THE EFFICACY OF LEGISLATION AND INSTITUTIONS AIMED AT REGULATING INSIDER TRADING IN SOUTH AFRICA

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ABSTRACT

Insider trading should be regulated and prohibited to ensure the effective operation of securities market. South Africa has witnessed several amendments of law intended to strengthen the insider dealing prohibitions, however these changes have resulted in few civil settlements, low administrative sanctions and insignificant criminal convictions. The main research objectives of this study are to investigate the efficacy of the legislation, institutions and strategies aimed at regulating insider trading in South Africa. The study used the textual analysis method and the desktop research approach, whilst drawing on the unified misappropriation theory. The findings of the study indicates that both the legislative shortcomings and the proposed solutions pointed to the importance of ensuring that offences are easier to prove and the need of the ability of the authourities to discern the nature of insider trading contraventions. The research also argues for contemporary, prudent, business and ethically informed alternative insider trading enforcement strategies. The argumentation for a pragmatic position for the enforcement of insider trading revealed the importance of the three-pronged utilisation of insider trading remedies, with the urgent need to enhance successful criminal prosecutions. Strengthening criminal sanctioning methods would help set national legal precedence and enhance the deterrence of insider trading offences. Whilst insider trading establishments' challenges entail staffing, apparatus, operational and structural restrictions, the proposed strategies to these limitations strengthens the institutional capacity of establishments that enforce insider trading sanctions in South Africa. The envisaged legislative, institutional and enforcement solutions would enhance the potential for successful criminal convictions, strengthen insider trading legislation and help maintain the integrity and stability of local financial markets. Overally, the study's challenges and the suggested solutions shows that the current legislative, institutional and enforcement limitations hinders-, whilst the envisaged resolutions improves the efficacy of the legislation and institutions aimed at regulating insider trading.

KEY WORDS: Insider trading legislation; institution regulating insider trading; South Africa

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DEDICATION

To my sister and my mother -Trecia and Mankopodi Ginnet Mashupye for their sacrifice, inspiration and support throughout the time I spent doing my Masters in Law.

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CHAPTER 1: INTRODUCTION

1.1. Purpose of the study

The overarching and main purpose of this study is to investigate the efficacy or the extent of the efficiency of legislation and institutions aimed at regulating insider trading in South Africa. The research examines the limitations in the legislation enforcing insider trading, and it relatedly also analyses the institutional limitations in the core establishments that enforces insider trading? The context of the limitations provides the study with the impetus to explore both how legislation that enforce insider trading can be strengthened as well as the strategies that can be used to strengthen institutions that enforce insider trading sanctions. The South African insider trading regulations foregrounds, three enforcement mechanisms of sanctioning insider trading offences through criminal penalties, civil settlements and administrative remedies. Given these regulatory enforcement tools, the study seeks to explore the most pragmatic position for the enforcement of insider trading sanctions.

1.2. Context of the study

In a comprehensive survey of 103 countries with stock markets, Bhattacharya and Daouk noted that the existence and enforcement of insider trading are characteristic features of global securities markets.[1] Insider trading regulations were originally formulated in the United States of America in 1934 – with the Securities and Exchange Commission (SEC) having the main responsibility of enforcing insider trading regulations.[2] The European Union community through the Insider Dealing Directive implemented insider trading prohibiting legislation in 1989, with France having initiated similar legislation, earlier, in 1970.[3] The UK followed comparable

[1] U Bhattacharya & H Daouk 'The World Price of Insider Trading' (2002) 57/1 *Journal of Finance* 75 at 78.
[2] I Clacher, D Hillier and S Lhaopadchan 'Corporate insider trading: a literature review' (2009) 38/143 *Revista Española de Financiación y Contabilidad* 373 at 387; K Opoku *What is really wrong with insider trading?* (unpublished Master of Law minor dissertation, University of Cape Town, 2007) 9.
[3] R C Alexander '*Insider dealing and money laundering'* (2007) xv; Opoku 2007 op cit 11.

initiatives two years later. A year later South Africa introduced its first overt insider trading laws under the Companies Act 61 of 1973.[4]

For the last half century South Africa has experienced several amendments and introduction of different pieces of legislations aimed at combating insider trading practices. Similar insider trading enforcement trends have been noted in Australia during the same period.[5] The global prevalence of insider trading prohibitions has been noted as critical for effective and efficient securities markets.[6] Thus insider trading laws have become a central feature of global financial markets, that are recognised as a means for fighting financial market abuse practices.[7]

Despite the numerous legislative changes, which started with Companies Act 61 of 1973, subsequent amendments in 1989 and 1990, the Insider Trading and Securities Services legislations to the Financial Markets Act 19 of 2012 and the recently enacted Financial Sector Regulation Act 9 of 2017, insider dealing activities are still prevalent in South Africa.[8] Such kinds of market abuse practices are also prominent and rife across global financial markets.[9] In spite of the strengthening of insider trading legislation enforcement, what is disturbing is the recurring and worrisome sentiment in the literature concerning the unsuccessful or relatively low prosecution rates.[10] Even after subsequent re-enactments scholars have been puzzled by the

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[4] Bhattacharya & Daouk 2002 op cit 88; provide a global historical genesis of insider trading legislation which is acknowledged in South Africa by K Ojah, S Muhanji & O Kodongo 'Insider trading laws and price informativeness in emerging stock markets: The South African case' (2020) 43 *Emerging Markets Review* 1 at 2; H Chitimira 'A historical overview of the regulation of market abuse in South Africa (2014a) 17/3 *PER/PELJ* 937 at 937.

[5] P F Hanrahan 'Deterring white-collar crime: Insights from Australia's insider trading penalties regime' (2017) 11/2-3 *Law and Financial Markets Review* 60 at 63.

[6] This perspective is shared in the work of Ojah, Muhanji & Kodongo 2020 op cit 2; Chitimira 2014a op cit 962; H Kawadza 'A step towards the harmonization of the regulation of financial misconduct in BRICS: A comparison of the Chinese and South African regimes for the prohibition of insider trading' (2018) 62/3 *Journal of African Law* 357; Nothemba Lugaju *The effectiveness of insider trading regulation in South Africa* (unpublished LLM Research report, University of Pretoria, 2018) 27.

[7] Chitimira 2014a op cit 937; Lugaju 2018 op cit 27.

[8] A chronology of the local insider trading legislations and its ineffectiveness is provided by Lugaju 2018 op cit 15-16.

[9] T Morojane 'What constitutes inside information for purposes of insider trading: Zietsman V Directorate of Market Abuse' (2017) 80/3. *THRHR-Journal of Contemporary Roman-Dutch Law* 507.

[10] This viewpoint is frequently recurring in the earliest published scholarly work up to date; N Bhana 'Take-over announcements and insider trading activity on the Johannesburg Stock Exchange' (1987) 18/4 *South African Journal of Business Management* 201. Johannesburg Stock Exchange '*Insider trading and other market abuses (Including the effective management of price sensitive information)'.* (2015) 4; Lugaju 2018 op cit 15; U Bhattacharya & H Daouk 'When no law is better than a good law' (2009) 13 *Review of Finance* 578.

seemingly ‘few civil settlements and criminal convictions being successfully obtained’.[11] The prevalence of such challenges in South Africa and even in some of the most advanced states with progressive insider trading prohibition legislation such as the United States of America, United Kingdom and New Zealand is a cause for concern.[12]

Given the fact that South Africa has criminal, administrative and civil sanctions that can be effected by different state authorities and establishments this research is interested in understanding the effectiveness of legislations, institutions and enforcement approaches aimed at regulating insider trading. This research focus emanates from the diverging local business law scholarly views that regard local insider trading legislation as being ‘amongst the progressive and equitable in the World[13]’ and is regarded as ‘salutary’.[14] Yet other academics claim that the statutes have ‘remained insufficient and less dissuasive for deterrence purposes’.[15] Relatedly other scholars have firmly asserted that ‘regulation prohibiting insider trading [in South Africa] has failed’.[16] Because of such argumentation digression the study intends to explore insider trading legislation, feasible positions for the enforcement of insider trading sanctions and the institutional limitations of establishments mandated with sanctioning this proscribed practice.

Even in the United States ‘there is still much work to be done, particularly on enforcement and regulation’.[17] A slightly similar position is also noted by New Zealand scholars who argue that ‘enforceability is key’ for insider trading laws to be

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[11] Chitimira 2014a op cit 959.
[12] N Reamer and J Downing ‘Fraud, market manipulation and insider trading’ In Norton Reamer, & Jesse Downing, *Investment: A history* (2016) 147-147; B Frijns, A Gibert & A Tourani-Rad, A. ‘Do criminal sanctions deter insider trading?’ (2013) 48 *The Financial Review* 206; Bhana 1987 op cit 198. J N van der Walt *The definitions of 'inside information' and 'insider' in the Financial Markets Act 19 of 2012* (unpublished PhD thesis, Stellenbosch University, 2019) 17; JSE 2015 op cit 4.
[13] JSE 2015 op cit 4; PC Osode ‘The new South African Insider Trading Act: Sound law reform or legislative overkill?’ (2000) 44/2 *J.A.L.* 262.
[14] Osode 2000 op cit 262.
[15] T T Mabina & H Chitimira ‘A comparative synopsis of the statutory prohibition of insider trading in Namibia and South Africa’ (2019) 9/2 *Juridical Tribune* 495.
[16] H Kawadza ‘A discussion of some aspects of the regimes for the regulations of insider dealing in South Africa and the United States of America’ (2015a) 59/2 *Journal of African Law* 369; See Lugaju 2018 *LLM Research report* 16 who similarly argues that several local insider dealing legislation amendments have ‘remained defective’ and with ‘new deficiencies’.
[17] Reamer & Downing 2016 op cit 147.

effective.[18] Relatedly Du and Wei's empirical study of global markets also indicates that amongst other factors '... enforcement of existing laws and regulations' helps deter insider trading prevalence.[19] The challenge of securities law enforceability is also claimed to be higher in emerging markets.[20] As stated earlier this research focuses on South African legal framework aspects as well as the institutions mandated with enforcement to examine the legislation and institution enforcing insider trading, their limitations, strategies and approaches that can be utilised for effective insider trading sanctioning. Such a legal prognosis will draw from both local and international literature perspectives, prominent insider trading cases as well as the unified misappropriation theory.

Given this mandate the research will engage pertinent financial law literature and local and international legislations and prominent insider trading cases in discussing the key insider trading debates as well as illustrating the four research objectives framing this study. The unified misappropriation theory will enable the study to explore approaches for strengthening local insider trading legislation and institutional capacity as well examine the most prudent approach for the enforcement of insider trading sanctions. A qualitative textual analysis and desktop research of pertinent business law texts and documents will be used to investigate the efficacy of insider trading legislation and institutional capacity in South Africa,

1.3. Problem statement

Whilst the business law debates about insider trading have been 'long standing and inconclusive',[21] most scholars alongside a large number of modern states and their legislations argue for the integrity, fairness and effectiveness of prohibiting insider trading. On the other hand the line of arguments in Manne's writing encourages insider trading as a harmless crime that promotes free, efficient markets and

[18] Frijns, Gibert & Tourani-Rad 2013 op cit 208; See Bhattacharya & Daouk 2002 *Journal of Finance* 90, who also admit that the global enforcement of law is a challenge.
[19] J Du & S Wei 'Does insider trading raise market volatility' (2004) *The Economic Journal* 114/498 916 at 921.
[20] Bhattacharya & Daouk 2009 op cit 578.
[21] L N Beny 'Do insider trading laws matter? Some preliminary comparative evidence' (2005) 7/1 *American Law and Economics Review, Special issue on Comparative law* 145.

executives' entrepreneurial initiatives typical of liberal economies.[22] Regardless of the scholarly reasoning in Manne's propositions and intentions, progressive states enforce insider trading practices and so does South Africa. In fact, there are more benefits and advantages of the latter than the former perspective, with recent scholarly views portraying insider trading to be a 'cancer that erodes public confidence in the capital markets ... one of the most serious diseases our capital markets face'.[23] It is the general consensus across the globe that insider trading is wrongful and harmful that motivates the need for this study to examine the efficiency of the South African legislation and institutions in regulating this practice.

South Africa has had several insider trading legislation enactments, re-enactment and reformulations aimed at sanctioning this unethical business practice. The same can be said of the European Community, the United States, Hong Kong, Australia, the United Kingdom and New Zealand where insider trading is proscribed.[24]

However, a historical overview of the development of local insider trading acts, and of interest and motivating this study since the enactment of the 1973 insider trading legislation is the lack of prosecution under this provision.[25] This status quo has not changed even today – almost half a century later – with most of the current literature maintaining that monitoring and controlling or enforcing insider trading is a difficult mandate.[26] Even Osode alluded to the fact that the local market professionals, financial press officials and regulatory policy-makers once described South African securities markets as an "insider haven".[27] Such sentiments stimulate the need for a study that investigates the extent of the effectiveness of legislations and institutions aimed at regulating insider trading in South Africa. The low prosecution rates and unsuccessful sanctioning of insider trading through criminal, civil and administrative mechanisms inspires this study to examine the legislation and the institutions that

[22] A strong and in-depth critique of insider trading regulation is contained in Manne's work; H G Manne 'In defense of insider trading' 1966 *Harvard Business Review* 116; H G Manne 'Insider trading: Hayek, virtual markets and the dog that did not bark' 2005 *The Journal of Corporation Law* 169.
[23] T Morajane 2017 op cit 507.
[24] Du & Wei 2004 op cit 919; Bhana 1987 op cit 198.
[25] See Bhana 1987 op cit 201; Osode 2000 op cit 247.
[26] H Kawadza 'A discussion of some aspects of the regimes for the regulations of insider dealing in South Africa and the United States of America' (2015a) 59/2 *Journal of African Law* 384; Mabina & Chitimira 2019 op cit 499; Bhattacharya & Daouk 2009 op cit 578.
[27] Osode 2000 op cit 247.

enforce insider trading, their limitations and suggests approaches that can be used to effectively enforce and strengthen insider trading prohibition.

Earliest financial law studies undertaken in South Africa have described the challenges facing the local stock exchange market within the national insider trading framework.[28] Relatedly, Osode and Jooste provided a critique of the then insider trading legislation at the beginning of the 21st century.[29] There have been comparative analysis studies of local insider trading legislation with other regional nations,[30] strategically related economic bloc nations[31] and other progressive foreign nations.[32] Insights from such studies have differently informed the limitation in local insider trading legislations and how it can be strengthened. Some recent studies have focused on the effectiveness of insider trading laws[33] in local emerging markets[34] as well as provide a historical overview of market abuse regulations in South Africa.[35] Other current longitudinal studies and commercial attorneys' publications have provided the definitional limitations in key insider trading legislation concepts.[36] On the other hand international scholarly work has described legislation challenges in Australia, the USA and New Zealand.[37] However there have been no known studies that comprehensively focus on the local legislation shortcomings as well as strategies and approaches that can be employed to strengthen local insider trading provisions.

Most of the local and international literature has also implicitly discussed the institutional limitations and approaches that can be used to overcome state

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[28] Bhana 1987 *SAJBM* 198.
[29] Osode 2000 op cit 239; Richard Jooste 'A critique of the insider trading provisions of the 2004 Securities Services Act' 2006 *The South African Journal of Law* 437 at 460.
[30] Mabina & Chitimira 2019 op cit 492.
[31] H Kawadza 'A step towards the harmonization of the regulation of financial misconduct in BRICS: A comparison of the Chinese and South African regimes for the prohibition of insider trading' (2018) 62/3 *Journal of African Law* 351.
[32] Kawadza 2015a *JAL* 380.
[33] Lugaju 2018 op cit 1-59.
[34] Ojah, Muhanji & Kodongo 2020 op cit 1.
[35] Chitimira 2014a op cit 937.
[36] Van der Walt 2019 *PhD thesis* 130-262; Yaniv Kleitman 'Coorporate and commercial alert'. Cliffe Dekker & Hofmeyr 16 September 2015 at 2, available at :https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2015/corporate/downloads/Corporate-and-Commercial-Alert-16-September-2015.pdf, accessed on 17 April 2020.
[37] P F Hanrahan 2017 op cit 61; Thomas L Hazen 'Defining illegal insider trading: lessons from the European Community directive on insider trading' (1992) 55/4 *Law and Contemporary Problems* 231 at 231; Frijns, Gibert & Tourani-Rad 2013 op cit 208.

authorities in enforcing insider trading legislation. Most of these studies have partly discussed the above raised issues, and explained some of the local institutional limitations in enforcing insider trading.[38] Reamer and Downing have also explicated such a related challenge in the United States' securities establishment context.[39] Some other scholars have suggested how local institutions can be strengthened[40] as well as the strategies that can be deployed to enhance insider trading enforcement.[41] The latter issue has also surfaced in the Australian securities market environment.[42] However, the motivation for this study emanates from the fact that there has been a dearth of studies that have investigated institutional challenges and how all the South African insider trading regulatory establishments' can be strengthened to enhance the prohibition of this practice.

Criminal penalties, civil settlements and the administrative mechanisms of sanctioning insider dealing activities have been used in the South African financial markets. Both local and international literature has postulated the numerous advantages and disadvantages inherent in using the criminal tools in sanctioning insider trading prohibitions.[43] Relatedly economic law scholars have explored the merits and demerits of civil penalties in the enforcement of insider dealing activities.[44] Furthermore studies have examined the benefits and limitations of employing administrative tools in enforcing insider trading practices.[45]

Both local and international studies have implicitly and explicitly elucidated the need for a model of regulating insider trading, however the framework developed by Seredynska and Alexander draws from examples in the European Union

[38] H Chitimira & V Lawack 'Overview of the role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa' 2013 *Obiter* 200; Kawadza 2015a op cit 392-393; Lugaju 2018 op cit 22-53; JSE 2015 op cit 3-6; Osode 2000 op cit 260-263.
[39] Reamer & Downing 2016 op cit 194-195.
[40] H Chitimira & M Ncube 'The role of regulatory bodies and other role-players in the promotion of financial inclusion in South Africa' 2020 16/1 *Juridica* 7; Mabina and Chitimira 2019 op cit 507-512.
[41] Kawadza 2018 op cit 361-363.
[42] Hanrahan 2017 op cit 63.
[43] Chitimira 2014b op cit 269; H Kawadza. 'Extra-judicial enforcement of securities regulation and the public interest theory: a South African perspective' (2015c) 29/1 *Speculum Juris* 57; H Kawadza. 'The liability regime for insider dealing violations in South Africa: Where we have been, where we are' (2015b) 3 *South African Mercantile Law Journal* 388.
[44] Seredynska 2012 op cit 228 & 240; Kawadza 2015c op cit 55; Alexander 2007 op cit 246; Luiz 2011 op cit 155.
[45] Seredynska 2012 op cit 237; Kawadza 2015c op cit 57; Kawadza 2015b op cit 397; Chitimira 2014b op cit 270.

jurisdictions.[46] The local work by Luiz provides the chronological changes in the South African sanctioning approaches, without critically envisaging for the development of an enforcement model.[47] Whilst one of Kawadza's article has a similar objective, it however narrowly focuses on discussing only the insider trading enforcement responsibilities of the then FSB.[48] Relatedly his other work also discusses the enforcement of insider trading regulation in South Africa, without drawing from any theoretical perspective.[49]

Thus informed by the unified misappropriation theory and exploring the regulating responsibilities of numerous key government establishments, this study critically argues and discusses the need for the development of a position or a framework for the enforcement of insider trading sanctions in South Africa. The knowledge gaps identified herein justifies the need for a study that investigates these core insider trading legislative issues within the South African financial market context.

