nonetheless, improper disclosure of confidential inside information that relate to juristic persons by their agents who are not necessarily insiders appears not to be expressly covered under the Securities Services Act.⁷⁹ This flaw was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.⁸⁰

2 2 2 2 Civil Liability for Insider Trading

Any insider or person who was involved in insider trading activities could incur civil liability.⁸¹ This civil liability could be imposed on an insider who knew that he had inside information and who dealt directly or indirectly or through an agent for his own account in securities listed on a regulated market to which the information relates or which were likely to be affected by it and who made a profit or would have made a profit if he had sold the securities at any stage, or avoided a loss through such dealing unless he proved one of the defences outlined in the Securities

74 Clause 82(2)(a) & (3)(a) of the Financial Markets Bill; clause 80(2)(a) & (3)(a) of the Financial Markets Bill 2012 & s 78(2)(a) & (3)(a) of the Financial Markets Act.

75 S 73(4); also see clause 82(5) of the Financial Markets Bill; clause 80(5) of the Financial Markets Bill 2012 & s 78(5) of the Financial Markets Act.

76 2 1 1 above.

77 Clause 82 of the Financial Markets Bill; clause 80 of the Financial Markets Bill 2012 & s 78 of the Financial Markets Act.

78 S 73(3)(a); also see clause 82(4)(a) of the Financial Markets Bill; clause 80(4)(a) of the Financial Markets Bill 2012 & s 78(4)(a) of the Financial Markets Act.

79 S 73(3)(a).

80 Clause 82(4)(a) of the Financial Markets Bill; clause 80(4)(a) of the Financial Markets Bill 2012 & s 78(4)(a) of the Financial Markets Act.

81 S 77 of the Securities Services Act; also see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

Services Act.⁸² Such a person was then liable at the suit of the Financial Services Board, in any court of competent jurisdiction, for the administrative or civil compensatory fine as stipulated in the Securities Services Act.⁸³ Moreover, an insider who engaged in insider trading and made a profit or avoided a loss for personal benefit or for the benefit of any other person could incur civil liability.⁸⁴ Therefore, the person involved was liable to pay the Financial Services Board an amount equivalent to the profit made or loss avoided or a penalty for compensatory and punitive purposes,⁸⁵ but not exceeding three times the amount of the profit made or loss avoided plus any other amount for interest and legal costs as determined by a competent court.⁸⁶

The person or insider who indulged in insider trading activities for the benefit of another person could be jointly and severally liable together with that other person to pay the Financial Services Board a penalty for compensatory and punitive purposes plus interest or costs as determined by the relevant courts.⁸⁷ This joint and several liability was contingent upon a tippee's liability as an insider. Apparently, there was no liability for a party who deals in the securities in question for another person who was not an insider as defined in the Securities Services Act.⁸⁸ This shortcoming was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.⁸⁹ Civil liability was further imposed on an insider who knew that he had price-sensitive inside information and improperly disclosed such information to other

82 S 77(1); also see clause 86(1) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

83 S 77(1); also see clause 86(1) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(1) of the Financial Markets Act.

84 S 77(1)(b) & (2)(b); also see clause 86(1)(b) & (2)(b) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(1); (2) & (3) of the Financial Markets Act.

85 S 77(1)(c); (2)(c); (3)(b); (4)(a) to (e) read with subsections (5) & (6); also see clause 86(1)(c); (2)(c); (3)(b); (4)(b); (5)(a) – (e) read with sub-clauses (6) & (7) of the Financial Markets Bill; clause 84(1) & (4) of the Financial Markets Bill 2012 & s 82(1); (2); (3) & (6) of the Financial Markets Act.

86 These are the High Courts and regional courts, see s 79 of the Securities Services Act. Notably, the Financial Markets Bill only provides that a court of competent jurisdiction includes a court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing or offence occurred, and there is no need to make any attachment to found or confirm its jurisdiction. See clause 81 of the Financial Markets Bill. However, no similar provision is made in clause 79 & s 77 of the Financial Markets Bill 2012 & the Financial Markets Act respectively.

87 S 77(5); also see clause 86(6) & (7) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(3) of the Financial Markets Act.

88 S 72; also see clause 81 of the Financial Markets Bill; clause 79 of the Financial Markets Bill 2012 & s 77 of the Financial Markets Act. See further Jooste 2006 *SALJ* 454–455.

