WHAT CONSTITUTES "INSIDE INFORMATION" FOR PURPOSES OF INSIDER TRADING?

Zietsman v Directorate of Market Abuse
2016 1 SA 218 (GP)

OPSOMMING

Wat is "binnekennis" vir doeleindes van binnekennishandel

Die aantekening is ŉ analise van *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP) aan die hand van die moderne benadering ten opsigte van wetsuitleg om te bepaal of inligting wat aan die appellante gekommunikeer is binnekennis was, wat vereis word vir die misdryf van handel op binnekennis. *Zietsman* skep ŉ welkome presedent wat

aanbevelingswaardig is as 'n behoorlik-beredeneerde uitspraak wat ondersteun moet word. Die regter volg 'n kontekstuele en doelmatigheidsbenadering tot wetsuitleg om die betekenis van woorde te bepaal wat nie in die herroepe "Securities Services Act" (SSA) omskryf is nie. Hierdie benadering tot wetsuitleg neem die beleid ten opsigte van die wetgewing in ag asook die grondwetlike oogmerke met die totstandkoming van die Wet, in hierdie geval billike, effektiewe en deursigtige finansiële markte. Verder, as gevolg van die gebrek aan gesag ten opsigte van binnekennishandel in Suid-Afrika, volg die hof die vereistes van artikel 233 van die Grondwet en verwys na buitelandse reg by die uitleg van die bepalings oor binnekennishandel. Die hof wys daarop dat die inligting wat die vermeende binnkenners gehad het nie in 'n finale stadium hoef te wees om as presiese inligting te kwalifiseer nie, solank as wat daar 'n realistiese vooruitsig was dat die handeling wat die oorsprong van die binnekennis was redelikerwys sal realiseer. Tweedens sal inligting spesifiek wees as dit geïdentifiseer, uitgewys en ondubbelsinnig uitgedruk kan word. Derdens moet die inligting wat die binnekenner het die effek hê om die aandeelprys wesenlik te beïnvloed, gebaseer op die toets van die redelike belegger wat daardie inligting in ag sal neem wat waarskynlik 'n wesenlike effek op die aandeelprys sal hê. Laastens sal die geloof van die vermeende binnekenner dat die inligting wat hy of sy het nie binnekennis is nie, nie 'n verweer wees wat op redelike gronde gebaseer is nie.

1 Introduction

Insider trading continues to be rife across the world. The Ontario Securities Commission in a settlement hearing in the matter of *MCJC Holdings Inc and Michael Cowpland* (12 February 2002) 8 referred to insider trading as "a cancer that erodes public confidence in the capital markets as . . . one of the most serious diseases our capital markets face" (available at http://bit.ly/2c5TcyH). In South Africa, in the period between 2 March 1999 and 15 June 2015, the market abuse regulator, namely, the Financial Service Board (FSB), investigated and closed two hundred and sixty seven market-abuse cases, two hundred and thirty four of which were insider-trading matters (see "Past market abuse investigation", available at www.fsb.co.za). The mandate to investigate alleged market-abuse offences such as insider-trading cases in South Africa vests with the Directorate of Market Abuse (DMA). The DMA is a committee established in terms of section 12 of the repealed Insider Trading Act 135 of 1998, and is intended to exercise the FSB's powers, which include investigating and instituting civil proceedings relating to market-abuse offences (see s 85 of the Financial Markets Act 19 of 2012 (FMA)). The DMA may refer possible contraventions of the law regulating market-abuse to either the Enforcement Committee (EC) for institution of enforcement actions against market-abuse offenders (see s 6A(2) of the Financial Institution (Protection of Funds) Act 28 of 2001 as amended by the Financial Services Laws General Amendment Act 22 of 2008) or to the National Prosecuting Authority for criminal prosecution (see "Departments-Market Abuse" available at www.fsb.co.za). The EC is an administrative body that falls under the control of the FSB and is established in terms of section 10(3) of the Financial Services Board Act 97 of 1990, to assist with the effective enforcement of law administered by the FSB (see also s 99 of the FMA and *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) para 50). Recently, the Pretoria High Court delivered a ground-breaking judgment on insider trading in *Zietsman v Directorate of Market Abuse* 2016 1 SA 218 (GP) (*Zietsman*). *Zietsman* is the first insider-trading case where the EC's determination was taken on appeal. The appeal focused on, amongst others, the question of whether information that was communicated to the appellants prior to their purchase of shares in a listed

company amounted to inside information that is required for purposes of insider-trading. Therefore, *Zietsman* afforded the Pretoria High Court an opportunity of a first-time judicial consideration on what constitutes "inside information" that is required for purposes of insider trading. *Zietsman* is therefore notable, authoritative and worthy of analysis.

The charges against the appellants in *Zietsman* were instituted under the provisions of the now repealed Securities Services Act 36 of 2004 (SSA). Insider trading is currently prohibited in terms of the Financial Markets Act 19 of 2012 (FMA) which came into effect on 3 June 2013. This note refers to both the SSA and the FMA; first, due to similarities in some of the insider-trading provisions in both statutes; second, because both statutes have similar policy reasons for proscribing insider trading; and lastly, reference is made to the two statutes as a way of extending this case analysis to the current dispensation under the FMA. Furthermore, the note provides an analysis of the meaning of "inside information" in *Zietsman*, against the backdrop of legislative policy by using the modern approach to statutory construction, namely, purposive construction and the contextual approach to statutes. This approach to statutory construction is used to determine whether knowledge that came to the attention of the appellants constituted the required "inside information" for purposes of insider trading. The manifest purpose of an enactment was long ago given effect to in South Africa by the (then) Appellate Division in *Principal Immigration Officer v Hawabu* 1936 AD 26 33, where the court pointed out that

> "[w]here the wording of a provision of an enactment is not clear or is ambiguous when read within the context of the Act, the provision should be interpreted as having a meaning which gives effect to the manifest purpose of the enactment".

Purposive construction of statutes was also given effect to by Schutz JA in *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) para 16 who stated that "[o]ur courts have, over many years, striven to give effect to the policy or object or purpose of legislation".

In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) 943I–944A, Smalberger JA with reference to the manifest purpose of a statute pointed out that

> "where [the application of the literal interpretation principle] results in ambiguity and one seeks to determine which of more than one meaning was intended by the Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective".