1.4. Research objectives and research questions

The main objective of this research is to investigate the efficacy of the legislation and institutions aimed at regulating insider trading in South Africa. The motivation to partake such a study has been the poor enforcement against insider trading offenders. Given such a scenario the study intends to examine the local legislation that enforces insider trading, its limitations and how it can be strengthened to enforce insider trading sanctions. The study will also analyse the different state institutions that enforce insider trading sanctions, the limitations in such establishments and the approaches that can be used by the institutions to overcome limitations in enforcing insider trading legislations. Given the prevalence of the three insider trading sanctioning mechanisms, the study also explores the most pragmatic position that can be used for the enforcement of insider trading sanctions in South Africa. Given these aims of the research, the study is guided by the following research questions.

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[46] Alexander 2007 op cit 229; Seredynska 2012 op cit 227.
[47] Luiz 2011 op cit 151.
[48] Kawadza 2015c op cit 49.
[49] Kawadza 2015b op cit 385.

- What are the limitations in the legislations enforcing insider trading?
- How can legislation that enforce insider trading be strengthened.
- What is the most pragmatic position for the enforcement of insider trading sanctions
- What are the institutional limitations in the establishments that enforces insider trading?
- Which strategies can be used to strengthen institutions that enforce insider trading sanctions

1.5. Significance of the study

The significance of the study will be discussed in relation to the five research questions that inform and frame this study. The importance of this research relates to discussing the key limitations in the South African legislation enforcing insider trading. Through interpreting the legislative limitations, the study explores the several inadequacies and shortcomings that perpetuate the on-going and elusive challenge of not achieving successful insider trading criminal convictions.

Relating to the emerging enforcement limitations, the study also explores different approaches and strategies that can be used to enhance and strengthen South African insider trading enactments. These proposed legislative solutions would also be critical in improving on the need to achieve the successful conviction of insider trading contraventions. Thus both the interpretation and analyses of the limitations and envisaged legislative suggestions can inform future prospective South African insider trading legislation re-enactments, reformulations and amendments that can be effected with the intention of strengthening the enforcement of insider trading activities.

The research is also relevant for it proposes alternative and contemporary insider trading sanctioning strategies that are on the intersection of legal statutes and corporate informed approaches. The distinctively envisaged mechanisms are

prudent, relevant; resonate with extra-judicial sanctioning tools, modern business issues and considers business ethical dimensions.

The study is also important as it explore the several challenges that constrain insider trading institutional capacity in enforcing insider dealing regulations. It is critical to highlight the nature of the institutional limitations that have led to few civil and administrative settlements and the unsuccessful criminal prosecutions being attained by the authourities.[50] Through highlighting such limitations the study will ultimately make several recommendations and suggestions that improve and strengthen the institutional capacity of establishments that enforce insider trading sanctions in South Africa.

Given the utilisation of the criminal, civil and administrative sanctions in the South African financial markets, the study offers a pragmatic position for the enforcement of insider trading sanctions. Encapsulated in the envisaged standpoint is the research focus of the equal importance of the three insider trading remedies and the suggested need to improve successful criminal prosecutions? Such an insider trading regulatory perspective enhances the efficacy of legislation aimed at regulating insider trading in South Africa.

The theoretical significance of the study lies in uniquely drawing from the unified misappropriation theory in illustrating the approaches and strategies of strengthening local insider trading legislation, institutional capacity as well proposing the most prudent approach for the enforcement of insider trading sanctions in South Africa. These theoretical insights help strengthen and validate the study's findings. In addition to the theoretical importance of the research the study also has insider trading enforcement legislative and corporate significances.

1.6. Research methodology

This research will use the qualitative textual analysis method and the desktop research approach. Books and pertinent corporate booklets that explain local and international insider trading legislation will be scrutinised to evaluate the

[50] JSE 2015 op cit 4; Lugaju 2018 op cit 53; Chitimira 2014a op cit 959.

effectiveness, strategies and limitation of insider trading legislations. These sources will also be examined to determine state institutions mandated with enforcing insider trading legislation, their challenges and approaches to overcoming institutional sanctioning impediments. Prudent insider trading proscription practices and principles worth drawing from and informing the local legislation will be analysed and reviewed, with their insights and precepts being discussed and considered for local insider trading acts. The perspectives of the commercial law books and corporate booklets will also be critical in examining the most prudent approach for the enforcement of insider trading sanctions.

Local and international journals from countries with progressive insider trading legislation proscriptions such as the United States, the United Kingdom, Australia New Zealand and the European Union will be essential in informing the study on the legislation and institutions that have improved the effectiveness of insider trading enactments within these states and regions. These countries and regions have well developed institutions and improved legislative frameworks that have effectively sanctioned insider trading practices. Both the prominent South African, regional and international peer reviewed publications will also provide insights in assessing the most prudent insider dealing enforcement approaches.

The study will also analyse legislation that has dealt with insider trading prohibition in South Africa. Thus the study will examine insider trading legislation and their key informing tenets from the enactment of the Companies Act 61 of 1973 up to the recently enacted Financial Sector Regulation Act 9 of 2017. Prominent local and international court cases concerning insider trading will also be examined. A desktop research of internet sources that cover issues relating to insider trading in South Africa and other jurisdictions will also be made use of. In examining the contents of these pieces of legislation, internet sources and court cases the study will consider the enforcement tools, the limitations and strategies that can be used to enforce insider trading sanctions as well as the institutions, their limitations and approaches that can be used to overcome organisational challenges in enforcing insider trading enactments. Drawing from these sources the study will also analyse the most practical and sensible framework of enforcing insider trading regulatory sanctions.

Thus key documentary content analysis will focus - on the research objectives and research questions foregrounded in this study - and zoom in on the overarching aim of the research relating to the efficacy of legislation and institutions used to enforce insider trading in South Africa while borrowing and drawing from comparative jurisdictions to inform local enactments.

1.7. Delimitation of the study

In delineating the academic boundaries of the study, the research reflects both on the main aim and the five research questions underpinning the study. Thus in exploring the limitations and strategies that can be used in enforcing insider trading enactments the research discusses the South African insider trading legislation. It primarily focuses on the key legal informing tenets that are in the Financial Market Act 19 of 2012. Relatedly the research also surveys the former insider trading enactments in the South African context such as the Companies Act 61 of 1973 - subsequent amendments, and successive statutes such as the Insider Trading Act 135 of 198, the Securities Service Act 36 of 2004 as well as the recently enacted Financial Sector Regulation Act 9 of 2017. The interpretation and analyses of these legislations helps illustrate the limitations as well as the envisaged solutions of strengthening the enforcement of insider trading activities.

In relation to the focus and the nature of market abuse practices, the study will delimitate its primary research foci. Literature indicates that there are three kinds of market abuse practices prohibited in the South African financial markets and these entail insider trading, market manipulation and false reporting relating to the affairs of a public company.[51] The study will not focus on the market abuse practices relating to disclosure-based market manipulation and trade-based market manipulation.[52] However the focal point of the study will be the market abuse form pertaining to insider trading. The study's working definition of insider trading is that it involves dealing in market regulated securities by corporate officers, agents or individuals on the basis of classified, specific, material, price–sensitive information. Providing this focal point of the study will enable the research to delineate the boundaries of the study as well as the key tenets of the concept under review.

[51] FSCA 2018 op cit 3; Chitimira 2014b op cit 254.
[52] FSCA 2018 op cit 3; Chitimira 2014b op cit 256.

As the study focuses on the insider trading of financial markets, the research will relate with South African corporate insider dealing activities as well as equity market securities. The examination of corporate insider dealing activities will involve analysing corporate dealing conducts between listed or unlisted companies and government institution that offer business loans such as the Industrial Development Corporation. However the study is partially foregrounded within the Johannesburg Stock Exchange equity market insider trading activities.[53] Given the fact, that most of the insider trading violation relate to the JSE equity market, the study will not consider the other four additional and recently licensed stock exchange markets, such as – ZARX (2016), 4AX (2016), A2X (2017) and Equity Express Securities Exchange (2017).[54] Furthermore in relation to this delineation, the research will mainly focus on stock exchange equities, and will hardly consider other financial market instruments such as commodity markets, government bonds, foreign currency exchange and money markets.[55]

It is important to delineate the context of the study in relation to the South African institutions that supervise and monitor financial market compliance especially adherence to insider trading. Thus the study will explore the responsibilities and roles of the following key establishments that regulate insider trading activities such as the Financial Sector Conduct Authority (FSCA), Directorate of Market Abuse (DMA), the Enforcement Committee, the JSE Market regulation division, National Prosecuting Authourity and the Prudential Authourity. However the study will not interrogate institutions that have oversight functions such as the South African Reserve Bank (SARB), the National Treasury and other related institutions who don't have insider regulating responsibilities such as the Finance Intelligence Centre (FIC).[56]

Lastly in relation to the research methodology the study's interpretation and discussion of the effectiveness of legislation and institutions regulating insider trading will draw on the desktop research approach. The study's analysis will be mainly

[53] Goodspeed op cit 2019 1019.
[54] Goodspeed 2019 op cit 1019; FSCA 2020-2021 op cit 86.
[55] National Treasury 2021 op cit 37-38; K van Wyk 2019 op cit 366.
[56] Chitimira & Ncube 2020 op cit 9.

informed by South African insider trading enactments, related cases, prudent international statutes and case laws, local economic law scholarly publications as well as pertinent international literature. Thus the study won't collect data using any other research tools except the documentary analysis strategy.

CHAPTER 2: THEORETICAL FRAMEWORK OF THE STUDY

2.1. Introduction

The theoretical review provides a critique and a working definition of the insider trading concept. The study motivates the reasons for and against insider trading, with the research questions framing the research, presupposing and supporting the prohibition of the practice. Though they are several theoretical orientations that can be used to inform local perspectives on insider trading, this study will be conceptually informed by the unified misappropriation theory. The unified misappropriation theory will help the research to illustrate the research questions related with strengthening South African insider trading legislation and institutional capacity as well as illuminate the most feasible approach for the enforcement of insider trading sanctions. The ensuing theoretical discussion draws on and reflects on a few selected prominent classical global cases of insider trading.

2.2. Definition of the insider trading concept

Legal scholars acknowledge that insider trading is a very difficult concept to delineate.[57] Because of such challenges some national legislation prefers not to define the phenomenon, even though they list and describe its elements. For instance the Namibian and the USA insider trading regulations have never sought to define what constitutes this proscribed practice.[58] Relatedly the South African Financial Markets Act 19 of 2012 and its predecessor, the Securities Services Act (2004),[59] do not have an explicit definition of the construct. Chitimira similarly postulates that the concept of insider trading is not expressly defined in the Financial Markets Act.[60] But however a conflation of the notion of 'inside information'[61] and the concept of an 'insider'[62] within these two enactments implies that insider trading entails dealing directly or indirectly in securities listed on a regulated market through

[57] Mabina & Chitimira 2019 op cit 492.
[58] Mabina & Chitimira 2019 op cit 492; Kawadza 2015 op cit 385.
[59] Security Services Act, 2004, s.72 *(ab);* Financial Markets Act 19 of 2012, s. 72 *(ab).*
[60] H Chitimira 'Overview of problems associated with Ineffective enforcement of market abuse provisions in South Africa' (2014c) 5/4 *Mediterranean Journal of Social Sciences* 53.
[61] Financial Markets Act, 2012 s 77-77 (*b*); Security Services Act, 2004 s 72-72 *(b).*
[62] Financial Markets Act, 2012 s 78 (1) *(a)*; Security Services Act, 2004 s 73 (1) *(a).*

specific, material, precise, non-public information which affects the price or value of listed security.

Local business law scholars have attempted to provide definitions of this concept. Ojah and colleagues defined insider trading as the 'means by which information-privileged few attempt to expropriate the wealth of the many that lack access to the same kind of information'.[63] Borrowing from different commercial law literature Kawadza, Mabina and Chitimira defined insider trading as entailing the practice of concluding a transaction in securities or financial instruments on the basis of material, price-sensitive, confidential, privileged or non-public corporate information.[64]

International business law literature has also defined the phenomenon as referring to 'trading by people who possess some non-public material information ... which is relevant for the price of stock or stocks'.[65] Relatedly Bhattacharya, described insider trading as referring to the 'buying or selling of securities ... while in possession of material non-public information'.[66] Beny has also explained the concept as implying 'trading by corporate insiders or their associates on the basis of price-sensitive, private information'.[67] In a more explicit manner the work of Clacher, Hillier and Lhaopadchan delineates insider dealing as involving 'trading on private, specific, and precise information that is likely to have a material impact on prices'.[68] Scholarly insights elucidates that such information can be accessed through someone's special position, accidently or through criminal conduct.[69]

What can be gleaned from these local and international business law scholars' definitions as well as the key national insider trading legislations is that insider trading involves conducting securities dealings on the basis of corporate classified price-responsive information. Such information is privy to corporate officers and

[63] Ojah, Muhanji & Kodongo 2020 op cit 2.
[64] Kawadza 2015a op cit 383; Mabina & Chitimira 2019 op cit 492-493.
[65] Du & Wei 2004 op cit 498.
[66] Bhattacharya 'Insider trading controversies: a literature review' (2014) 6 *The Annual Review of Financial Economics* 386.
[67] Beny 2005 op cit 145.
[68] Clacher, Hillier & Lhaopadchan 2009 op cit 388.
[69] Seredynska 2012 op cit 12; Christopher P Montagano 'The global crackdown on insider trading: a silver lining to the "Great Recession" ' (2012) 19/2 *Indiana Journal of Global Legal Studies* 595.

agents or can be accessed fortuitously and is unintended for the general members of the public. In the purview of economic law scholarly perspectives, the study will provide a working definition of insider trading as involving the dealing in market regulated securities by corporate officers, agents or individuals on the basis of classified, specific, material, price–sensitive information. Providing a provisional definition of insider trading will allow the research to delineate its framework of study as well as having insights of the concept under review.

2.3. Reasons for and against insider trading legislation

It is important for this study to critically discuss the scholarly theoretical views' pertaining to the need for and against insider dealing, as it justifies and motivates the exploration of the underpinning research question relating to the efficacy of insider trading legislation in South Africa. This question has a presumption that insider trading regularisation is generally favoured in local and international economic law circles. However, this might not be the case, as some scholars argue that the pros and cons for insider trading are both valid and correct.[70] Conversely literature indicates that the debate for and against insider dealing[71] is favouring the argument for the prohibition of the practices.[72] In fact such contestations, according to Alexander are now consigned to history, as there is a consensus that insider trading is wrong and should be prohibited.[73] Thus the generally accepted scholarly view is that insider trading is wrong and it should be regulated.[74] It logically follows that this article is written from this standpoint, which out rightly condemns insider trading practices.

In the global economy it is always the norm for economists to revisit and strengthen insider trading legislation after economic recessions or financial crises – which points to the importance of enhancing insider dealing proscriptions so as to avoid related

[70] Hayne E Leland 'Insider trading: should it be prohibited' (1992) 100/4 *Journal of Political Economy* 859.
[71] Leland 1992 op cit 862; Matlida, Gillis 'A symbolic legislative gesture? An argument for active enforcement of the insider trading prohibition in Myanmar' (2020) 14/1 *Law and Financial Markets Review* 59 reports of such debates even in smaller South-East Asia states such as Myanmar.
[72] Stephen Bainbridge 'Insider trading: an overview' in *Encyclopedia of law and economics* vol 3 (2000) 1-1.
[73] Alexander 2007 op cit 229; See also Bruce W Klaw & D Meyer 'Ethics, markets, and the legalization of insider trading' (2019) 168 *Journal of Business Ethics* 55 at 57.
[74] Opoku 2007 op cit 2; Jooste 2000 op cit 285.

previous national economic predicaments.[75] Montagano, Schotland and Opoku recapitulate the benefits of enforcing insider trading, through the economic goals of increasing the fairness, just rewards and integrity of the market, which makes capital more affordable, secures stock market investments and stimulates national economic growth.[76]

2.3.1. Reasons for insider trading legislation

There are several reasons why insider trading laws are becoming a central feature of global financial markets. Insider trading legislation is recognised and recommended as a channel and means for fighting financial market abuse practices.[77] Similarly and in the light of the global financial crisis insider dealing regulations are needed to remove unethical market behaviour practices, protecting the average investor and members of the public from abusive financial conduct in regulated markets thereby promoting inclusive, stable and financial markets integrity.[78] A similar line of reasoning permeated the American investment law discourse where Reamer and Downing claimed that insider dealing enforcement advances the fair market principle and promotes an orderly market - which ensures that investors do not enrich themselves at the expense of law-abiding citizens.[79] Insider trading opponents mention the inherent unfairness and harmfulness of the practice as the reason for outlawing it.[80] Such unfairness is prominent, when individuals or investors are differently informed, which consequently disincentives people or small investors to invest in financial markets.[81] Literary, informed investors have superior knowledge advantage when compared to other market participants, which enables them to make huge abnormal profits in a short period of time, in an unethical, unjustly and manipulative manner, similar to theft.[82] The proscription of insider dealing permits

[75] Montagano 2012 op cit 595; Kawadza 2015b op cit 54.
[76] Montagano 2012 op cit 595; Roy Schotland 'Unsafe at any price: a reply to Manne, insider trading and the stock market' (1967) *Virginia Law Review* 53/7, 1439; Opoku 2007 op cit 69.
[77] Chitimira 2014a op cit 937; Lugaju 2018 op cit 27.
[78] Kawadza 2015a op cit 380; Bhana 1987 op cit 200; Lugaju 2018 op cit 27; Marius C Milos & Laura R Milos 'Regulation, insider trading and stock market reaction' (2017) 1 *Annals of the economy series, Special issue* 174; Montagano 2012 op cit 595.
[79] Reamer & Downing 2016 op cit 190; Gillis 2020, op cit, 60; Schotland 1967 op cit 1438.
[80] Jooste 2000, op cit, 286; Seredynska 2012 op cit 51.
[81] Leland 1992 op cit, 859; Montagano 2012 op cit 595; Seredynska 2012 op cit 52.
[82] Seredynska 2012 op cit 52, 58 & 73; Bhattacharya 2014 op cit 396; Clacher, Hillier & Lhaopadchan 2009 op cit 377.

the benefits of securities trading to accrue to both minor and established shareholders.[83] Such compliance subsequently improves the welfare of the corporation and corporate governance as organisational employees effectively manage company portfolios in line with their contractual duties, what they are compensated for and through which they expect reasonable returns.[84]

Insider trading also ensures international investors' capital safety, fair investment returns, effective pricing of shares and improves market discipline.[85] Schotland elucidate that stock markets are key national economy's commercial and financial structures, whose operations are sustained through ensuring that the bourse is a safe places for investments.[86] For emerging and transforming markets such as South Africa effective insider trading regulations minimise abnormal profiteering, restores and increases public investor confidence, helps maintain stable market environments, guarantees capital market corporate governance initiatives which enhances the efficiency of capital markets.[87] Relating to the last point, prominent economic law scholars also allude that insider trading enforcement improves market efficiency as it significantly decreases the cost of equities, enhances return on investment, making capital more affordable, which ultimately leads to economic growth.[88] Improved market efficiency is encapsulated through a liquid market under which all types of investors from established to small, can conveniently acquire and dispose-off their investments.[89] Long-term investors regard insider trading legislation as critical to their investment decisions as are the security's fundamental soundness, dividends and growth potential.[90] There is thus broader acknowledgement in economic circles that insider trading laws are good for society and improves liquidity in the market.[91]

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[83] Bhattacharya 2014 op cit, 392.
[84] Schotland 1967 op cit 1452; Seredynska 2012 op cit 10 & 57.
[85] Ojah, Muhanji & Kodongo 2020 op cit 2; Schotland 1967 op cit 1440.
[86] Schotland 1967 op cit 1440.
[87] Ibid; Chitimira 2014a op cit 962; Kawadza 2018 *J.A.L* 357; Lugaju op cit 27; Bainbridge 2000 op cit; K Ojah, S Muhanji & O Myburg 2008 'Market reaction and equity market efficiency: a survey of the insider trading law in South Africa - Part 2' 10 *The African Finance Journal* 1 at 24.
[88] Hanrahan 2017 op cit 62; Bhattacharya & Daouk 2002 op cit 78; Gillis 2020, op cit, 60; Leland 1992 op cit 862; Schotland 1967 op cit 1441.
[89] Seredynska 2012 op cit 71.
[90] Schotland 1967 op cit 1451.
[91] Hanrahan 2017 op cit 62; Schotland 1967 op cit 1441.

