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THE REGULATION OF INSIDER TRADING BY SOUTH AFRICAN AUTHORITIES

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CHAPTER 1: INTRODUCTION TO THE STUDY

1.1. INTRODUCTION

South Africa is a significant player in international financial markets. In the premises, there is a need to ensure that the regulation of these markets are in line with best practices and international trends in order to retain a good "reputation". Financial markets include the foreign exchange market, money market, bond market, equity market, credit market, commodities market and property or real estate market.[1]

Stock exchange or securities exchange, on the other hand, is a platform or exchange where securities are traded and where the different financial markets activities take place. Accordingly, exchanges facilitate the selling and buying of securities.[2] South Africa has five licensed stock exchanges on which companies can list and traders can trade:[3] The Johannesburg Stock Exchange (JSE), ZAR X, A2X, 4 Africa Exchange (4AX) and Equity Express Stock Exchange (EEEE). The JSE is the oldest exchange and was, for a long time, the only stock exchange licensed in South Africa[4]. According to the Sustainable Stock Exchanges Initiative (SSE), the JSE is easily ranked the 17th largest stock exchange by market capitalisation standards and when compared to other global exchanges.[5] The JSE is the oldest, largest, and most sophisticated exchange in Africa;[6]

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[1] National Treasury "2018 Financial Markets Review", available at http://www.treasury.gov.za/publications/other/2018_FMR_07.pdf (accessed 4 February 2021). Also see section 1 of the Financial Sector Regulation Act 9 of 2017 (hereafter "the Financial Sector Regulation Act") for a definition of "Financial Markets System". The legislation defines the latter as "the system of institutions and markets through which financial products, financial instruments and financial services are provided and traded, and includes the operation of a market infrastructure and a payment system".

[2] Kabai (2019) De Rebus 18-19.

[3] Stock exchanges are licensed in terms of section 9 of the Financial Sector Regulation Act 9 of 2017, hereafter the "Financial Sector Regulation Act". The regulatory body responsible for licensing these exchanges is the Financial Sector Conduct Authority.

[4] See Brown "South Africa's new stock markets started to nibble the JSE's lunch this year", available at https://www.businessinsider.co.za/south-africas-new-stock-markets-started-to-nibble-the-jses-lunch-this-year-2019-12#:~:text=The%20four%20new%20bourses%20%2D%204,the%20market%20to%20new%20competitors (accessed 21 May 2021).

[5] Sustainable Stock Exchanges Initiative (hereafter "SSE") "Johannesburg Stock Exchange", available at https://sseinitiative.org/stock-exchange/jse/#:~:text=About%20the%20stock%20exchange&text=The%20JSE%20is%20currently%20ranked,exchange%20in%20the%20African%20continent (accessed 4 February 2021).

[6] Afego (2015) JDA 243-266.

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and although its jurisdiction is confined to South Africa, market players wanting to access African markets see it as a center for listing and trading.[7]

The JSE's history can be traced back to 8 November 1887 when it was established in response to a need to facilitate trade following the discovery of gold in Johannesburg.[8] Old as it is, the JSE, was not the first exchange to be established in South Africa. It was preceded by the Kimberly Royal Stock Exchange (KRSE), which was formed in the early 1880s.[9] Despite the long history of the existence of stock exchanges in South Africa, the regulation of stock exchanges only became a reality in 1947, sixty-six years after the formation of the KRSE.[10]

According to Maxfield, stock markets [or exchanges] are central institutions of capital market or "arms-length" financial systems.[11] This is because they provide liquidity and the much-needed capital; and enable companies to expand their businesses through raising long term capital.[12] Notwithstanding their role in the economy, stock exchanges are susceptible to market abuse such as insider trading. History is replete with examples of market crashes that, although not resulting directly from insider trading but from other forms of market abuse, have had an impact on and caused systematic risks to the economies of the world. Some of these crashes or financial crises include the Black Monday crisis (1987), Russian crisis (1998), Burst of the dot-com bubble (2001), and Subprime Mortgage Crisis (2008) and, according to Sandoval Junior and Franca, these represent some of the largest downturns of financial markets in the last three decades.[13] It is accepted that greed and lack of regulation contributed to market collapses.[14]

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[7] Oxford Business Group (hereafter Oxford) "Johannesburg Stock Exchange seeks to establish South Africa as a global trading centre", available at https://oxfordbusinessgroup.com/overview/between-two-worlds-jse-seeks-establish-south-africa-global-trading-centre (accessed 19 May 2021).
[8] Johannesburg Stock Exchange (hereafter "JSE") "Company overview", available at https://www.jse.co.za/our-business/history-%26-company-overview#:~:text=The%20JSE%20was%20formed%20in,system%20in%20the%20early%201990s (accessed 5 February 2021).
[9] Lukasiewicz (2017) JSAS 715-732.
[10] *Ibid.*
[11] Maxfield (2009) IJoEM 43-55.
[12] Chipaumire and Ngirande (2014) JOE 185-192.
[13] Sandoval Junior and Franca (2012) Physica A 187-208.
[14] Dominique (2008) EERI 1-13.

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Market abuse is a general occurrence and incorporates the concept of insider trading or insider dealing.[15] Insider trading is a practice in which players in the stock exchanges or security exchanges make use of information, which is not publicly available, to trade and to their advantage[16]. Insider trading, which is an offence, is regulated in South Africa and will be fully discussed in the subsequent paragraphs.

1.2. UNDERSTANDING INSIDER TRADING

In *Zietsman and Another v Directorate of Market Abuse and Another*,[17] the court held that, in the case of insider trading, the insider obtains an unfair advantage from information not in the public domain. The advantage gained is unfair to the parties who do not have the same information and knowledge relating to the company which is the subject of the inside information.[18] Insider trading, it has been argued, could result in the undermining of the integrity of financial markets and investor confidence.[19] Integrity of the financial markets and investor confidence would be undermined where there are perceptions of unfairness where it concerns trading on these markets. For the integrity to be maintained, the market [should] operate "in a manner that is, and is perceived to be, fair and orderly".[20] At the same time, for the integrity to be maintained, "effective rules [should] be in place and enforced by regulators so that confidence and participation [by investors] in the market is fostered".[21]

According to Kerner and Kucik, the practice of insider trading occurs when someone who has access to non-public information uses that information to trade in corporate securities.[22] Different people qualify as insiders and include directors of companies,

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[15] Other jurisdictions, such as the United Kingdom, use the term "insider dealing" as opposed to insider trading. This is a matter of preference, it is rooted in semantics and has nothing to do with the constitution and general understanding of the concept itself.
[16] Kaufman et al "Inside Insider Trading" (2021), available at https://www.theregreview.org/2021/02/20/saturday-seminar-inside-insider-trading/ (accessed 5 February 2021).
[17] 2016 (1) SA 218 (GP) (hereafter "Zietsman") at par 83.
[18] Werhane (1989) JBE 844.
[19] *Ibid.*
[20] The International Organization of Securities Commissions Technical Committee *"Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency, Final Report*", available at https://www.iosco.org/library/pubdocs/pdf/IOSC OPD354.pdf (accessed 10 May 2021).
[21] *Ibid.*
[22] Kerner and Kucik (2010) ISQ 666.

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anyone who has inside information and those who trade on behalf of others using inside information.[23] What differentiates insider trading from any other form of trading is that, in the case of insider trading, the trading is based on information that has not been made public; and the trader trades using material, non-public information about a corporation to trade in securities.[24] In this regard, the Financial Markets Act[25] defines "inside information" as information that is specific and precise, and which has not been made public. The aforementioned Act provides that such information, if made public, would have a material effect on the price or value of any security listed on regulated market.[26] The noted impact on the valuation of securities would be as a result of information – whether positive or negative – that has been made public. In this context, the regulated market refers to the regulated stock exchanges.

The court in *Zietsman* briefly dealt with the need for inside information to be specific and precise. It held that it is not a requirement for information to be in a final form to be specific and precise, and that even intermediate phase information could still be specific and precise and constitute inside information.[27]

To illustrate the different phases, namely the intermediate and final phases, consider this scenario: Company A conducts a due diligence assessment on Company X, a company listed on the JSE. During the due diligence assessment, Company X informs Company A that it is in the process of negotiating a loan with a Lender and no further details are provided. The directors of Company A proceed to purchase more shares in Company X on the basis of the information received, which has not been made public. The information in this scenario is not final as no precise information about the loan has been provided and the loan has not been granted to Company X. The fact that the loan has not been finalized does not, however, make the information received by Company A "less" of inside information, as the directors have acted on the basis of the information and it is possible that, had it been made public, other shareholders would have acted on it and bought

[23] Section 78 of the Financial Markets Act 19 of 2012 (hereafter the "Financial Markets Act")
[24] Padilla (2002) The QJAE 3.
[25] Section 19 of the Financial Markets Act.
[26] Section 77 of the Financial Markets Act.
[27] *Zietsman supra* at par 98.1.

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shares. If the details of the loan are disclosed and it is finally approved, then the information moves from the intermediate stage to the final stage. This means that, even at this intermediate stage, it remains inside information. The information ceases to be inside information when it is made public, for example, through a SENS announcement.

In addition, price-sensitive information relating to securities has to be determined by way of a reasonable investor test. In this regard, a relevant question to ask is this: Would a reasonable investor regard the information as relevant to a decision to deal in such securities or not?[28] To illustrate this point: the use of price sensitive information would be where X uses information that is not publicly available to buy shares in a company that is about to announce an acquisition, anticipating that the shares of the acquiring company will appreciate in time – thereby gaining financially from the sale. Another instance would be where X sells shares in the company, which is about to be liquidated – thereby avoiding a loss. According to the reasonable investor test, in both instances, a reasonable investor would have taken the same decision as X, had he had the same price-sensitive information.

Regarding the precision of information, the court held that, in the first instance the information must indicate that circumstances exist or that an event has occurred or may reasonably be expected to come into existence or occur. Secondly, the information must be sufficient to enable a conclusion to be drawn as to the "possible effect" of those circumstances, or that event, on the price of the relevant investments.[29]

1.3. THE THEORETICAL FOUNDATIONS OF INSIDER TRADING REGULATION

Insider trading regulation can perhaps be explained with reference to a number of theories. The most relevant for the purpose of this dissertation include the classical theory, the tipper-tippee theory and the misappropriation theory.

[28] *Zietsman* supra at par 98.3.
[29] *Zietsman* supra, at par 89.

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The classical theory applies to instances where the trader who trades using inside information has a fiduciary duty[30] towards the company's but proceeds to trade in contravention of that duty.[31] This would typically apply to a situation where trading is carried out by a director, an executive, or other people who owe fiduciary duties to the company.[32]

In terms of the tipper-tippee theory, the tipper discloses information to another person (the tippee) in contravention of his (the tipper's) fiduciary duty to the company and its shareholders.[33] The tippee, in turn, uses the information to derive a benefit.[34]

The misappropriation theory applies in instances where someone who is not an insider lawfully comes into contact with information, which is not public, and trades on the basis of that information or passes it on to other people, who then trade on the strength of that information.[35]

According to the Financial Markets Act, an insider includes those who possess inside information by association with the company to which the inside information relates, i.e. directors, employees or shareholders.[36] Anyone who has inside information – whether as a result of their employment in the company, the office they occupy, or their profession – qualifies as an insider.[37] The definition of insider extends to those who know that the

[30] Cohen et al (2010) Securities Litigation Journal 12-17.
[31] See section 76(2) of the 2008 Companies Act for the fiduciary responsibilities of directors in relation to company information. This section provides that "a director of a company must (a) not use the position of director, or any information obtained while acting in the capacity of a director: (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company; and (b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director: (i) reasonably believes that the information is immaterial to the company; or generally available to the public, or known to the other directors; or (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality."
[32] Bondi and Lofchie (2012) NYUJLB 157.
[33] *Ibid.*
[34] *Ibid.*
[35] Bondi and Lofchie at 158.
[36] Section 77(a)(i) of the Financial Markets Act.
[37] Section 77(a)(ii) of the Financial Markets Act.

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source of information – whether direct or indirect – is a director, employee or shareholder in the company to which the insider information relates.[38]

The requirement that to be inside information, such information must not have been made public, implies that as soon as the information is published, it stops being inside information.[39] It is further not a requirement that there should have been any reaction whatsoever to the information.[40] Amongst others, information is regarded as having been made public if such information was published in terms of the rules of the stock exchanges, when the information is contained in records which are open for public inspection in line with legislation, and when the information can be acquired by those who are likely to need the information in order to trade.[41]

1.4. THE PROPONENTS AND OPPONENTS OF INSIDER TRADING REGULATION

There are two opposing views or schools of thought on the regulation of insider trading. These views are often based on moral and ethical foundations. The supporters of the one school of thought – the proponents of insider trading regulation – believe that there is a compelling need to regulate insider trading. They argue that insider trading is inherently immoral as it undermines the efficient and proper functioning of a free market[42] In arguing for regulation, proponents, the proponents argue that, left unregulated, insider trading creates unfairness as it results in a situation where traders gain advantage over those without the inside information.[43] A further opposition to insider trading is that it undermines the efficient and proper functioning of a free market,[44] hence the need for regulation.

[38] Section 77 (b) of the Financial Markets Act.
[39] *See* section 77 of the Financial Markets Act for a detailed definition of inside information and section 79 of the Financial Markets Act to see the circumstances under which information would be regarded as having been made public.
[40] Cassim *et al* (2011) 941.
[41] Section 79 of the Financial Markets Act.
[42] Ma and Sun (1998) JBE 67.
[43] Strudler (2009) Legal Studies and Business Ethics Papers.
[44] Werhane (1989) JBE 841.

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Contrary to the assertion by the opponents of regulation that it contributes to free market and competition, the view held by the proponents is that it stifles competition.[45]

The supporters of the other school of thought – the opponents of insider trading regulation – hold a different view in that insider trading does not affect public investor confidence in the financial markets and should be deregulated.[46]

The opponents of insider trading regulation argue that allowing insider trading causes no harm to anyone; that insider trading allows for efficient markets;[47] that it helps compensate entrepreneurs for their innovation prowess.[48] This idea is attributed to Henry Manne, who argued that entrepreneurs produce new ideas, whose value cannot be immediately ascertained in advance and that salary was not the most appropriate way of compensating for these ideas.[49] Instead, by trading on the ideas and information they generate, these entrepreneurs determine their compensation.[50] In turn, it is argued ensures that the entrepreneurs become more innovative, producing more ideas for the company,[51] and that it can serve in the best interests of shareholders and the company to which it relates.[52]

Yet there are those who believe that the motivation for regulating insider trading is neither to be found in the thesis or antithesis advanced by both the proponents and the opponents to insider trading – as discussed in the preceding paragraph. Their view is that any persuasive reasoning *for* the regulation of insider trading should be anchored in the fiduciary duty that insiders owe to the shareholders; that permitting insider trading threatens the fiduciary relationship; and that the violation of the fiduciary duty lies at the centre of insider trading offenses.[53] In this context, fiduciary responsibility relates to the expectation that those who are held in fiduciary relationship with the organization, i.e.

[45] *Ibid.*
[46] Chitimira and Mokone (2020) LFMR 102-109.
[47] Manne (2003) Wall Street Journal 14.
[48] Ma and Sun (1998) JBE 6*7.*
[49] Bainbridge (2008) SSRN 1-11.
[50] *Ibid.*
[51] *Ibid.*
[52] Manne (2003) Wall Street Journal 14.
[53] Moore (1990) JBE 180.