89 Clause 86(6) & (7) of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82(3) of the Financial Markets Act.

persons.⁹⁰ However, the Securities Services Act did not expressly provide how companies could lawfully disclose price-sensitive inside information to relevant persons such as investment analysts so that they could not practise or fall victims to insider trading.⁹¹ This shortcoming was not resolved in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.⁹² Additionally, any person who knowingly encouraged or caused another person to deal in securities listed on a regulated market could incur civil liability.⁹³ The discouragement of others from dealing in such securities by any person who knew that he had inside information was not expressly prohibited under the civil provisions of the Securities Services Act.⁹⁴ This disparity left room for some persons to evade their civil insider trading liability. Amazingly, this flaw was not resolved in the Financial Markets Bill.⁹⁵ However, this flaw was addressed in the Financial Markets Bill 2012 and the Financial Markets Act.⁹⁶

2 2 3 Prohibition on “Disclosure-based Market Manipulation”

Publication of false or deceptive statements, promises and forecasts was prohibited under the Securities Services Act.⁹⁷ Consequently, any person who directly or indirectly made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, at the time and in the light of the circumstances in which it was made, false or misleading or deceptive in respect of any material fact and which the person knew, or ought reasonably to have known was false, misleading or deceptive could be guilty of an offence.⁹⁸ Likewise, any person who directly or indirectly, made or published in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which was, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knew, or ought reasonably to have known was rendered false, misleading or deceptive by reason of the omission of that fact could be liable of an

90 S 77(3); also see clause 86(4) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

91 Jooste 2006 *SALJ* 452-453; Loubser 14-15.

92 Clause 86(4) of the Financial Markets Bill; clause 84 read with clause 80(4) of the Financial Markets Bill 2012 & s 82(2) & (3) read with s 78(4) of the Financial Markets Act.

93 S 77(4); also see clause 86(5) of the Financial Markets Bill; clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

94 S 77(4); also see clause 86(5) of the Financial Markets Bill. Also see Jooste 2006 *SALJ* 455.

95 Clause 86(5).

96 Clause 84(1) of the Financial Markets Bill 2012 & s 82(2) read with subsection (3) of the Financial Markets Act.

97 S 76; also see clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.

98 S 76(1)(a); clause 85(1)(a) of the Financial Markets Bill; clause 83(1)(a) of the Financial Markets Bill 2012 & s 81(1)(a) of the Financial Markets Act.

offence.⁹⁹ This indicates that disclosure-based market manipulation was, and still is discouraged in South Africa.¹⁰⁰ Thus, the issuing of false, deceptive or misleading statements reduces public investor confidence and can harm the integrity of the financial markets and is as such prohibited in South Africa.¹⁰¹ For example, incorrect published information regarding the financial state of a listed company may discourage or encourage investors to trade in the company's shares at prices that would not be sustainable when the true facts are later known.¹⁰²

The making or publication of false statements regarding matters that are not directly associated with the company's current performance, but which may nevertheless artificially inflate the share prices was prohibited under the Securities Services Act.¹⁰³ For example, the publication or making of false claims regarding orders purchased or products developed by the company concerned could give rise to an offence under the Securities Services Act. The prohibition on disclosure-based market manipulation also applied to matters relating to the non-publication of price-sensitive information or the omission of material facts, often done to conceal the negative effect it could have on the share prices.¹⁰⁴ Nevertheless, no provision was made in the Securities Services Act for any presumptions that provide insight as to when a fact or an omitted fact would be material for the purposes of disclosure-based market manipulation.¹⁰⁵ Furthermore, no such provision was made in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.¹⁰⁶ Further liability was imposed on persons who either intentionally or negligently published or made incorrect statements.¹⁰⁷ For example, a company director who allowed a trading statement to be published without taking reasonable steps to ensure that such statement was correct could be liable for causing a false statement to be made or published negligently and recklessly. Nonetheless, the Securities Services Act did not impose civil liability on disclosure-based market manipulation offenders.¹⁰⁸ However, the JSE's Listing Requirements that prohibit false

99 S 76(1)(b); clause 85(1)(b) of the Financial Markets Bill; clause 83(1)(b) of the Financial Markets Bill 2012 & s 81(1)(b) of the Financial Markets Act.

100 Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Merc LJ* 177-178.