Ojah and others relatedly argue that curbing insider trading improves 'stock price informativeness' thus ensuring more accurate stock prices.[92] Inhibiting insider dealing enhances stock market price performance as it instigates the equity prices to accurately reflect underlying values causing gradual price movements.[93] Bhattacharya and Daouk, and Beny also concur that insider trading enforcement improves liquidity in the stock markets.[94] Furthermore Beny, explains that curbing insider trading diffuses or disperses equity ownership which fosters concentrated widespread shareholder ownership rather than larger shareholding in the hands of the elite as characterised in legalised insider trading contexts.[95] All these positive attributes of prohibiting insider trading improve stock market development which ultimately leads to market efficiency.[96] Relatedly, countries with strict insider trading prohibitions and dedicated securities law enforcements have resulted in stronger and efficient markets.[97]

Osode and Lugaju concur that local insider trading regulations were essentially aimed at reintegrating the South African economy into the international financial markets.[98] This intention involved realigning and transforming local insider dealing regulations with prudent international standards.[99] Such a need was highly motivated for, at the end of the apartheid era and at the dawn of democracy in 1994. Local insider trading legislation reformulations were also aimed at ensuring that perpetrators of illicit trading met the strong arm of the law as well as compensate victims thus enhance the South African financial markets as important 'socio-economic instruments of capital formation and accumulation'.[100] Whilst such insider trading legislative transformation advantages, where captured in the changing South African market they have also been acknowledged in other markets as protecting

[92] Ojah, Muhanji & Kodongo 2020 op cit 1; L N Beny 'Do insider trading laws matter? Some preliminary comparative evidence' (2005) 7/1 *American Law and Economics Review, Special issue on Comparative law* 166.
[93] Schotland 1967 op cit 1443.
[94] Bhattacharya & Daouk 2002 op cit 92; Beny 2005 op cit 146; Leland 1992 op cit 862.
[95] Beny 2005 op cit 147.
[96] Bhattacharya & Daouk 2002 77; Beny 2005 op cit 174; Milos & Milos 2017 op cit 174.
[97] Gillis 2020, op cit 60.
[98] Osode 2000 op cit 240; Lugaju 2018 op cit 16.
[99] Lugaju 2018 op cit 16.
[100] Ibid.

investors, which increases the integrity of the market and stimulates investment in equities.[101]

Thus, there are numerous advantages of enforcing insider trading which broadly aim at normalising trading in securities market. There is general consensus amongst progressive law economic scholars and across the globe that insider trading is wrongful and harmful as they are more legal and economic benefits than limitations in prohibiting the practice. The benefits of inhibiting insider dealing and the presumption of this assertion motivate the need for this study to examine the efficiency of the South African legislation and institutions in regulating this practice.

2.3.2. Reasons against insider trading legislation

Whilst scholarly views support the enforcement of insider trading legislation, it is the argumentation in the classical work of Manne which initially encouraged and supported insider trading practices.[102] Other notable finance law scholars, such as Easterbrook, Fischer, Dye and Friedman have of late followed the same position by arguing that insider prohibitions should be reconsidered.[103] This position accentuates that insider trading is highly profitable and systematically outperforms the market.[104] Renowned economist, Milton Friedman was courageous enough in a 2002 television interview, to aver that "You want more insider trading, not less".[105] Manne argues that insider trading enhances and promotes 'free capital markets and entrepreneurial capitalism'.[106] Scholars, who favour this position, concur that insider trading returns fairly, sufficiently and effectively rewards and provides compensation for insiders and practising executives' entrepreneurial initiatives in large corporates.[107] Thus they argue that insider trading is a mechanism that may be used by owners to improve

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[101] Montagano 2012 op cit 595.
[102] A strong and in-depth critique of insider trading regulation is contained in Manne's work; Manne 1966 op cit 113; Manne 2005 op cit 167.
[103] A. A. Durnev & A. S. Nain 'The effectiveness of insider regulation: International evidence' (2007) 1 *Forum CESifo DICE Report* 10; D. Carlton & D. Fischer 'The regulation of insider trading' (1983) 35/5 *Stanford Law Review* 861; Ronald Dye 'Insider trading and incentives' (1984) 57/3 *Journal of Business* 295; F. H. Easterbrook 'Insider trading, secret agents, evidentiary privileges and the production of information' (1981) 1981 *The Supreme Court Review* 309 at 313.
[104] Carton & Fischer 1983 op cit 859.
[105] Durnev & Nain 2007 op cit 10.
106 Manne 1966 op cit 133.
107 ibid; Dye 1984 op cit 297; Carlton & Fischer 1983 op cit 861 & 867; Bhattacharya 2014 op cit 391.

the earning-contingent arrangement.[108] Such entrepreneurial roles would be an accurate gauge of individual innovative worthiness within a company.[109] Insider trading incentives manipulative practices, permits managers to trade on inside information which stabilises stock prices and ensures that equities move in a positive direction.[110] Thus insiders trading recompensate managers who explore potential valuable investment opportunities for the organisation.

Plausible as the argumentation might be, Schotland is cautious of the entrepreneur's ability to profit from insider information, as this is highly circumstantial. Thus according to Schotland the entrepreneur's ability to profit from confidential information is sharply restricted by amongst other factors: (a) his limited capital and credit; (b) his limited knowledge of the overall picture of the corporation; (c) his limited knowledge of the stock market, and possible fears of the risks he must take upon entering it; (d) the infrequency of events significant enough to trade upon and (e) the need to act quickly.[111] Furthermore the company has adequate forms of compensation that stimulate and sufficiently rewards the entrepreneurial inventiveness of managers, rather than allowing investors to engage in insider trading practices.[112] This convincing and justifiable critique of the entrepreneurial benefits makes the arguments for permitting insider trading practices to hang in the balance.

Both Manne and Easterbrook assent that insider securities trading and dealings do not harm any investors, in fact no one suffers as result of such practices.[113] They allege that the only stock exchange traders likely to be disadvantaged by insider trading are short term speculators and not long-term securities investors who are regularly subjected to the vagaries and uncertainties of probabilities in the market.[114] Similar scholarly argumentation postulates that insider trading is a highly profitable practice that allows insiders to pursue valuable investments opportunities for the

[108] Dye 1984 op cit 307.
[109] Manne 2005 op cit 172.
[110] Bainbridge 2000 op cit 16.
[111] Schotland 1967 op cit 1455.
[112] Schotland 1967 op cit 1457.
[113] Manne 2005 op cit 172; Easterbrook 1981 op cit 322; Bhattacharya, 2014 op cit 391.
[114] ibid.

firm.[115] Thus insider trading promotes and encourages long term investment as opposed to short-term speculators and opportunists. Such long term orientation investment that reflects on market information increases stock market efficiency.[116]

The argument for a positive relationship between insider trading and market efficiency were explained in 2005 by Manne, who posited that market efficiency results from insider traders who convey free, open, fast, accurate and extremely valuable stock price information.[117] Relatedly the availability of information as a public good on the market through insider trading improves the efficiency of the stock market as trading profits are not sacrificed to insiders.[118] Through permeating information to be used freely, knowledge development is incentivised, which maximise the wealth of both users and society.[119] Insider trading stimulates market efficiency as securities prices reflect the publicly and privately held information which improves the liquidity and viability of stock markets.[120] Put differently, Bhattacharya argues that insider trading enhances stock price informativeness, which benefits society.[121] Such market scenarios are critical in improving management efficiency.[122] Insiders enhance market efficiency as they possess superior information which gets imparted into prices, allowing traders to buy when prices rise, and sell, when prices fall.[123]

2.3.3. The neutral ethical view regarding insider trading

Whilst most of the theoretical literature provides opposing views on insider trading, it is McGee's and to a limited extent, Statman's line of reasoning that provides a uniquely ethical informed perspective regarding this practice. Informed by utilitarian and rights-based philosophical ethical foundations McGee reasons that there are instance and circumstances when insider trading is ethical. McGee argues that insider trading is moral when 'the result is the greatest good for the greatest

[115] Carlton & Fischer 1983 op cit 859 & 871.
[116] See Bhana 1987 op cit 200 for re-explanation of Manne's, 1966 defense of insider trading as well as Manne 2005 op cit 168.
[117] See Manne 2005 op cit169.
[118] Dye 1984 op cit *295*.
[119] Easterbrook 1981 op cit 313 & 338.
[120] Ako Doffou 'Insider trading: a review of theory and empirical work' (2003) 11/1 *Journal of Accounting and Finance Research* 5 & 11.
[121] Bhattacharya 2014 op cit 391.
[122] Manne 2005 op cit 185.
[123] Bhattacharya 2014 op cit 398.

number'.[124] Following this philosophical assertion, insider trading results show that they are more winners than losers in this proscribed practice, thus from an utilitarian perspective insider trading is justified. Secondly and from a right-based approach which is key in informing public policy positions, if insider trading does not violate anyone's rights, then there is nothing wrong with the practice.[125] This argumentation is similar to Manne's earlier assertion that insider trading is but a 'victimless crime'. Furthermore this position is akin to Statman's reasoning that one's fairness perception and view of insider trading depends on one's culture and ethical reasoning which are strongly different between United States citizens and the Chinese.[126] Emerging from McGee and Statman's analysis is the interpretation that insider trading is but a circumstantial practice, which must be subjected to factual inferences.

Regardless of the plausibility of this ethical position and Manne and related scholars argumentations to encourage, support and reconsider insider trading practices, the most pragmatic and progressive economic law perception is to regard insider trading as a wrongful and harmful practices that wantonly destroy and manipulates stock market trading fundamentals.[127] The prohibition of insider trading basically promotes the integrity, fairness, inclusivity and liquidity of the market which improves equity investment returns, market efficiency, investor confidence and stimulates national economic growth.[128] It is these benefits and the plethora of advantages that motivates this study to examine the effectiveness of legislation and institutions aimed at regulating insider trading in South Africa. Thus there is resonance between the objectives of this study and the assumed benefits arising from proscribing insider trading.

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[124] R W McGee 'Analysing insider trading from the perspectives of utilitarian ethics and right theory' (2010) 91/1 *Journal of Business Ethics* 66.
[125] McGee 2010 op cit, 67 & 78.
[126] M Statman 'The cultures of insider trading' (2009) 89 *Journal of Business Ethics* 51-58.
[127] Ojah, Muhanji & Kodongo 2020 op cit 2; Schotland 1967 op cit 1440; Schotland 1967 op cit 1440
[128] Kawadza 2015a op cit 380; Bhana 1987 op cit 200; Lugaju 2018 op cit 27; Milos and Milos 2017 op cit. 174; Montagano 2012 op cit 595; Seredynska 2012 op cit 52; Bhattacharya 2014 op cit, 396; Clacher, Hillier & Lhaopadchan 2009 op cit 377; Ojah, Muhanji & Myburg 2008 op cit, 24. Hanrahan 2017 op cit 62; Bhattacharya and Daouk 2002 op cit 78; Gillis 2020, op cit, 60; Leland 1992 op cit 862; Schotland 1967 op cit 1441.

2.4. The unified misappropriation theory

The emergence of this theory was invoked by the weaknesses and flaws in the classical and misappropriation theories and has been used in the United States to regulate and curb insider trading activities.[129] The unified misappropriation theory combines the positive features and attributes of both the classical and misappropriation theories.[130] The combination of such features makes the theory to be all-encompassing.[131] Through this endeavour, the unified theory dually elucidates why classical insider trading and misappropriation are wrongful activities.[132] The unified theory provides a shared means of distinguishing between activities that are wrongful and those that are not.[133]

The study is motivated to use a unified theory for it is claimed that the interpretation and the understanding of a country's insider trading legislation is pre-eminently suited to the use of multiple legal theoretical perspectives.[134] Furthermore the thrust of the classical and the misappropriation theories are based on the fundamental notion, that the misuse of information by corporate insiders having a fiduciary relationship within a company undermines the management of the corporation and is harmful to the business.[135] These theories make it a liability to trade on inside information both in South Africa and in the global markets.[136] This theoretical standpoint resonates with the position adopted by the study regarding the importance of the regularisation of insider trading.

Both the classical and the misappropriation theory complement each other, with the classical concept holding primary insiders liable for insider trading whilst the misappropriation theory outlaws secondary insiders from dealing on material information.[137] Such complementarity resonates with the Financial Markets Act 19 of 2012 positions that regard either secondary or primary insiders as both liable for

[129] Chitimira 2021 op cit 7.
[130] Chitimira 2021 op cit 7; Klaw & Meyer 2019 op cit 65.
[131] Walter 2012 op cit 522.
[132] Klaw & Meyer 2019 op cit 65.
[133] ibid
[134] Opoku 2007 op cit 70.
[135] Opoku 2007 op cit 69.
[136] Van der Walt 2019 op cit 41-126; Kawadza 2015a op cit 388.
[137] Kawadza 2015a op cit 388.

insider trading.[138] The insider dealing liability of tippes and primary insiders will enable the study to critically examine insider trading violations and South African cases that involve both types of insiders.

In the American insider trading authourities context, the unified misappropriation theory has been argued to be inclusive of both the classical and the misappropriation theoretical perspectives with its enforcement of insider trading being mandatory.[139] Through the lens of the unified misappropriation theory, there is the compulsory enforcement of insider trading violation, which permits the SEC to pursue individuals who violates the enactment through criminal, civil or administrative penalties.[140] In relation to the focus of this study and in the South African context this theory encourages and illustrates the combined utilisation of the three insider trading enforcement approaches.

2.4.1. The classical theory

The classical theory of insider trading liability is violated when a corporate insider, who has obtained confidential information, trades in the securities of his corporation on the basis of material, non-public information.[141] The classical theory elucidates that it is "illegal for corporate insider to use confidential corporate information gleaned from their position to trade in the securities of their company for their own benefit".[142] This traditional theory explicates that there is a fiduciary relationship and a position of trust between the directors and a company, in which they have a duty to use reasonable diligence to protect inside information and safeguard corporate property.[143]

The theory has been used in the American insider trading violations of *the case between the SEC v. Texas Gulf Sulphur (1968)*, in which corporate insiders had illegally traded when they bought more stock in their mining company after learning

[138] Financial Markets Act 19 of 2012 s 78 (1) *(a).*
[139] Walter 2012 op cit 522.
[140] Ibid.
[141] Richard, A. Epstein 'Returning to common-law principles of insider trading after "United States v. Newman"' (2016) 125/5 *The Yale Law Journal* 1482 at 1495; Walter 2012 op cit 522.
[142] Klaw & Meyer 2019 op cit 57.
[143] Opoku 2007 op cit 6-8.

of the discovery of substantial mineral deposits.[144] This case illustrates that insiders owe the firm and its shareholders fiduciary duties of loyalty that require full candour and a subordination of personal interests, with the violation of such corporate obligations being wrongful - for material non-public information must be used with corporate authorisation.[145]

To curb insider trading, the classical theory highlights that it is the mandate of the corporation to provide policy and guidelines on how investors and corporate insiders should respond in the marketplace.[146] Such organisational standpoints insinuate the use of internal mechanism and approaches, such as encouraging corporate governance[147] and the use of the Chinese wall [148] to inhibit insider trading practices. The former position is acknowledged by the classical theory position in which the corporate governance fiduciary duty highlights that directors owe fiduciary duty to the company and through it have an obligation to enhance the interest of the company and its members or shareholders.[149] Thus the classical theory which is part of the unified misappropriation theory will illustrate, in the discussion chapter, how internal corporates' mechanisms or codes of conduct enhance the inhibition of insider dealing activities.