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directors and prescribed officers are not to use the information they obtain to gain personal advantage.[54] Other jurisdictions have taken this further. In the United States fiduciary duties may also arise out of a confidentiality agreement between someone who did not previously have a fiduciary relationship with a company.[55]

Whether regulated or unregulated, there are those who believe that insider trading could have adverse effects on the pricing of securities to which it relates. Fishman and Hagerty are of the view that[56]

"…insider trading has two adverse effects on stock price efficiency. First, with insider trading, the number of informed traders in the market is lower-the presence of a better-informed insider deters noninsiders from acquiring information and trading. Second, with insider trading, the information in the market is not evenly distributed across traders-the insider has an informational advantage. Both of these effects lead to a less competitive market and less efficient prices."[57]

1.5. THE PURPOSE OF THE STUDY

While several jurisdictions have designed legal frameworks within which insider trading is regulated, there is neither a uniform approach nor a degree of regulating insider trading.[58] In some jurisdictions, the emphasis is on insider trading as a commercial crime – classified in the same legislation dealing with money laundering and financing of terrorism.[59] In other jurisdictions, insider trading is classified alongside other cases of market abuse.[60] When it comes to penalties, most jurisdictions make provision for both administrative penalties and imprisonment, which results from criminal prosecution, as a

[54] Section 76(2)(a)(i) of the Companies Act 71 of 2008 (hereafter "the Companies Act").
[55] Cohen *et al* (2010) Securities Litigation Journal 12-17.
[56] Fishman and Hagerty (1992) The RAND Journal of Economics 106-122.
[57] *Ibid.*
[58] Salbu (1991-1992) TLR 837-870.
[59] In the United Kingdom, part V of the Criminal Justice Act focuses on the crime of insider trading. It is preceded by part IV, which is dedicated to the crime of financing of terrorism whilst part III's focus is on proceeds of criminal conduct.
[60] Chapter 10 of the Financial Markets Act, specifically section 77, covers different types of market abuse, and insider trading is listed as the first offence.

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form of punishment.[61] However, some jurisdictions emphasise administrative penalties, which are seen to be less costly, yet effective.[62]

This dissertation will focus on the regulation of insider trading by South African authorities. This will be done by considering both the historical and current legal framework regulating insider trading; by looking at the mechanisms and tools through which insider trading regulation is enforced; considering the challenges that are inherent to regulating insider trading in a technology-driven environment; and comparing South African the insider trading regulatory framework to those of the United Kingdom (UK) and Mauritius. It is in these jurisdictions where some South African companies are dually-listed alongside the JSE or to which they have expanded to through acquisitions. In comparing South Africa to these jurisdictions, the dissertation seeks to find out whether there are possible areas of improvement insofar as the regulation of insider trading by regulatory authorities is concerned, and to make recommendations to enhance the South African framework. Specifically, this dissertation will seek to answer the following questions:

1. What is the legislative framework governing the regulation of insider trading in South Africa? This question aims to establish the framework within which regulation of insider trading takes place in South Africa.

2. Authorities carry out regulation of insider trading within established framework. The question is: Who are the key authorities involved in the regulation of insider trading in South Africa? This question aims to locate and understand the authorities that are involved in the regulation of insider trading in South Africa.

3. If there is more than one authority in South Africa, what is the framework for cooperation to ensure effective regulation of insider trading? This question aims to

[61] This is particularly the case in the case in the European Union area. In this regard, see Regulation (EU) No 596/2014 of the European Parliament and of The Council of 16 April 2014 On Market Abuse, published by the European Commission.
[62] South Africa is one of the countries, which have pursued administrative penalties more than criminal penalties, which could result in imprisonment. This is despite the fact that the latter is also provided in terms of section 109 of the Financial Markets Act.

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establish the type and level of cooperation between these authorities that are involved in the regulation of insider trading in South Africa.

4. Having established who the authorities responsible for regulating insider trading are, the next question is: What are the responsibilities and the powers of these authorities?
5. It would be near impossible to effectively regulate insider trading without mechanisms and tools. To this extent, the question is: What mechanisms are there to regulate insider trading in South Africa? This question seeks to find the mechanisms and tools that are used by these authorities in the process of regulating insider trading in South Africa.
6. How does South Africa compare to the United Kingdom in terms of the regulation of insider trading? This question seeks to contrast the regulation of insider trading to that of the UK. It further seeks to establish if there are lessons to be learnt from the UK on the issue of regulating insider trading.
7. How does South Africa compare to Mauritius in terms of the regulation of insider trading? This question seeks to establish how South Africa compares to the Mauritius when it comes to regulating insider trading. It further seeks to establish if there are lessons to be learnt from Mauritius on the issue of regulating insider trading.
8. What can be done to strengthen the regulation of insider trading in South Africa? This question seeks to contrast South Africa's approach to regulating insider trading by authorities to the positions in the UK and Mauritius. The aim is to recommend changes to the framework that will enhance the South African position for consideration by the Legislator.

1.6. METHODOLOGY

The dissertation is based on qualitative desk-based research that focuses on primary and secondary sources of law in the form of legislation, case law, books, articles, and other relevant sources of information, including credible and reliable internet-based sources.

A comparative element is included to compare the regulation of insider trading in the UK and Mauritius. These jurisdictions have been selected for a number of reasons. There are

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a handful of companies listed on South Africa's JSE, the United Kingdom's London Stock Exchange (LSE) and the Stock Exchange of Mauritius (SEM). The United Kingdom has a long-standing relationship with South Africa, dating back to the occupation of the Cape in 1795;[63] the arrival of the "1820 settlers";[64] and the subsequent discovery of mineral resources, which led to the formation of some of South Africa's earlier stock exchanges.[65] Some of the key figures in the mining sector, such as Cecil John Rhodes, were of British ancestry. The company he founded,[66] De Beers, which is 85% owned by a JSE and LSE-listed Anglo American, has its headquarters in London. On the other hand, the LSE is one of the oldest stock exchanges, with its history dating back to the 17th century.[67] Besides the issue of dual-listing, Mauritius is an African country, whose economy has been attracting company listings from across several jurisdictions. Moreover, the SEM "is widely considered as a reference Exchange in Africa"; and was "the first Exchange in Sub-Saharan Africa to move to fully-automated stock market infrastructure".[68] The SEM was also previously "ranked the No 2 exchange in Africa after the JSE in terms of market infrastructure, modern and flexible regulatory environment, and innovative initiatives to develop capital markets".[69]

According to Khakpour, a comparative study is ideal when studying a particular topic or phenomenon that occurs in two or more countries.[70] The study often aims to establish "similarities or differences, in whole or in bringing them to achieve greater awareness and deeper understanding about the social reality in different areas of the nation".[71]

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[63] Britanica "British occupation of the Cape", available at https://www.britannica.com/place/South-Africa/British-occupation-of-the-Cape (accessed 21 September 2021).
[64] South African History Online "Britain takes control of the Cape", available at https://www.sahistory.org.za/article/britain-takes-control-cape (accessed 21 September 2021).
[65] See par 1.1 above for discussion on the history of stock exchanges in South Africa.
[66] De Beers Group "Our History", available at https://www.debeersgroup.com/about-us/our-history (accessed 21 September 2021).
[67] London Stock Exchange "Overview of London Stock Exchange", available at https://www.londonstockexchange.com/personal-investing/overview-london-stock-exchange-markets-lse (accessed 21 September 2021).
[68] Benimadhu (2008) "The Stock Exchange of Mauritius: Driving the change process in Africa", available at https://slidetodoc.com/the-stock-exchange-of-mauritius-driving-the-change/ (accessed 21 September 2021)
[69] *Ibid.*
[70] Khakpour (2012) CERJ 20-26.
[71] *Ibid.*

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Comparing South Africa to these countries will aid in understanding and benchmarking its regulatory framework against the frameworks of other jurisdictions.

1.7. CONCLUSION

Insider trading is a reality and, over the years, jurisdictions across the world have tried to draft best practices to regulate it, although differences in both the degree and approach differ for each nation.[72] There are, of course, those who are opposed to the regulation of insider trading on the basis that it stifles competition and that it is contrary to the idea of open market.[73] However, the proponents of insider trading regulation believe that it is a necessary intervention, which could help to support the integrity of the financial market system.[74] They further believe that this would protect the other shareholders, who have interests in the securities traded and which may be the subject of insider trading.[75] It is for this reason, that stock exchanges need companies to disseminate information to shareholders at the same time using accessible communication means.[76] Once the information becomes public, it is for the shareholders to decide how to deal with it.

Chapter 1 of this dissertation dealt extensively with, and established, the concept of insider trading. More specifically, it defined insider trading, discussed the theories behind its regulation and looked at the views for, and against, regulating insider trading. Insider trading is a global phenomenon and South Africa, as one of the players in the global financial markets, finds itself having to deal with it in its various forms and expressions, as discussed in paragraph 1.3 dealing with the theoretical foundations of insider trading regulation.

The upcoming chapters will investigate the subject of insider trading regulation in South Africa. More specifically, chapter two will focus on the history of insider trading in South Africa, chapter three on the current framework for insider trading regulation in South

[72] Salbu (1991-1992) TLR 837-870.
[73] See the discussion in par 1.4 above on the proponents and opponents of insider trading regulation.
[74] *Ibid.*
[75] *Ibid.*
[76] This is often called information disclosure requirement. In the case of the JSE, it is regulated in terms of JSE Listing Requirement no 3.4, known as "General Obligation of Disclosure".

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Africa, and chapter four on mechanisms and tools used to deal with incidences of insider trading. Chapter five will look at how other jurisdictions, especially the United Kingdom and Mauritius, deal with insider trading. Chapter six will reflect on the findings of the research and is devoted to recommending reformation in order to enhance the South African framework for insider trading regulation.

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CHAPTER 2: THE HISTORY OF INSIDER TRADING REGULATION IN SOUTH AFRICA

2.1. INTRODUCTION

The focus of this chapter is on the historical overview of insider trading regulation in South Africa. I will address the following question: What is the legislative framework governing the regulation of insider trading in South Africa? To answer this question, the chapter will look at the legislative framework that guided insider trading over the years, starting with the Companies Act of 1973 as well as the regulatory framework for the authorities involved in the regulation of insider trading over the same period.

2.2. THE LEGISLATIVE FRAMEWORK

The regulation of insider trading must be understood within the context of the history of financial markets in South Africa. As stated earlier, South Africa has a long history of stock exchanges, going back to the KRSE days.[77] Despite this history, it was only with the promulgation of the Stock Exchanges Control Act 7 of 1947 that government took a significant step towards ensuring the regulation of financial markets. The Stock Exchanges Control Act was silent on insider trading but prescribed capital requirements for listed companies and regulated the conduct of brokers and dealers.[78] The regulation of conduct of brokers and dealers was the closest the government came to regulating insider trading, given that insider trading results from the conduct of a variety of players, including dealers and brokers.[79] Subsequent laws regulating stock exchanges, which broadly dealt with preventing the manipulation of market practices and which are not fully discussed in this dissertation for the fact that they were not explicitly dealing with insider trading. These include: the Stock Exchanges Control Act 1 of 1985; the Financial Markets

[77] See par 1.1 *supra*.

[78] The South African History Online "The Johannesburg Stock Exchange is established", available at https://www.sahistory.org.za/dated-event/johannesburg-stock-exchange-established (accessed 4 February 2021).

[79] Section 78 of the Financial Markets Act lists types of insider trading offences and makes reference to dealing through an agent. Brokers and dealers are intermediaries or agents who trade on behalf of their clients.

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Control Act 55 of 1989; the Stock Exchanges Control Amendment Act 54 of 1995; and the Stock Exchanges Control Amendment Act 40 of 2001.

2.2.1. Insider trading legislation from 1973 to 1990

Insider trading first constituted an offence in terms of the Companies Act.[80] The inclusion of insider trading regulation in the 1973 Companies Act was as a result of the recommendations of the Commission of Inquiry into the Companies Act, which was appointed in October 1963.[81] Chaired by Justice van Wyk de Vries, the commission was appointed to investigate possible law reform in respect of the South African company law.[82] It made recommendations, and those relating to the regulation of insider trading were some of the most notable suggestions.[83] It recommended that insider trading in listed securities [trading with insider information, which has not been made public] be classified as an offence, coupled with a substantial penalty.[84] This was in an attempt to deal with the potential abuse of inside information by those dealing in shares of listed companies.[85] To do so, it recommended that directors, certain officers and staff of the company should disclose and record their dealings in the shares of the company in a [company share] register.[86]

The outcome was section 233 of the 1973 Companies Act, which provided that:

"every director, past director, officer and person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it becomes publicly known, may be expected materially to affect the price of the shares or debentures of the company and who deals in any way to his advantage, directly or indirectly, in such shares or debentures while such information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, shall be guilty of an [criminal] offence."

[80] Section 233 of the Companies Act 61 of 1973 (hereafter "Companies Act 1973").
[81] Benade (1970) CILSA 298.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*

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Section 233 of the 1973 Companies Act had little success in curbing instances of insider trading, as it had several limitations. These limitations, had to do with unsuccessful detection and investigation, resulting in hindrance to successful prosecution of insider trading offenders[87] and as a result of these deficiencies prosecution became impossible.[88]

Non-prosecution of the offence of insider trading under the 1973 Companies Act brought about additional legislative reforms.[89] In order to deal with the weaknesses of section 233, prevent circumvention of the provision, and increase regulation on insider trading practices, legislators introduced section 440F in the Companies Amendment Act.[90] The section made it an offence for "any person who, whether directly or indirectly, knowingly deals in a security on the basis of unpublished price-sensitive information" provided that such information "has been obtained (a) by virtue of a relationship of trust or other contractual relationship or (b) through espionage, theft, bribery, fraud, misrepresentation or other wrongful method, irrespective of the nature thereof".[91]

The Companies Act was further amended by the Companies Second Amendment Act.[92] Section 440F of the Companies Second Amendment Act failed to address the shortcomings of its predecessor, despite introducing provisions that expressly prohibited insider trading.[93] This, it has been argued, was due to the fact that these provisions brought nothing new and merely replicated most of the flaws that were in the Companies Amendment Act.[94] The failures of section 233 of the Companies Act, section 440F of the Companies Amendment Act and the Companies Second Amendment Act prompted legislators to introduce yet another law, as discussed below.

[87] Chitimira (2014) PELJ 946.
[88] Bhana (1987) S.-Afr.Tydskr.Bedryfsl.18(4)
[89] *Zietsman* at par 65.
[90] Companies Amendment Act 78 of 1989 (hereafter "Companies Amendment Act").
[91] Section 440F(1) of the Companies Amendment Act.
[92] 69 of 1990 (hereafter "Companies Second Amendment Act"). In this regard, see section 3 of the Companies Second Amendment Act, which deals with the offence of insider trading.
[93] Mabina and Chitimira (2019) JT 492-514.
[94] *Ibid.*

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2.2.2. Insider trading legislation from 1990 to 2012

At the time when insider trading was introduced as an offence, it found expression in the form of sections within broader legislation – the Companies Act. The court in *Pather and Another v Financial Services Board* stated that "there had not been single prosecution since the introduction of the prohibition [of insider trading]".[95] "The King Task Group[96] accordingly recommended that insider trading should be regulated under a separate statute outside of the Companies Act".[97] In what was viewed as a breakaway from established practice, the legislator introduced a stand-alone Act, which focused primarily on the offence of insider trading.[98] The separate statute became the Insider Trading Act.

The preamble to the Insider Trading Act[99] expressed its purpose as follows: "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…"

In two instances, section 2 of the Insider Trading Act expressly criminalised insider trading. In the first instance, it made it an offence for anyone with inside information "to deal directly or indirectly, for his or her own account or for any other person, in the securities or financial instruments to which such information related or which were likely to be affected by it".[100] In the second instance, the Insider Trading Act made it an offence for anyone with inside information to encourage or cause another person "to deal, or discourage or stop another person from dealing, in the securities or financial instruments to which such information related or which are likely to be affected by it".[101]

The legislation introduced both civil and criminal liability in relation to the offence of insider trading: the Act provided that "an individual who had been convicted was liable to a fine

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[95] *Pather and Another v Financial Services Board* 2017 (4) All SA 666 (SCA) (hereafter "Pather") at par 37.
[96] The King Task Group was mandated by the Minister of Finance to probe the efficacy of the insider trading regulation in South Africa. The *Final Report by the King Task Group Into Insider Trading Legislation* was published in October of 1997.
[97] *Pather* at par 6.
[98] This is evident from the preamble of the Insider Trading Act 135 of 1998 (hereafter "Insider Trading Act").
[99] The preamble of the Insider Trading Act.
[100] Section 2(1)(a) of the Insider Trading Act.
[101] Section 2(1)(b) of the Insider Trading Act.