101 Loubser 24; Cassim 2008 *SA Merc LJ* 177-183.

102 *Ibid.*

103 S 76; clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act. Also see Loubser 24.

104 S 76(1)(b); clause 85(1)(b) of the Financial Markets Bill; clause 83(1)(b) of the Financial Markets Bill 2012 & s 81(1)(b) of the Financial Markets Act. Also see Cassim 2008 *SA Merc LJ* 180.

105 S 76.

106 Clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.

107 S 76(1); also see clause 85(1) of the Financial Markets Bill; clause 83(1) read with sub-clauses (2) & (3) of the Financial Markets Bill 2012 & s 81(1) read with subsections (2) & (3) of the Financial Markets Act.

108 S 76.

or misleading statements by the JSE's member companies are usually used to extend civil liability to such companies or other relevant entities and their agents.¹⁰⁹ The aforesaid flaw was addressed in the Financial Markets Bill which provided a civil remedy for market manipulation.¹¹⁰ Nevertheless, this provision was omitted in the Financial Markets Bill 2012 and the Financial Markets Act.¹¹¹ Moreover, disclosure-based market manipulation on the Internet was not expressly prohibited in the Securities Services Act.¹¹² This flaw was not addressed in the Financial Markets Act. Therefore, the Internet could be providing unscrupulous persons in South Africa with opportunities to participate in disclosure-based market manipulation activities more easily and faster.¹¹³ Additionally, the words "directly or indirectly"¹¹⁴ which are employed¹¹⁵ do not seem to extend liability to secondary offenders who do not directly engage in disclosure-based market manipulation practices but who simply aided and abetted others to commit such practices. This obscurity remains unresolved in the Financial Markets Bill; the Financial Markets Bill 2012 and the Financial Markets Act.¹¹⁶

2 2 4 Available Penalties

Criminal penalties can be imposed on all the three forms of market abuse which are outlawed in South Africa.¹¹⁷ Consequently, persons who engage in market abuse activities could be sentenced to a fine not exceeding R50 million or imprisonment for a period not exceeding ten years or both such fine and imprisonment.¹¹⁸ Notably, with regard to insider trading, the criminal sanctions were increased significantly from a fine of R2 million (previously stipulated in the Insider Trading Act)¹¹⁹ to R50 million under the Securities Services Act.¹²⁰ While the introduction of new market abuse penalties is a positive improvement, it is submitted that standing alone, even the R50 million fine and a ten

109 Rules 8.20.2; 8.20.3 & 8.20.6 of the JSE Listing Requirements.

110 Clause 87.

111 See the relevant clauses and sections under Chapter X entitled "Market Abuse" in the Financial Markets Bill 2012 & the Financial Markets Act respectively.

112 S 76; also see clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & s 81 of the Financial Markets Act.

113 S 76(1); also see clause 85(1) of the Financial Markets Bill; clause 83(1) of the Financial Markets Bill 2012 & s 81(1) of the Financial Markets Act. Also see Cassim 2008 *SA Merc LJ* 178.

114 Cassim 2008 *SA Merc LJ* 178.

115 S 76(1) of the Securities Services Act.

116 Clause 85(1) of the Financial Markets Bill; clause 83(1) of the Financial Markets Bill 2012 & s 81(1) of the Financial Markets Act.

117 Loubser 28.

118 S 115(a) of the Securities Services Act; also see clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & s 109(a) of the Financial Markets Act.

119 S 5 of the Insider Trading Act.

120 S 115(a); also see clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & s 109(a) of the Financial Markets Act.

year imprisonment term cannot be an effective deterrent.¹²¹ It is possible that prospects of enormous profits may outweigh the deterring effect of the stipulated fine and/or prison sentence. For example, companies may simply regard it as just another cost of doing business, especially where profits gained exceed the penalty imposed.¹²² Moreover, the fact that the actual perpetrators may plead guilty and be convicted of lesser offences may also have a negative effect on any impact a criminal sanction might have. Furthermore, the difficult burden of proof needed in the criminal prosecution of market abuse offences has, to some extent, marred the prosecution of such offences in South Africa to date and this is unlikely to be different in future.¹²³ Civil penalties for insider trading could be imposed on offenders for the profit made or loss avoided or as a penalty for compensatory and punitive purposes, an amount as determined by a competent court but not exceeding three times the amount of the profit made or loss avoided plus interest and legal costs as determined by the court or the Enforcement Committee.¹²⁴ Nevertheless, prejudiced persons who proved their claims as provided for in the Securities Services Act could only get their compensation after the Financial Services Board had recouped its expenses in relation to a successful litigation.¹²⁵ This approach was also employed in the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act.¹²⁶ It is submitted that if not properly executed, this approach may give rise to bureaucracy and unnecessary delays before the affected persons receive their compensation.