2.4.2. The misappropriation theory

The misappropriation theory, arguments that it's awfully wrong and fraudulent to use confidential inside information in conducting securities transactions without the approval of the owner.[150] The theory is used to prohibit trading by an individual who misappropriates inside information in breach of the duty owed to the source of information.[151] The misappropriation theory holds that a person commits fraud when he misappropriates material non-public confidential inside information they acquired

[144] *SEC v Texas Gulf Sulphur Co* (1968) 401 F. 2d 833 – Court of Appeals, 2nd Circuit.
[145] Klaw & Meyer 2019 op cit 57.
[146] Epstein 2016 op cit 1530.
[147] Van Wyk 2019 op cit 10; Seredynska 2012 op cit 245.
[148] Cassim 2008 op cit 190b; Chitimira 2014c op cit 53 & 55.
[149] Opoku 2007 op cit 35.
[150] Opoku 2007 op cit 42.
[151] Walter 2012 op cit 522.

during the course of their corporate duties for securities trading purposes, in breach of a duty of trust and confidence owed to the principal of the source of information.[152] The rationale and scope of the application of the theory involves instances where the offenders breach their fiduciary duty to their companies.[153] Thus is it possible to interpret the misappropriation theory as a continued defence of the fiduciary-type duties of loyalty, in which corporates are obligated to remain loyal to his firm and its clients.[154] Insiders take advantage of the inside information when they trade against the interest of the principals that he works for and the clients who has retained the firm.[155] Scholars concur that the misappropriation theory's original goal was the preservation and protection of the market integrity.[156]

The misappropriation theory originated in the United States in the 1980s, *in the case between the Chief Justice Burger and Chiarella's* misappropriation of confidential, material non-public information in his duties as a financial printer.[157] Three years later the same theoretical tenets were applied in the *case between Dirks and SEC*, where Raymond Dirks was alleged to have received inside corporate information which he disclosed to investors, who relied on it on trading shares of the corporation, thus violating his fiduciary duties and misappropriating corporate non-public information.[158] The theory initially related to *the Chiarella v U.S. case* in which a Pandick Press' printer employee obtained confidential information and fraudulently used it to purchase stock in a target company and immediately sold the shares after the takeover announcements.[159] The doctrine that evolved from the Chiarella case was subsequently labelled the misappropriation theory because the duty to disclose was triggered only if the trade could be regarded as theft from an entity, which the trader owed fiduciary duty.[160]

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[152] Epstein 2016 op cit 1495; van der Walt 2019 op cit 42-43; McGee 2010 op cit 76; Klaw & Meyer 2019 op cit 57; Montagano 2021 op cit 590; Steven Salbu 'The misappropriation theory of insider trading: A legal, economic, and ethical analysis' (1992) 15/1, *Harvard Journal of Law and Public Policy* 223.
[153] Chitimira 2021 op cit 7; Clacher, Hillier & Lhaopadchan 2009 op cit 389.
[154] Klaw and Meyer 2019 op cit 58.
[155] Epstein 2016 op cit 1496.
[156] Salbu 1992 op cit 223; Bhattacharya 2014 op cit 387.
[157] Bainbridge 2000 op cit 3; *Chiarella v. United States* 1980 (445) US 222 - Supreme Court of United States; van der Walt 2019 op cit 42-43; McGee 2010 op cit 76.
[158] *Dirks v. SEC* (1983) 463 U.S. 646
[159] Montagano 2012 op cit 585; *Chiarella v United States* (1980) 445 U.S. 222 No. 78-1202
[160] Salbu 1992 op cit 224; Botha 1991 op cit 9.

To curb the misappropriation of inside information the corporation is *mostly* encouraged to formulate sufficient and explicit contractual principles and restrictions and also permit the use of securities law in sanction insider trading and limiting the use of information by the recipient and his ability to share it with other individuals. [161] In other word besides securities regulation, private ordering imposes additional insider trading proscription.[162] The theory's claims that besides the tools at the state's discretion, corporate governance protects the interest of investors and shareholders.[163] Furthermore the legislative attributes of the theory, makes it one of the most effective tools in the enforcement of inside law, in fact insider trading involves unauthorised use of information, which basically violates the misappropriation doctrine.[164] Thus the misappropriation theory suggests the use of both internal corporate mechanisms as well as the application of insider trading legislation in prohibiting insider trading activities.

2.5. The application of the unified misappropriation theory

The unified misappropriation theory will be used in the study to illustrate some of the research questions relating to strengthening insider trading legislation and institutional capacity as well as examining the most prudent insider dealing enforcement approaches. Theoretical insights have indicated that the unified misappropriation theory will enable the study to examine South African insider trading violations that involve both primary and secondary insiders. Secondly this theory will motivate for the utilisation of the three combined enforcement of insider trading sanctions in curbing insider dealing activities. Thirdly through the lens of the classical theory which is part of the unified misappropriation theory, the study will illustrate how internal corporates' mechanisms enhance the inhibition of insider dealing activities. Relating to the latter, the misappropriation theory also suggests the use of both internal organisational mechanisms as well as the application of insider trading legislation in proscribing insider trading activities. It is these four uses of the theory under which it will be applied in this study in the discussion chapter.

[161] Epstein 2016 op cit 1530.
[162] ibid
[163] Seredynska 2012 op cit 245.
[164] Opoku 2007 op cit 45.

2.6. Conclusion

This theoretical chapter provided a working definition of the insider trading concept. The section also provided a critique for and against insider trading, with the study's research questions presupposing and supporting the prohibition of the practice. In the light of these tensions, the neutral ethical view provides a theoretically plausible viewpoint. Of the several theoretical orientations that can be used to inform local perspectives on insider trading, this study will be conceptually informed by the unified misappropriation theory. The study motivated for the theoretical use of the unified misappropriation theory, which combines the insights of the classical and the misappropriation theories. Reflecting on a few selected classical global insider trading cases, the unified misappropriation theory will be used to illustrate the research questions relating to the strengthening of local insider trading legislation and institutional capacity as well in examining the most prudent approach for the enforcement of insider trading sanctions. Thus through the theoretical lens provided herein, the discussion on chapter five will help overally illustrate the efficacy of legislation and institutions aimed at regulating insider trading in South Africa.

CHAPTER 3: THE STATUTORY FRAMEWORK OF INSIDER TRADING IN SOUTH AFRICA

3.1. Introduction

The ensuing review, overarchingly discusses the statutory framework of insider trading in South Africa. It begins with the historical development of insider trading legislation reflecting on the informing tenets, weaknesses and the types of sanctions highlighted through each enactment. The statutory analysis will also explicate the limitations in the South African insider trading legislation and the range of strategies for enforcing insider trading sanctions. Relatedly the study also explores the institutional limitations and proposes approaches for enhancing institutional capacity for enforcing insider trading legislation. Engaging with these key issues will enable the study to respond to all the research questions informing this study.

3.2. The historical development of insider trading legislation in South Africa

Since the introduction of insider trading legislation in 1973, South Africa has witnessed numerous amendments and re-enactments intended to strengthen insider trading prohibitions and create a fair, safe, transparent and efficient securities market for investors that are realigned with international regulatory practices.[165] Whilst the initial laws prohibited insider dealing and criminally sanctioned the practice, recent developments have widened to include civil and administrative penalties. The discussion on the historical development of insider trading legislation will reflect on the types of remedies highlighted through each enactment.

The South African legislation improvements, of introducing criminal, civil and administrative penalties, places local insider trading at par with most progressive economies in the World.[166] However the major flaws and weaknesses of local insider trading legislation have been the insignificant criminal prosecutions and fewer civil and administrative sanction rates which suggest weak institutional

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[165] P Redman '*2nd South African International Financial Markets Regulatory Summit market abuse' South African Institute of Financial Markets* 2014 October at 4, available at http://www.saifm.co.za/summit/slides2015/10.pdf, accessed on 17 April 2020; Financial Markets Act 19 of 2012.

[166] JSE 2015 op cit 4.

capacity, poor enforcement tools and inadequate legislation transgression mechanisms.[167]

3.2.1. The Companies Act 61 of 1973

Local business law scholars generally agree that insider trading legislation was explicitly introduced in South Africa under the Companies Act 61 of 1973.[168] The act was an initial attempt to regulate the activities of insider trading.[169] The South African insider trading provisions were borrowed from two different legal regimes of the United States and the United Kingdom's policies.[170] The 1973 Companies Act highlighted that the sole response to insider trading violations were criminal penalties. The enforcement of insider trading criminal sanctions was the combined responsibility of the Johannesburg Stock Exchange, the Registrar of Companies and the Attorney-General's Office.[171] Section 233 of the Act made insider trading by primary insiders such as directors, employees, shareholders or officers an offence and its contravention constituted a criminal offence liable for imprisonment or fine or both.[172]

The major weakness of this Act was its non-prohibition of secondary insiders, tippees and fortuitous person as well as various people involved in take-over situations from trading on privileged information.[173] According to Bhana, the other flaws of this Act pertained to allowing directors of an acquiring company in dealing in the shares of a targeted company as well as having no stipulations on the digestion period of publicly announced information.[174] The criminal penalties of two years imprisonment or a fine not exceeding R8 000, as well as the lack of a civil monetary compensatory clause, where not sufficient to deter insiders in engaging in these

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[167] See Bhana 1987 op cit 201; Chitimira 2014a op cit 947,952, 959, 960; Mabina & Chitimira 2019 op cit 495; JSE 2015 4*;* Kawadza 2018 *J.A.L.* 368.
[168] For a historical overview and the beginning of insider trading legislation as discussed in the local literature see Kawadza 2018 op cit 363; Bhana 1987 op cit 201; Mabina & Chitimira 2019 op cit 494; Osode 2000 op cit 241. An exhaustive background is provided for by Chitimira 2014a op cit 937.
[169] Derick Botha 'Control of Insider Trading in South Africa: a comparative analysis' 1991 3/1 *South African Merchant Law Journal* 1.
[170] Botha 1991 op cit 1.
[171] Botha 1991 op cit 5.
[172] Companies Act 61 of 1973, sec 441.
[173] See Mabina & Chitimira 2019 op cit 494; Bhana 1987 op cit 202; Jooste 2000 op cit 284.
[174] Bhana 1987 op cit 202.

profit-bearing commercial transactions.[175] Because of these deficiencies, flaws and shortcomings' the Act was amended in 1989 and this gave way to the Companies Amendment Act 78 of 1989. However, of interest in the 1973 piece of legislation and motivating this study was the lack of prosecution under this Act with enforcement, detection and investigation being practically impossible.[176] These limitations forced the legislature to enact strict legislation through amending the act in 1989.

3.2.1.1. Companies Amendment Act 78 of 1989

The Act inserted a new chapter[177] whose main provisions established the Securities Regulation Panel which supervised dealings in securities and aimed at regulating insider trading through criminal liability.[178] Changes in the Companies Amendment Act 78 of 1989 introduced a secondary insider trading prohibition clause[179] and further stipulated the digestion period of publicly announced information to 24 hours under section 404f.[180] By contrast the United States prescribed a digestive period of 48 hours before insiders may trade on publicly announced information.[181] The insider trading criminal sanctions were increased from a paltry R8 000 to a maximum of R500 000 or imprisonment not exceeding 10 years or both fine and imprisonment.[182]

However the amendments replicated some earlier flaws in the previous legislation and was criticised for prohibiting insider trading too broadly[183] and borrowing from American insider legislation without considering the South African securities market context.[184] Furthermore like its predecessor the re-enactment failed to provide operational definitions of key insider trading concepts.[185] Mabina, Chitimira and Kawadza also concurred that provisions of the Act were ineffective, inconsistent and awkward and made it difficult to monitor, apprehend and penalise the proscribed

[175] See Chitimira 2014 op cit 946.
[176] See Bhana 1987 op cit 201; Chitimira 2014 op cit 947; Botha 1991 op cit 5 & 6.
[177] The Act inserted Chapter XVA and sections 440A, 440B, 440C, 440D, 440E, 440F, 440G, 440H, 440I and 440J, whose main thrust was the Regulation of Securities.
[178] Botha 1991 op cit 6.
[179] Kawadza 2018 op cit 364.
[180] Companies Amendment Act 78 of 1989 sec 404.
[181] See Bhana 1987 *SAJBM* 202.
[182] Companies Amendment Act 78 of 1989 s 440j.
[183] Mabina and Chitimira 2019 495.
[184] Chitimira 2014 op cit 948; Botha 1991 op cit 9.
[185] Botha 1991 op cit 7.

practise.[186] Like its American legislative source and counterpart, the amendment did not attain a successful prosecution because of the high standard of proof in the criminal penalty, which requires authourities to prove their case beyond reasonable doubt.[187]

3.2.1.2. Second Companies Amendment Act 69 of 1990

Like the preceding provisions where flaws were evident, the legislation was revised and this culminated into the Second Companies Amendment Act in 1990.[188] A positive development of this amended legislation was its explicit proscription of insider trading by insiders and tippees on the basis of 'unpublished price-sensitive information'.[189] The amendment also retained the insider dealing criminal sanctions with similar amount of fine or imprisonment term or both as was in the former legislation. However the amendment had some of the flaws that were contained in the previous insider legislations. Firstly, there was poor surveillance detection and preventative measures by the Securities Regulation Panel.[190] Secondly, the panel lacked authority to impose civil penalties which could have increased outside court settlements.[191] Thirdly, it is argued that there was lack of cooperation and coordination between the different state institutions which were tasked with enforcing insider trading proscriptions.[192] Fourthly, was the problem of enforcement which resulted in no individual being convicted for insider dealing under this Act?[193]

3.2.2. Insider Trading Act 135 of 1998

These flaws and the report and the recommendations of the King Task Group in October 1997 resulted in the enactment of the Insider Trading Act in 1998, which came into effect on January 1999.[194] A notable achievement in this Act which made

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[186] Mabina & Chitimira 2019 *op* cit 495; Kawadza 2018 op cit 364.
[187] Botha 1991 op cit 10 & 11; Kawadza 2015b op cit 388.
[188] Second Companies Amendment Act 69 of 1990.
[189] Chitimira 2014a op cit 950; Mabina & Chitimira 2019 495; Second Companies Amendment Act s 440F (2).
[190] Chitimira 2014 op cit 952.
[191] ibid; Mabina & Chitimira 2019 op cit 495.
[192] Chitimira 2014a op cit 952.
[193] Ibid.
[194] Mabina & Chitimira 2019 op cit 495; Webber, Wentzel 'South Africa: Insider Trading Act' Mondaq 14 April 2000 at 1, available at: https://www.mondaq.com/southafrica/securitization-structured-finance/8564/insider-trading-act, accessed on 6 October 2021.

local insider trading legislation to be at par with other prudent global securities markets - such as those of the United States, Australia and New Zealand - was the introduction of civil remedies to investors who suffered prejudice because of wrongful insider trading activities.[195] The provisions of this enactment brought in a new sanctioning regime simultaneously based on civil action and criminal prosecution for violating insider trading.[196] The new civil settlement remedy strengthened civil claim processes, which involved the recovery of the profit made, or loss avoided, by the insider dealer perpetrator, plus a penalty.[197] Thus, contravention made the accused liable for any financial loss or damage suffered by the wronged person.[198] Another notable retention in this insider trading legislation was the upholding of stern criminal penalties that were contained in the previous enactments.[199]

However some scholars were critical of the Act's extension of insider trading prohibition to include a wide range of 'financial instruments' such as bonds, futures, agriculture and equity derivatives.[200] This broadened responsibility and the inclusion of foreign borders insider trading ban application according to Osode would make enforcement difficult.[201] As indicated earlier, in the previous re-enactments the capacity of state institutions and courts in detecting, monitoring and enforcing insider trading was also limited, thus consequently only a few settlements and convictions were successfully made and obtained.[202]

3.2.3. Securities Services Act 36 of 2004

Because of the weaknesses in the Insider Trading Act and the admission of South Africa into the World global economy, the aforementioned enactment was repealed by the Securities Services Act in 2004.[203] Generally the consolidated Act was intended to increase confidence in the national financial markets through realigning South African financial trading legislation with prudent international regulatory

[195] Chitimira 2014a op cit 953; See for example Osode 2000 *J.A.L.* 241; Financial Service Board 2002 op cit 42; Luiz 2011 op cit 151.
[196] Mitchell 2015 op cit 2; Kawadza 2015b op cit 389.
[197] Jooste 2000 op cit 298; Wentzel 2000 op cit 1; Luiz 2011 op cit 151.
[198] Insider Trading Act 135 of 1998 s 404 F (4).
[199] Insider Trading Act 135 of 1998 s 404 N (7); Companies Amendment Act 78 of 1989 s 440j; Wentzel 2000 op cit 1.
[200] Chitimira 2014 op cit 953; Osode 2000 op cit 241; Johannesburg Stock Exchange 2015 op cit 3.
[201] Osode 2000 op cit 241-242.
[202] Chitimira 2014 op cit 959; Luiz 2011 op cit 162.
[203] Securities Services Act 36 of 2004; Mitchell 2015 op cit 5.

practices.[204] The new regulatory framework ensured the competitiveness of the local financial markets and was also intended to avert the effects of the financial crises.[205] Under this act, the most significant enforcement tool was in the form of administrative penalties.[206] Thus this piece of legislation collectively extended the prohibition of insider trading through the three relative remedies of civil, criminal and administrative sanctions.[207]

Stringent criminal penalties were introduced, with offenders liable for fine not exceeding R50 million or imprisonment for a period not exceeding 10 years, or both fine and imprisonment.[208] The courts had the jurisdiction to impose criminal penalties.[209] Whilst the criminal sanctions were strongly dissuasive, critiques argued that the remedy may not necessarily be proportionate to the gains realised, especially in instances where the profits gained exceed the penalty imposed.[210] Thus the most prudent action would have been to allow the courts to impose a penalty of any amount that it considers appropriate, as is the case in the United Kingdom insider trading legislation.[211]

The civil liabilities and remedies were foregrounded in the Act[212] and it is because of such a highlight that Chitimira contends that South Africa was amongst the first countries to introduce civil liabilities.[213] Besides the courts, the Directorate of Market Abuse also had powers to investigate criminal insider trading offences as well as to institute civil proceedings under this Act.[214] It was the responsibility of the Financial Services Board to investigate, interrogate, administer and supervise insider trading compliances.[215] These managerial and investigative functions showed the

[204] Kawadza 2018 op cit 365; Kawadza 2015b op cit 53; R Cassim 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 20 *South African Mercantile Law Journal* 198.
[205] Kawadza 2015c op cit 54.
[206] Kawadza 2015b op cit 391.
[207] Mabina & Chitimira 2019 op cit 495; Kawadza 2015b op cit 53.
[208] Securities Services Act 36 of 2004 s 115.
[209] Securities Services Act 36 of 2004 s 79 (1).
[210] Cassim 2018 op cit 194.
[211] ibid.
[212] Securities Services Act 36 of 2004 s 77(1).
[213] Chitimira 2014 op cit 960.
[214] Securities Services Act 36 of 2004 s 83 (1).
[215] Securities Services Act 36 of 2004 s 82 (1/2).

enactment's paradigm shift to 'stringent enforcement'.[216] However Chitimira argues that the prosecuting function was vested in Directorate of Public Prosecution which did not have the capacity to conduct effective and timeous prosecutions.[217] Criminal courts backlogs also added to the delays in prosecution with some flaws in the civil provisions undermining successful enforcement of civil remedies.[218] Thus the Act's sanctions of insider trading transgressions were relatively few and insufficient for deterrence purposes.[219]

3.2.4. Financial Markets Act 19 of 2012

These weaknesses led the Act to be repealed by the Financial Market Act.[220] Like its predecessor this legislation aligned local financial markets with global international practices as well as aimed at reducing the risks and effects of the 2007-2009 financial global crises.[221] The enactment retained the stern criminal fine not exceeding R50 million or imprisonment for not more than 10 years or both for insider trading offenders.[222] An explicit insider trading administrative sanction was also introduced in the act[223] which marked a difference with the previous penalties which only involved civil liabilities and deterred the proscribed market practice.[224] However civil sanctions were still part of the penalties at the disposal of the Directorate of Market Abuse.[225] The civil and administrative remedies had the advantages of having low cost involvement, could be resolved expeditiously, enabled investors to recover losses incurred and required lower standards of proof.[226] Furthermore the civil remedies are preferred by the defendants when compared to the dreaded criminal prosecution.