The need to give effect to the context in which the words in a statute occur, even where such words are not ambiguous and unclear, was emphasised by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) 527D. Ngcobo J further quoted with approval (527A–H) the dissenting judgment of Schreiner JA in *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A) 662G–H 664H who pointed out that the

> "[contextual approach] . . . is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. . . the legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be interpreted without sufficient attention to the contextual scene".

Recently the Supreme Court of Appeal in *Natal Joint Municipal Pension Funds v Endumeni Municipality* 2012 4 SA 593 (SCA) (*Natal Pension Fund*) acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that "[i]n resolving a problem, [where the language of a statute leads to ambiguity] the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation" (610B–C).

In the United Kingdom, the Chancery Division of the High Court, per Lord Greene MR in *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd* 1949 Ch D 121 130, stated the following on the contextual approach to statutory construction:

> "The real question to be decided is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

Currently, purposive construction of insider-trading legislation is expressly provided for in the FMA. Section 104 requires courts and regulatory bodies tasked with enforcement of the FMA to interpret and apply the Act in a manner that gives effect to its objects as set out in section 2. The repealed SSA does not have a provision similar to section 104 of the FMA. However, both the SSA and FMA have similar policy reasons for proscribing market abuse that are entrenched in their object clauses and must be given effect to when interpreting the provisions of each statute. These policy reasons include the realisation of fair, efficient and transparent financial markets and the promotion of investor confidence (ss 2 SSA and FMA). Therefore, market fairness and equal footing trading, amongst others, must serve as important guiding principles in the interpretation of the insider trading provisions of the SSA and FMA. Furthermore, the constitutional demands of statutory interpretation must be adhered to in interpreting the provisions of the SSA and FMA. Section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) imposes a mandatory requirement for every piece of legislation to be interpreted in a manner that promotes the spirit and purpose of the Bill of Rights (see *Batho Star Fishing* 527H–528C; *Pather v Financial Service Board* [2014] 3 All SA 208 (GP) para 66; and *Juleiga Daniels v Robin Grieve Campbell* 2004 5 SA 331 CC paras 43–44). The Constitution also requires courts to follow an interpretation that is consistent with international law (see s 233; *Seton Co v Silveroak Industries Ltd* 2000 2 SA 215 (T) 229D–E and *Mzeku v Volkswagen SA (Pty) Ltd* 2001 4 SA 1009 (LAC) 1020–1023). It is on the basis of the above exposition that this note follows the purposeful interpretation of statutes and the constitutional demands to statutory interpretation, to offer an analysis of *Zietsman* on the core issue that was on appeal, namely, whether the appellants had "inside information" or not.

An insider trader can commit four types of insider-trading offences, namely, the dealing offence, the disclosure of inside information offence, the offence of encouraging another to trade, and that of discouraging another from trading (see s 73(1)–(4) of SSA and s 78(1)–(5) of FMA). This note deals only with the dealing offence. The appellants in Zietsman were charged with two counts of the dealing offence, namely, dealing on one's own account and that of another person's account. The liability requirements for commission of these dealing offences are (a) possession of the inside information; (b) insider's knowledge of his or her possession of inside information; and (c) dealing in listed securities

either by the insider for him- or herself or for another person (see ss 73(1)(a) and 73(2)(a) of SSA and 78(1)(a) and 78(2)(a) of FMA). The first appellant, Mr Zietsman, was charged with the offence of dealing for another person. The second appellant, Harrison and White Investment (Pty) Ltd (H & W (Pty) Ltd), was charged with the offence of dealing for one's own account. This note focuses only on one requirement of the insider dealing offence, namely, inside information that must be possessed by an insider, with specific reference to its meaning. The appellants' defence was *inter alia* that they did not, on reasonable grounds, believe that the information they possessed constituted inside information that is required for purposes of insider trading. (This note does not refer to the other statutory defences that are available to an insider who has dealt for another person or for their own account.)

2 Facts

In late 2010 and early 2011, the second appellant, H & W (Pty) Ltd, authorised the chairperson of its board of directors, Mr Zietsman, and its managing director, Mr Ralston, to purchase a majority interest in Africa Cellular Towers Ltd (ACT Ltd), a company listed on the alternative exchange of the Johannesburg Stock Exchange (JSE). The majority interest was to be held in one of the subsidiaries of H & W (Pty) Ltd, namely, AJP Investment (Pty) Ltd (AJP). The purchase of a majority interest was intended to give effect to the second appellant's plan to acquire a controlling stake in the shares of ACT Ltd. In pursuit of this acquisition plan, H & W (Pty) Ltd conducted a valuation of the business of ACT Ltd, through a consulting company, DP Cohen Consulting (Pty) Ltd (DPCC (Pty) Ltd). Meetings were held between ACT Ltd, H & W (Pty) Ltd and DPCC (Pty) Ltd. In a meeting with the appellants on 26 January 2011, ACT Ltd disclosed information about a debt funding of R99 million that they managed to secure from the Industrial Development Corporation (IDC). Further clarification of this information was offered to the appellants in another meeting held on 1 February 2011, with ACT Ltd and DPCC (Pty) Ltd. Furthermore, DPCC (Pty) Ltd compiled the Cohen Valuation Report, dated 9 February 2011, which expressly referred to the loan and the identity of the lender and which was furnished to the appellants. The appellants considered the information about the IDC loan as a disclosure in principle, since the loan was only provisionally approved by IDC. On 28 January 2011, ACT Ltd issued a first Stock Exchange News Service (SENS) bulletin, advising the public that it had secured debt funding. The identity of the lender and the amount of the loan were not disclosed in the first SENS bulletin. ACT Ltd only disclosed the full details of this loan by publishing a second SENS bulletin on 11 March 2011.