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not exceeding R2 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment".[102] Concerning civil liability, the Act empowered the Financial Services Board to sue the inside trader "by way of civil proceedings in any court for payment of the amount by which the [trader] profited or the loss which he or she avoided as a result of such dealing".[103] However, the penalty imposed following successful civil proceedings shall not exceed "three times the amount of the profit gained or the loss avoided as a result of such dealing".[104]

Within half a decade following its promulgation, the Insider Trading Act was repealed and the Securities Services Act[105] introduced. Unlike the Insider Trading Act, the Securities Services Act was meant to regulate stock exchange-activities relating to securities trading[106] and address several market abuse practices, with insider trading being one of them.[107] Chapter 8 of the Securities Act created the offence of insider trading in four instances. The first instance was where an insider who knew he or she had inside information dealt, "directly or indirectly or through an agent for his or her own account", in the securities listed on the stock exchange to which the information related or which were likely to be affected by it.[108] The second instance was where the insider dealt with the securities for another person.[109] In the third instance, the Act made it an offence for the insider to disclose any information to another person.[110] The predecessor to the Securities Services Act, Insider Trading Act, made reference to an individual, as opposed to a person.[111] In this context, another person meant any person other than an individual and

[102] Section 5 of the Insider Trading Act.
[103] Section 6 (4) (a)(i) of the Insider Trading Act.
[104] Section 6 (4) (a)(ii) of the Insider Trading Act.
[105] Securities Services Act 36 of 2004 (hereafter "Securities Services Act").
[106] The preamble to the Securities Services Act states that its purpose is to "consolidate and amend the laws relating to the regulation and control of exchanges and securities trading, the regulation and control of central securities depositories and the custody and administration of securities, and the prohibition of insider trading".
[107] Sections 72 and 73 of the Securities Services Act.
[108] Section 73(1)(a) of the Securities Services Act.
[109] Section 73(2)(a) of the Securities Services Act.
[110] Section 73(3)(a) of the Securities Services Act.
[111] Section 2 of Insider Trading Act.

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included corporates,[112] partnerships, and any trust.[113] It was, however, a requirement that the person must have had knowledge that he or she had inside information.[114] In the fourth instance, it became an offence for an insider to encourage or cause another person to deal, or discourage or stop another person from dealing, in the securities listed on the stock exchange to which the information related or which was likely to be affected by it.[115] To qualify as an offence, it was a requirement that the conduct must have been based on knowledge of inside information.[116] To qualify as inside information, such information must have met four conditions: (i) it must have been "specific or precise information"; (ii) it must not have been made public; (iii) it must have been obtained or "learned as an insider"; and (iv) "if it were made public would be likely to have a material effect on the price or valueof any security listed on a regulated market" [stock exchange].[117]

During this period the insider trading offence was punishable by way of civil, criminal, and administrative penalties.

In 2012, the South African financial markets sector underwent another major change with the introduction of the Financial Markets Act. The Financial Markets Act will be discussed briefly in chapter three, as part of the review of the current legislative framework regulating insider trading. For now, it is sufficient and instructive to state that much has changed since its promulgation, with the Twin Peaks regulatory structure[118] now fully implemented.

Great legislation void of implementation is futile and useless. It was for this reason that as the government introduced insider trading regulation, and assigned responsibility to specific organisations. These institutions are discussed in the succeeding paragraphs.

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112 Jooste (2006) SALJ 437-460.
113 See the definition of "person" in section 72 of the Securities Services Act.
114 Jooste (2006) SALJ 437-460.
115 Section 73(4) of the Securities Services Act.
116 Section 77 of the Securities Services Act.
117 See definition of "inside information" under Section 72 of the Securities Services Act.
118 In terms of the South African Twin Peak model, the Prudential Authority (PA) supervises the safety and soundness of all financial institutions. The Financial Sector Conduct Authority (FSCA), on the other hand, supervises how financial institutions conduct their business and is responsible for the efficiency and integrity of financial markets. National Treasury "Treasury on new Twin Peaks regulators", available at https://www.gov.za/speeches/treasury-new-twin-peaks-regulators-29-mar-2018-0000 (accessed 26 May 2021).

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2.3. THE REGULATORY FRAMEWORK: AUTHORITIES

2.3.1. Authorities regulating insider trading: 1973 to 1990

When insider trading was introduced as an offence in terms of section 233 of the 1973 Companies Act, there was no structured regulatory framework. It was a shared responsibility. According to Chitimira, the enforcement of insider trading regulation lay in the hands of three organisations, namely: the JSE, the Registrar of Companies, and the Attorney General's Office.[119] The JSE was responsible for monitoring and detecting insider trading activities, the Registrar of Companies would then analyse any data received from the JSE, and refer it to the Attorney General's Office, which was supposed to be responsible for criminal prosecution.[120] The phrase "supposed to" is used because no successful criminal prosecution ever realised during this period.[121]

This changed with the amendment of the 1973 Companies Act in 1989. The responsibility of regulating insider trading was transferred to the Securities Regulation Panel (SRP). It needs to be stated that the SRP already existed under the pre-amended 1973 Companies Act[122] but its responsibilities did not include the regulation of insider trading. Its main responsibility was to focus on mergers and acquisitions.[123] The transferred responsibilities included the monitoring and investigation of insider trading.[124] The SRP was meant to exercise full control over insider trading regulation and to be positioned as a forum where complaints relating to insider trading could be lodged.[125] In this regard, it had the power to subpoena and interrogate anyone suspected of committing the offence of insider trading.[126] It further provided a platform through which victims of insider trading could rely on civil remedies to claim from offenders.[127] This was a positive development

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[119] Chitimira (2014) PELJ 946.
[120] Bhana (1987) SATB 18(4).
[121] Chitimira (2014) PELJ 946.
[122] Section 440B of the 1973 Companies Act.
[123] Section 440C of the 1973 Companies Act deals with the functions of the SRP. See in this regard the definition of "affected transaction", which lists instances which qualify as affected transactions.
[124] *Zietsman* at par 66.
[125] Botha (1991) SAMLJ 7.
[126] Mabina and Chitimira (2019) JT 492-514
[127] *Ibid.*

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as there is no indication that, prior to the amendment, a platform existed to lodge any complaints and obtain recourse.

Following the Companies Second Amendment Act, the responsibility of regulating insider trading was entrusted to the SRP, the Registrar of Companies and the Department of Justice.[128]

The SRP's powers to regulate insider trading were later moved to the Financial Services Board (FSB). As it would be apparent from the discussions below, insider trading is now the responsibility of the FSB's successor, Financial Sector Conduct Authority (FSCA).

2.3.2. Authorities regulating insider trading: 1990 to 2012

The FSB was established following the promulgation of the Financial Services Board Act,[129] and at the recommendation of the Van der Horst Committee.[130] It was assigned the responsibility of regulating insider trading following the introduction of the Insider Trading Act in 1998.[131] According to Pretorius, the transfer of power from the SRP to the FSB to regulate insider trading was as a result of the recommendations by the King Task Group.[132] The reasoning behind assigning the responsibility of insider trading regulation to the FSB was found in the preamble of the Financial Services Board Act. It stated that the purpose of the FSB was "to provide for the establishment or a board to exercise supervision over the business of financial institutions".[133] It made sense to move the responsibility of insider trading regulation to the FSB, as it was assigned the responsibility to license and monitor stock exchanges. In this regard, section 1 of the Financial Services Board Act defined financial institutions as including any licensed stock exchange [which is where the trading takes place] or stock broker trades[134].

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[128] *Ibid.*
[129] Financial Services Board Act 97 of 1990 (hereafter "Financial Services Board Act")
[130] Financial Services Board *FSB Annual Report of 2011,* available at https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202011.pdf (accessed 8 February 2021).
[131] Section 11(1) of the Insider Trading Act.
[132] Pretorius (1999) *Hahlo's South African Company Law Through the Cases.* See also *Pather* at par 38.
[133] See preamble of the Financial Services Board Act.
[134] Section 1(vi)(b) of the Financial Services Board Act.

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The Insider Trading Act, *inter alia*, empowered the FSB to do the following in relation to insider trading: investigate, institute proceedings against anyone, summon any person, and interrogate any person.[135] Prior to its repeal, the Insider Trading Act established the Insider Trading Directorate within the FSB and empowered it to institute civil proceedings in matters relating to insider trading, which, if successful, could result in the offending party having to pay an administrative fine not exceeding R2 million.[136] The fines were payable to the FSB and a mechanism was created "to distribute the funds recovered from a successful action to persons who had been prejudiced by the insider trading".[137]

The FSB carried this responsibility throughout the era of the Securities Act and the early days of the Financial Markets Act. The operation of the Securities Act brought about some notable changes. One such change was the replacement of the Insider Trading Directorate with the Directorate of Market Abuse (DMA).[138] This was to focus the attention of the FSB on all manners of market abuses and not restrict the Directorate's mandate on insider trading. Broadly, the DMA became responsible for the investigation of cases relating to market abuse, including those relating to insider trading.[139] The Enforcement Committee (EC) was responsible for, *inter alia*, the adjudication of insider trading offences and imposition of administrative penalties[140].

The FSB's Appeal Board became a platform where parties who were not pleased with the decisions of the EC could lodge their appeals. Individuals who were still discontent with the platforms provided for in terms of the Financial Services Board Act and SSA could bring an application to the court.[141]

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[135] Section 11(2) (a)-(e) of the Insider Trading Act.
[136] Section 12(1) of the Insider Trading Act.
[137] *Pather* at par 6.
[138] *Ibid.*
[139] *Ibid.*
[140] Financial Services Board "*FSB Annual Report 2017*", available at https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf (accessed 29 May).
[141] Financial Sector Conduct Authority "About FSB Appeal Board", available at https://www.fsca.co.za/Enforcement-Matters/Pages/About-FSB-Appeal-Board.aspx (accessed 29 May 2021).

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2.4. CONCLUSION

It is clear that South Africa has been struggling with the issue of insider trading regulation since 1973. The regulation of insider trading has faced several challenges and, along the way, lessons were learnt. For almost 50 years, the legislator has developed, amended, repealed, and generally tried to improve the laws with a view to curbing insider trading. These changes included making insider a criminal offence, but this did not result in successful prosecutions. This was because authorities charged with the responsibility to prosecute insider trading failed to obtain more prosecutions and – by extension – to enforce criminal. These failures meant that people were not effectively discouraged from engaging in insider trading practices.[142] As a result, subsequent changes to the legislation retained the criminal element, but added civil remedies and, later on, the imposition of administrative penalties.

Imposition of administrative penalties seem to have placed the issue of insider trading in the spotlight, as decisions relating to this offence often get publicized. Several institutions have been established and assigned the responsibilities to regulate and enforce insider trading legislation. As a result, South Africa has seen the responsibility of regulating insider trading assigned to the SRP and later to the FSB. The FSB has since ceased to exist and in its place a new regulator, the Financial Sector Conduct Authority (FSCA), has been established.

As of April 2018, that responsibility was transferred to the FSCA, which succeeded the FSB following the promulgation of the Financial Sector Regulation Act. Now that the regulation of insider trading is within the ambit of the FSCA's authority – what is called the new era – there is an opportunity to have a fresh look at the authorities charged with the power and responsibilities to regulate insider trading; the mechanisms and tools they use to achieve this; the effectiveness of these mechanisms and tools; and whether there are potential areas of improvement. In this regard, a number of questions must be kept in mind: Whether a single statute dealing with insider trading, such as the Insider Trading Act is needed? Whether there is a need to have a regulator whose sole focus is on insider

[142] Mabina and Chitimira (2019) JT 492-514.

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trading, similar to the singular focus of the TRP, which deals with mergers and acquisitions? This question is necessary in view of the fact that between 2010 and 2018, the FSCA and its predecessor investigated 83 cases of insider trading.[143] The answers to these questions will be dealt with in chapter six.

The next chapter will look into the regulation of insider trading under the FSCA regime, as well as other involved and responsible authorities.

[143] The number of insider trading cases investigated is based on information contained in the FSB and FSCA annual reports for the period 2010 to 2018. The 2019 and 2020 annual report do not record any cases. The investigated cases are not necessarily the successfully prosecuted case or those which resulted in the imposition of administrative penalties.

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CHAPTER 3: THE CURRENT FRAMEWORK FOR INSIDER TRADING REGULATION IN SOUTH AFRICA

3.1. INTRODUCTION

The previous chapter provided a historical overview of insider trading regulation in South Africa. Chapter three will focus on the current framework for insider trading in South Africa. It will answer the following questions: Who are the key authorities involved in the regulation of insider trading in South Africa? What is the framework for cooperation to ensure effective regulation of insider trading? Lastly, what are the responsibilities and the powers of these authorities? To do this, the chapter will consider the current legislative framework, the responsibilities and powers of the key authorities involved in regulating insider trading, as well as the cooperation, if any, between these authorities.

3.2. CURRENT LEGISLATIVE FRAMEWORK

The Financial Markets Act is the most recent legislative attempt to regulate financial markets in South Africa. To restate what was said in chapter one, the concept of financial markets include the foreign exchange market, money market, bond market, equity market, credit market, commodities market, and property or real estate market.[144] The regulation of insider trading is now substantively governed by the Financial Markets Act.[145] The objectives of the Financial Markets Act include, *inter alia*, "to prohibit insider trading, and other market abuses; and to replace the Securities Services Act".[146]

Of relevance to this dissertation is chapter 10 of that Act, which regulates the different types of market abuse practices, including insider trading. Section 78 of the Financial Markets Act provides for five insider trading offences. These are instances where:

[144] National Treasury "2018 Financial Markets Review", available at http://www.treasury.gov.za/publications/other/2018_FMR_07.pdf (accessed 4 February 2021).
[145] Section 78(1)-(5) of the Financial Markets Act.
[146] See the preamble of the Financial Markets Act.

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(i) "an insider knows that he or she has inside information and deals, directly or indirectly or through an agent for his or her own account, in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it";[147]

(ii) "an insider knows that he or she has inside information and 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";[148]

(iii) "any person 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";[149]

(iv) "an insider knows that he or she has inside information and discloses the inside information to another person";[150] and

(v) "an insider knows that he or she has inside information and encourages or causes another person to deal, or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it".[151]

The Financial Markets Act further makes provision for civil, criminal, and administrative penalties. Regarding civil and criminal penalties, section 109 of the Financial Markets Act provides that any person who contravenes the provisions of section 78, which deals with insider trading, may be convicted of a crime. The conviction could be a fine not exceeding R50 million, or imprisonment for a period of up to 10 years, or both a fine and imprisonment.[152] If any person is found to have committed the first three offences, i.e. of dealing for own account, dealing for someone's account, and where someone else deals on behalf of the insider, such a person may be subjected to administrative sanctions.[153] These sanctions would not exceed:

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[147] Section 78(1)(a) of the Financial Markets Act.
[148] Section 78(2)(a) of the Financial Markets Act.
[149] Section 78(3)(a) of the Financial Markets Act.
[150] Section 78(4)(a) of the Financial Markets Act.
[151] Section 78(5) of the Financial Markets Act.
[152] Section 109(a) of the Financial Markets Act.
[153] Section 82(1) of the Financial Markets Act.