Two new legal developments in the enactment are worth explaining. Firstly, the Act introduced a new scope of transgression involving intentionally dealing with an

[216] Kawadza 2018 op cit 365.
[217] Chitimira 2014 op cit 960.
[218] Chitimira 2014 op cit 960; Kawadza 2015b op cit 392.
[219] Mabina & Chitimira 2019 op cit 495.
[220] Financial Markets Act 19 of 2012.
[221] Financial Markets Act 19 of 2012 s 2; Kawadza 2015c op cit 54; Kawadza 2018 op cit 366.
[222] Financial Markets Act 19 of 2012 s 109.
[223] Financial Markets Act 19 of 2012 s 82 (1).
[224] Kawadza 2018 op cit 366.
[225] Financial Markets Act 19 of 2012 s 85 (1).
[226] Kawadza 2015c op cit 55; Kawadza 2015b op cit 392-396; Chitimira 2014c op cit 53.

insider. It was therefore an offence to deal on a regulated market with an insider - directly, indirectly or through an agent – who possessed material information.[227] Secondly, the enactment made use of the naming and shaming enforcement tools to expose offending parties, thus through appropriate communication channels the then Financial Service Board (FSB) (now the Financial Sector Conduct Authority (FSCA)), could circulate pertinent insider trading information if it was 'in the public interest'.[228]

This enactment has also made successful civil and administrative settlements imposed by the Directorate of Market Abuse. The four notable local cases being the administrative sanction of *Zietsman*[229] and administrative penalty of *Panther* by the then Financial Services Board[230] as well as the civil sanctions of *Bronn* by the FSB's Enforcement Committee.[231] Recently the enactment witnessed Markus Jooste and three others paying a record insider trading administrative penalty amounting to R240 million.[232] In the process, total penalties from civil and administrative sanctions since 1999 up to 2019 have resulted in settlement amounting to approximately R138 million.[233] The huge administrative penalties collected show the effectiveness of this remedy which also constituted an effective retributive element.[234]

Beside all these improvements there is still insufficient insider trading prosecution or criminal sanctions. Main reasons account for this including the congested criminal courts as well as the fact that insider dealing is a financially intricate offence beyond the capacity and expertise of the Director of Public Prosecutions.[235] In fact it is difficult to prosecute and obtain a conviction with respondents preferring settlements

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[227] Kawadza 2018 op cit 366; Chitimira 2014b op cit 264; Financial Markets Act 19 of 2012 s 78 (3).
[228] Kawadza 2018 op cit 367; Financial Markets Act 19 of 2012 s 84 (2) *(c)* (ii).
[229] *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) (24 August 2015).
[230] *Pather v Financial Services Board* (866/2016) [2017] ZASCA 125 (28 September 2017).
[231] *Financial Services Board v Coal of Africa and Mr Bronn*, Enforcement Committee proceedings – ex temporae judgment – 28 February 2017.
[232] Dawid De Villiers & Johann Scholtz 'Insider trading: recent fines imposed by the FSCA'. Webber Wentzel 9 November 2020 at 1, available at https://www.webberwentzel.com/News/Pages/insider-trading-recent-fines-imposed-by-the-fsca.aspx, accessed 14 October 2021. FSCA 2020-2021 op cit 106
[233] Financial Sector Conduct Authority *FSCA Bulletin: Quarter 3* (2018/2019) 8; de Villiers & Scholtz 2020 op cit at 3.
[234] Kawadza 2015c op cit 55; Kawadza 2015b op cit 397; Luiz 2011 op cit 155.
[235] Johannesburg Stock Exchange 2015 4; Chitimira 2014 960; Kawadza 2018 368.

as they maintain the appearance of innocence despite paying a fine.[236] Thus by 2015 only 5 people had been criminally prosecuted under the insider trading enactments.[237] The Johannesburg Stock Exchange (JSE) defends this low prosecution rate instead pointing out that globally criminal insider prosecution is rare even in countries with progressive insider trading laws such as the United States the United Kingdom and the European Union.[238] The lack of conviction is exacerbated by the defendants' preferences to settle insider trading cases rather than through litigation.[239]

3.2.5. Financial Sector Regulation Act 9 of 2017

The Financial Sector Regulation Act is a recent enactment with broader objectives of regulating and supervising the financial sector so as to improve its market conduct and to protect financial customers.[240] As this legislation does not directly deal with insider trading issues, a brief description of the Act relative to insider trading will be made herein. In relation to insider trading, the legislation deals with the imposition of administrative penalties through the established Financial Sector Conduct Authority (FSCA).[241] Thus the FSCA performs a regulatory and supervisory function with its key objectives being mainly enhancing efficiency, integrity, stability of financial markets, protecting customers and promoting financial literacy.[242] Relatedly, in one of its initial quarterly bulletin the FSCA defines the entity as 'a dedicated conduct authority for the financial services industry'.[243] The FSCA mainly investigates and takes administrative enforcement action against insider trading practices and refers offences for criminal action to the Director of Public Prosecution.[244] The full responsibilities of these authorities, the legislation limitations and how they can be strengthened will be described in subsequent paragraphs.

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[236] Kawadza 2015c op cit 58.
[237] Redman 2015 op cit 25.
[238] JSE 2015 op cit 4; See also Alexander 2007 op cit 122.
[239] Kawadza 2015c op cit 56.
[240] Financial Sector Regulation Act 9 of 2017 s 7 (1) *(a-h).*
[241] Financial Sector Regulation Act 9 of 2017 s 167 (1) *(ab).*
[242] Financial Sector Regulation Act 2017 s 57 (a) *(b)* (i) (ii) *(c)*; Financial Sector Regulation Act 2017 70 (2*) (b)* (i).
[243] Financial Sector Conduct Authority (2018/2019) op cit 3; Financial Sector Conduct Authority (2020/2021) op cit 10.
[244] Financial Sector Conduct Authority (2018/2019) op cit 8.

3.3. The South African mechanisms for enforcing insider trading regulations

This part of the review discusses and critiques the three options available in enforcing insider trading regulations. The three mechanisms consist of ensuing criminal penalties, civil settlements and administrative sanctions to insider trading offenders. The three remedies will be discussed in the context of the low prosecution rate characterising the South African financial markets. The discussion will be informed by both local and international economic law scholars' insights and will inform the need to pursue a pragmatic position regarding the enforcement of insider trading, in the discussion chapter. The review will help the study respond to the research question relating to exploring the most pragmatic position for the enforcement of insider trading sanctions

3.3.1. Criminal penalties

Criminal prosecution were the first mechanism introduced in South Africa to sanction insider trading, however there has been no insider trading case successfully prosecuted before the local courts and consequently no precedent exists in this regard.[245] The criminal sanctions mechanism has not been fully exploited as most of disciplinary actions are settled rather than fully litigated.[246] There is concurrence that the challenging standard of proof or evidentiary requirements in the criminal penalties has lowered the prosecution of insider trading violations in South Africa and this is unlikely to be change in the future.[247] Similar circumstances have also been reported in the European Union states.[248] Scholars also express that the litigation costs involved in the civil action are low when compared to criminal liabilities.[249] Offenders also cover up their criminal conduct through intricate corporate measures which make it difficult for the authorities to detect the offence, prosecute and obtain a conviction.[250]

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[245] Chitimira and Lawack 2013 op cit 216; Kawadza 2015c op cit 54; Kawadza 2015b op cit 387; Luiz 2011 op cit 162.
[246] Kawadza 2015c op cit 56.
[247] Chitimira 2014b op cit 269 & 271; Kawadza 2015b op cit 388; National Treasury *Financial Markets Review Final Report* (2021) 81.
[248] Alexander 2007 op cit 203.
[249] Kawadza 2015c op cit 55.
[250] Kawadza 2015c op cit 57.

The lack of criminal conviction implies that an exemplary conviction is still lacking in South Africa yet such a show-case has a symbolic value that sends positive signal to the market.[251] The criminalisation and prosecution of insider trading is basically meant to act as deterrence to insider dealing contraventions.[252] Thus the criminal punishment inflicted on individuals or investors discourages other members of the business community from committing a similar act.[253] Besides the difficulties in obtaining prosecution, this form of sanctioning should be encouraged to deter insider trading and set guidance for the local financial markets.

3.3.2. Civil tools

The civil remedy was the second enforcement tool applied by the authourities to curb insider trading practices in the South African financial markets. The civil settlement mechanism emerged and was foregrounded in the Insider Trading Act 135 of 1998. The difficulties involved in attaining prosecution because of the burden of proof motivated the need for civil remedies whose evidentiary standard is very low.[254] In fact the hallmark of the civil approach is the greater ease of proof.[255] Generally civil law is important in resolving conflicts between individuals and providing compensation to the offended party.[256] Civil applications allow for the decriminalisation of insider trading misconduct and introduction of friendly civil law mechanisms.[257]

Civil remedies enable investors to recover losses that they would have incurred through entering into imprudent investment contracts.[258] The civil enforcement costs when compared to criminal sanctions are generally regarded to be very low as they involve common daily standard operational functions of enforcement agencies.[259] The civil remedies penalties are regarded as effective as they dispose corporates of their hard earned profits, something which investors detest from, even if they are

[251] Kawadza 2015c op cit 57.
[252] Luiz 2011 op cit 167; Alexander 2007 op cit 231.
[253] Seredynska 2012 op cit 166.
[254] Kawadza 2015b op cit 389; Alexander 2007 op cit 246.
[255] Alexander 2007 op cit 202.
[256] Seredynska 2012 op cit 228 & 240.
[257] Seredynska 2012 op cit 240.
[258] Kawadza 2015c op cit 55.
[259] ibid.

proceeds of crime.[260] Technically, civil settlements reduce the workload and responsibilities of the overburdened and overstretched courts that lack specialised legal personnel.[261] Locally the huge amount of money collected from civil remedies suggests that civil sanctions have been successful as a mechanism for inhibiting insider trading.[262]

3.3.3. Administrative sanctions

The administrative sanction explicitly emanated when the Financial Market Act was enacted in 2012. Like the civil action remedies, the administrative penalties' standard of proof is easier to obtain especially when compared to the traditional criminal liabilities.[263] In fact, Seredynska explicates that administrative settlements offer an interesting and feasible alternative to criminal law provisions, which helps establish order.[264] Administrative sanctions play a role in inhibiting insider trading, as it is argued that the mere thought of paying fines deters such practices.[265] Relatedly, the merits of administrative remedies, especially the disgorgement compensation, have been argued to have the effect of increasing compliance with insider trading provisions.[266] The lack of resource and human capacity to enforce insider trading through the criminal procedures has compelled South African financial markets regulators' to seek compliance through co-operation which is offered in out of court settlements.[267] Administrative arrangement and resolutions are compelling and attractive when one considers the fact that issues are resolved expeditiously, through low costs mechanisms, rather than utilising an over-burdened civil justice system.[268] The settlement approach between the enforcing authourities and the offender, suit the respondents as they suffer less reputational damage and humiliation despite paying a fine.[269]

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[260] Ibid.
[261] Kawadza 2015c op cit 64.
[262] Luiz 2011 op cit 155.
[263] Kawadza 2015c op cit 55; Kawadza 2015b op cit 393 & 396.
[264] Seredynska 2012 op cit 237.
[265] Kawadza 2015c op cit 57; Kawadza 2015b op cit 397.
[266] Chitimira 2014b op cit 270; Kawadza 2015b op cit 392.
[267] Kawadza 2015c op cit 57.
[268] Kawadza 2015c op cit 58; Kawadza 2015b op cit 392 & 395.
[269] Kawadza 2015c op cit 58.

However, despite its numerous advantages, administrative settlements occur in an apprehensive context, where the regulator wants to resolve matters expeditiously, which can consequently result in compounding insider trading problems and perpetuating corporate governance malpractices. [270] The effects of the administrative penalties are hardly felt by the offenders as the disgorged amount is not paid in most of the cases by the defendant but is re-compensated by the company.[271] Using extra-judicial penalties, such as civil and administrative sanctions have been reported, in other jurisdiction to be associated with deterioration in financial market conduct.[272]

3.3.4. Pragmatic position regarding the enforcement of insider trading

Whilst the three sanctioning mechanisms have been used in South African financial markets, it is the limitations in criminal penalties that are worrying as no successful prosecution has been effected. This therefore calls for pragmatic insider trading frameworks. Such practical and realistically reflective insider trading approaches will be exhaustively discussed in the discussion section; however such positions need to take effect of the following scholarly perspectives. The use of the three sanctioning remedies broadly increases the compliance and the enforcement of insider trading provisions.[273] The utilisation of different remedies enables the relevant authourities to use and impose appropriate disciplinary sanctions on different offenders and also depending on the nature of the transgression.[274] Thus for example, Seredynska emphasises that criminal liabilities are critical for the protection of the financial markets and should be used when punishment is in the interest of the whole community and in instances where the wrongful act violates the most essential community's values.[275] In the same breadth, civil tools are efficient remedies when the amount of suffered losses is clearly definable.[276] It is important to highlight that the efficient application of the three insider trading mechanisms depend on the clear

[270] Kawadza 2015c op cit 59.
[271] Kawadza 2015c op cit 61.
[272] Kawadza 2015b op cit 395.
[273] Chitimira 2014b op cit 270; Kawadza 2015b op cit 399.
[274] Chitimira 2014b op cit 270; Seredynska 2012 op cit 147.
[275] Seredynska 2012 op cit 148 & 154.
[276] Seredynska 2012 op cit 231.

formulation of the forbidden and acceptable behaviour.[277] This is even more desirable in instances for the criminalisation of insider dealing, where the objective criteria for violation of the rule should be clearly formulated.[278]

However other progressive jurisdictions such as the UK and the USA emphasise a strict parallel system of extra-judicial penalties, with criminal sanctions having a subsidiary punitive role.[279] What can be gleaned from the different sanctioning positions is that the utilisation of the three remedies is equally important, with the need to improve the criminal penalties and prosecutions, through strengthening the objective criteria rule. This pragmatic position resonates with the prevailing South African insider trading context and will be fully explored in the impending discussion chapter.

3.4. How can legislation that enforces insider trading be strengthened

The following legislative solutions and reformulations can enhance and strengthen South African insider trading Acts. These enactment suggestions and changes draw from national legislative analysis and local scholarly insights. A feasible, practical and prudent solution of easily attaining convictions which could be practiced in South Africa is to have relatively less stringent evidentiary requirements which admit circumstantial evidence subject to stipulated admissibility criteria.[280] Such evidence, according to Kawadza should both be appropriate and have as much probative value as direct evidence.[281]

Local literature also provides solutions to overcome the legislation hurdle, of differentiation in the penalty provisions between the actual insider trader and those that merely encourage or discourage others from dealing in the affected listed securities future. South African economic law scholars suggest that insider trading legal reformulations must provide for distinct and separate criminal penalties for persons that commit insider trading for their own account and other persons that encourage or discourages others from dealing in the affected listed securities whilst

[277] Seredynska 2012 op cit 232.
[278] Seredynska 2012 op cit 233.
[279] Kawadza 2015b op cit 398.
[280] Kawadza 2015a 392.
[281] Kawadza 2015a 392.

having inside information.[282] The differentiation strategy should be extended to separate individuals from juristic persons, when delimiting insiders – with both of them having discrete sanctions under insider trading statutes.[283]

Scholars have different solutions to the numerous definitional challenges by arguing for the need for future amendments to explicitly define all the basic elements of insider trading as a way of enhancing the curbing of insider trading in local financial markets.[284] According to van der Walt the definitions need to be clarified, simplified and intelligible typical of a modern financial markets so that people know what their rights and obligations are.[285] Furthermore, clarified concepts encourage international investments as investors can ascertain what the rules entail.[286] On the other hand there are some scholars who claim that it is prudent in some local cases to draw from foreign progressive insider trading legislation sources, cases or material such as the European Union Directives, USA and the United Kingdom legislations when having key undefined terms or concepts.[287] This group finds the current status quo to be justified with concepts definitions and their meaning depending on a case by case and the surrounding circumstances.[288]

Borrowing from Germany and American insider dealing perspectives and in addition to the proof of knowledge posited under section 77 of the Financial Market Act 19 of 2012, local regulatory provisions should justify that the alleged wrongdoer deliberately exploited the information for personal financial gain.[289] Thus in addition to the specific criterion in the Act, the court must prove that the offending insider used the acquired insider information for his/her financial rewards. The material effect of inside information which in the current provision is alluded to have impact on the 'price of value' of securities should have a wording that implies that securities are in fact 'price affected in relation to the information' as is the case under the

[282] Mabina & Chitimira 2019 507.
[283] Financial Markets Act 2012 s 77-78; Mabina & Chitimira 2019 op cit 511.
[284] Mabina & Chitimira 2019, 512; Chitimira 2016 op cit 41.
[285] Van der Walt 2019 op cit 9-12.
[286] Van der Walt 2019 op cit 13.
[287] Morajane 2017 op cit 512; Lugaju 2018 op cit 27; Redman 2015 op cit 6; *Zietsman v Directorate of Market Abuse* 2015 page 26.
[288] JSE 2015 op cit 5.
[289] Osode 2000 op cit 248.

English Criminal Justice Act, 1993, as explained by Jooste.[290] Thus, the different legislation challenges and the solutions provided herein could help to enhance and strengthen local insider trading acts. In the ensuing discussion chapter these impediments and resolutions will be fully explored as they are the main research objective of this study.