Furthermore, administrative penalties were provided for all the three forms of market abuse that were prohibited by the Securities Services Act. The Enforcement Committee could, on a referral basis, impose administrative penalties on persons who indulge in market abuse activities.¹²⁷ Therefore, administrative penalties, namely a civil monetary penalty, an order for remedial action, costs orders, separate

121 Cassim 2008 SA Merc LJ 194; Jooste 2006 SALJ 453–454.

122 *Ibid.*

123 Only 32 cases of insider trading, 8 cases of trade-based market manipulation and no cases for disclosure-based market manipulation were reportedly investigated by the Financial Services Board during the period between January 1999 and December 2007. No convictions were obtained in all these criminal cases of market abuse. This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer on 05 May 2009. Also see Jooste 2006 SALJ 453–454.

124 S 77; clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act. See 2 2 2 above.

125 No civil penalties may, however, be levied against the culprits who indulge in market manipulation practices. See further Whiting “Civil Liability for Insider Trading: A Comparison of the Insider Trading Act of 1998 with the Securities Services Act of 2004” 2005 *Responsa Meridiana* 99 116–117.

126 Clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

127 S 94(e) & ss 102 to 105 of the Securities Services Act; generally see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act.

order for legal costs, remuneration costs orders, a fine for punitive purposes and other appropriate disciplinary sanctions could be imposed on the offenders.¹²⁸ The Enforcement Committee could impose an administrative compensatory amount payable to the Financial Services Board for distribution to the victims only in respect of insider trading.¹²⁹ No similar provision was made for market manipulation. This might be caused by the fact that it would be very difficult to accurately calculate the amount of loss incurred by the victims of market manipulation.¹³⁰ Moreover, the Financial Markets Bill, the Financial Markets Bill 2012 and the Financial Markets Act did not provide any specific administrative functions of the Enforcement Committee in detail.¹³¹ Nonetheless, it is submitted that the introduction of additional and/or sufficient administrative penalties might have the effect of increasing the compliance with, and the enforcement of the market abuse provisions in South Africa.¹³²

3 Concluding Remarks

Numerous amendments to the market abuse legislation were introduced from time to time in a bid to *inter alia* restore public investor confidence and improve the regulation of market abuse practices in South Africa. However, the Insider Trading Act,¹³³ like its predecessors, failed to expressly provide for other alternative enforcement methods like whistle-blowing, private rights of action and specialised insider trading courts to complement the Financial Services Board. Eventually, the Securities Services Act was introduced and it brought more elaborate civil remedies, new criminal penalties, administrative sanctions and additional regulatory bodies such as the Enforcement Committee, the Board of Appeal and the Directorate of Market Abuse in a bid to enhance the enforcement of the market abuse ban in South Africa.¹³⁴ However, the Securities Services Act's market abuse prohibition also had some flaws and it was recently repealed by the Financial Markets Act. Be that as it may, various gaps that were previously embedded in the Securities Services Act were re-duplicated in the Financial Markets Act's relevant market abuse provisions and it remains questionable whether such provisions are robust enough and/or going to be effectively implemented to prevent market abuse in the South African financial markets. It is,

128 S 94(e) & ss 102 – 105; generally see clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & s 82 of the Financial Markets Act. Also see Van Deventer "Harnessing Administrative Law in Encouraging Compliance" 2009 *FSB Bulletin* 3 3-4.

129 Cassim 2008 *SA Merc LJ* 195.

130 *Ibid.*

131 See clauses 105 & 101 & other relevant clauses under Chapter X entitled "Market Abuse" in the Financial Markets Bill & the Financial Markets Bill 2012 respectively & s 99 & other relevant sections under Chapter X entitled "Market Abuse" in the Financial Markets Act.

132 Van Deventer 2009 *FSB Bulletin* 3-4.

133 See 2 2 4 above.

134 See sub-parr under 2 1 & 2 2 above.

therefore, hoped that the flaws exposed above will be addressed and the recommendations enumerated in this article will be utilised in the future to enhance the combating of market abuse in South Africa.