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(i) “the equivalent of the profit that the person, such other person, or such insider as the case may be, made or would have made if he or she had sold the securities at any stage, or the loss avoided through such dealing”;[154]

(ii) “an amount of up to R1 million, to be adjusted by the registrar annually to reflect the Consumer Price Index, as published by Statistics South Africa, plus three times the [equivalent of the profit that the person, such other person or such insider, as the case may be, made or would have made if he or she had sold the securities at any stage; or the loss avoided, through such dealing]”;[155]

(iii) “interest”;[156] and

(iv) “cost of suit, including investigation costs, on such scale as determined by the Enforcement Committee”.[157]

It would be apparent later in this dissertation that, despite the power to pursue criminal sanctions against insider trading offenders, authorities have consistently preferred administrative penalties.

3.3. REGULATING AUTHORITIES’ RESPONSIBILITIES AND POWERS

3.3.1. Stock Exchanges

There are five stock exchanges in South Africa, namely the JSE, ZARX, A2X, 4AX and EESE.[158] These exchanges have been licensed in terms of section 9 of the FMA and their licenses carry terms and conditions specific to each. Some of these conditions include the categories of securities which each exchange may list as well as restrictions where each of them may operate their businesses.[159] These exchanges have a wide range of

[154] Section 82(1)(a) of the Financial Markets Act.
[155] Section 82(1)(b) of the Financial Markets Act.
[156] Section 82(1)(c) of the Financial Markets Act.
[157] Section 82(1)(d) of the Financial Market.
[158] See Jooste (2019) “How are SA’s new stock exchanges doing?” where the performance of the stock exchanges is discussed and the argument whether these will enhance the market or introduce greater volatility, available at https://www.dailymaverick.co.za/article/2019-04-03-how-are-sas-new-stock-exchangesdoing (accessed 8 February 2021).
[159] Section 9(2) of the Financial Markets Act.

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responsibilities assigned to them by the Financial Markets Act and directives from the FSCA, including making rules that govern companies listed on their platforms[160].

3.3.1.1. Stock Exchanges' responsibilities and powers

Stock exchanges are an important component of the regulatory framework for market abuse and, for the purpose of this dissertation, insider trading. As licensed entities, they are expected to play an active role to ensure and maintain the integrity of the financial markets, including developing rules to support this responsibility.[161] Section 10 of the Financial Markets Act lists a number of functions that must be performed by these exchanges, which are relevant to the subject of insider trading. The referenced functions are broad enough to address insider trading and include the following:

(i) Supervising compliance with the Financial Markets Act by companies listed on the exchange and those trading on the exchange and reporting any non-compliance to the FSCA as part of enforcing the Act.[162]

(ii) Enforcing the exchange rules, listing requirements, and exchange directives.[163]

(iii) Informing the FSCA of any matter that they are aware of that could pose a systematic risk to the financial markets.[164]

Some of these rules and listing requirements cover the subject of insider trading.[165] For an example, the JSE Listing requirements state that companies "should be aware that price sensitive information pursuant to the provisions of Requirements may also qualify as inside information pursuant to the FMA".[166] The JSE further requires companies that provide information before such information is released through the SENS to ensure that they do not contravene section 78(4) of the Financial Markets Act, which deals with the

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[160] To the extent that stock exchanges have rules that govern listing companies, they qualify as regulators. This is based on the fact that regulation is defined by Oxford-powered Lexico as "A rule or directive made and maintained by an authority."
[161] Section 10(2)(b), read with section 17 (2)(q) of Financial Markets Act.
[162] Section 10(2)(d) of Financial Markets Act.
[163] Section 10(2)(e) of Financial Markets Act.
[164] Section 10(2)(f) of Financial Markets Act.
[165] JSE Listing Requirement 3(3.6) dealing with confidentiality.
[166] JSE Listing Requirement 3 dealing with Guidance Letter: Discussions with Journalists and Investment Analysts.

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offence of insider trading.[167] The JSE further recommends that companies that are listed on its platform "must have internal written policies for handling confidential and price sensitive information; and that they must ensure that their directors and senior management are trained and understand the provisions of the Requirements dealing with price sensitive information and the provisions of the FMA dealing with market abuse and insider information".[168]

Beyond the functions listed in section 10 of Financial Markets Act, section 11 of the Act empowers exchanges to make rules and listing requirements which are prescriptive in nature. The prescriptions may include requirements relating to disclosure of information by listed companies,[169] and disciplinary actions being taken against those not complying with listing requirements.[170]

3.3.2. The Financial Sector Conduct Authority

The FSCA replaced the FSB.[171] The FSCA is part of the Twin Peaks model in terms of which the FSCA regulates and supervises the conduct of financial institutions.[172] Although the legislation founding the FSCA was promulgated in 2017, the FSCA officially took over from the FSB in April 2018[173].

The South African market conduct regulator was established in terms of section 56(1) of the Financial Sector Regulation Act. Two objectives of the FSCA are relevant for the purpose of insider trading. These are: "to enhance and support the efficiency and integrity of financial markets"[174] and "assist in maintaining of financial stability"[175] in South Africa.

[167] JSE Listing Requirement 3.6.
[168] JSE Listing Requirement 3.
[169] Section 11(1)(d) of the Financial Markets Act.
[170] Section 11(1)(g) of the Financial Markets Act.
[171] Sections 293 and 294 of the Financial Sector Regulation Act.
[172] Section 58(1)(a) of the Financial Sector Regulation Act.
[173] Financial Sector Conduct Authority *FSCA Annual Report 2019/2020*, available at https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202019-2020.pdf (accessed 31 May 2021).
[174] Section 57(a) of the Financial Sector Regulation Act.
[175] Section 57(c) of the Financial Sector Regulation Act.

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3.3.2.1. Financial Sector Conduct Authority's responsibilities and powers

The Financial Sector Regulation Act provides that the FSCA must perform any function conferred to it in terms of the founding Act and any other legislation.[176] The reference to any other legislation is broad enough to include the Financial Markets Act, whose section 78 regulates the offence of insider trading. Moreover, section 84(1) of the Financial Markets Act provides that the FSB – now replaced by the FSCA[177] – is responsible for the supervision of compliance with the Financial Markets Act. The FSCA has the power to:

(i) investigate instances of market abuse, of which insider trading is part of;[178]

(ii) summon any person who can furnish any information that could assist with the investigations;[179]

(iii) interrogate any person who could assist with the investigation; and

(iv) examine or retain for examination any such document.[180]

The power of the FSCA to investigate insider trading offences is further contained in the Financial Sector Regulation Act. Section 135 provides that, "[t]he responsible authority may investigate any matter relating to an offence or contravention referred to in sections 78, 80 and 81 of the Financial Markets Act, including insider trading in terms of the Insider Trading Act, 1998 (Act No. 135 of 1998), and the offences referred to in Chapter VIII of the Securities Services Act, 2004 (Act No. 36 of 2004), committed before the repeal of those Acts".[181] The powers of the FSCA in respect of imposition of penalties will be discussed later in Chapter four.

[176] Section 58(3) of the Financial Sector Regulation Act.
[177] Section 293 (1) of the Financial Sector Regulation Act.
[178] Section 84(2)(a) of the Financial Markets Act.
[179] Section 84(3)(a) of the Financial Markets Act.
[180] Section 84(3(b) of the Financial Markets Act.
[181] Section 135 (2) of the Financial Sector Regulation Act.

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3.4. COOPERATION BETWEEN REGULATING AUTHORITIES

3.4.1. Levels of cooperation

Cooperation between the authorities regulating insider trading, particularly as it relates to the licensed exchanges and FSCA takes two forms, namely legislative and operational. Legislative cooperation or what may be called "forced" cooperation is expressed in section 10(f), which provides that the stock exchange "must, as soon as it becomes aware thereof inform the registrar of any matter that may pose systemic risk to the financial markets". Insider trading has the potential to cause systematic risk.[182] Under the FSB, the registrar was the Chief Executive Officer (CEO).[183] The FSCA has replaced the title of the CEO with Commissioner.[184]

Operational cooperation takes a form of bi-weekly standing meetings between the JSE's surveillance officials and investigators from the FSCA's Directorate of Market Abuse (DMA).[185] These meetings are meant to discuss results of surveillance and track progress on investigations that are still underway.[186] There is, however, no evidence of similar meetings between FSCA and other exchanges, presumably because they are not trading large volumes as yet. This, however, does not suggest that there is no interaction with the rest of the licensed exchanges.

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[182] See Du and Wei who conducted research (Du and Wei (2004) The Economic Journal 927–956) which considered various factors that could contribute to market volatility. They found that insider trading is associated with higher market volatility and that the quantitative effect of insider trading on market volatility was higher compared to the effect of other [economic] fundamentals. These include gross economic product (GDP) growth, which indicate that countries with volatile GPD growth have more volatile stock markets.
[183] Section 6(1) of the Financial Markets Act.
[184] Section 56(2) of the Financial Sector Regulation Act.
[185] See FSB *Annual Report of 2017* at 60, according to which "the DMA has representatives from the FSB (now FSCA), JSE, legal and accounting professions, insurance industry, fund management industry, banking industries, and the Association for Savings and Investments South Africa and South African Reserve Bank (SARB)."
[186] Financial Services Board *Annual Report of 2017,* available at https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf (accessed 8 February 2021).

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3.4.2. Process of cooperation

Cooperation between the regulating authorities, i.e. stock exchanges (the JSE is used in this scenario) and the FSCA follows this simplified process.[187] The JSE conducts surveillance on its trading platforms on a continuous basis. If a suspicious insider trading transaction is detected, it is referred to the FSCA.[188] The detection is discussed fully in chapter four below, but it needs be stated that it is triggered by unusual trading volumes and price movements on the stock exchange platform. The Market Abuse Department (MAD) within the DMA investigates the referred suspected insider trading transaction. Following the investigation by the DMA, one of two things would happen: an administrative penalty is imposed on anyone who is found to have committed an insider trading offence or the matter is closed for lack of evidence.[189]

3.5. CONCLUSION

The current legislative framework discussed in this chapter was developed to respond to failures by successive legislations to deal with the offence of insider trading. The Financial Markets Act of 2012 was introduced as another attempt to curb insider trading.[190] It is apparent from the preceding discussions that there are limited authorities involved in the regulation of insider trading in South Africa. The FSCA is the foremost regulatory authority in this regard because of the powers vested in it through various statutes.[191] Amongst some of its most notable responsibilities and authority, is the power to conduct extensive investigations into allegations of insider trading and to impose penalties in instances where such offence is found to have occurred.[192]

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[187] JSE "Market Regulation" available at https://www.jse.co.za/regulation/markets-regulation/market-regulation#:~:text=The%20JSE%20Market%20Regulation%20division%20utilizes%20electronic%20surveillance%20systems%20to,insider%20trading%20and%20market%20manipulation (accessed 21 May 2021).
[188] *Ibid.*
[189] Section 82(1) of the Financial Market Act.
[190] See par 3.2 *supra*.
[191] Section 58(1)(a), read with section 135(2) of the Financial Sector Regulation Act.
[192] See par 3.3.3 *supra*.

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The FSCA is not self-sufficient where it concerns regulation of insider trading. The stock exchanges are a critical component in fighting insider trading. These are licensed by, and fall under, the supervision of the FSCA.[193] For this reason, it would not be wrong to conclude that the exchanges are an extension of the FSCA when it comes to monitoring insider trading.[194] This is good to the extent that reliance can be placed on JSE data and the opposite would be the case in instances where data is compromised.

It was demonstrated in the preceding paragraphs that successful fight against insider trading is predicated upon cooperation between the various authorities. In this regard, it was stated above that the process of cooperation is as follows: the JSE is responsible for monitoring insider trading on its platforms and that, upon detecting suspected insider trading, it passes the information to the FSCA. The FSCA, on the other hand, conducts investigations and has the powers to impose penalties on the offending parties.[195]

In the paragraphs above, discussions focused on the ideas of civil, criminal and administrative penalties as provided for by section 109 of the Financial Markets Act in detail. However, these discussions did not dwell on the imposition of criminal penalties. The FSCA is of the view that it is not its function to institute criminal prosecution but that it would be willing to provide all the necessary information to assist the Director of Public Prosecutions (DPP) should it be required.[196] This is a shortcoming in the regulatory framework and, for this reason, chapter six of this dissertation will set out the research that determined the existing shortcomings in relation to the regulation of insider trading; discuss how, and which, authorities should be addressing the identified shortcomings; and provide recommendations to address these issues.

[193] See chapter III of the Financial Markets Act, which is dedicated to the licensing of exchanges.
[194] Section 17(2)(q) of the Financial Markets Act.
[195] See par 3.4.2 *supra*.
[196] Financial Sector Conduct Authority "*Report by FSCA*", available at https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20Regulatory%20Action%20Forum%20-%2026-07-2018.pdf (accessed 29 May 2021).

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CHAPTER 4: REGULATION OF INSIDER TRADING

4.1. INTRODUCTION

Chapter four's focus will be on the mechanisms and tools that are used by the stock exchanges, specifically the JSE, and the FSCA, to regulate insider trading. This chapter seeks to answer this question: What mechanisms are there to regulate insider trading in South Africa? In this regard, I will look at how insider trading is detected through surveillance by the JSE, how the FSCA conducts investigations, the FSCA's enforcement process and the imposition of administrative penalties on the offenders. To provide for further comprehension, the discussion will consider the practical application of the outlined mechanisms and tools to the decided insider trading case involving the erstwhile chief executive officer of Steinhoff International, Markus Jooste. The case was finalized at the end of 2020, resulting in the imposition of administrative penalties on those involved.

4.2. MECHANISMS AND TOOLS OF REGULATING INSIDER TRADING

4.2.1. Mechanism and tools used by Stock Exchanges

It is instructive to state that the JSE has no legislated powers to investigate the offence of insider trading. However, the JSE has, at its disposal, mechanisms and tools that it employs to limit and detect instances of insider trading. These tools can be classified into two categories, namely prevention and detection. The responsibility of "preventing" and detecting insider trading lies with the Johannesburg Stock Exchange's market surveillance, for the fact that trading takes place on the exchange's platforms.[197]

4.2.1.1. Prevention

The main issue in insider trading is that it is based on information that is not publicly available.[198] Section 79 of the Financial Markets Act provides for instances where the

[197] See pages 2 and 3 of International Organisation of Securities Commissions (IOSCO) Report, titled, "*Technological Challenges to Effective Market Surveillance: Issues and Regulatory Tools*", according to which market surveillance has two objectives: (1) to ensure fair and orderly trading in the market; and to detect and uncover market abuse.

[198] See definition of inside information under section 77 of the Financial Markets Act.

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information would be regarded as having been made public. One such instance is "when price sensitive information is published in accordance with the rules of the relevant regulated market".[199] Price sensitive information is defined in the JSE Listing Requirements as "unpublished information that is specific or precise, which if it were made public, would have a material effect on the price of the issuer's [listed company's] securities".[200] Regarding disclosure, the JSE Listing Requirements provide, *inter alia*, that:

(i) "A company listed on the JSE should immediately release an announcement providing details relating directly or indirectly to the company that constitutes price sensitive information";[201] and

(ii) "Immediately after a listed company knows of any price sensitive information and when such information can no longer be kept confidential or the company suspects that the confidentiality of such information has been breached, such a company must publish a cautionary announcement. The cautionary announcement is meant to warn shareholders to exercise caution when dealing in the securities of that company."[202]

Although not a guarantee, the disclosure of information on prompt basis is viewed as one of the ways by which to curb insider trading.[203] Once made public, it is up to anyone interested to deal with the securities to which the disclosed information relates. The stock exchange news services (SENS) is one of the ways by which the information is made

[199] Section 79(a) of the Financial Markets Act. See section 79(b)-(d) for other instances where the information is regarded as having been made public. These include when it is contained in record and is open for public inspection as per enactment; when the information can be readily acquired by those who are likely to deal in any listed securities to which it relates or of a listed company to which the information relates or if the information has already been made public.
[200] Definition of Price Sensitive information in the JSE Listing Requirements.
[201] JSE Listing Requirement 3.4(a).
[202] JSE Listing Requirement 11.40.
[203] JSE "Insider Trading and Other Market Abuse" (hereafter "Insider Trading Booklet"), available at https://www.jse.co.za/sites/default/files/jse_document_manager/RW/Internal/Market%20Regulation/Insider%20Trading/Insider%20Trading%20Booklet%202016.pdf (accessed 29 May 2021).