3.5. The main institutions mandated to enforce insider trading legislation

This part discusses the main institutions, which are state organisations and establishments that have been mandated to enforce insider trading legislation in South Africa. These establishments consists of the Directorate of Market Abuse, the Financial Sector Conduct Authourity, the Enforcement Committee, the JSE's Market Regulation Division, the Prudential Authourity and the National Prosecuting Authourity – which are tasked with the implementation and the enforcement of insider trading legislation locally.[291] The nature of the responsibilities of each organisation will be fully discussed, so as to assess the role played by each institution in controlling and monitoring insider trading.

3.5.1. The Financial Sector Conduct Authourity

The FSCA replaced the FSB which was established under the Financial Service Regulation Act 9 of 2017 and has shifted its approach from the traditional compliance driven model to a dedicated conduct authority for the financial services industry.[292] The FSCA is an independent government agency that reports directly to the National Treasury and is responsible for regulating the market conduct of financial institutions and supervisors of financial institutions. [293] Of interest are the Committee's financial market integrity supervision and the protection of customers and investors' functions.[294] Given the evolving financial market landscape the

[290] Jooste 2006 op cit 451.
[291] Johannesburg Stock Exchange 2015 21-24.
[292] Financial Sector Conduct Authority (2018/2019) op cit 3; Financial Sector Regulation Act 9 of 2017 s 58 (1); FSCA (2018-2021) op cit 4; Financial Sector Conduct Authority (2020/2021) op cit 10; FSCA 2018 op cit 3.
[293] Van Wyk 2019 op cit 2; Chitimira & Ncube 2020 op cit 9; Financial Sector Conduct Authority (2020/2021) op cit 16.
[294] Financial Sector Regulation Act 9 of 2017 s 167 (1/5); Financial Sector Conduct Authority (FSCA) (2018/2019), 6; Van Wyk 2019 op cit 16; FSCA (2018-2021) op cit 2; National Treasury 2021 op cit 149.

authority has the oversight and strategic function of enhancing the efficiency and integrity of the financial markets.[295]

Related to this study and a core function of its specialist investigation team, the FSCA has a wide range of powers to conduct in-depth market abuse investigations and corroborate its findings.[296] In compliance of the administrative law principles, the authority enforces appropriate administrative penalties to deter insider trading practices but cannot institute criminal prosecution, as the latter responsibility lies with the Director of Public Prosecutions.[297] To ensure the protection of its consumers against risk and financial harm and in compliance with the FSR act and privy legislation, the FSCA has the power to debar and remove key persons and suspend or revoke operational licences.[298] Once the responsibility of the FSB, and included in the wider roles of the FSCA is the multilateral agreements to combat cross-border market abuse with similar national authourities through investigating, interrogating or prosecuting perpetrators of extra-territorial market abuse activities.[299] In relation to the twin peak model, the FSCA works in collaboration with the South African Reserve Bank (SARB) and the PA, to determine the regulatory framework of specified foreign countries and the extent of their equivalence to the local market regulations.[300] Thus within the new twin peaks system, the FSCA has the responsibility of maintaining the financial stability of financial institution which constitutes the 'macroprudential' regulation dimension.[301]

3.5.2. The Directorate of Market Abuse

The institution that wields wide responsibilities is the Directorate of Market Abuse (DMA) - formerly called the Insider Trading Directorate – which has the main function of instituting civil proceedings against market abuse practices including insider

[295] FSCA (2018-2021) op cit 11.
[296] FSCA (2018-2019) op cit 8; Van Wyk 2019 op cit 16; FSCA (2018-2021) op cit 57.
[297] FSCA (2018-2019) op cit 8; Van Wyk 2019 op cit 16; FSCA (2018-2021) op cit 58; De Villiers 2020 op cit 2.
[298] FSCA (2018-2021) op cit 58.
[299] Chitimira & Lawack 2013 op cit 204-205; Chitimira 2014a op cit 943; Osode 2000 op cit 260; JSE 2015 op cit 24.
[300] FSCA (2020-2021) op cit 39.
[301] Van Wyk 2019 op cit 13.

trading violations.[302] In this regard, the DMA operates with the Financial Sector Conduct Authourity in instituting civil proceedings and settling insider trading matters.[303] The establishment also has overarching powers to investigate, search and seize records and documentation that are in possession of suspected individuals or organisations, which would have committed market abuse offences.[304] Because of its wide ranging prerogatives the Directorate of Market Abuse may refer cases either to the Enforcement Committee to impose administrative penalties or to the prosecuting authorities for consideration.[305] It is the prerogative of the DMA to undertake forensic investigation on suspected market-abuse cases forwarded to it by the JSE's surveillance department.[306]

3.5.3. The Enforcement Committee

The Enforcement Committee was initially established as committee of the then Financial Services Board (now the FSCA) and has the responsibility of administrating and adjudicating on all the forms of market abuse.[307] The Enforcement Committee is provided with insider trading reports by the DMA to furnish before the alleged offender and adjudicating the matter as well as imposing a penalty.[308] Thus primarily the enforcement committee responsibility is to adjudicate a case and punish a wrongdoer by imposing the appropriate administrative sanctions and penalties and deciding on the compensation amount supposed to be paid by the offender.[309] However respondents can appeal any case before the Enforcement Committee.[310]

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[302] Securities Service Act 36 of 2004 s 83 (1) (a) *(c)* (i). JSE 2015 op cit 3; Chitimira & Lawack 2013 op cit 206 & 208; Petersen 2010 op cit 1.
[302] Chitimira & Lawack 2013 op cit 207; Petersen 2010 op cit 1.
[303] Chitimira & Lawack 2013 op cit 207.
[304] Securities Service Act 36 of 2004 s 82 (1) (2) *(a-f)*; JSE 2015; Chitimira & Lawack 2013 op cit 206; According to Redman 2015 op cit 24 the DMA has 'extensive power of search, seizure, summoning and interrogating'; Petersen 2010 op cit 1.
[305] JSE 2015 op cit 24.
[306] Chitimira & Lawack 2013 op cit 208.
[307] Chitimira & Lawack 2013 op cit 208; Paul, Kruger 'FSB Enforcement Committee' Moonstone 30 July 2013 at 1, available at: https://www.moonstone.co.za/fsb-enforcement-committee/, accessed 4 November 2021.
[308] JSE 2015 op cit 26.
[309] Chitimira & Lawack 2013 op cit 211.
[310] ibid.

3.5.4. Prudential Authourity

The Prudential Authourity is a separate legal entity, operating within the administration of the SARB and whose responsibilities under the twin peak system relates to “micro-prudential regulation”, which entails the regulating and maintaining of the stability of financial institutions.[311] Besides monitoring financial institutions, the regulatory authority also has the mandate of promoting the safety and soundness of market infrastructures that provide financial products and securities.[312] The PA works in cooperation and collaboration with other key regulatory bodies and role-players such as the SARB, the FSCA, the Competition Commission, the NCR, the FIC in ensuring the fair provision of financial products and financial services to all South Africans.[313] Relatedly, its responsibility extents to assisting the SARB in maintaining financial stability.[314] Like its counterpart the FSCA, the PA also has extra-territorial powers to execute it dual functions of regulating and supervising financial institutions and market infrastructures.[315] In line with the twin peak model the PA coordinates with the FSCA on common ancillary objectives and on various aspects of their respective mandates in supporting the provision of financial products and services and enhancing financial sector transformation and financial inclusion.[316]

3.5.5. Market Regulation Division

It is the responsibility of the JSE Market Regulation division to monitor and identify possible market abuse conduct and ensure the members’ compliance with regulatory obligation[317] – in fact its mandate involves supporting the effective performance of the market regulation function.[318] The Division basically prevents market abuse activities on the stock exchange through identifying any unusual trading volumes and price movements which could be indicative of insider trading violations and market

[311] Van Wyk 2019 op cit 13; Chitimira & Ncube 2020 op cit 10; SARB (2018-2021) op cit iii & 5; SARB 2021 op cit 54.
[312] Chitimira & Ncube 2020 op cit 10; SARB (2018-2021) op cit iii; SARB 2021 op cit 3; SARB 2021 op cit 54.
[313] Chitimira & Ncube 2020 op cit 11; FSR Act 9 of 2017 s 34 (1) *(b-d)*; SARB (2018-2021) op cit 22.
[314] SARB (2018-2021) op cit 3; SARB 2021 op cit 3.
[315] Chitimira & Ncube 2020 op cit 11; FSR Act 9 of 2017 s 34 (3) *(a)*; SARB (2018-2021) op cit 3.
[316] SARB (2018-2021) op cit 23.
[317] JSE 2021 op cit; JSE 2015 op cit 23.
[318] JSE 2018 op cit 4.

manipulation.[319] It is essential to note that the function of the division only pertains to the identification of potential market abuse matters, with the further investigation of cases being referred to the FSCA for consideration.[320] To identify potential insider trading and market manipulation practices as well as to monitor and analyse trading activities on the JSE listed securities, the Market Regulation division utilises electronic surveillance systems.[321] When unusual trading activities are detected the relevant corporate sponsors are questioned

3.5.6. National Prosecuting Authourity

Besides these described five institutions the high court, any regional court and the National Prosecuting Authority has the jurisdiction to try an offence and effect criminal prosecution of insider trading offenders.[322] Thus the National Prosecuting Authourity or its directorate can institute criminal action against any person that commits market abuse transgression including insider trading.[323] The FSCA furnishes all the necessary information to the NPA so as to enable it to carry its criminalisation mandate.[324]

3.6. Institutional limitations in enforcing insider trading legislation

Numerous challenges have been discussed as constraining institutional capacity in enforcing insider trading regulations. As alluded earlier on, such constrictions have led to few civil and administrative settlements and the unsuccessful criminal prosecutions being attained by the Directorate of Public Prosecutions.[325]

Incapable staffs, that lacks the necessary expertise or specialised knowledge to prosecute regulatory contraventions hinders state institutional enforcement especially on the part of the Directorate of Market Abuse and the Directorate of Public Prosecutions.[326] Relatedly, local literature insights also accentuate that the

[319] JSE 2015 op cit 23.
[320] JSE 2021 op cit 1.
[321] JSE 2015 23; JSE 2021 op cit 1.
[322] Morajane 2017 op cit 507; The criminal sanctions are set out in s 115 *(a)* Securities Services Act 36 of 2004.
[323] FSCA 2018 FSCA Press release 26 July 2018, 4; Petersen 2010 op cit 1.
[324] FSCA 2018 op cit 4.
[325] JSE 2015 4; Chitimira 2014a op cit 959; Lugaju 2018 op cit 53.
[326] Kawadza 2015a op cit 392; JSE 2015 op cit 4; Chitimira 2014a op cit 960.

low salaries within different government establishments mandated with enforcing insider trading legislations, does not attract or may lead to the attrition of specialised regulators – which deters the effective operations of sanctioning insider trading malpractices.[327]

Local literature also attribute the poor allocation of financial resources within different government institutions mandated with insider trading sanctioning as deterring the effective inhibition of the practice.[328] Relatedly, national establishments also face the challenge pertaining to the unavailability of relevant surveillance equipment resources, especially in the FSCA and the DMA which do not have their own equipment to detect market-abuse activities, expeditiously.[329] These bureaucratic hurdles restrict FSCA in detecting market abuse activities as it relies on alerts from the JSE's market regulation division.[330] Thus the unavailability of investigative resources disempowers the FSCA in effecting its insider trading mandate.

Another institutional challenge prevalent relates to the FSCA's current mandate to investigative and prosecutes perpetrators of cross-border market abuse activities.[331] This extra-territorial responsibility has been explained as being illogical and making no financial sense.[332] Such a responsibility has been described as protecting the integrity of foreign markets and a costly undertaking that far outweighs the sanctioning benefits.[333] There is also doubt whether there exist mutual agreements between local enforcement establishments and foreign international institutions.[334] The most progressive countries with prudent insider trading legislation such as Hong Kong, Canada, Japan and New Zealand have no provisions for foreign jurisdictions applications to illicit cross-border transactions.[335] Thus South Africa appears to be overstraining its insider trading jurisdiction mandate.

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[327] Kawadza 2015a op cit 393.
[328] ibid.
[329] Chitimira & Lawack 2013 op cit 214 & 215; Chitimira 2014b op cit 271.
[330] Chitimira 2014c op cit 52; Chitimira 2014b op cit 271.
[331] Chitimira 2014 op cit 943; Osode 2000 op cit 260; JSE 2015 op cit 24.
[332] Osode 2000 op cit 260.
[333] Ibid.
[334] Chitimira 2014a op cit 943.
[335] Osode 2000 op cit 262.

Another institutional problem has been the separation of responsibilities which lead to poor co-ordination between the FSCA and the Directorate of Public Prosecutions with the former empowered to regulate insider trading whilst the latter executes the prosecution function.[336] According to Lugaju such a position is strange if one considers that other regulatory bodies such as the National Home Builders Registration Council have powers to adjudicate over contravention of its enabling legislation.[337] To enhance the criminal prosecution of market abuse in South Africa the same arrangement and understanding must have been applied, with the FSCA being both mandated to regulate and prosecute insider trading violations. Similarly the Enforcement Committee's mode of operation, of hearing market abuse cases on a referral basis from the DMA weakens the enforcement functions of the Committee and could, continue to have the effect of restricting the implementation of the administrative sanctions.[338] Relatedly the DMA has restricted authority as it cannot execute its duties without confirmation from the FSCA and this affect the performance of its duties.[339] Thus the challenge of collaboration or operating in silos between the aforementioned institutions, combine to lower insider trading prosecution and administrative sanctioning.

Scholars also explain that the continuous backlog in the criminal courts delays insider trading criminal prosecutions.[340] In relation to this argument Kawadza explains that both local and foreign jurisdictions find prosecuting intricate financial insider trading offences to be 'time-consuming and difficulty activity'.[341] Thus the challenges in the South African legislative courts combine to lower insider trading prosecution rates.

3.7. Enhancing institutional capacity for enforcing insider trading legislation

Numerous recommendations have been envisaged to enhance and strengthen the institutional capacity of state establishments that enforce insider trading legislation. In the purview of literature, the research discusses some of the recommendations that could strengthen the institutional capacity of organisation mandated with

[336] Lugaju 2018 op cit 22; Chitimira 2014a op cit 960.
[337] Lugaju 2018 op cit 22.
[338] Chitimira & Lawack 2013 op cit 216.
[339] Chitimira & Lawack 2013 op cit 214; Chitimira 2014b op cit 259.
[340] Chitimira 2014a op cit 960.
[341] Kawadza 2018 op cit 368.

implementing insider trading prohibition regulations. Discussing approaches of strengthening the institutional capacity will help the study respond to the research question relating to analysing strategies that can be used to strengthen institutions that enforce insider trading sanctions.

3.7.1. Recruiting knowledgeable and adequately remunerated personnel

A solution to the incompetent staff that lacks specialised prosecutorial knowledge would be to deploy 'capable personnel', 'top talent' - knowledgeable staff - that is well compensated above the earning of those people they are regulating.[342] Such personnel should have the appropriate capacity, expertise, skills and knowledge to successfully and effectively enforce insider trading sanctions.[343] Both in the American, United Kingdom and the local context there have been calls for insider trading enforcing institutions to be adequately staffed with employees with the necessary combination of skill sets that enhances effective enforcement.[344] The effect of recruiting knowledgeable personnel was evident in the UK insider trading authority, whose increased specialist enforcement staff resulted in increased fine penalties and its first successful criminal conviction of insider dealing violation.[345]

3.7.2. Progressive and a localised national mandate for the FSCA

Another challenge relates to the FSCA's current mandate to investigative and prosecute perpetrators of cross-border market abuse activities. Different perspectives have emerged regarding this obligation with some authourities arguing for and against the practice. Such extra-territorial responsibilities of conferring overseas enforcement, overburdens already overstretched local institutions,[346] if not incapacitating them at the expense of foreign markets obligations. To avoid such legislative overload both Osode and Jooste have argued for South Africa to restrict its scope of conferring enforcement within local boundaries.[347] To clarify this position and being informed by the United States' SEC, and the EU Directive they have been suggestions of only encouraging specified extra-territorial applications in cases were

[342] Kawadza 2015a op cit 393; Reamer & Downing 2016 op cit 195.
[343] National Treasury 2021 op cit 66.
[344] Kawadza 2015a op cit 393; Reamer & Downing 2016 op cit 194; FSCA 2018-2021 op cit 28; Montagano 2012 op cit 592.
[345] Montagano 2012 op cit 592.
[346] Ibid.
[347] Osode 2000 op cit 263; Jooste 2006 op cit 453.

violation of securities law occur in foreign countries and in exceptional situations where there is legislative, territorial and market professionals connection between the host state and foreign countries.[348] Thus there is tension in the literature regarding the foreign territorial obligations of the FSCA.

3.7.3. Coordination of institutions enforcing insider trading prohibition

Another approach to approve institutional capacity draws from Chitimira's earlier insights which suggests the need for co-operation and coordination between the institutions mandated with enforcing insider trading prohibition and the Registrar of Companies, Securities Regulation Panel and the Department of justice to increase the chance of civil settlement of insider trading cases.[349] Such coordination and collaboration approaches should be enhanced also between FSCA and the DMA and NPA on the other hand, so as to enhance their insider dealing sanctioning mandates.[350] To enhance the effective operation of the FSCA as the overarching institute that regulates insider trading jurisdictions, it must also be empowered to adjudicate market abuse cases, as is the case with the National Home Builders Registration Council which controls and monitors its related industry.[351]

3.7.4. Empowering FSCA with comprehensive insider trading prohibition powers

Emerging institutional capacity flaws have been brought to the fore by Lugaju who argues that given the primary objectives of the FSCA which is to investigate and enforce appropriate administrative penalties for market abuse, the authority needs to be empowered to conduct its own monitoring and detection in addition to the JSE Surveillance so as to avoid the risks of having insider trading offenses not being detected.[352] The ideal proposed strategy involves financially and statutorily empowering the FSCA to procure its own market abuse surveillance equipment.[353] Currently the insider trading detection function heavily relies on the JSE surveillance

[348] Osode 2000 op cit 262; Clacher, Hillier & Lhaopadchan 2009 op cit 389.
[349] Chitimira 2014a op cit 952.
[350] Lugaju 2018 op cit 22; Chitimira 2014a op cit 960; Chitimira & Lawack 2013 op cit 214; Chitimira 2014b op cit 259.
[351] Lugaju 2018 op cit 22.
[352] ibid 52-53.
[353] Chitimira 2014c op cit 56; FSCA 2018-2021 op cit 30.

responsibilities.[354] Relatedly, economic law scholars propose that the FSCA should consider having more offices and divisions of its departments in the different regions of South Africa, so as to enhance the implementation of its functions.[355] The institutional capacitation suggested solutions discussed herein would arguably be critical in enforcing insider trading prohibitions.