In the period between February and 10 March 2011, a day prior to publication of a second SENS bulletin of ACT Ltd, the first appellant, while in possession of the information regarding the IDC loan and acting on behalf of the second appellant, H & W (Pty) Ltd, acquired 19 491 977 shares in ACT Ltd. After the publication of a second SENS bulletin, the share price of ACT Ltd increased by 54% from 11 cents to an average of 17 cents per share. The second appellant did not resell the shares that it acquired in ACT Ltd. This was in line with the acquisition of a control plan it had in the shares of ACT Ltd. The potential profit that the second appellant would have made, had ACT Ltd not been liquidated, would have been R1 203 819. Subsequent to the appellant's acquisition of ACT Ltd shares, the FSB through the DMA initiated an investigation into the appellants'

alleged act of contravening the insider trading provisions under the SSA. The appellants allegedly bought shares while in possession of the non-public information about the IDC loan, which had a material effect on the value of ACT Ltd shares. The EC found the appellants guilty of insider trading and imposed an administrative penalty of R1 million. The appellants appealed against this decision on various grounds, *inter alia*, that the EC erred in finding them guilty of committing the insider trading offence.

The main question before the Pretoria High Court which is relevant for purposes of this note was whether the information that was communicated to the appellants by ACT Ltd, prior to publication of the second SENS bulletin, constituted inside information that is required for purposes of insider trading. The court also dealt with two other secondary issues that are not dealt with in this note, namely, the dispute relating to the appellants' liability for payment of an administrative penalty and the calculation thereof. Secondly, the dispute about the referral procedure adopted by the EC and whether or not it was flawed for non-compliance with the procedure that is prescribed in section 6A–D of the Financial Institution (Protection of Funds) Act 28 of 2001. The information which was communicated to the appellants by ACT Ltd formed part of the approval letter that was issued to ACT Ltd by IDC. The letter was to the effect that IDC had made a funding package to the value of R99 million available to ACT Ltd. ACT Ltd did not communicate the terms and conditions of its loan agreement with IDC to the appellants. The appellants alleged that the information that was communicated to them was imprecise and non-specific. Furthermore, that it was vague, uncertain and unreliable. They also alleged that the approval of the IDC loan was merely provisional as no loan agreement had been concluded in writing at the time the information was communicated to them. The appellants further contended that they purchased shares based on the information that was already made known to the public through the publication of the first SENS bulletin and that there was no material difference between the information disclosed in the first SENS bulletin and that which was known to them. Furthermore, they argued that they did not know or believe that the information they had constituted inside information. The appellants therefore contended that the information they had did not constitute inside information.

3 Decision and analysis

3 1 What constitutes inside information?

The definitional elements of "inside information" in the repealed SSA have been re-enacted in the FMA and are therefore the same. Sections 72 and 77 of the SSA and FMA respectively define "inside information" as

> "specific or precise information, which has not been made public and which—
> (a) is obtained or learned as an insider; and
> (b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market".

The analysis of whether information that was communicated to the appellants in *Zietsman* constituted "inside information" in line with sections 72 and 77 will be guided by the manifest purposes of the SSA and FMA as entrenched in the object clauses in section 2 of each of these statutes. Therefore, the meaning that is attached to the phrase "inside information" will, amongst others, give effect to

market fairness and equal footing trading. A similar trend in the use of purposeful statutory construction can be gleaned from the judgment of the European Court of Justice (ECJ) in *Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* [2009] EUECJ C-45/08 (23 December 2009) (*Spector*) para 62, where the court pointed out that:

> "The question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information."

(See also *Markus Gelt v Daimler AG* [2012] EUECJ C-19/11 para 33 (*Gelt*).)

In *Zietsman*, Avvakoumides AJ (with Tuchten J concurring) relied, in the first place, on the definition section of the SSA to give meaning to the words "inside information". Secondly, due to the dearth of authorities in the South African insider trading law on what constitutes "inside information" that is required for purposes of insider trading, the court followed the constitutional demand on statutory interpretation by relying on foreign law to assist with the interpretation of the provisions of the SSA that regulate insider trading (232E para 77). The court appreciated the differences between the wording of the South African and foreign insider trading provisions, which may warrant an exercise of caution when considering comparable case law (236F–G).

It is commendable that the court in *Zietsman* used both the European Union (EU) and United Kingdom (UK) as jurisdictions for comparative analysis on what constitutes "inside information". The selection of these two comparable jurisdictions is laudable as both countries, like South Africa, are members of the Group of 20 (G20), a forum of Finance Ministers and Central Bank Governors from 20 major economies, whose objectives include, amongst others, "promoting financial regulations that reduce risks and prevent future financial crises" (see "The European Union's role in G20" (April 2015) 13 39 available at http://bit.ly/2kKKlEZ). Secondly, both jurisdictions, similar to South Africa, are members of the International Organisation of Securities Commission (IOSCO), a multilateral regulatory network of regulators, whose objectives include enhancing investor protection and promoting investor confidence in the integrity of the securities markets (see "The European Union's role in international economic fora: Paper 6: The IOSCO" (July 2015) 9 24, available at http://bit.ly/2kuyQCJ). Thirdly, the EU and UK, like South Africa, use market fairness, efficiency and transparency as policy reasons for proscribing insider trading (see Recital 2 of Regulation (EU) 596/2014; s 3(1) of the Financial Services and Market Act 2000 (UK FSMA) and *Zietsman* 236G). Fourthly, both the EU and UK, similar to South Africa, have inside information as one of the requirements for contravention of insider trading and all three jurisdictions require information to be precise in nature in order to qualify as inside information (see a 7(1)(a) of Regulation (EU) 596/2014; s 118C (2) of the UK FSMA and ss 72 and 77 of the SSA and FMA respectively). Lastly and most importantly, the phrase "inside information" has been subject to judicial consideration in both the EU and UK (see *Gelt*'s case and *Hannam v Financial Conduct Authority* [2014] UKUT 0233 (TCC) (*Hannam*). It is for these reasons that this note also uses the EU and UK as comparable jurisdictions on what constitutes "inside information" for purposes of insider trading.

The EU has recently endorsed the final version of the market abuse regulation, Regulation 596/2014, which became applicable on 3 July 2016. Regulation (EU) 596/2014 repealed, amongst others, the Market Abuse Directive 2003/6/EC and the Commission Directive 2003/124/EC (see a 37, recitals 3 and 87 of Regulation (EU) 596/2014 of the European Parliament and the Council of the European Union of 16 April 2014). Article 7(1)(a) of Regulation (EU) 596/2014 defines inside information as

> "information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments".