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public and it is a requirement in terms of the JSE Listing Requirements.[204] Once made public, people are free to do deal freely with it.

4.2.1.2. Detection

The JSE has a specialized division – the Market Regulation Division – whose responsibility it is to detect and identify all forms of market abuse practices, which for the purpose of this dissertation, include insider trading.[205] Although the Market Regulation Division is not mandatory, it operates within a legal framework that comprises the Financial Markets Act, 2012, the JSE Rules and Directives and the Financial Intelligence Centre Act, 2001.[206] The JSE detects potential insider trading by two means, namely technology and surveillance officers.[207] This is a clear case of how humans and technology can collaborate for better outcomes [in this instance detecting insider trading], with people defining the outputs expected of the machines and machines extending the physical capabilities of human beings.[208]

On the technology front, the JSE has sophisticated technological surveillance systems that are designed to detect unusual trading volumes and price movements.[209] These systems can also identify the names, addresses, telephone numbers and other details of those involved in various transactions.[210] Moreover, the systems are capable of linking trades that have occurred through accounts held at different broking firms, as well as the history of trading by a particular account holder.[211] The technological system refreshes trading information every half hour to provide real time data for effective surveillance.[212]

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[204] See schedule 9.2 of the JSE Requirements for procedural requirements of the Stock Exchange News Service (SENS). According to 9.2 of the schedule, SENS seeks to facilitate early, equal and wide dissemination of company information. This is done by distributing company information electronically to a variety of subscribers, which include major news services.
[205] Johannesburg Stock Exchange "Market Regulation", available at https://www.jse.co.za/regulation/markets-regulation/market-regulation (accessed 10 June 2021).
[206] *Ibid.*
[207] *Ibid.*
[208] Wilson and Daugherty (2018) *Harvard Business Review* 114.
[209] Insider Trading Booklet at 21.
[210] Insider Trading Booklet at 23.
[211] *Ibid.*
[212] *Ibid.*

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On the human side, the JSE has employed surveillance officers in its Market Regulation Division. These officers use the technology, discussed in the preceding paragraph, to detect signs of market abuse, which include insider trading.[213] If the surveillance officers detect any unusual activity, which may not at the face of it look like insider trading, they contact the listed company's directors through the company's sponsor[214] to inquire if there is any price-sensitive information that they know of, which is due for release. If there is, the company is requested to make the SENS announcement.[215]

The surveillance officers review transactions every time a listed company discloses price-sensitive information. The reviews are done a week following the disclosure of price-sensitive information.[216] By a way of illustration: If listed company X discloses price sensitive information on Monday, review of trading activity in relation to company X will take place the next Monday. During the review, the surveillance officers are able to isolate and focus on the profiles of specific traders to ascertain possibility of insider trading activity.[217] The review process looks at the patterns of trading in relation to the company which has disclosed price-sensitive information. By a way of illustration, some of these patterns would include, where traders XYZ sold down securities of a particular company before negative, price-sensitive information was published. This was the situation in the case involving CEO of Steinhoff International, Markus Jooste, which will be discussed as a case study in this chapter. Other patterns include where XYZ buy securities in a listed company before positive, price sensitive information is made public. This scenario is similar to what happened in the case of *Zietsman* discussed above. If unusual patterns are identified in relation to a trader, surveillance officers would trace the trader's trading patterns back to six months.[218] However, this approach presents difficulties when the trader involved has a history of executing voluminous transactions on regular basis. In

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[213] *Ibid.*
[214] According to the JSE Listings Requirements, sponsors are corporate brokers, banks and other professional advisers who advice the listed company on regarding the application of JSE Listings Requirements. (section 2 of the Listings Requirements)
[215] Insider Trading Booklet at 23.
[216] Jacob Shayi (Senior Manager: Market Surveillance), email personal communication, 17 March 2021 confirming the role of Johannesburg Stock Exchange's role in surveillance of insider trading.
[217] *Ibid.*
[218] *Ibid.*

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this case, the trader could easily explain that his/her trading pattern is no different from previous trading patterns relating to other stocks even though he took advantage of unpublished price sensitive information. According to Shayi, the only way to catch someone like this is through tip-off from another market participant.[219] Based on this regard, it can be said that the efficiency of this mechanism is doubtful. Notwithstanding this, when all has been done and evidence gathered point to possible insider trading, the suspected cases are referred to the FSCA.

4.2.2. The mechanisms and tools used by the FSCA

The JSE refers suspicious transactions to the FSCA. The FSCA uses enforcement mechanisms and tools, which are made available through several statutes. Investigations is one of the tools used by the FSCA to deal with alleged cases of insider trading. Section 135 of the Financial Sector Regulation Act empowers the FSCA to conduct investigations if it reasonably suspects that a person "may have contravened, may be contravening or may be about to contravene a law which it is responsible for;[220] and that it may investigate all forms of market abuse as listed sections 78, 80 and 81 of the Financial Markets Act".[221] Section 78 is the section dealing with the offence of insider trading. As part of the investigation, the FSCA can use summons and can interrogate the suspected insider trading offenders.

In relation to summons, the Financial Markets Act provides that the investigators can summon any "person who can assist it with information or documentation relating to any matter under investigations".[222] Summons is an important tool in the hands of the FSCA, as they may not be ignored. In this regard, section 84 of the Financial Markets Act provides that

"a person commits an offence if that person fails, without any sufficient reasons, to appear at the time and place specified in the summons; to remain in attendance until excused from further attendance; to answer fully and satisfactorily any question lawfully put to him; to furnish

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[219] *ibid.*
[220] Section 135(1)(a) of the Financial Sector Regulation Act.
[221] Section 135(2) of the Financial Sector Regulation Act.
[222] Section 80(3)(a) of the Financial Markets Act.

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information or to produce a document; refuse to take the oath or to make an affirmation; and … fails to answer fully and satisfactorily any question lawfully put to him or her".[223]

If convicted, such a person would be liable to a fine or imprisonment to a maximum of two years or both fine and imprisonment.[224] The Financial Markets Act empowers investigators "to interrogate any such person under oath or affirmation", as well as "examine or retain for examination any document" that can help in the investigation process.[225]

FSCA investigators can enter and search any premises for any information that could assist in proving the offence of insider trading.[226] Although the requirement for officers to enter these premises is that they should have in their possession a search warrant, they can still proceed without warrant provided anyone in charge of the premises which are subject to search grants consent.[227]

As part of investigations, the FSCA may in some instances apply to the court for an interdict or order to attach assets of suspected insider trading offenders. This would be done to counter possible concealment, removal, dissipation and destruction of these assets.[228]

4.2.2.1. Enforcement

Enforcement is one of the mechanisms and tools at the FSCA's disposal to give effect to the regulation of insider trading. Following successful conclusion of the investigation, the DMA refers the matter to the EC for adjudication. The referral is expected to detail the contravention and recommended administrative penalty.[229]

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[223] Section 84(4)(a)(i)-(iv) of the Financial Markets Act.
[224] Section 84(4)(a)(v) of the Financial Markets Act.
[225] Section 80(3)(b) of the Financial Markets Act.
[226] Sections 136 of the Financial Sector Regulation Act enumerates the powers of investigators to question or require production of documents to assist with the investigation. Section 137, on the other hand, re-affirms the powers of investigators to enter and search the premises in search of information that could assist in the investigation process.
[227] Section 80(3)(c) of the Financial Markets Act.
[228] Section 83 of the Financial Markets Act.
[229] Luiz and Van der Linde (2013) SA Merc LJ 472.

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4.2.2.2. Administrative penalties calculation guidelines

The Financial Sector Regulation Act empowers the FSCA to impose an appropriate administrative penalty on a person who has contravened a financial sector law, which include the Financial Markets Act.[230]

On the other hand, the Financial Markets Act provides guidelines on the appropriate administrative penalties. Where the insider trading offence consists of insider dealing for own account or for another person's account; or where any person deals for the insider the penalties would include:

(i) the equivalent of the profit the person made or would have made if he or she had sold the securities at any stage; or the loss avoided, through such dealing[231]; and

(ii) "an amount of up to R1million, to be adjusted by the registrar annually in line with the Consumer Price Index", plus three times the profit made or that would have been made by the insider or the loss avoided through dealing in insider information.[232]

Over and above these, the EC may determine that the offending party pay interest on the profit made, cost of suit and investigation costs incurred by the DMA.[233] The above administrative penalties are applicable even where the offence consists in the insider disclosing the inside information to another person; and where the insider encourages or discourages or stops a person from dealing in listed securities to which insider trading relates.[234] However, additional administrative penalties would apply and would not exceed the commission or consideration received for disclosure of inside information; and

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[230] Section 167(1)(a) of the Financial Sector Regulation Act.
[231] Section 82(1)(a) of the Financial Markets Act.
[232] Section 82(1)(b) of the Financial Markets Act.
[233] Section 82(1)(c) and (d) of the Financial Markets Act. See also section 167(3) of the Financial Sector Regulation Act, which empowers the FSCA to impose administrative penalty for "reasonable costs incurred by the responsible authority in connection with the contravention".
[234] Section 82(2) of the Financial Markets Act.

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encouragement or discouragement to deal in the securities to which inside information relates.[235]

4.2.2.3. Matters for consideration when imposing administrative penalties

Section 167(2) of the Financial Sector Regulation Act provides for matters that the FSCA must have regard for, when imposing administrative penalty. In the first instance, this section provides that the matters that the FSCA must have regard to include the following: "(i) The need to deter such conduct; (ii) the degree to which the person has co-operated with a financial sector regulator in relation to the contravention; and (iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions".[236]

The section further provides that the FSCA may have regard when imposing penalty include the following:

"(i) The nature, duration, seriousness and extent of the contravention;

(ii) any loss or damage suffered by any person as a result of the conduct;

(iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct;

(iv) whether the person has previously contravened a financial sector law;

(v) the effect of the conduct on the financial system and financial stability;

(vi) the effect of the proposed penalty on financial stability; and

(vii) the extent to which the conduct was deliberate or reckless".[237]

4.2.2.4. Criminal Prosecution

Section 109 of the Financial Markets Act empowers the FSCA to impose criminal penalties. Legislations before the Financial Markets Act similarly gave the FSCA's predecessors the same powers. Notwithstanding these powers, South Africa has never had any successful criminal prosecution for insider trading offence. This could be

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[235] Section 82(2)(e) of the Financial Markets Act.
[236] Section 167(2)(a) of the Financial Sector Regulation Act.
[237] Section 167(2)(b) of the Financial Sector Regulation Act.

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attributed to the strict requirement that certain aspects of be satisfied before conviction can be secured. These requirements were summarized in *S v Mdiniso*[238] as follows:

(a) "the State must prove an accused person's guilt beyond a reasonable doubt;

(b) the onus rests on it [the state] to prove every element of the crime alleged, including that the accused is the perpetrator of the crime;

(c) that he or she [the accused] had the required intention;

(d) that the crime in question was committed [by the perpetrator];

(e) and that the act in question was unlawful".

4.2.2.5. Sentencing in criminal prosecution

In instances where the onerous requirement of proving beyond reasonable doubt is satisfied, the next step in the process would be sentencing. What are the relevant factors to be considered when sentencing an offender, who has been found guilty of a criminal offence? The decision in *S v Zinn*[239] remains an important guide in sentencing criminal offenders. The court ruled that "what has to be considered is the triad consisting of the crime, the offender and the interests of society".[240] These factors were reiterated in *Seedat v The State*,[241] which emphasized that, "in determining what an appropriate sentence should be, the court will take the following factors into account:

(a) the gravity of the offence;

(b) the interest of society;

(c) the retributive aspects, rehabilitation, deterrence, and the interest of the victim; and

(d) the interest and personal circumstances of the offender".

The court further held that this is a balancing act, which the court should embark upon without overemphasizing one aspect against the others.[242]

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[238] *S v Mdiniso* [2010] ZAECGHC at par 13.
[239] *S v Zinn* 1969 (2) SA 537 (A) at 540G.
[240] *Ibid.*
[241] *Seedat v The State* [2015] 3 All SA 93 (GP) at par 47.
[242] *Ibid.*

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4.2.2.6. Reconsideration and review of decisions

The process discussed below is in relation to administrative penalties and does not cover the criminal sentencing. It follows that where the penalty is a criminal one, the normal process of appealing criminal sentences shall apply.

If the person found to have committed insider trading offence is not content with the penalty imposed, the Financial Services Tribunal may be approached[243] for assistance. Section 230 of the Financial Sector Regulation Act provides that "a person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal". The section further provides that "a reconsideration of a decision constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act [No 3 of 2000]".[244]

If not satisfied with the decision of the Tribunal, the aggrieved person may exercise his or her rights in terms of section 235 of the Financial Sector Regulation Act. This section provides that "any party to proceedings on an application for reconsideration of a decision who is dissatisfied with an order of the Tribunal may institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law".[245]

4.3. INSIDER TRADING CASES CONCLUDED WITH ADMINISTRATIVE PENALTIES

South Africa has never had any successful criminal prosecution for insider trading offence. This failure can be attributed to the onerous requirements of proving the crime of insider trading beyond reasonable doubt, as discussed in paragraph 4.2.2.4 above. There has, however, been notable success in imposition of administrative penalties for the offence of insider trading. To illustrate this point, it is instructive to state that, since the promulgation of the Financial Markets Act in 2012, a total of fourteen cases relating to

[243] The Financial Services Tribunal has been established in terms of section 219 of the Financial Sector Regulation Act to, *inter alia*, attend to applications for reconsideration of FSCA's decisions as provided for in section 224 of the Financial Sector Regulation Act.
[244] Sections 230(1) and 170(1)(b)(i) of the Financial Sector Regulation Act.
[245] Sections 235 and170(1)(b)(i) of the Financial Sector Regulation Act.

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insider trading were successfully concluded and administrative penalties imposed on the offending parties. The table below lists the fourteen cases referred to above.

Year	Provision contravened	Defendant/Respondent	Administrative Penalty
2012	Section 73 of the Securities Services Act	Collins, Johan Klue	R31 500
2013	Section 73 of the Securities Services Act	Handelsman, Kevin Guy	R68 460
2013	Section 73 of the Securities Services Act	Ralston, Michael Trevor	R40 000
2013	Section 73(4) of the Securities Services Act	Lovell, Justin	R10 080
2014	Section 73 of the Securities Services Act	Theba, Yaseen A	R60 000
2014	1. Section 73(2)(a) of the Securities Services Act, No 36 of 2004 (SSA) in respect of Mr Zietsman 2. Section 73(1)(a) of the SSA in respect of Harrison & White	Zietsman, Gavin Lyonel and Harrison & White Investments (Pty) Limited	R1 000 000 (was to be paid jointly and severally by the respondents)
2014	Section 78 of the Financial Markets Act	Deetlefs, David	R14 152
2016	Section 78(1)(a) of the Financial Markets Act Section 78(5) of the Financial Markets Act	Johnson, Bernard Melvin	R850 000

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2016	Section 78(1)(a) of the Financial Markets Act	Moodley, Vinayagam Kumarasamy	R467 388
2017	Section 78 (1) (a) of the Financial Markets Act	Bronn, Michiel Jakobus	R350 000
2020	Section 78 (1) (a) of the Financial Markets Act	Swiegelaar, Marthinus Jaco	R18 328
2020	Section 78 (2) (a) of the Financial Markets Act	Burger, Gerhardus Diedericks	R3 002 630 was imposed in terms of section 167 of the Financial Sector Regulation Act
2020	Section 78 (1) (a) of the Financial Markets Act	Ocsan Investment Enterprise (Pty) Ltd	R115 867 122
2020	Section 78 (4) (a) and section 78 (5) of the Financial Markets Act	Jooste, Markus	R161 568 068

Source: FSCA

4.4. CASE STUDY: STEINHOFF INTERNATIONAL

The case of Steinhoff is a recent and the biggest insider trading case that the FSCA dealt with. The administrative penalty imposed on insider trading offenders in the Steinhoff case, particularly Jooste, was the largest.[246] It is being discussed hereunder to illustrate the mechanisms and tools that are used in the regulation of insider trading in South Africa.