3.8. Conclusion

In the purview of pertinent literature and business law legislation the chapter discussed the statutory legal framework of insider trading in South Africa. It reviewed the fifty year historical development of insider trading in South Africa. The discussion also critiqued the three key mechanisms available for enforcing insider trading regulation. The review further explored some of the limitations and the strategies for strengthening enactments enforcing insider trading. The analysis also examined the main institutions and the limitations therein of these structures in enforcing insider trading legislation. The following chapter interrogates the main research questions, framing this study and in the process illustrates the extent of the efficacy of the legislation and institutions aimed at regulating insider trading in South Africa.

[354] JSE 2015 23; Chitimira 2014c op cit 52.
[355] Chitimira & Lawack 2013 op cit 217.

CHAPTER 4: DISCUSSION

4.1. Introduction

In the purview of both local and international literature, the unified misappropriation theory and prominent local and global insider trading cases, the ensuing critique and discussion will respond to the five research questions relating to the institutional limitations, overcoming these and the limitations and how to strengthen insider trading legislation as well as the mechanisms that can be used to enforce insider trading sanctions. The responds and the interpretation of these questions will overally aim at assessing the efficacy of the legislation and institutions aimed at regulating insider trading in South Africa. The ensuing discussion will enable the study to draw insights from prudent global jurisdictions so as to inform and improve the enforcement of insider trading regulations and practices in South Africa.

4.2. The limitations in the legislation enforcing insider trading

In the purview of economic law literature and prominent cases in insider trading the ensuing interpretation discusses the key limitations in the South African legislation enforcing insider trading. The ensuing discussion will enable the study to respond the research question that examines the limitations in legislation that enforces insider trading. The analysis and interpretation of the research indicates that the main restriction of local insider trading enactments concern the strict standards of proof in criminal penalties, the definitional challenges in key insider trading concepts, the shortcomings of knowledge encountered by primary insiders and the lack of distinction of penalties between primary and secondary insiders. The inadequacies in insider trading legislation will be primarily analysed through examination of the Financial Markets Act 19 of 2012. The analysis of insider trading legislation resonates with the misappropriation theory which arguments for the utilisation and the scrutiny of securities laws in sanctioning insider trading.[356] The study's findings indicate that the legislative shortcomings makes insider trading offences not 'easier to prove' and difficult to discern the nature of insider trading offences. These limitations affect the successful attainment of market abuse criminal convictions.

[356] Epstein 2016 op cit 1530.

4.2.1. The high and insurmountable evidentiary requirements

One of the major shortcomings in both the South African insider dealing legislation and other jurisdictions which have led to low prosecution rates and unsuccessful conviction of the malpractice has been the stringent evidentiary requirements.[357] Insider trading legislation does not admit circumstantial evidence, especially that relating to meetings, phone calls and presumed possession of inside information.[358] Thus in criminal cases the prosecuting authourities must prove the accused 'beyond reasonable doubt' whilst civil sanctions can only be proved on a 'balance of probabilities' that the defendant violated the specified provisions of the Financial Markets Act.[359] It is the insurmountable and high evidentiary requirements or the burden of proof, required for the authourities in local insider trading criminal cases which leads to the scarcity of prosecution and conviction of insider offenders in South African courts.[360] However, it must be noted that the challenge in the burden of proof is not peculiar to South Africa or emerging states but a phenomenon common in the prosecution of global inside trading offences, worldwide.[361] Thus the stringent evidentiary requirement especially in enforcing criminal prosecution has negatively impacted the sanctioning of insider trading legislation in South Africa.

4.2.2. Insider trading concepts definitional challenges

The other challenge permeating the South African insider dealing proscription enactments regards the definitional challenges of key concepts. Insider trading legislation does not clarify and expressly define the central concepts of what entails: 'an insider', 'insider information' and 'insider trade' preferring instead to borrow from foreign legislation to illustrate these notions.[362] The worst part of these flawed definitions is evident in the lack of terminological explication of the insider trading

[357] Kawadza 2015a op cit 392; Frijns, Gibert & Tourani-Rad 2013 op cit 206; JSE 2015 op cit 3.
[358] Kawadza 2015a op cit 392; Frijns, Gibert & Tourani-Rad 2013 op cit 206.
[359] JSE 2015 op cit 3; Financial Markets Act 2012 s 78 (1) *(b)*; Chitimira 2014c op cit 48; Osode 2000 op cit 248.
[360] Mabina & Chitimira 2019 op cit 507; Jooste 2006 op cit 444; Luiz 2011 op cit 162; Chitimira 2014b op cit 269 & 271; Chitimira 2014c op cit 54.
[361] Bhattacharya & Daouk 2002 op cit 90; See Frijns, Gibert & Tourani-Rad 2013 op cit 207.
[362] Financial Markets Act ss 77, 77(b), 78 (i) (a); Mabina & Chitimira 2019 op cit 496; van der Walt 2019 op cit 12; Kleitman 2015 op cit 2; Chitimira 2016 op cit 27.

concept.[363] Relatedly, the definitional difficulty of what constituted 'insider information' surfaced in *the case between Zietsman and the Directorate of Market Abuse.*[364] Because of the difficulties in clarifying such key concepts pertaining to insider dealing, the local legislation and insider trading regulators has used foreign enactments to illustrate - that is make a comparative analysis of - some of these core aspects.[365] However, it must be noted that insider trading concepts definitional shortcomings are also common in some of the most progressive jurisdictions such as the USA, the UK, Australia and the EU.[366]

Some of the critical concepts of this notion, such as 'inside information' and 'inside' are cumbersomely, counter-intuitively, circularly and incoherently defined, for it is argued that "for one to know whether information is 'inside information' one has to know who an 'insider' is; and to know who an 'insider' is one has to know what 'inside information' is".[367] The Financial Market Act 19 of 2019 does not also explicitly delineate key and equally important related terms such as 'specific' and 'precise' 'material information', 'tipping' and 'tippee'.[368] As previously eluded the insufficiency of the legislation in this regard has led to the consultation or the use of foreign enactments or sources in order to arrive at the meaning of these terms.[369]

Adding to the plethora of definitional challenges, in the insider trading enactment, is the lack of a clear definition of the term or expression 'through an agent' in the Financial Markets Act.[370] This limitation can lead to both agents and non-agents that trade listed securities on behalf of insiders or other individuals evading insider trading liability.[371] An analysis of Financial Markets Act alludes to the widened scope of what constitutes an insider under the act, as it may be deduced to include a 'person' who could either be an individual or a juristic person or it could be inferred

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[363] Chitimira 2016 op cit 30; Chitimira 2014 op cit 53.
[364] Morajane 2017 op cit 512; *Zietsman v Directorate of Market Abuse* SA A679/14 232E paragraph 77, (24 August 2015).
[365] Kawadza 2018 op cit 364; van der Walt 2019 op cit 12; Kleitman 2015 op cit 2; Morajane 2017 op cit 512; Redman 2015 op cit 6.
[366] Chitimira 2016 op cit 27.
[367] Financial Markets Act s 77 *(a)*; Jooste 2006 op cit 438.
[368] Financial Markets Act s 77; Mabina & Chitimira 2019 op cit 501; Lugaju 2018 op cit 27; JSE 2015 5; Redman 2015 op cit 6.
[369] Lugaju 2018 op cit 27.
[370] Financial Markets Act s 78 (2) *(a)*; Mabina & Chitimira 2019 op cit 501.
[371] Chitimira 2014b op cit 264; Chitimira 2016 op cit 31.

to imply a 'partnership or any trust'.[372] There is therefore confusion in the enactment regarding as to whether an insider could be either a 'person' or a corporate or a legal entity.[373]

In the light of these inadequacies, there have been recommendations for the amendment of the Financial Markets Act so as to provide succinct and concise definitions of these key insider trading concepts.[374] An in-depth analysis and interpretation of these definitional challenges indicates that these shortcomings could be one of the possible reasons for the unsuccessful prosecution of insider trading offenders as it makes insider dealing offences harder to prove rather than being 'easier to prove'. Such difficulties make it complicated to achieve or attain convictions of perpetrators of market abuse malpractices.

4.2.3. The challenge of the defendant's state of knowledge

There is also the challenge of inferring the defendant's state of knowledge, which pertains to proving the extent to which the insider is cognisant that the information that came into his possession was inside information. This drawback relates to the nature of inside informational knowledge which the primary insiders must apparently 'know' that meets specified conditions and implications - for the offender to be identified as an insider. The information must be presumably:

(i) Specific or precise information,
(ii) must have not been made public,
(iii) obtained or learned through being an insider and
(iv) if it were to be made public, would be likely to have material effect on the price or value of any security listed on a regulated market.[375]

This inside information criteria results in apparent difficulty, for establishing such facts is but a matter of personal judgement or depends on an individual's subjective interpretation of facts.[376] Conversely the offenders can escape liability if they prove the disclosed information did not amount to inside information.[377] Economic law

[372] Financial Markets Act s 77 *(b)*; Lugaju 2018 op cit 25; Chitimira 2014b op cit 259.
[373] Jooste 2006 op cit 438.
[374] Chitimira 2016 op cit 41.
[375] Financial Markets Act s 77 *(a-b)*; Jooste 2006 op cit 442.
[376] Jooste 2006 op cit 442 & 443.
[377] Mabina & Chitimira 2009 op cit 510.

experts, also disagree on the specifications of the facts that need to be established to guarantee whether information is or is not inside knowledge.[378] This challenge of examining the defendant's state of inside information knowledge is also common in European member states, Australian and other emerging state jurisdictions. [379]

4.2.4. The lack of distinction of penalties between primary and secondary insiders

Besides these prominent challenges, it has also been noted there is lack of differentiation or segregation of penalty provisions in the Financial Market Act, between the primary and secondary insiders who deal in the affected listed securities.[380] The distinction in the parties that might be involved in insider trading is critical in understanding the nature of their insider trading offences, especially between those offenders that commit insider trading for their own account and those that simply encourage or discourage others from dealing in the affected market securities.[381] This position relate with the study's theoretical elucidations that hold both primary and secondary insiders as liable for insider dealing.[382] Thus the lack of distinction between the primary and secondary insiders' penalty provisions makes it difficult to discern the extent and the scope of the offenders' insider dealing contraventions.

The insurmountable evidentiary requirements, definitional challenge anomalies and the shortcomings in verifying the defendant's state of knowledge indicates the technical legal drawbacks, which makes it difficult to 'easily prove' insider dealing offences. On the other hand the lack of differentiation of penalties between primary and secondary insiders makes it difficult to discern the nature of the insider trading offences. These legal drawbacks highlight the simultaneous challenges of proving insider trading offences and discerning the nature of insider trading contraventions. Such difficulties perpetuate the on-going and elusive challenge of not achieving or obtaining criminal conviction on insider trading activities.

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[378] Jooste 2006 op cit 443.
[379] Alexander 2007 op cit 231; Gillis 2020 op cit 61.
[380] Mabina & Chitimira 2019 op cit 507; Jooste 2000 op cit 294.
[381] Jooste 2000 op cit 294.
[382] Kawadza 2015a op cit 388.

4.3. Strengthening legislation that enforces insider trading

Given the legislative challenges elucidated above, the research will provide different legislative solutions, reformulations and changes that can enhance and strengthen South African insider trading enactment. The interpretation of such strategies will be illustrated by the pertinent literature and aspects of the unified misappropriation theory. The ensuing analysis and discussion will help the study respond to the question that examines approaches that can be used to strengthen insider trading legislation. The study's critical analysis indicates the need for less stringent evidentiary requirements that admits circumstantial evidence, clear definition and illustration of insider trading concepts and cases, establishing the regulatory proof of the defendant's inside information knowledge and distinguishing between the different insider trading offenders. The envisage solutions are within the periscope of the legislative framework, which resonate with the misappropriation theory's elucidation that resolutions to insider trading enactments must be within the insights of securities law. [383] The proposed legislative solutions could be critical in ensuring that offences are easier to prove and enables the discerning of the nature of insider contraventions, which enhances insider trading legislation.

4.3.1. Less stringent evidentiary requirements that admits circumstantial evidence

A prudent solution of easily attaining convictions that has been exercised in both the United States and Netherlands, which could be practiced in South Africa, is to have less stringent evidentiary requirements.[384] The flexible proof criterion would admit circumstantial evidence subject to stipulated admissibility criteria.[385] An analysis of the current insider trading cases, indicate the acceptance of circumstantial evidence relating to meetings, phone calls and presumed possession of inside information.[386] Thus in *the case between the FSCA and Markus Jooste* - sms, meetings and having

[383] Epstein 2016 op cit 1530.
[384] Kawadza 2015 op cit 392; Frijns, Gibert & Touran-Rad 2013 op cit 206; Alexander 2007 op cit 202.
[385] Kawadza 2015 op cit 392.
[386] Kawadza 2015 op cit 392; Frijns, Gibert & Tourani-Rad 2013 op cit 206; FSCA v Markus Johannes Jooste. 29 October 2020.

knowledge of the insider information evidence – was accepted by the administrative court as valid circumstantial proof.[387] Such secondary inferred evidence should both be appropriate and have as much probative value as direct evidence.[388] Thus the use of credible and relevant circumstantial evidences lessens the burden associated with the stringent evidentiary requirements, which enhances the legislation that enforces insider trading.

4.3.2. Clear definition and illustration of insider trading concepts and cases

This challenge could be overcome either through ascertaining conceptual definitions or having meanings illustrated or illuminated through foreign jurisdiction and cases. Thus firstly, the definitional shortcomings have led to the need for future amendments to clearly define all the rudimentary elements of insider trading as a way of strengthening legislation that prohibits insider trading practices.[389] The key insider trading concepts should be precise, clear and simple, resulting in intelligible legislation that is typical of modern financial markets, which enables people to know what their rights and obligations entail.[390] Clarified insider trading concepts encourage international investments as investors can easily establish the meaning and implications of the rules.[391]

The other solution to the definitional limitations pertains to drawing from foreign progressive insider trading legislation sources, cases or material such as the European Union, USA and the United Kingdom legislations when having undefined key terms.[392] Under this perspective insider trading concepts definitions and their meaning are illustrated through foreign legislation and credible academic sources, depending on a case by case and the surrounding circumstances.[393] Thus in *the case between Zietsman v Directorate of Market Abuse* foreign sources were

[387] *FSCA v Markus Johannes Jooste*. 29 October 2020 paragraphs 4.2; 85.6 indicated sms evidence; 52 indicated meetings evidence 21; 113.2; 134 showed the offender's awareness of the insider trading concept.
[388] Kawadza 2015a op cit 392.
[389] Mabina and Chitimira 2019, 512; Chitimira 2016 op cit 41.
[390] Van der Walt 2019 op cit 9-12.
[391] Van der Walt 2019 op cit 13.
[392] Morajane 2017 op cit 512; Lugaju 2018 op cit 27; Redman 2015 op cit 6.
[393] JSE 2015 op cit 5.

consulted in order to arrive at the meaning intended by the local legislation.[394] Inferring from the work of Hazen, the most preferable situation, would be for local insider trading legislation to exclusively adopt the definitions and prohibitions in the preferable law codification nations so as to bring certainty and coherence on national insider dealing statutes.[395] However the challenge of these positions is that foreign jurisdictions are different to local securities markets contexts. Thus the definitional challenges could be attended through either having clear conceptual definition or by drawing meanings through foreign legislation and sources.

4.3.3. The need for regulatory proof of the defendant's inside information knowledge

With regards to the challenge of the defendant's state of knowledge, it has been argued that in addition to the individual's proof of inside information knowledge[396] - in the current enactments - local regulatory authourities should prove that the alleged wrongdoer deliberately exploited the information for personal financial benefits.[397] Thus in addition to the "insider information" criterion in the Act, the court must prove that the offending insider used the acquired insider information for his/her financial rewards. The material effect of inside information which in the current provision is alluded to have impact on the 'price of value' of securities should be rephrased to imply that inside information impacts the business of the company or the value of the business - as is the case under the English Criminal Justice Act, 1993.[398] The legislation solution pertaining the need for regulatory authourities' proof of the defendant's inside information would be critical in ensuring that the offence is easier to prove, which would ultimately enhance and strengthen local insider trading acts.

4.3.4. Distinguishing between the different insider trading offenders

Scholars also provide solutions to overcome the legislation hurdle, of differentiation in the penalty provisions between the primary and the secondary insiders who deal

[394] *Zietsman v Directorate of Market Abuse* 2015 (26) SA A679/14.
[395] Hazen 1992 op cit 239.
[396] Financial Market Act 19 of 2012 s 77.
[397] Osode 2000 op cit 248; Wentzel 2000 op cit 1.
[398] Jooste 2006 op cit 451.

in the affected listed securities. Scholarly views suggest that insider trading legal changes must provide for discrete criminal sanctions for persons that commit insider trading for their own account and for those that encourage or discourages others from dealing in the affected listed securities whilst having material price-sensitive information.[399] Relatedly the misappropriation theory argues for the distinction of the penalties between primary and secondary insiders, though it further elucidate that both are liable for insider dealing offences.[400] Relatedly, there is also need to separate and differentiate individuals from juristic persons when defining an insider, with the two types of roles, having distinct penalties under the envisaged legislation changes.[401] Furthermore the inclusion of a 'partnership or any trust' under the Financial Market Act to imply that such entities can commit insider trading offences or civil wrongs, when neither of them has a legal personality in terms of the common law should either be further elaborated or excluded from the respective provisions.[402] The separation of the types of insiders helps the authourities to discern the nature of the insider trading offences contravened by either primary or secondary dealers.

4.4. The limitations to and solutions on the legislation enforcing insider trading

The interpretation and discussion of limitations and the suggested solutions on the legislation enforcing insider trading is informed both by the pertinent literature and the unified misappropriation theory explication that insider dealing enactments' shortcomings and envisaged resolutions must be illustrated by an examination of securities law.[403] Informed by such perspectives, the table below illustrates the shortcomings in the legislation enforcing insider trading and the envisaged solutions to strengthen legislation to overcome such challenges

[399] Mabina & Chitimira 2019 op cit 507.
[400] Kawadza 2015a op cit 388.
[401] Financial Markets Act 2012 s 77-78; Mabina & Chitimira 2019 op cit 511.
[402] Financial Markets Act 2012 s 77 *(b)*; Jooste 2006 op cit 441.
[403] Epstein 2016 op cit 1530.