The UK, an EU member state until its recent vote to exit the EU, commonly referred to as Brexit (see Perry *et al* "Brexit: Legal implications" 24/06/2016 available at http://bit.ly/2k6AtDd), has incorporated EU regulations and directives into its national law. These regulations and directives will continue to form part of UK law until it invokes article 50 of the Lisbon Treaty, which is expected to be triggered by the end of March 2017 and completed in 2019. It remains to be seen what the effect of article 50 will be on UK insider trading law. The UK may, for legal certainty and continuity, retain in part or in full the EU directives and regulations or completely change them (see also the Financial Conduct Authority's statement on the European Union referendum result 27/06/2016 available at www.the-fca.org.uk and Hunt and Wheeler "Brexit: All you need to know about UK leaving EU" available at www.bbc.com). UK market abuse is regulated under section 118C of the UK FSMA which, similar to the EU, requires inside information (a) to be of a precise nature; (b) not to be generally available; (c) to relate to the issuer of qualifying investments or to one or more qualifying investments; and (d) if made public, to have a significant effect on the price of the qualifying investments or related investments (see s 118C of the UK FSMA).

The above exposition reflects the underlying legislative provisions governing the meaning of inside information in South Africa, the EU and the UK. All three jurisdictions require information to be precise, non-public and price sensitive to qualify as inside information. Information in South Africa may either be precise or specific to qualify as inside information. The EU and UK only provide for precision and not specificity in their definitional elements of inside information. However, specificity in both jurisdictions is incorporated as one of the limbs to what constitutes "precise information". Information in the UK and EU is precise if, amongst others, it is "specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the price of qualifying investments or related investments" (see a 7(2) of Regulation 596/2014 and s 118C (5)(b) of the UK FSMA). Furthermore, South Africa also requires the insider dealer to have obtained or learned of inside information as an insider. This is because South Africa follows a person-connection approach, in terms of which information is required to be learned or obtained by the dealer in his or her capacity either as a primary insider, who has obtained inside information by virtue of his or her position as "a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or having access to such information by virtue of employment, office or profession" or by virtue of being a secondary insider who has inside information and knows that the direct or indirect source of such information was the primary insider (see

the definitions of an insider and inside information in ss 72 and 77 of the SSA and FMA respectively and Blackman *et al Commentary on the Companies Act* Vol 1 (Revision Service 10 2010) 5-394-14-17). The EU and UK follow the information-connection approach and require the information possessed to relate to the issuers of financial instruments. The offender's connection to the issuer of financial instruments is irrelevant (see a 7(1) Regulation (EU) 596/2014 and s 118C of the UK FSMA). The requirement that the information must be learned or obtained in one's capacity as an insider was not in dispute in *Zietsman.* The appellants were secondary insiders who obtained information about the possible IDC loan of R99 million from a primary insider, the CEO of ACT Ltd, Mr Jacques De Villiers, who communicated such information on 26 January 2011 in a meeting between the board of directors of ACT Ltd and the appellants (*Zietsman* 223C–G paras 14 17–18).

Unlike South Africa, the EU and UK also require information to relate to the issuer of financial instruments or to one or more financial instruments to qualify as inside information. This requirement has been referred to as market information, a term that has been used to refer to "information about events or circumstances which affects the market for a company's securities" (see Fleischer *et al* "An inquiry into the responsibility to disclose market information" 1973 *Univ Penn LR* 798 799; see also Warren "The regulation of insider trading in the European Community" 1991 *W&LLR* 1037 1058). Market information is not one of the definitional elements of "inside information" in South Africa. However, in committing insider trading an insider is required, amongst others, to have dealt in securities that are listed on the regulated market to which the inside information relates (see s 73 of SSA and s 78 of FMA). This requirement has correctly been referred to as an inept requirement because market information "relates to the business of the company or to some matter that will increase or decrease the value of the business, (and that) it never relates (only) to the securities themselves" (Jooste "A critique of the insider trading provisions of the 2004 Securities Services Act" 2006 *SALJ* 437 451). It is submitted, in line with section 3.4 of the JSE Listing Requirements of 2016 (JSE Listing Requirements) that market information is price-sensitive information that relates directly or indirectly to the issuer of securities and has an effect on the price or value of shares. In *Zietsman* the alleged "inside information" was about the loan made by IDC to ACT Ltd, a company listed on the alternative exchange of JSE (222E para 10), and such information had the capacity to materially affect the share price of ACT Ltd as the terms of the loan were less onerous than those of a commercial bank and disclosure of such information resulted in a spike in ACT Ltd's share price (229E para 57 229H–I para 60).

An analysis of whether information that was communicated to the appellants in *Zietsman* constituted "inside information" therefore is confined only to the following definitional elements of "inside information", namely, (a) specific or precise information; (b) non-public information; and (c) price sensitive information. The fourth definitional element, namely, that inside information must be learned as an insider, was not in dispute in *Zietsman* as the appellants were secondary insiders who learned of the inside information from the primary insider, namely, the CEO of ACT Ltd. This requirement is therefore not discussed in this note. Furthermore, the analysis is guided by purposeful interpretation of the provisions of sections 72 and 77 of the SSA and FMA respectively. Therefore, market fairness and equal footing trading serve as guiding tools in the interpretation

of the phrase "inside information". Thus, the meaning attached to the words under consideration will give effect to the purpose of both the SSA and FMA, as entrenched in the object clauses of these statutes.

3 1 1 Specific or precise information

The SSA and FMA are both silent on the meaning of specific or precise information. The dictionary meaning of the words "specific" and "precise" offers less legal certainty in the interpretation of the phrase "inside information". "Specificity" is defined as something that is clearly defined or identified, whilst "precision" is defined as something that is marked with exactness, accuracy and detail (see www.oxforddictionaries.com). The courts will therefore have to determine the meaning of these words on a case-to-case basis as what is specific and precise in one case may not be so in another case (see JSE booklet *Insider trading and other market abuses (including the effective management of price sensitive information*) (revised January 2016) 5 available at www.fsb.co.za and *Choudhury v Public Prosecutor* [1980–1981] SLR 146 151C–D (*Choudhury*). In *Zietsman*, Avvakoumides AJ followed the constitutional demand of statutory interpretation by relying on EU and UK laws to assist with the interpretation of the words "precise" and "specific" information. The court's reliance on the EU and UK is laudable, firstly, because article 7(2) of Regulation 596/2014 provides more legal certainty on what constitutes "precise information" and, secondly, as the meaning of these words has been subject to judicial consideration in both the EU and UK (see *Gelt* and *Hannam*). Article 7(2) outlines two limbs that are at the heart of the inquiry into what constitutes information of a precise nature. The UK FSMA also contains these two limbs. For information to be precise in nature, it must firstly "indicate a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur". Secondly information is precise if "it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments" (see a 7(2) of Regulation 596/2014 and s 118C(5) UK FSMA). These two limbs were held to be essential elements that are mutually independent and each must be satisfied for information to qualify as precise information (see *Gelt* para 29 and *Hannam* paras 36 45).