4.4.1. The facts

The facts of the case were as follows: Steinhoff International was, and still is, a company listed on the JSE, whose securities lost significant value during December 2017. The loss

[246] Planting "The R161-million SMS: FSCA slaps world's second-largest fine on Jooste for Steinhoff insider trading", available at https://www.dailymaverick.co.za/article/2020-10-30-the-r161-million-sms-fsca-slaps-worlds-second-largest-fine-on-jooste-for-steinhoff-insider-trading-2/#:~:text=This%20is%20the%20largest%20penalty%20imposed%20by%20the,the%20R24-million%20it%20fined%20Deutsche%20Bank%20in%202019 (accessed 11 June 2021).

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of value was attributed to what became known as "accounting irregularities"[247] involving several of subsidiaries under Steinhoff. These irregularities were uncovered by the auditing firm, Deloitte.[248] The discovery of these irregularities led to the re-statement of its financials and subsequent investigation by the company.[249]

4.4.2. The surveillance process

The JSE, through surveillance, reviewed trading in relation to the Steinhoff International securities. The surveillance, carried out through technological systems, concluded and determined that there were suspicious transactions relating to Steinhoff. Since the JSE has no investigative powers, it passed the preliminary findings on to the FSCA for further investigation.

4.4.3. Investigation process

The FSCA exercised its authority in terms of section 136(1)(a) to conduct the investigation.[250] This involved obtaining statements under oath from persons who the FSCA believed had information that was relevant to the investigation, in particular from those working for Steinhoff.[251] It also obtained information from those who received warning text messages (SMS) from Jooste, which were warning them of the challenges that Steinhoff was faced with.[252] Over and above this, using the same section 136(1)(a), the FCSA investigators obtained documentary evidence from, *inter alia*, Steinhoff's auditors, the JSE, Mobile Network Service Providers, Steinhoff officers and authorised members of the JSE (brokers).[253]

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[247] See the SENS announcement issued by Steinhoff titled, "Steinhoff International Holdings N.V. - Steinhoff announces investigation into accounting irregularities and resignation of CEO", available at https://irhosted.profiledata.co.za/steinhoff/2017_feeds/SensPopUp.aspx?id=301862 (accessed 11 June 2021).
[248] Naude et al (2018) "Business perspectives on the Steinhoff saga" USB Management Review 1-33.
[249] Steinhoff International Holdings "Steinhoff restatement of consolidated financial statements" available at https://irhosted.profiledata.co.za/steinhoff/2017_feeds/SensPopUp.aspx?id=302449 (accessed 11 June 2021).
[250] See section 136(1)(a) of the Financial Sector Regulation Act, which deals with the powers of FSCA's investigators to question and require production of documents or other items.
[251] *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 13.
[252] *Ibid.*
[253] *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 14.

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4.4.4. Mitigating factors

In the case of Jooste, the FSCA considered the following mitigating factors to determine the appropriate administrative penalty:[254]

(a) That he did not benefit from the contraventions;

(b) That he had not previously been found to have contravened a financial sector law;

(c) The he was reasonably cooperative; and

(d) The need to deter deliberate conduct of this kind (insider trading).

In the final analysis, the FSCA came to a conclusion that the need to deter insider trading conduct weighed the heaviest[255] and imposed the penalty as discussed in paragraph 4.4.5. below.

4.4.5. Administrative penalty

Following the investigation, Jooste was found to have contravened sections 78(4)(a) and 78(5) the Financial Markets Act. The former section makes it an offence for an insider to disclose inside information to any person and the latter makes it an offence for an insider to encourage or discourage another person to deal in securities to which the inside information relates.

Subsequently, the FSCA imposed an administrative penalty of R168 997 772 (One hundred and sixty eight million nine hundred ninety seven thousand seven hundred and seventy two thousand rand) on Jooste. The administrative penalty was calculated in terms of section 82(1) of the Financial Markets Act and considered the loss avoided by those who sold their shares in Steinhoff after receiving a warning text message from Jooste. This was done by looking at the Steinhoff's closing price on 08 December 2017 – a date

[254] *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 160.
[255] *Ibid.*

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FSCA believed the market would have had enough time to absorb some of the inside information.[256] The calculation was done as follows:[257]

(a) "In terms of section 82(2)(a) and considered the equivalent of the total loss avoided by the trades of Mr Swiegelaar, Dr Burger and Mr Oosthuizen Snr and Ocsan Investment totaling R40 142 017;

(b) In terms of section 82(2)(b), and considered an amount of three times the total loss avoided in respect of R120 426 051 plus R1000 000 in respect of the warning SMS sent to Mr Du Toit;

(c) In terms of section 82(2)(c) interest of the total amount of R161 568 068 a tempora morae to date of payment; and

(d) In terms of section 82(2)(d), costs of suit, including costs of the investigation on the tariff as per the Auditor General Fees relevant for the period of the investigation and all disbursements incurred".

An administrative penalty was also imposed on the recipients of the text messages, who sold their shares in Steinhoff and, as a result, avoided losses, in contravention of section 82(1) of the Financial Markets Act.[258]

In this regard, administrative penalty of R8 005 260 (eight million five thousand and two hundred and sixty rand) was imposed on Gerhardus Diedericks Burger;[259] Oscan Investments (Pty) Ltd received an administrative penalty of R43 242 374 (Forty three million two hundred and forty two thousand three hundred and seventy four rand);[260] and Marthinus Swiegelaar had to pay R10 73 312 (One million seventy three thousand and three hundred and twelve rand).[261]

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256 *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 151.
257 *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 161.
258 *Financial Sector Conduct Authority v Markus Johannes Jooste* at par 150.
259 *Financial Sector Conduct Authority v Gerhardus Diedericks Burger* at par 68.
260 *Financial Sector Conduct Authority v Oscan Investments (Pty) Ltd* at par 74.
261 *Financial Sector Conduct Authority v Marthinus Jaco Swiegelaar* at par 70.

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4.6. CONCLUSION

South Africa has a clear legislative framework to guide the regulation of insider trading. The stock exchanges – particularly the JSE as the oldest exchange – and the FSCA are key players in the regulation of insider trading, with the JSE being largely responsible for detection – through surveillance – of insider trading.[262] Detection is done through the use of both technology and human analysis. The FSCA is responsible for conducting investigations – as empowered by the legislation – and imposing administrative penalties where insider trading is established.[263] In order to arrive at an imposition of administrative, mutual working relationship between the stock exchanges and the FSCA is of utmost importance.

There are clear principles that guide how the administrative penalties are to be calculated.[264] Moreover, the FSCA considers mitigating and aggravating factors before imposing an administrative penalty.[265] It needs be stated that the FSCA and its predecessor have recorded successes with regards to imposition of administrative penalties.[266] Those not satisfied with the FSCA's decision, may approach the Tribunal to have such decision reviewed.

Securing criminal prosecutions still remains an issue for the FSCA. There is no clear responsibility matrix, specifically regarding the reporting of any detected insider trading for the purpose of criminally-prosecuting the same.[267] Despite the fact that there is a provision for criminal liability in the Financial Markets Act, there is a gap where it concerns criminal prosecution of insider trading. The next chapter will look into how insider trading is regulated in other countries, namely the United Kingdom and Mauritius.

[262] See par 4.2.1 *supra.*
[263] See par 4.2.2 *supra.*
[264] See par 4.2.2.2 *supra.*
[265] See par 4.2.2.3 *supra.*
[266] See par 4.3 *supra.*
[267] Financial Sector Conduct Authority *Report by FSCA*, available at https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20Regulatory%20Action%20Forum%20-%2026-07-2018.pdf (accessed 29 May 2021).

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CHAPTER 5: INTERNATIONAL PERSPECTIVE

5.1. INTRODUCTION

The offence of insider trading or dealing is not unique to South Africa. It is a global problem, which various jurisdictions attempt to regulate.[268] In this chapter, focus will be placed on how some of these jurisdictions – specifically the United Kingdom and Mauritius regulate insider trading. This chapter will address these questions: How does South Africa compare to the United Kingdom in terms of the regulation of insider trading? How does South Africa compare to Mauritius in terms of the regulation of insider trading?

Comparison with the United Kingdom is relevant for the reason that some South African companies are listed on both the JSE and the London Stock Exchange (LSE).[269] Mauritius is an African country, which has developed financial market system and it makes sense to compare South Africa with it.[270] The discussion will look at both the legislative frameworks and the authorities responsible for regulation of insider trading in the United Kingdom and Mauritius.

5.2. THE UNITED KINGDOM

The discussion in relation to the UK focuses on the legislative framework upon which insider trading regulation is enforced, the regulatory authorities charged with the responsibilities to enforce insider trading.

5.2.1. Legislative Framework

A history of regulation of insider trading in the United Kingdom (UK) can be summarized as follows. The regulation of insider trading or dealing, as it is known in the UK, was until 1980 not legislated. It was done on a self-regulation basis.[271] The regulation self-

[268] Montagano (2012) IJGLS 579.
[269] Thendo Sidogi (Quantitative Analyst with the Public Investment Corporation), email personal communication, 15 June 2021 confirming that as of 15 June 2021 a total of seventeen companies were dually-listed on the JSE and LSE.
[270] Official Monetary and Financial Institutions Forum "Absa Africa Financial Markets Index 2020", available at https://www.omfif.org/wp-content/uploads/2020/10/Absa-Africa-Financial-Markets-Index-2020.pdf (accessed 15 June 2021).
[271] Rider (1978) JCCLSR 319-348.

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regulation was achieved through the City Code on Take-overs and Mergers, devised by the City Panel on Take-overs and Mergers.[272] The Code did not have the force of law,[273] implying that no legal consequences flowed from non-compliance.

Insider trading was for the first time legislated as an offence in the Companies Act 1980.[274] Its formal legislation in the 1980 Companies Act was a significant move, which made the offence of insider trading a crime.[275] The idea of regulating insider dealing was carried on in the Companies Securities (Insider Dealing) Act[276] and the Financial Services Act 1986. In 1993, insider trading became a chapter in the Criminal Justice Act, 1993.[277] The Criminal Justice Act still continues to be used to deal with aspects of insider trading and is now complimented by the Financial Services and Markets Act 2000 (FSMA), as amended by the Financial Services Act 2012, which addresses a number of market abuse offences, including insider trading.[278]

5.2.2. Regulatory Authorities: The London Stock Exchange

The London Stock Exchange (LSE) is regulated as a Recognised Investment Exchange (RIE).[279] RIE is defined as “an investment exchange which is declared by a recognition order for the time being in force to be a recognised investment exchange”.[280] To be declared an RIE, the FCA has to be satisfied that the RIE meets the necessary requirements.[281] These include the approval by the Treasury, after having considered a number of factors, including competition matters.[282] Although it provides a listing platform

[272] *Ibid.*
[273] *Ibid.*
[274] Chapter 22, sections 68-74 of the Companies Act 1980 (hereafter “UK Companies Act).
[275] Lee (1982) JCCLSR 389
[276] Chapter 8 of the Companies Securities (Insider Dealing) Act 1985 (hereafter “Insider Dealing Act”).
[277] Part V of the Criminal Justice Act 1993 (hereafter the “Criminal Justice Act").
[278] Section 118(1) read with section (118)(2)(a) of the Financial Services and Markets Act 2000 (hereafter “Financial Services and Markets Act”).
[279] London Stock Exchange “Aim Regulatory Landscape – Who’s Who”, available at https://docs.londonstockexchange.com/sites/default/files/documents/aim-landscape-infographic.pdf (accessed 15 June 2021).
[280] Financial Conduct Authority “FCA Handbook”, available at https://www.handbook.fca.org.uk/handbook/glossary/?starts-with=R (accessed 15 June 2021).
[281] Section 290 of the Financial Services and Markets Act.
[282] Section 307 of the Financial Services and Markets Act.

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for companies, also known as firms,[283] much of the monitoring and surveillance work is done by the Financial Conduct Authority (FCA),[284] which is discussed in the subsequent paragraphs. The firms are required to make transaction disclosures and report directly to the FCA.[285] The FCA believes that the "firms' unique position and proximity to their clients mean they have the ability to perform the most effective market surveillance and are the first line of defence".[286]

5.2.3. Regulatory Authorities: The Financial Conduct Authority (FCA)

The Financial Conduct Authority (FCA), previously the Financial Services Authority (FSA), is responsible for the regulation of the financial markets in the United Kingdom to ensure integrity thereof. In this regard the integrity of the financial market includes ensuring that it is not affected by market abuse, which includes insider trading.[287] It achieves this by using the laws outlined above, specifically those relating to insider trading. It works closely with licensed financial service providers in the identification of insider trading activities.[288]

5.2.3.1. Enforcement Team

The UK's FCA has its own surveillance systems, which are capable of identifying insider dealing through analysing data relating to transactions.[289] The FCA uses its investigative powers, as a tool and mechanism of enforcing insider trading regulation. Section 165 of FSMA provides that investigators can require a person to provide information or produce any documents that can assist in the investigation process.[290] The FCA can also obtain

[283] A firm is an authorized person (section 31(1) of FSMA) and authorized person is someone who has a person who has a [F1Part 4A permission] to carry on one or more regulated activities. Section 55A(1) of FSMA provides that "application for permission to carry on one or more regulated activities may be made to the appropriate regulator by – (a) an individual, (b) a body corporate, (c) a partnership, or (d) an unincorporated association".
[284] Spens "Surveillance: The FCA's expectations and toolkits", available at https://www.fca.org.uk/news/speeches/surveillance-fcas-expectations-and-toolkits (accessed 15 June 2021).
[285] *Ibid.*
[286] *Ibid.*
[287] Section 1D(2)(c) of the Financial Services Act 2012 (hereafter "UK Financial Services Act").
[288] Financial Conduct Authority "Market Abuse", available at https://www.fca.org.uk/markets/market-abuse (accessed 16 June 2021).
[289] *Ibid.*
[290] Section 165(1) of the Financial Services and Markets Act 2000.

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warrants to enter premises to obtain information or documents, which may assist in the investigation process.[291]

5.2.4. Regulatory Decisions Committee (RDC)

When the investigation has been completed, the FCA Enforcement team makes recommendations to the Regulatory Decisions Committee (RDC),[292] which is responsible for imposing administrative penalties. Although it is chaired by an employee from the FCA, the RDC is a body that is separate from the FCA. To ensure its independence and partiality, its membership is made of persons business, consumer and financial services backgrounds. The RDC is the final stage of decision-making within the FCA.[293]

5.2.5. Administrative Penalties

The Financial Services Markets Act (FSMA) empowers the FCA to impose civil and administrative penalties in relation to market abuse, which includes insider trading. Unlike the provisions of South Africa's Financial Markets Act, the UK's FSMA is not prescriptive on the percentage of the monetary penalty to be imposed, but leaves this to the discretion of the FCA. Section 123 FSMA provides that were someone is found to have committed insider trading offence, the FCA may impose a monetary penalty that it considers appropriate.[294] The FSMA further gives the FCA the alternative of publishing a statement indicating that someone was involved in insider trading, instead of imposing a monetary penalty.[295]

5.2.5.1 Determining the penalty

The imposition of penalty is based on the following principles: (1) Disgorgement, which seeks to ensure that "a firm or individual do not benefit from any breach [market abuse]"; (2) Discipline, according to which "a firm or individual should be penalised for

[291] Section 176(1)-(3) of the Financial Services and Markets Act 2000.
[292] Financial Conduct Authority "Regulatory Decisions Committee (RDC)", available at https://thefca.cc/about/committees/regulatory-decisions-committee-rdc.html (accessed 2 June 2021).
[293] Financial Conduct Authority "Regulatory Decisions Committee (RDC)", available at https://www.fca.org.uk/about/committees/regulatory-decisions-committee-rdc (accessed 2 June 2021).
[294] Section 123(1) of the Financial Services and Markets Act 2000.
[295] Section 123(3) of the Financial Services and Markets Act 2000.