The two limbs to article 7(2) (then a 1(1) of the repealed Commission Directive 2003/124/EC (Directive 2003/124)) were tested by the ECJ in deciding a case referred to it by the German Federal Supreme court in *Gelt.* The ECJ determined whether intermediate steps in a protracted process intended to generate a future event amounted to inside information. The protracted decision-making process in *Gelt* was about the early resignation of Mr Schrempp, the chairperson of the board of Daimler AG. This information was communicated to the board over a period of two months, but was only disclosed to the market after Daimler's supervisory board approved Mr Schremmp's resignation. The announcement of the supervisory board's decision resulted in a sharp increase in the value of Daimler shares and a loss for Mr Gelt and a number of investors who sold their shares prior to the disclosure of the resignation. The ECJ pointed out that the test to determine whether a protracted decision-making process leading to a future event qualified as precise information requiring disclosure, is to make an overall assessment of the existing factors to determine whether there is a realistic prospect that the event or circumstance will come into existence (para 56).

The ECJ further rejected the "probability magnitude test" by pointing out that the expression "may reasonably be expected to exist" in article 1(1) of the repealed Directive 2003/124, cannot be interpreted as requiring proof of a high probability of the event coming into existence (para 46), nor can precise information include information concerning circumstances and events the occurrence of which is implausible (para 48). Furthermore, the ECJ used the *Spector* test to point out that if the terms "set of circumstances" and "event" were to disregard the intermediate steps in a protracted process, this would remove the obligation to disclose such information, resulting in an unfair advantageous position for parties in possession of such information *vis-à-vis* other investors who would be without the same information (see paras 35–36).

In *Jean-Bernard Lafonta v Autorité des marches financiers* C-628/13, a recent case referred to the ECJ by the Paris Court of Appeal, the ECJ once more relied on the two limbs to article 1(1) of the repealed Directive 2003/124 and held that information of a precise nature is not restricted to information that makes it possible for one to determine the likely direction of change in the price of the securities involved (para 34). The court pointed out that allowing the anticipated direction in change of price to determine the precision of information would allow the holder of such information to use the uncertainty in share price direction to justify non-disclosure of the information to the detriment of other market participants (para 36). The ECJ further held that the only information that can be referred to as imprecise information is "information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned" (para 31).

The Ontario High Court of Justice in *Green v Charterhouse Group Canada Ltd* [1973] 2 OR 677 (*Green*) considered the meaning of specific information required for commission of the insider trading offence. The shareholder agreement in *Green* required the plaintiff to offer his shares internally before he could offer them to outsiders. The plaintiff alleged that the defendant used specific confidential information about the quarter earnings of Imbrex shares and a discussion about an impending take-over from Imbrex to purchase his shares. The High Court held that the purchasers of the shares were not liable as the information was not specific as it was preliminary and uncertain at the time of the transaction (para 142). This decision was, however, reversed by the Ontario Court of Appeal, which pointed out that the information possessed by the purchasers was specific confidential information and that the word "specific" is used in contra-distinction to the word "general"; furthermore, that the state of the negotiations which had matured to a stage where the bidder was willing to offer a specific price, made the information possessed specific information ([1976] 68 DLR (3d) 592 paras 78–79; see also Johnston "Statutes-interpretation-securities-insider trading liability legislation-*Green v The Charterhouse Group Canada Ltd*" 1976 *UW Ontario LR* 239 240–241). The *Green* test was endorsed by the Singaporean Court of Criminal Appeal in *Choudhury* where the court also accepted that "specific" is used in contra-distinction to "general", that a determination of whether information is specific or not is a question of fact and that each case must be resolved on the evidence adduced (151C–D). The court held that the information Choudhury had about the financial difficulty that Ben & Co Ltd faced, which he used to sell his shares, was not generally known but was specific information that the insider may not use for his own benefit to the detriment of the investing public (151G–H). The court followed the judgment of Lee J of the

Australian Supreme Court in *Ryan v Triguboff* (1976) 1 NSWLR 588 596D–E 597E–F and held that "knowledge of a financial crisis in a company is specific information as it is capable of being pointed to, identified and unequivocally expressed" (151H). The Singaporean Court of Criminal Appeal therefore rejected the decision of the Singaporean High Court in *Choudhury v Public Prosecutor* [1980] SGHC 9, where Rajah J held that information to the effect that a company was facing a financial crisis was a matter of opinion that was subjective and could not be specific (paras 9–11).

Avvakoumides AJ in *Zietsman* correctly relied on the comparable laws of the EU and UK to hold the information about the IDC loan precise and specific. The court followed the *Gelt*, *Green* and *Choudhury* tests to determine whether information relating to an event in an intermediate phase, namely, the in principle conclusion of a loan agreement, amounted to precise or specific information which required disclosure. Relying on the test set out in *Gelt*, the court made an overall assessment of existing factors to determine whether there was a realistic prospect that the event in an intermediate phase may reasonably be expected to exist. The High Court considered numerous factors to determine whether there was a realistic prospect, at the time of communication of the information pertaining to the IDC loan, that the loan agreement would reasonably be finalised. The factors considered include that the information which was communicated to the appellants was contained in the letter from IDC, which contained information relating to approval of funding, the identity of the lender, the loan amount and the breakdown of the funding package. Furthermore, that the information about the loan agreement was expressly stated in the Cohen Valuation Report, which was made available to the appellants.

The High Court then correctly held that the mere fact that the loan agreement was not yet signed by IDC and ACT Ltd at the time of the communication of such information to the appellants, was not sufficient to hold such information imprecise and non-specific and, thus, held that the overall factors described an event which would realistically or on probabilities materialise (227F para 42). The court further held that information need not be in its final stage to qualify as specific and precise information and that its disclosure must be attributed to its precision and not to its chronological location in the process of an intermediate stage (234D–E paras 85 86). It is submitted that the court's approach in following the test set out in *Gelt* is correct and commendable. The information possessed by Mr Zietsman, even though not in its final stage, was precise as there was a realistic prospect that the loan agreement would reasonably be finalised. It is further submitted, in line with the *Green* and *Choudhury* tests, that the information about the loan agreement was specific and not general information. The information that Mr Zietsman had about the loan amount, the identity of IDC, the lender and the breakdown of the funding package, could be identified, pointed out and be unequivocally expressed, even though the agreement was not signed at the time of communication of such information to the appellants (see also *Green* paras 78–79 and *Choudhury* 51G–H). The court's decision in determining the specificity and precision of the information possessed by the appellants was in line with purposeful statutory construction as followed in *Spector*. The manifest purposes of the SSA and FMA, namely, market fairness and equal footing trading, would have been disregarded, had information communicated to the appellants been held as imprecise and non-specific. This would have removed

the duty on the appellants to refrain from trading whilst in possession of non-public information and would therefore had placed them in an unfair advantageous position to the detriment of other investors, contrary to the *Spector* test (234A para 83). Furthermore, not holding information about the IDC loan as precise and specific information would also have been contrary to the JSE Listing Requirements, which impose a number of duties on the issuer of securities, amongst others, the duty to release price-sensitive information without delay (s 3.4(a) JSE Listing Requirements, available at www.jse.co.za) and the duty to ensure simultaneous release of an announcement of price sensitive information and publication of this through SENS, where the issuers intend to release such information at a meeting of shareholders (s 3.8 JSE Listing Requirements).

3 1 2 Non-public information

The second requirement for information to qualify as inside information is that it must be non-public. The information possessed by the appellants in *Zietsman* was communicated to them prior to its publication through the second SENS Bulletin. ACT Ltd was warned about the price-sensitive nature of the information and the need to issue a cautionary statement (230C–D paras 62–63). In terms of the repealed section 74(1) of the SSA, information is regarded as having been made public if it is made public in circumstances which include, but are not limited to, the ones listed below, namely:

> "(a) When the information is published in accordance with the rules of the relevant regulated market for the purpose of informing clients and their professional advisers;
> (b) when the information is contained in records which by virtue of any enactment are open to inspection by the public; or
> (c) when the information can be readily acquired by those likely to deal in any listed securities –
> (i) to which the information relates; or
> (ii) of an issuer to which the information relates; or
> (d) when the information is derived from information which has been made public."

The provisions of section 74(1)(b)–(d) were re-enacted under section 79 of the FMA. However, the provisions of section 74(1)(a), which deal with the purpose of the publication of information, namely, "informing clients and their professional advisers", were not included in the current section 79. This exclusion is welcomed as the inclusion of these provisions would have been restrictive and may have resulted in the exclusion of other unlisted purposes (see also Luiz and Van der Linde "The Financial Markets Act 19 of 2012: Some comments on the regulation of market abuse" 2013 *SA Merc LJ* 458 462). The legislature's re-enactment in section 79 of the FMA of the phrase "include, but not limited to the ones listed below" is also welcomed. This phrase suggests that the list of information categorised as public is non-exhaustive and other circumstances not listed both in sections 74 and 79 may also be classified as public information (see also *ibid*). It is, however, submitted that the circumstances that qualify to make information public must yield accessibility of information without difficulty and without preferring certain investors to others. This submission is in line with the JSE listing requirements, which require dissemination of price-sensitive information on a real-time basis, through SENS and in line with the general principles of publication, namely, "early, equal and wide dissemination of relevant company information" (sch 9.2 JSE Listing Requirements). The submission is also in

line with the general obligation of disclosure of price-sensitive information, which is imposed on the issuers of securities who are required to disclose such information without delay (s 3.4(a) JSE Listing Requirements). This submission is further in line with the main purpose of both the SSA and FMA, namely, market fairness and equal footing trading, as prompt disclosure of information will ensure that all investors trade on an equal footing to avoid information asymmetry. The submission is also buttressed by the insider trading regulations in comparable jurisdictions. Article 17(1) of Regulation 596/2014 requires issuers of financial instruments to disclose as soon as possible inside information which directly concerns the said issuers. Article 17(1) further requires disclosure to be in a manner that yields fast access to complete and correct information. Article 17(1) further requires disclosure to be in accordance with mechanisms outlined in article 21 of Directive 2004/109/EC, namely, disclosure in a non-discriminatory manner.

In *Zietsman*, the court regarded the information possessed by the appellants prior to publication of the second SENS bulletin as price-sensitive information, which was acquired during negotiations that were covered by a non-disclosure agreement between ACT Ltd and AJP (230B–C para 62). It is submitted that the court correctly regarded information communicated to the appellants as non-public since publication of the first SENS bulletin did not contain the precise and specific price-sensitive information which ACT Ltd communicated to the appellants. It is further submitted that disclosure of such information to the appellants only was selective and contrary to the spirit and purpose of the insider-trading regulation, namely, market fairness and trading on an equal footing. Selective disclosure is also contrary to the JSE general principles of listing, namely, "early, equal and wide dissemination of relevant company information" (sch 9.2 JSE Listing Requirements).