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wrongdoing"; and (3) Deterrence, the aim of which is to ensure that "any penalty imposed should deter the firm or individual who committed the breach , and others, from committing further or similar breaches".[296]

The FCA uses two factors to determine the penalty figure to be imposed. These factors are "the seriousness of the market abuse and whether or not the market abuse was referable [linked] to the individual's employment".[297]

The penalty figure imposed where the *market abuse* was linked to the individual's employment is calculated on the basis of the following principles.

(a) The greater of a figure based on a percentage of the individual's "relevant income":[298] The relevant income is defined as "the gross amount of all benefits received by the individual from the employment in connection with which the market abuse occurred for the period of the market abuse".[299]

(b) "A multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as a direct result of the market abuse (the "profit multiple")".[300]

(c) "For market abuse cases which the FCA assesses to be on a seriousness level 4 or 5, £100,000 may be imposed".[301]

There are five levels considered when imposing penalties, which consist of percentage range and profit multiple range. "The more serious the market abuse, the higher the level."[302] These levels are: "(a) level 1 – 0%, profit multiple of 0; (b) level 2 – 10%, profit multiple of 1;(c) level 3 – 20%, profit multiple of 2; (d) level 4 – 30%, profit multiple of 3; and (e) level 5 – 40%, profit multiple of 4".[303]

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[296] Section 6.5.2 (G) of the FCA The Decision Procedure and Penalties Manual.
[297] Section 6.5C.2 (1) of the FCA The Decision Procedure and Penalties Manual.
[298] Section 6.5C.2 (2)(a) of the FCA The Decision Procedure and Penalties Manual.
[299] Section 6.5C.2 (4) of the FCA The Decision Procedure and Penalties Manual.
[300] Section 6.5C.2 (2)(b) of the FCA The Decision Procedure and Penalties Manual.
[301] Section 6.5C.2 (2)(c) of the FCA The Decision Procedure and Penalties Manual.
[302] Section 6.5C.2 (8) of the FCA The Decision Procedure and Penalties Manual.
[303] *Ibid.*

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The FCA is likely to consider the following as "level 4 factors" or "level 5 factors": (a) "the level of benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the market abuse was significant"; (b) "the market abuse had a serious adverse effect on the orderliness of, or confidence in, markets"; (c) "the market abuse was committed on multiple occasions"; (d) "the individual breached a position of trust"; (e) "the individual has a prominent position in the market"; and (f) "the market abuse was committed deliberately or recklessly".[304]

The approach is slightly different where the abuse was not referable to the individual's employment. In this instance, the penalty would be based on: (a) "multiple of the profit made or loss avoided by the individual for his own benefit, or for the benefit of other individuals where the individual has been instrumental in achieving that benefit, as direct result of the market abuse"; and (b) "for market abuse cases which the FCA assesses to be seriousness level 4 or 5, £100,000".[305]

Moreover, in this instances only the profit range would apply and not the percentage range.[306] To illustrate this point, the levels would be like this: (a) level 1 – profit multiple of 0;(b) level 2 – profit multiple of 1;(c) level 3 – profit multiple of 2;(d) level 4 – profit multiple of 3; and (e) level 5 – profit multiple of 4.

5.2.5.2 Mitigating factors

The FCA looks at the following aggravating and mitigating factors, to arrive at an appropriate penalty:

"(a) the conduct of the individual in bringing (or failing to bring) quickly, effectively and completely the market abuse to the FCA's attention (or the attention of other regulatory authorities, where relevant); (b) the degree of cooperation the individual showed during the investigation of the market abuse; (c) whether the individual assists the FCA in action taken against other individuals for market abuse and/or in criminal proceedings; (d) whether the individual has arranged his resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty; (e) whether the individual had previously been told about the FCA's concerns in relation to the

304 Section 6.5C.2 (15) of the FCA The Decision Procedure and Penalties Manual.
305 Section 6.5C.2 (3) of the FCA The Decision Procedure and Penalties Manual.
306 Section 6.5C.2 (8) of the FCA The Decision Procedure and Penalties Manual.

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issue; (f) the previous disciplinary record and general compliance history of the individual; (g) action taken against the individual by other domestic or international regulatory authorities that is relevant to the market abuse in question; (h) whether FCA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials; and (i) whether the individual agreed to undertake training subsequent to the market abuse."[307]

5.2.6. Criminal penalties

The criminal penalties in relation to insider trading are provided for in terms of part V of the Criminal Justice Act (CJA) 1993. Section 61 of CJA provides that an "individual guilty of insider dealing shall be liable on summary conviction, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding six months or to both; or on conviction on indictment, to a fine or imprisonment for a term not exceeding seven years or to both."[308] The Courts' attitude is that "those who involve themselves in insider dealing are criminals: no more and no less."[309]

5.2.6.1. Appealing criminal penalty

On conviction by the lower court, the offender can appeal to the higher court, as demonstrated by the insider trading case of *R (Financial Conduct Authority) v Fabiana Abdel-Malek & Walid Choucair*.[310] In this case, Fabiana Abdel-Malek and Walid Choucair were each convicted of five offences of insider dealing in 2013/4 and were sentenced to 3 years' imprisonment. They appealed their sentences. The facts of the case were briefly as follows: Fabiana Abdel-Malek was working as a senior compliance officer for UBS AG investment bank in London office. During that time she accessed inside information on UBS AG compliance systems and passed it to her family friend Walid Choucair, who was an experienced financial securities trader.[311] Abdel-Malek was convicted of passing inside

[307] Section 6.5C.3(2) of the FCA The Decision Procedure and Penalties Manual.
[308] Section 61(1) of Criminal Justice Act 1993.
[309] *R v McQuoid* (2009) 4 All ER 388 at par 8.
[310] 2020 EWCA (Crim) 1730 (hereafter "Fabiana Abdel-Malek").
[311] *Fabiana Abdel-Malek* at par 7 to 17.

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information to Choucair in respect of five transactions, which Choucair used to trade and made a profit of approximately, £1.4 million.[312]

The prosecution argued that Choucair had insider information, which he received from Abel-Malek and that the information enabled him to trade on each of these five transactions. As a result, the prosecution argued, he made significant profits. The prosecution further argued that the relevant price sensitive information was obtained by from Abdel-Malek, who as an insider, by accessing the computer database on the GLS and Banker Portal.[313] The court dismissed the appeal and ordered that the two complete the remainder of their sentence. Since the criminalization of insider trading, As of June 2019, the FCA, had secured 36 convictions in relation to insider dealing.[314]

5.3. MAURITIUS

The discussion in relation to Mauritius focuses on the legislative framework upon which insider trading regulation is enforced, the regulatory authorities charged with the responsibilities to enforce insider trading, comparison with South Africa and the conclusion. Over the years, it has attracted investors from across the globe and was amongst the top 5 small developing island states to receive foreign direct investment in 2019. Small Island Development States are defined as countries located in the Caribbean, the Pacific, and the Atlantic, Indian Ocean and South China Sea (AIS).[315] The country's stock exchange, the Stock Exchange of Mauritius (SEM) has also seen an increase in the number of companies listing on its platform.[316] By way of example, between 2015 and 2020, a total of 124 new securities were listed on SEM, with 47 of these companies classified as foreign.[317]

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[312] Financial Conduct Authority "Two found guilty of insider dealing", available at https://www.fca.org.uk/news/press-releases/two-found-guilty-insider-dealing (accessed 4 June 2021).
[313] *Fabiana Abdel-Malek* at par 21.
[314] Financial Conduct Authority "Two found guilty of insider dealing", available at https://www.fca.org.uk/news/press-releases/two-found-guilty-insider-dealing (accessed 4 June 2021). In this regard, see item 2 of "Notes to Editors".
[315] United Nations "About Small Island Developing States", available at https://www.un.org/ohrlls/content/about-small-island-developing-states (accessed 30 June 2021).
[316] The Stock Exchange of Mauritius "Annual Report 2020" available at https://www.stockexchangeofmauritius.com/media/5186/sem-areport-2020-single-page.pdf (accessed 15 June 2021).
[317] *Ibid.*

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5.3.1. Legislative Framework

There are two primary legislations that regulate insider trading in Mauritius. These are the Securities Act[318] 2005 and the Financial Services Act.[319] The former gives directives to the SEM to investigate and report on the progress of investigation relating to suspected cases of insider trading.[320] The latter gives powers to the Mauritius Financial Services Commission to, *inter alia* investigate and impose penalties for the offences of insider trading in Mauritius.[321] The role of both the SEM and FSC in the regulation of insider trading are discussed in the succeeding paragraphs.

The role of the different authorities in the regulation of insider trading is clearly articulated.

5.3.2. Regulatory Authorities: Securities Exchange of Mauritius (SEM)

The SEM has regulatory functions assigned to it in terms of the Securities Act. The relevant functions for the purpose of this discussion, include

(i) "investigating possible market abuses, including insider dealing and fraudulent behaviour"; and[322]

(ii) "investigating misconduct or apparent misconduct by market participants and their representatives that could seriously affect investors or other participating organisations and promptly reporting to the Commission on these instances of misconduct."[323]

The SEM monitors listed companies and, at times, conducts site visits of these companies to inspect their books, records and accounts.[324] It is a legislative requirement for the SEM to inform the FSC – the equivalent of South Africa's FSCA – of the investigations it is carrying; the nature of nature of the investigations; the people who are the subject of the

[318] Securities Act 2005 (hereafter "Securities Act").
[319] Financial Services Act 2007 (hereafter "Financial Services Act")
[320] Section 24(1)(e) of the Securities Act.
[321] Section 6(g) of the Financial Services Act.
[322] Section 24(1)(e) of the Securities Act.
[323] Section 24(1)(d) of the Securities Act.
[324] Stock Exchange of Mauritius "Regulations & Governance", available at https://www.stockexchangeofmauritius.com/regulations-governance/regulatory-framework (accessed 17 June 2021).

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investigation; and to advise the commission of the status of the investigations.[325] This is contrary to the South African situation, where there is no legislative requirement for the stock exchanges to conduct investigations and report their investigations to the FSCA.

The SEM further uses listing regulations, which companies listed on its platform are required to comply with and which have the effect of regulating insider trading. These regulations include the requirement that:

(i) A listed company should inform the SEM and shareholders of any information relating to the company, "might reasonably be expected materially to affect market activity in and the price of its [the company's] securities";[326] and

(ii) A listed company must not give price sensitive information to any third party before notifying SEM or unless SEM has granted a permission to do so.[327]

5.3.3. Regulatory Authorities: Financial Services Commission Mauritius

The Financial Services Commission of Mauritius (FSC) was established in 2001 and is responsible for enforcing several financial sector laws.[328] These laws include the Securities Act and the Financial Services Act. The Commission employs several tools to deal with the offence of insider trading. As already indicated in the preceding paragraphs, SEM is largely responsible for the detection of insider trading activities on its trading platform and is also required to report suspected insider trading to the FSC.

5.3.3.1. Power to investigate

One of the functions of FSC is to carry out investigations and take measures to suppress market abuse.[329] The investigations are ordered by the FSC Chief Executive Officer (CEO) if he/she has reasonable cause to believe that there is contravention of the law. The investigative powers of the commission extend to instances of market abuse, of

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[325] Section 24(1) of the Securities Act.
[326] Rule 11.3(c) of the Listing Rules of the Stock Exchange of Mauritius.
[327] Rule 11.4 of the Listing Rules of the Stock Exchange of Mauritius.
[328] Financial Services Commission "Who We Are", available at https://www.fscmauritius.org/en/about-us/who-we-are (accessed 17 June 2021).
[329] Section 6(g) of the Financial Services Act 2007.

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which insider trading is part.[330] More generally, the powers of the Commission to investigate are in terms of section 44 of the Financial Services Act.[331] Upon conclusion of the investigations the CEO may decide to refer the matter to the EC.[332]

5.3.3.2. Enforcement Committee

The Enforcement Committee (EC) is an internal committee established by the FSC.[333] Its main function is to consider and evaluate the outcomes of the investigations referred to it by the FSC CEO, together with the recommended penalties. It has the power to impose administrative penalties.[334]

5.3.4. Penalties: administrative

The offence of insider trading in Mauritius carries both administrative penalty and imprisonment. As discussed above, the EC is responsible for the imposition of administrative penalties.

5.3.4.1. Determining the penalty

As with the UK, in Mauritius, administrative penalties hang on three principles. These are discipline, which seeks to bring about an appropriate penal element; disgorgement, the aim of which is "to ensure that a licensee does not directly benefit financially from any breach or wrongdoing whether in terms of profit made or loss avoided"[335]; and deterrence, whose aim is to ensure that the administrative penalty deters the offenders from committing such wrongdoing.[336] The calculation of the administrative penalty or fine, as it is called in Mauritius, considers the profit gained or loss avoided by the insider trader offender. Section 111 provides that such a fine "shall be an amount of not more than 3

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[330] Section 2.2 of the Enforcement Manual of the Financial Services Commission of Mauritius (hereafter "Mauritius Enforcement Manual").
[331] Section 44 (1) of the Financial Services Act
[332] Section 5.3 of the Mauritius Enforcement Manual.
[333] Section 52 of the Financial Services Act. Also see section 5.5 of the Mauritius Enforcement Manual.
[334] Section 7(v) of the Financial Services Act.
[335] Section 2.3 of the FSC's Administrative Penalties Regulatory Framework.
[336] *Ibid.*

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times the amount of any profit gained or loss avoided by any person as a result of the offence".[337]

The profit gained or loss avoided is calculated as "the difference between the price at which the initial trade was effected and the average market price of the security in the 10 trading days following general disclosure of the information".[338] Alternatively, "where the securities position has been liquidated within those 10 trading days, the profit gained or loss avoided would be the difference between the price at which the initial trade has been effected and the price actually obtained to the extent that the price yields a greater profit than what would be obtained at the average market price."[339] Where a person commits the offence of communicating inside information, "the penalty would be the consideration received for having communicated the information".[340]

5.3.4.2. Mitigating factors

The Act is silent on the mitigating factors to be considered when imposing a fine, penalty on individuals involved in insider trading. However, the FSC's Administrative Penalties Regulatory Framework provides an idea of some of the factors that may be considered. These include, "the nature, seriousness and impact of the breach(es); the conduct of the licensee after becoming aware of the breach(es); the previous disciplinary record and compliance history of the licensee; action taken by other domestic or international regulatory authorities; and other additional factors"[341], which include "the need to encourage and enforce high standards of business conduct so as to deter future abuse and to bolster confidence in the financial services sector of Mauritius".[342]

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[337] Section 111(5) of the Securities Act of 2005.
[338] Section 111(6)(a)(i) of the Securities Act of 2005.
[339] Section 111(6)(a)(ii) of the Securities Act of 2005.
[340] Section 111(6)(b) of the Securities Act of 2005.
[341] Section 2.2 of the FSC's Administrative Penalties Regulatiory Framework.
[342] Section 2.2.4 (b) of the FSC's Administrative Penalties Regulatiory Framework.