3 1 3 Likely to have a material effect on the price of securities

The third requirement for information to constitute inside information in South Africa is that it must be price-sensitive in that its publication is likely to have a material effect on the price or value of any security listed on a regulated market (s 72 of SSA and s 77 of FMA). The EU and UK use the "significant effect test" rather than the "materiality test" to determine the price sensitive nature of information once it is published. Therefore, reference is not made to the EU and UK in analysing the meaning of the phrase "material effect on the price or value of any security". The use of the "materiality test" in South Africa is as a result of the recommendation of the King Task Group to the effect that the impact of information on the price of securities once published should be material rather than significant, as South Arica has extensive case law on the meaning of materiality (see par 3.2.2 of *The King task group final report into insider trading legislation* (1997) 10 (King). It must be pointed out that the vast judicial authority on the meaning of materiality in South African law is in the field of insurance law, specifically regarding the non-disclose of information required for the assessment of risk (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) and *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 2 SA 147 (SCA)). The words "likely" and "material" are not defined in either the repealed SSA or the FMA. Both words have been regarded as difficult concepts that are "murky" and their use in legislation has been regarded as a creation of difficult legislative provisions that call for judicial intervention in attempting to

resolve such difficulty, having regard to the underlying policy objectives of statutes that provide for such difficulty (see Miller "Staff accounting bulletin no 99: Another ill-advised foray into the murky world of qualitative materiality" 2000–2001 *Nw U LR* 361 363; Lee "The elusive concept of materiality under the US federal securities laws" 2004 *Willamette LR* 661; and Dean J in *Tillmanns Butcheries (Pty) Ltd v Australasian Meat Industries Employees Union* [1979] 27 ALR 367 380).

The word "likely" was considered in South Africa by the Labour Court in *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 SA 135 (LC) (*Tshishonga*). Pillay J interpreted "likely" in section 9(2)(b) of the Protected Disclosure Act 26 of 2000 to mean "an impropriety that can be less than a probability, but must be more than a mere possibility" (167–168 para 180). The interpretation of "likely" in a provision regulating inside information came before the UK Tribunal in *Hannam*. The UK Tribunal interpreted "likely" in section 118C(2)(c) of the UK FSMA as "a real (in contrast with fanciful) prospect of the information having an effect on the price of qualifying instruments" (para 118). It is submitted that the interpretation of the word "likely" as more than a mere possibility is in line with the main policy objectives of both the SSA and FMA, namely, market fairness and trading on an equal footing. The rationale for this submission is that information which on available evidence (in this case selective disclosure of information about the identity of the lender and the loan amount to the appellants, prior to publication of the information) is more likely to affect the share price than not, should on probabilities be classified as inside information warranting disclosure, whereas information that has no possibility of affecting the price of shares or that has an insignificant effect on the value or price of shares, should not be classified as inside information. Therefore, Avvakoumides AJ in *Zietsman* was correct in construing the word "likely" to mean "more probable than not" and in holding the information which was known to the appellants on probabilities, as likely to affect the price of ACT Ltd's shares, and furthermore in holding that non-conclusion of the loan agreement at the time of communication of the information could not warrant uncertainty or vagueness about the loan agreement as alleged by the appellants (229A–F paras 53–57).

"Materiality" is another difficult word that is not defined in the SSA and FMA. The interpretation of materiality in insurance law may be useful in assisting with the analysis of the word "material" in sections 72 and 77 of the SSA and FMA respectively. The test of materiality in the area of non-disclosure of facts in insurance law was formulated in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) (*Oudtshoorn Municipality*) and clarified in *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika* 1989 1 SA 208 (A) (*Trust Bank van Afrika*). Joubert JA in *Oudtshoorn Municipality* pointed out that the test of materiality is a reasonable man test which is not applied from the point of view of the reasonable insured nor that of the reasonable insurer, but "objectively from the point of view of the average prudent person or reasonable man"(435F–I and *Trust Bank van Afrika* 216D–G). An application of the test of materiality as outlined in *Oudtshoorn Municipality* to the word "material" in the SSA and FMA implies an objective reasonable investor test and not a sophisticated or expert investor test (see also Luiz "Insider trading—If at first you don't succeed" 1999 *SA Merc LJ* 136 142). This interpretation of materiality by using the test of an objective reasonable investor coincides with the American

interpretation of materiality in the context of financial disclosure. In *TSC Industries Inc v Northway Inc* 426 US 438 (1976) (*TSC Industries*) the Supreme Court pointed out that the test for materiality is an objective test and that material facts include "all facts which a reasonable stockholder might consider important" (445). The objective reasonable investor test is also in accord with the recent JSE quantitative and qualitative guidelines that directors of listed companies are required to apply in assessing whether information is price-sensitive and whether its impact is material in influencing the economic decision of an investor (see JSE Practice Note 2 of 2015 available at www.jse.co.za (2015 JSE Practice Note). The JSE guidelines provide a list of examples of information which is considered relevant to influence the economic decision of a reasonable investor, amongst others, the performance or expected performance of the issuers' business (*ibid*). Directors of listed companies are also required, in assessing the materiality of information, to "take into consideration the anticipated impact of information in light of (i) the whole of the issuer's activities; (ii) the reliability of the source of information; and (iii) other market variables likely to affect the relevant listed securities" (*ibid*). The 2015 JSE guidelines are welcomed, as directors of listed companies have a framework from which to operate in assessing price-sensitive information for purpose of compliance with the JSE listing requirements. Furthermore, the directors' exercise of discretion in determining the price-sensitive nature of information, as provided for in the JSE guidelines, will allow companies to consider other factors that are not listed in the guidelines (*ibid*). The 2015 guidelines are also welcomed in that the disclosure of information that influences the financial decision of an investor will ensure that directors do not "bury shareholders in an avalanche of trivial information" (*TSC Indust*ries 448–449). The reasonable investor test will therefore ensure that non-important information that has no significance on the price of shares and that can never influence the economic decision of an investor is filtered out and not considered material for purposes of disclosure (see also Krause and Brellochs "Inside information and the disclosure of inside information after *Gelt v Daimler*" 2013 *Capital Markets LJ* 283 293).

In *Zietsman*, the court applied the objective reasonable investor test in determining whether information that was communicated to the appellants had a material effect on the price of shares. The High court correctly held that the information about the identity of the lender and the loan amount had the capacity to materially affect the share price (229D para 57). The court further held that the amount of R99 million could be viewed by the reasonable investor as sufficient for a small company requiring funding and that the identity of a lender meant to a reasonable investor that the terms of a loan agreement were less onerous than those of a commercial bank (229E–F para 57).