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5.3.5. Criminal penalties

The courts are responsible for imposition of a prison sentence, which may not exceed 10 years as was the case in *Police v Ashvedh Beeharry.*[343] The facts in Ashvedh Beeharry were briefly summarized in the case as follows:

"The accused, whilst being a member of the Task Force, set up by the Financial Services Commission (FSC), which held a meeting on the 11 November 2009 with the representatives of the Stock Exchange of Mauritius (SEM), Compagnie d'Investissement et de Development Ltee (CIDL) and CIEL Investment Ltd (CIL) and where it was decided that CIDL would purchase the minority shares of Ireland Blyth Limited (IBL) and the suspension of dealings in the shares would be notified after the close of business by SEM on 12 November 2009 in the evening, sold his 11,000 shares of IBL at Rs.72 each at the Central Market of the Stock Exchange of Mauritius on the 12 November 2009 at 10.29 hours. It is to be noted that the accused had previously purchased those shares at the price of Rs.62.- each."[344] *Ashvedh Beeharry* was sentenced to twelve months' imprisonment. However, the sentence was suspended after the court considered mitigating factors – but would have sent a stern warning that being involved in insider trading in Mauritius is a punishable offence.[345]

5.3.6. Financial Services Review Panel and Judicial Review

The Financial Services Review Panel (FSRP) is an avenue through which decisions of the EC can be challenged. A decision can be challenged by applying to the Panel within 21 days of the decision notice been given to him.[346] If any person wishes to challenge the decision of the Panel, such a person may apply to the Supreme Court for a judicial review.[347]

5.4. CONCLUSION

Both the UK and Mauritius are actively involved in the regulation of insider trading in their respective jurisdictions. Financial sector/services regulators of these countries are also

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343 *Police v Ashvedh Beeharry* 2017 UPW 138.
344 *Police v Ashvedh Beeharry* at par 7.
345 *Ibid.*
346 Section 53(4) of the Financial Services Act 2007. Also see section 5.33 of the Mauritius Enforcement Manual.
347 Section 5.39 of the Mauritius Enforcement Manual.

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empowered in terms of various legislation to regulate insider trading in their respective jurisdictions. In Mauritius, both the stock exchange and the Financial Services Commission are clearly involved in the regulation of insider trading, largely from surveillance and detection point of view.[348] The Mauritian situation is similar to South Africa, where the stock exchange conducts surveillance and, upon detection of insider trading, pass the information on to the FSCA.[349] However, in the case of the UK, there is little evidence of the stock exchange's active involvement in the regulation of insider trading. The FCA is the foremost regulator of insider trading, doing both the detection, investigation, and imposition of penalties, as well as bringing in criminal charges.[350] Legislations in the UK provide for both administrative penalties and criminal liabilities. The UK, as discussed above, has a record of successful criminal prosecution of insider trading. The same cannot be said about Mauritius, where there is only one known case of successful criminal prosecution and South Africa where no such record does not exist. An outstanding feature in the Mauritian law is that it clearly outlines the responsibilities of and the process to be followed by that country's stock exchange (SEM) on detecting and reporting instances of market abuse to that country's financial sector regulator, the FSC. This is not the case in South Africa and the United Kingdom. However, in South Africa, there is a practice in terms of which the JSE notifies the FSCA of suspected insider trading for further investigations.

In the UK, the FCA has the power to institute criminal prosecution – something that is not familiar in South Africa and Mauritius.

Both UK and Mauritius have clear principles that guide the imposition of administrative penalties. These principles, which are the same in both jurisdictions include the discipline, the aim of which is to ensure that administrative penalties carry punishment; disgorgement, whose aim is to make it a point that no one benefits financially from insider trading; and lastly, deterrence, whose aim is to ensure that the penalty deters offenders

[348] See paras 5.3.2 and 5.3.3 *supra*.
[349] See par 3.3.1 *supra*.
[350] See par 5.2.3 *supra.*

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from committing insider trading.[351] These principles are not clearly outlined in the South African case.

All these countries have clear principles of calculating administrative penalty for insider trading. It must be pointed out, however, that in meting out administrative penalty, the UK distinguishes between those who commit the offence while carrying out their duties and those who commit such offence not in the process of carrying their duties.[352] Both Mauritius and South Africa can adopt this approach to enhance their regulation of insider trading/dealing in their jurisdictions.

Chapter six below will focus on some of the gaps identified in the regulation of insider trading in South Africa, informed by some of the observations from the United Kingdom and Mauritius. I will further make recommendations for consideration, which aim to improve the regulation of insider trading in South Africa.

[351] See par 5.2.5.1 and 5.3.4.1 *supra.*
[352] See par 5.2.5.1 *supra.*

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CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1. THE MISSING LINK

It is clear from the preceding discussion that South Africa's efforts to regulate insider trading have a long history and can be traced back to almost fifty years.[353] The fact that South Africa is not alone in its efforts to regulate insider trading, is a clear indication that the challenge transcends borders – that it is a global phenomenon, as shown in the discussion on UK and Mauritius.[354]

With its history of regulating insider trading, there are still shortcomings. For an example, the 1973 Companies Act in which the idea of insider trading was first introduced, sought to make this a criminal offence. Years following its introduction, no one was convicted of the crime of insider trading.[355] Over the succeeding years, legislation was amended to find the best ways of dealing with this offence.[356] The current legislation empowers regulatory authorities to pursue civil or administrative penalties, as well as criminal penalties.[357]

The FSCA and its predecessors have successfully imposed administrative penalties on persons – both natural and juristic – who were found to have committed the offence of insider trading.[358] Although the legislation clearly provides for imposition of criminal penalties there does not seem to be a desire to make use of this option. The court in *Pather* stated that in relation to insider trading that "a criminal prosecution is a time-consuming and difficult activity. Prosecutors do not always possess the necessary specialised knowledge or skills or expertise"[359] and that "the stigma attached to a criminal conviction will always or often mean that industry professionals are likely to fight a relatively minor contravention."[360] Moreover, it can be argued that reluctance is possibly

[353] See paras 2.2 *supra.*
[354] See par 5.2 and 5.3 *supra.*
[355] See paras 2.2.1 and 2.3.1 *supra.*
[356] See paras 2.2 and 3.2 *supra.*
[357] See section 109 of the Financial Markets Act and par 3.2 *supra.*
[358] See par 4.3 *supra.*
[359] *Pather* at par 33.
[360] *Ibid.*

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due to the requirement in criminal proceedings to prove all the elements of crime beyond reasonable doubt in order to secure a conviction.[361] These elements include: A conduct (which is wrongful and unlawful), which caused the crime (causation), the capacity of the accused to appreciate the wrongfulness of his conduct and fault on the side of the accused (fault could be either intention or negligence.[362]

It needs be stated that the law is silent on who should institute criminal proceedings whenever the offence of insider trading has been committed. The JSE, as discussed in the preceding chapters, is responsible for surveillance.[363] Once it has established some facts and an offence of insider trading is suspected, the JSE passes the information on to the FSCA. The FSCA investigates and if it can prove on the balance of probabilities that the offence was committed, imposes administrative penalty.[364]

The question is this: what happens when the evidence is such that it warrants criminal investigation? Who must report this to the South Africa police services and the National Prosecuting Authority? The FSCA is of the view that such responsibility does not lie with it, but that it can provide the required information to assist the Police and Prosecuting Authority in their investigation and prosecution.[365] This is clearly a visible gap if this situation is compared to the UK, where the FCA is responsible for instituting investigation into insider trading and approaching the courts for imposition of criminal penalty.

6.2. RECOMMENDATIONS

The recommendation below will investigate two aspects, namely legislative and regulatory authorities. Recommendation relating to the legislative framework does not aim to address the substantive issues, but to simply investigate how a reformed legislative

[361] Grant (2018) "Critical Criminal Law", available at http://www.saflii.org/images/criticalcrimlaw.pdf (accessed 21 June 2021).
[362] *Ibid.*
[363] See par 4.2.1 *supra.*
[364] Section 82(1)(a) and (b) of the Financial Markets Act.
[365] Financial Sector Conduct Authority *Report by FSCA*, available at https://www.fsca.co.za/News%20 Documents/FSCA%20Press%20Release%20-%20Regulatory%20Action%20Forum%20-%2026-07-2018 .pdf (accessed 29 May 2021).

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framework can assist the regulatory authorities to carry out their responsibilities of addressing the offence of insider trading.

6.2.1. Legislative Framework: Criminal penalties

The legislators should consider reviewing the legislation to make it clear the following in relation to the criminal aspects of insider trading:

(i) The requirement to report insider trading to the National Prosecution Authority (NPA).

(ii) The FSCA must be responsible for reporting the insider trading offence to the NPA.

(iii) Anyone, other than the FSCA, may report the offence of insider trading to the NPA.

(iv) The NPA will have the discretion to do any of the following: Prosecute, Investigate further, or no investigation.

6.2.2. Legislative Framework: Other penalties

The legislators should insert a provision in the current legislations, which explicitly requires the FSCA to impose other penalties, other than criminal and civil penalties. These could include:

(i) **Debarment:** The provision for debarment is currently presented in broad terms in relation to contravention of financial sector laws. Section 153 of the Financial Sector Regulation provides for debarment as a form of punishment. Section 14 of the Financial Advisory and Intermediary Services Act[366] makes a provision for debarment of representatives of the financial services provider who have contravened the provisions of this Act. There is an opportunity to have a similar provision in the Financial Markets Act. In this regard, the option of debarment should be inserted in section 82 of the Financial Markets Act,

[366] Section 14(1) and (2) of the Financial Advisory and Intermediary Services Act, 37 of 2002 (hereafter "Financial Advisory and Intermediary Services Act").

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which deals with liability resulting from insider trading. By being specific, the legislators will eliminate any potential doubt on the options available for imposition on those who have contravened the insider trading provision of the Financial Markets Act. As an example of certainty, the Companies Act of 2008 provides for the process, including *locus standi* for bringing the application for declaration of delinquency against directors.[367]

(ii) **Probation:** Probation is defined as "a period of time when a criminal must behave well and not commit any more crimes in order to avoid being sent to prison"[368] or "being watched for a period of time during which one must behave well in order not to be seriously punished after having made a serious mistake or done something bad".[369] Those found to have committed the insider trading offence can be placed under probation for a specific period to observe their behaviour. If they behave and do not commit a similar offence within the specified period, they can avoid much harsher sentences. The Companies Act has a provision, which allows for the placement of directors under probation.[370] A similar provision can be included under the liability resulting from insider trading.

(iii) **Insider Trading Offenders' List:** "A good name is to be chosen rather than great riches", so says the book of Proverbs[371]. No one wants to be associated with a person with tarnished reputation. Establishing the offender's list[372], where the names of individuals found to have contravened insider trading are listed, could assist in reducing instances of insider trading. People in general,

[367] Section 162 of the South African Companies Act provides for the procedure and locus standi for the application to declare a director a delinquent or for the director to be placed under probation.
[368] Cambridge Dictionary "Probation", available at https://dictionary.cambridge.org/dictionary/english/probation (accessed 21 June 2021).
[369] Merriam-Webster Dictionary "Probation", available at https://www.merriam-webster.com/dictionary/on%20probation (accessed 21 June 2021).
[370] Section 162(7) of the Companies Act.
[371] Proverbs 22:1, King James Version (KJV).
[372] The idea of Offenders' List is not foreign to South Africa. There is a National Register for Sex Offenders, which has been established in terms of Chapter 6 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, the aim of which is to curb the prevalence of sexual offences in South Africa.

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and professionals in particular, thrive on their good name and if the name is tarnished, they stand to lose much more. This is because their reputation would precede them, wherever they go.

6.2.3. The Regulatory Authorities: The Financial Sector Conduct Authority

The FSCA should continue with its responsibility of investigating cases of insider trading. It must still have the powers to impose administrative penalties for anyone found, on a balance of probabilities, to have contravened the insider trading legislation. In its Perimeter Report, released in 2020,[373] the FSCA stated that it was investigating its ability to exercise criminal prosecution in relation to unlicensed entities, particularly those misusing customer funds. The investigation should go beyond this; it must include criminal prosecution in relation to insider trading.

There must clear legislation-induced collaboration between the FSCA and other law enforcement agencies. These include the Financial Intelligence Centre, the Directorate for Priority Crimes Investigation, and the National Prosecution Authority. The FSCA must be required to inform the DPCI of insider trading offences they're investigating and when these are concluded, upon which the DPCI will determine whether to proceed with criminal investigation.

6.2.4. The Regulatory Authorities: The Financial Intelligence Centre

The Financial Intelligence Centre (FIC) is tasked with countering money-laundering, a type of financial crime. There is a requirement in terms of the Financial Intelligence Centre Act[374] to report suspicious transactions and series of transactions, which could be pointing to money laundering. FSCA's predecessor, FSB is mentioned as one of the accountable institutions, which are expected to monitor and report suspicious transactions.[375] Transaction patterns that indicate insider trading is regarded as one of the key factors to

[373] Financial Sector Conduct Authority's Perimeter Report 2020, at page 11.
[374] Section 29 of the Financial Intelligence Centre Act 38 of 2001 (hereafter "Financial Intelligence Act").
[375] Schedule 2(1) of the Financial Intelligence Act

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consider whenever monitoring potentially suspicious and unusual transactions.[376] In this regard, and for the purpose of collaboration, it is recommended that subsection V be inserted in section 29 of the FIC Act to read as follows:

Suspicious and unusual transactions

29. (1) A person who carries on a business or is in charge of or manages a business or who is employed by the business or who knows or suspects that

(a) the business has received or is about to receive the proceeds of unlawful

(b) a transaction or series of transactions to which the business is a party

(i)…

(ii)…

(iii)…

(iv)…

(v) may be relevant to the investigation of market abuse legislation administered by the Financial Sector Conduct Authority

(c) ... must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

6.2.5. The Regulatory Authorities: The National Prosecution Authority

The NPA should play an active role in the prosecution of insider trading offences in South Africa. The NPA's involvement should be at three levels. These are investigation, asset forfeiture and prosecution.

(i) **Investigating Directorate (ID):** During 2019, the President of the Republic of South Africa, Mr Cyril Ramaphosa signed a proclamation to establish the

[376] Financial Intelligence Centre "Impact of the FIC Act on Unauthorized Users of Exchange", available at https://www.fic.gov.za/Documents/FIC_JSE%20Article_275mm%20x%20420mm_V3.pdf (accessed 30 June 2021).

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Investigating Directorate (ID) within the NPA.[377] The proclamation empowers the ID to investigate offences that include contraventions of various statutes, including the Prevention and Combating of Corrupt Activities Act of 2004, the Financial Intelligence Centre Act of 2001 and any other statutory offence involving dishonesty.[378] The ID mandate should expand to include investigating statutory offence of insider trading.

(ii) **Asset Forfeiture Unit (AFU) and the Special Commercial Crimes Unit (SCCU):** In its current form, the AFU has no arresting or prosecuting powers. It has the power to carry out forfeitures and institute preservation orders. The purpose of the forfeiture will be to forfeit to the state any property, which is the proceeds of crime.[379] The preservation order will aim to prevent the person suspected of insider trading from dealing with the property suspected to have been obtained from the proceeds of the crime of insider trading.[380] In both instances, the only requirement will be for it to be proved that, on a balance of probabilities, the property has been obtained from proceeds of crime – the crime of insider trading.

(iii) **The Special Commercial Crimes Unit and Court:** The scope of the Specialised Commercial Unit and Courts should include the investigation and prosecution of insider trading. Insider Trading is a very complicated offence and technical, financial and accounting skills will be necessary to ensure successful prosecution. The Specialised Commercial Crimes Court already deals with other commercial crimes, which should make it easier to deal with the offence of insider trading.

[377] President of the Republic of South Africa. (2019, April 4). National Prosecuting Authority Act (32/1998): Establishment of an Investigating Directorate in the Office of the National Director of Public Prosecutions (Proclamation no. 20 of 2019). Government Gazette, 42383.
[378] *Ibid.*
[379] Section 38(2)(b) Prevention of Organised Crime Act 121 of 1998 (hereafter "Prevention of Organised Crime Act).
[380] Montesh (2009*)* ACAJCV 31-40.

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