3 2 Defence of lack of knowledge based on reasonable grounds

The appellants in *Zietsman* raised the defence that they believed on reasonable grounds that the information they possessed was not inside information. They contended that this belief was based on the fact that the information they possessed was only in the process of being approved and therefore was vague and uncertain. The court correctly held that the appellants ignored warnings about the price-sensitive nature of the information and chose to turn a blind eye, thus establishing *mens rea* in the form of *dolus* (229J–230D paras 61–63). The court further held that since section 73(2)(a) of the SSA merely required one to have knowledge of the inside information at the time of dealing, the appellants'

knowledge of the information and subsequent dealing in shares made them guilty of commission of the insider trading offence (230E–F para 64).

The court's approach in dismissing the defence raised by the appellants is commendable as the appellants' belief was not based on reasonable grounds. This defence is not available as a listed statutory defence in either the repealed SSA or the current FMA. The court, however, was correct in addressing the defence of lack of knowledge. The provisions of sections 73(1)(a) and 78(1)(a) of the SSA and FMA respectively may be interpreted as providing insider dealers with a defence to escape liability upon proving, on a balance of probabilities, lack of knowledge of their possession of inside information (see also Blackman *et al Commentary on the Companies Act* (2010 Vol 1 Revision 7) 5-394-29). It, however, is submitted that the insider's lack of knowledge must be based on a reasonable belief that the information they possessed is not inside information. The basis for escaping liability will therefore flow from the absence of one of the required elements of insider trading, namely, knowledge of possession of inside information.

The defence of lack of knowledge on reasonable grounds is available as a statutory defence in the UK under section 123(2)(a) of the UK FSMA. In order to avoid a penalty by raising this defence, the alleged insider has to demonstrate that he believed that his behaviour did not fall within the definition of market abuse and that his belief was based on reasonable grounds (s 123(2)(a)). This defence makes the alleged offender's state of mind of importance in determining his or her chances of success in escaping liability (see *David Massey v The Financial Services Authority* [2011] UKUT 49 (TCC) para 45 (*David Massey*)). It therefore is submitted that the court in *Zietsman* was correct in its approach of dismissing the appellants' defence as their basis for raising this defence carried no water. They turned a blind eye to the warnings issued, thus making their belief disingenuous and *mala fide* (*Zietsman* 236I para 97). The appellants' wishful thinking that the information they possessed was not inside information did not, therefore, amount to a reasonable ground (see also *David Massey* para 51).

The appellants could have raised the defence in terms of section 440A of the Companies Act 61 of 1973, if they could have proved on a balance of probabilities that the information they possessed was in pursuit of the completion of an affected transaction (see s 73(1)(b)(i) of SSA). The court relied on *S v Western Areas Ltd* 2004 4 SA 591 (W) para 40 to point out that reliance on the section 440A defence required lawful conduct, which the appellants lacked (232C–D para 76). It must be noted that this defence does not form part of the statutory defences under the current dispensation (see s 78 of FMA). The legislative removal of this defence is based on its unfairness to uninformed sellers before a mandatory offer is made (see cl 75 of the Explanatory Memorandum on the Financial Markets Bill, 2012). It has correctly been submitted that the removal of the section 440A defence is laudable as it was a blanket defence that allowed parties to an affected transaction to take advantage of the inside information to the detriment of uninformed sellers (see Shongwe and Ratshitanga "Insider trading" 2012 (12)8 *Without Prejudice* 34 36). The legislature replaced the section 440A defence with a safe harbour defence which is provided for by section 78(1)(b)(ii) of the FMA. An insider dealer who dealt for his or her own account, can now under the FMA escape liability if he or she can prove on a balance of probabilities: (a) that he or she was acting in pursuit of a transaction in respect of which all the parties possessed the same information; (b) that trading was limited

to parties with the same information; and (c) that the transaction was not aimed at securing a benefit from the price movement (see s 78(1)(b)(ii) of FMA). The legislative act of replacing the old 440A defence with a safe harbour one has been correctly regarded as laudable on the basis that the safe harbour defence is a more targeted defence that recognises the unfair advantage that can be taken from parties in affected transactions (Shongwe and Ratshitanga 36). It must be noted that this safe harbour defence is likely to be available to off-market traders as it will be practically impossible to comply with the section 78 provisions due to the anonymous nature of parties dealing on market (see *idem* and Luiz and Van der Linde "2013 *SA Merc LJ* 458 465).

4 Concluding remarks

Zietsman is a precedent-setting case on the meaning of the type of information that is required for commission of the insider trading offence. The judgment is commendable as authoritative and well-reasoned and thus requires support. *Zietsman* is authoritative as it provides a valuable precedent in the field of insider trading that was gleaned from comparable jurisdictions in light of South Africa's dearth of authorities on insider trading. Reliance on foreign law in interpreting South African law is in accordance with the demands of section 233 of the Constitution.

Valuable lessons and interesting precedents arising from *Zietsman* include the following, namely, that the circumstances or events surrounding information that is possessed by the alleged insider dealers need not be in its final stage for information to qualify as precise information. The existence of a realistic prospect that the act from which the information flows would reasonably be finalised, is sufficient to make information arising from an event in an intermediate phase specific and precise. Secondly, information will be specific if it can be identified, pointed to and be unequivocally expressed. Thirdly, the information possessed by the alleged insider dealer must have the capacity to materially affect the share price using the test of a reasonable investor, who will take into account information that would likely have a significant effect on the price of shares. Fourthly, the alleged insider dealer's belief that the information he or she possessed was not inside information will not be a defence if the belief was not based on reasonable grounds. Fifthly, the fact that a contract is not signed at the time of communication of information does not make the information communicated non-specific and not worthy of publication.

In conclusion, Avvakoumides AJ correctly held that there was no basis for setting aside EC's determination that the appellants dealt in ACT Ltd shares whilst they had knowledge of possession of information that was specific, precise and price-sensitive and accordingly found them guilty of insider trading (237A–C para 98). The appellants' subsequent loss of profits was held irrelevant in determining whether the information they possessed when buying shares was inside information (237I–J para 103). *Zietsman* is therefore in accord with the demands of the current section 104 of the FMA, namely, an interpretation of the provisions of the FMA in a manner that gives effect to the purpose of the Act. The High Court in *Zietsman* ensured efficiency of the markets and trading by investors on an equal footing, by holding that information that arose from the events that were not final at the time of its selective disclosure is inside information.

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