The limitations of legislation enforcing insider trading	Strengthening legislation that enforces insider trading
The high and insurmountable evidentiary requirements	Less stringent evidentiary requirements that admits circumstantial evidence
Insider trading concepts definitional challenges	Clear definition and illustration of insider trading concepts and cases
The challenge of the defendant's state of knowledge	The need for regulatory proof of the defendant's inside information knowledge
The lack of distinction of penalties between primary and secondary insiders	Distinguishing between the different insider trading offenders

Table 1: The limitations to and solutions on the legislation that enforces insider trading

Responding to the questions relating to the limitations as well the strategies to strengthen legislation that enforces insider trading, the study findings indicate that the high and insurmountable evidentiary requirements challenge could be overcome through encouraging less stringent evidentiary requirements that admit circumstantial evidence. The formulation of clear definitions and illustration of insider trading concepts and cases helps the challenge of defining insider trading concepts. The shortcoming pertaining to the defendant's state of knowledge can be surmounted through the need for regulatory proof of the defendant's inside information knowledge. The solution to the challenge of the lack of distinction of penalties between primary and secondary insiders is through distinguishing between the different insider trading offenders.

The suggested shortcomings and solutions illustrates that the strengthening of legislation that enforces insider trading ensures that offences are easier to prove and enables the discerning of the nature of insider dealing contraventions. These suggestions improve on the need to achieve the successful convictions of insider trading violators and enhance insider trading legislation.

4.5. Alternative insider trading enforcement strategies

Given the success of insider trading enforcement such as disgorgement and naming and shaming wrongdoers, the study also proposes alternative and contemporary sanctioning schemes that can be considered for strengthening local insider trading legislation. The ensuing interpretation and discussion will be in the ambit of pertinent business law literature and the informing theoretical framework. Relating to the latter the misappropriation concept, which is a key aspect of the unified misappropriation theory, encourages both corporate informed measures and securities laws related strategies that can be used to enforce insider trading sanctions.[404]

The legislative related methods include sentencing guidelines, specialised commercial courts, banning orders whilst the corporate informed approaches incorporate the, whistle-blowing mechanisms, Chinese wall and corporate governance measures. These modern alternative sanctioning strategies would effectively help in enforcing insider trading prohibitions and should be critically considered and adopted in the South African financial markets given the evolving nature of the market abuse practices.

4.5.1. Sentencing guidelines

The concept of sentencing guidelines – is one feasible measure of enforcing insider trading - which have been used in the United States and could be employed in the South African financial markets context to ensure successful criminal prosecutions. The sentencing guidelines are critical in fostering uniform and consistent insider trading sentencing procedures that avoids unwarranted sentencing disparities.[405] The sentencing guidelines provide procedures and recommend insider trading sentencing ranges that the judiciary should impose on defendants.[406] The sentencing guidelines provide procedures, rules and formulas for enforcing insider trading sentences.[407] In other words the sentencing guidelines provide guideline principles for recommending insider trading sentencing ranges that the judiciary should impose

[404] Epstein 2016 op cit 1530.
[405] Christopher Conniff, Steven Goldschmidt & Helen Gugel 'Sentencing guidelines for insider trading: Recent amendments create greater disparity' (2013) 26/1 *Federal Sentencing Reporter* 43.
[406] Conniff, Goldschmidt & Gugel 2013 op cit 43.
[407] ibid.

on defendants.[408] Whilst they are promises in the sentencing guidelines, this procedure is fraught with weaknesses, such as inadequacies or inconsistencies when calculating a defence's total offence level, judicial discrepancies regarding the appropriate insider traders sentencing standards and the irregularities in sentencing and the factors emphasised in the guidelines.[409] Regardless of these technical weaknesses, the sentencing guidelines offer an alternative and promising approach that could enhance the enforcement of insider trading sanctioning.

4.5.2. Specialised commercial courts

The other legislative related alternative for enforcing insider trading prohibition entails the formulation of specialised commercial courts or tribunals.[410] Specialised commercial courts consist of financial services or corporate law practitioners, who have in-depth specialist knowledge to adjudicate complex financial markets issues.[411] Specialised courts provide invaluable legislative channels that help reduce the backlog of market manipulation cases in the criminal courts.[412] Commercial courts that specifically deal with market abuse malpractices enhance the current prosecutorial enforcement mechanisms.[413] Such courts would ensure the successful and faster prosecution by prosecutors with specialised knowledge.[414] Specialised courts are also important in separating insider trading offenders from hardened criminals. [415] The unavailability of such courts in South Africa is claimed to be very surprising given the range of specialists' courts that resolves family and labour issues.[416] Given the proliferation of insider trading offences and the elusive insider trading criminal convictions, the specialised commercial courts offer a feasible alternative that could provide legislative related channels or means that would help enforce insider trading contraventions.

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[408] ibid.
[409] Conniff, Goldschmidt & Gugel 2013 op cit 44-46.
[410] Kawadza 2015c op cit 65; Chitimira & Lawack 2013 op cit 214; Chitimira 2014b op cit 271; Chitimira 2014c op cit 56; Lugaju 2018 op cit 54.
[411] Kawadza 2015c op cit 65; Chitimira 2014b op cit 271; Chitimira & Lawack 2013 op cit 214.
[412] Chitimira 2014b op cit 271.
[413] Lugaju 2018 op cit 54.
[414] Ibid.
[415] Ibid.
[416] Kawadza 2015c op cit 65.

4.5.3. The banning order

Another key securities related strategy that has been introduced in Australia and which can be applied in the South Africa financial markets is the banning order. The banning order is form of administrative quasi-penalty that prohibits an insider trader or tipper from providing financial services, advice or dealing in financial products.[417] The written order is mainly used if a person has not complied or has contravened the financial services law,[418] thus in the South African context and in relation to the scope of this study, the banning order could be used for individuals who have breached insider trading legislation. The fact that the banning order relates, with administrative sanctioning tools, which have proved to be very successful in inhibiting insider trading in the South Africa context – makes a case for considering their use as an alternative insider dealing enforcement strategy.

4.5.4. Whistle-blowing

An effective corporate-inclined mechanism that can be used to complement insider trading investigative and surveillance efforts is whistle-blowing. This strategy significantly accounts for the large number of insider trading cases reported before the United States' Securities and Exchange Commission.[419] Relatedly, in the United Kingdom, financial and investment firms are required to establish an independent whistle-blowing channel which is an invaluable source of information that enhances the regulation of insider trading.[420] To argument the whistle-blowing approach, suggestions propose that insider prohibiting legislation must be extended to include the related aspect of whistle–blowing immunity,[421] under which informers are protected from any likelihood of harmful revenge. The whistle-blower bounty programme, which is used by USA's SEC and awards informers about 10% to 30% of the amount collected if it leads to successful enforcement action, can enhance the detection and investigation of market manipulation in the financial markets.[422] Both

[417] Hanrahan 2017 op cit 63.
[418] ibid.
[419] Kawadza 2015a op cit 392; Chitimira 2014a op cit 961; National Treasury 2021 op cit 64; Chitimira 2014b op cit 270.
[420] National Treasury 2021 op cit 64.
[421] Chitimira 2014b op cit 270; Chitimira 2014c op cit 52.
[422] Montagano 2012 op cit 593; National Treasury 2021 op cit 64.

the whistle-blowing programme and the bounty programmes enhance the authourities' abilities to enforce insider dealing penalties and have been recommended by the National Treasury for the South African financial markets.[423] The whistle-blowing tool is a covert corporate-induced insider trading enforcement strategy, which could be helpful in combating South African insider trading violations. The fact that the informer's identity is concealed and they are no extra-commitments attached would encourage individuals to utilise this enforcement tool.

4.5.5. The Chinese wall

A prominent corporate related strategy for inhibiting insider trading, that is gaining prominence in the economic law circles is the introduction of the Chinese wall in business organisations. The notion of a Chinese wall involves the creation of a physical and an operational separation of functions within multi-functioning organisations.[424] The establishment of a Chinese wall within a firm helps prevent the flow of information from one department to another department in the same company.[425] The creation of the Chinese wall has been postulated in local economic scholarly circles as being an effective mechanism of defending insider trading.[426] The construct of Chinese wall resonate with the misappropriation theory call for the need of internal corporate guidelines and policies in inhibiting insider trading practices.[427] The study arguments for the establishment of a Chinese wall, as such a mechanism is quite familiar in business economic circles and well acknowledged by the local legal fraternity. Thus there will be easy adoption of this strategy if businesses collectively accept and popularise its usage as a tool for prohibiting insider trading practices within the corporate World.

4.5.6. Corporate governance

The notion of corporate governance has been of lately suggested as a noble strategy of inhibiting insider trading practices, it has recently re-emerged in the local and

[423] Montagano 2012 op cit 594; National Treasury 2021 op cit 64.
[424] Cassim 2008 op cit 190; Chitimira 2014c op cit 55.
[425] Cassim 2008 op cit 190.
[426] Chitimira 2014c op cit 53.
[427] Epstein 2016 op cit 1530; Van Wyk 2019 op cit 10; Seredynska 2012 op cit 245; Cassim 2008 op cit 190b; Chitimira 2014c op cit 53 & 55.

international literature as being essential in inhibiting insider dealing practices. As previously alluded the need to reflect on this corporate inclined and ethically foregrounded mechanism gained prominence following the introspection of the insider trading penalties imposed on Markus Jooste, who was the Chief Executive Officer of Steinhoff.[428] This case distinctively highlighted the need to clarify the roles and responsibilities, principles and internal codes of conduct of the directors and managers of companies.[429] Corporate governance rules guide companies relating to how the economic surplus generated by the business should be distributed amongst its shareholders.[430] Whilst the notion of corporate governance is very broader, in relation to this study the construct is alleged to be important in fostering social capital, protecting the interests and enhancing the confidence of investors and improving the efficiency of the national financial markets.[431] The corporate governance postulations relate with the misappropriation key theoretical elucidations, which encourage the formulation of clear contractual principles in sanctioning insider trading. [432] The ethical guidelines encapsulated in the corporate governance construct is critical in overcoming insider trading practices, however the South African corporate World has not expressly explained and popularised the guidelines and codes of conduct for fostering and promoting this moral aspect in company operations.

The six strategies discussed in this section can be prudently used to enforce insider trading sanctions in the South African financial markets environment. These mechanisms are contemporary, theoretically relevant and reveal the evolving nature of the insider trading practices and how to counteract such malpractices. These approaches need to be seriously considered given both the proliferation of insider trading offences and the constantly reported elusive insider trading criminal convictions in South Africa securities markets. The envisaged alternatives for enforcing insider dealing activities resonate with the familiar administrative sanctioning tools, recognised within modern business circles and relate with business ethical dimensions. All these reasons motivate for the usage of these range

[428] *FSCA v Markus Johannes Jooste* 29 October 2020 paragraph 4.1.
[429] Van Wyk 2019 op cit 357; *FSCA v Markus Johannes Jooste* 29 October 2020 paragraph 4.1 - 4.2.
[430] Seredynska 2012 op cit 245.
[431] Ojah, Muhanji & Myburg 2008 op cit 2; Seredynska 2012 op cit 245 & 246; Chitimira 2014c op cit 55; Cassim 2008 op cit 182.
[432] Epstein 2016 op cit 1530.

of alternative strategies in helping the enforcement and the strengthening of insider trading legislation.

4.6. The pragmatic position for the enforcement of insider trading sanctions

In the purview of literature and the unified misappropriation theory, the study interprets and discusses the most pragmatic position for the enforcement of insider trading sanctions in South Africa. The adopted position critiques the criminal penalties, civil settlements and the administrative mechanisms of sanctioning insider dealing activities. The elucidation of this position will help the study relate to the research question that assesses the most pragmatic position for the enforcement of insider trading sanctions. Reflecting on the critique, the research argues that the utilisation of the three insider trading remedies is equally important, with the urgent need to improve successful criminal prosecutions, through ensuring that the offence is easier to prove. This standpoint offers a pragmatic view for the enforcement of insider trading sanctions.

4.6.1. Critiquing the methods used for the enforcement of insider trading sanctions

The criminal tools of sanctioning insider trading have been used in the South African financial market for the last half a century; however the lack of successful prosecution and conviction within the same period motivates the need to critique this mechanism. The key challenge in obtaining convictions has been the difficult standard of proof requirements needed in criminal prosecution.[433] Secondly the responsibilities of enforcing criminal liabilities have a high cost implications when compared to the low costs of attaining civil settlements.[434] The fact that insider offenders cover up for their criminal conduct through intricate corporate measures makes it difficult for the inexperienced public prosecutors to obtain a conviction.[435] Unsuccessful criminal prosecutions implies that no precedent exists in this regard,

[433] Chitimira 2014b op cit 269; Kawadza 2015b op cit 388.
[434] Kawadza 2015c op cit 55.
[435] Kawadza 2015c op cit 57.

which sends negative signals to the market as there is no model case, or a symbolic conviction to refer to in the South African legislation.[436]

However besides these challenges it is important to highlight that criminal conviction are important in financial markets as they act as deterrence to insider dealing contraventions.[437] For deterrence to occur, the laws must clearly indicate the kind of behaviour that is forbidden and theoretically the likely parties to violate such statutes.[438] In addition, the criminal punishment inflicted on insiding trading violators discourages other members of the business community from committing similar acts, as they fear of being punished in the same manner.[439] Weighing both the advantages and the disadvantages in obtaining prosecutions, the criminal remedies should be encouraged as it enhances the deterrence of insider trading and set guidance for the local financial markets. However such suggestions must be read in the local context, in which there has been no successful conviction and therefore no exemplary case, currently prevails within the local economic law circuit.

The civil settlement mechanism has been used in the South African financial markets, in the last 25 years. When compared to criminal penalties, the civil system is an affordable and low cost settlement mechanism.[440] Similarly and on a technical aspect, civil action reduces the workload of the overburdened criminal courts that lack specialised legal personnel.[441] The prevalence of the civil remedy as an insider trading enforcement tool has been evoked by the low evidentiary standards requirements.[442] In fact the key advantage of the civil approach is the "greater ease of proof".[443] Relatedly civil remedies have been touted as critical for resolving disputes between individuals and providing means of redress, compensation and recovery of the losses incurred.[444] The utilisation of civil tools has the benefit of allowing for the decriminalisation of insider trading violations.[445] Furthermore the civil

[436] Ibid.
[437] Luiz 2011 op cit 167; Alexander 2007 op cit 231; Seredynska 2012 op cit 168.
[438] Seredynska 2012 op cit 168; Kawadza 2015a op cit 388.
[439] Seredynska 2012 op cit 166.
[440] Seredynska 2012 op cit 240; Kawadza 2015c op cit 55.
[441] Kawadza 2015c op cit 64.
[442] Kawadza 2015b op cit 389; Alexander 2007 op cit 246.
[443] Alexander 2007 op cit 202.
[444] Seredynska 2012 op cit 228 & 240; Kawadza 2015c op cit 55.
[445] Seredynska 2012 op cit 240.

remedies' monetary penalties are regarded as effective and a severe form of punishment as they dispose corporates of their profits, something which investors detest.[446] Since the inception of civil remedies in the financial markets, there has been an increase in the amount of money collected which suggest the success of this system in proscribing insider dealing.[447] The range of legal, technical and economic advantages in the utilisation of civil tools in sanctioning insider trading violations logically indicates the effectiveness of this enforcement system in the South African financial markets.

The administrative sanctioning tools have been in use in the South African financial markets, for the last ten years. There are similarities between the merits of using civil remedies and administrative penalties. Because of the resemblance in their benefits, the study will briefly enlist these. The administrative penalties- evidentiary requirements are easier to obtain,[448] helps establish order[449] as fine payments deters such practices.[450] In addition, administrative resolutions are compelling as issues are resolved expeditiously, through low costs mechanisms, rather than utilising an over-burdened civil justice system.[451] The resources and human capacity limitations in criminal courts compel local financial markets regulators to seek compliance through the cooperation system afforded in out of court settlements.[452] Administrative remedies, especially the disgorgement compensation, have the punitive effect of increasing compliance with insider trading provisions.[453] The administrative settlement approach suits the respondents, who despite being penalised for their market abuse violations, suffer less reputational damage and humiliation.[454]

Though they are numerous advantages, of using the administrative settlement, this system is characterised by the need to resolve matters expeditiously, which can consequently result in compounding insider trading problems and perpetuating

[446] Kawadza 2015c op cit 55.
[447] Luiz 2011 op cit 155.
[448] Kawadza 2015c op cit 55; Kawadza 2015b op cit 393 & 396.
[449] Seredynska 2012 op cit 237.
[450] Kawadza 2015c op cit 57; Kawadza 2015b op cit 397.
[451] Kawadza 2015c op cit 58; Kawadza 2015b op cit 392 & 395.
[452] Kawadza 2015c op cit 57.
[453] Chitimira 2014b op cit 270; Kawadza 2015b op cit 392.
[454] Kawadza 2015c op cit 58.

corporate governance malpractices. [455] The other disadvantage of the administrative penalties is that they are hardly borne by the offenders as the disgorged amount - in most of the cases - is not paid by the defendant but is resettled by corporate companies.[456] More worrying and quite disturbing is the fact that using extra-judicial penalties, such as civil and administrative sanctions have been generally reported, to be associated with deterioration in financial market conduct.[457]

Critically assessing both the merits and demerits of out of court settlements indicates that administrative sanctions offers a feasible alternative of widening the options for the enforcement of insider dealing. It is such legal options encapsulated in administrative sanctions that have led to out of court settlements in most of the contemporary and prominent insider trading cases that has been dealt with in South Africa. The feasible options in administrative mechanisms have witnessed the successful settlement of the; *Zietsman and Another v Directorate of Market Abuse*;[458] *FSCA v Markus Johannes Jooste*;[459] and *FSB v Coal of Africa and Mr Bronn*.[460] The successful administrative settlement of these high profile and prominent insider trading cases in South Africa illustrates the effectiveness and feasible options inherent in out of court settlements.

4.6.2. Towards a pragmatic position regarding the enforcement of insider trading

Whilst the South African financial markets have utilised the criminal, civil and administrative sanctions, it is the limitations in criminal penalties that are worrying as no successful prosecution has been effected. Such a position calls for the study to analytical reconsider a pragmatic insider trading framework for the enforcement of insider trading activities. The envisaged position will take heed of prudent scholarly perspectives as well as insight from the unified misappropriation theory. The related

[455] Kawadza 2015c op cit 59.
[456] Kawadza 2015c op cit 61.
[457] Kawadza 2015b op cit 395.
[458] *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) (24 August 2015).
[459] *FSCA v Markus Johannes Jooste* Administrative penalty order in terms of Section 167 of the Financial Sector Regulation Act No 9 of 2017 (29 October 2020).
[460] *FSB v Coal of Africa and Mr Bronn*, Enforcement Committee proceedings – ex temporae judgment (28 February 2017).

theoretical framework encourages insider trading institutes to comprehensively use criminal, civil and administrative remedies for insider dealing violations.[461] The resultant perspective argues for the importance of the three-pronged utilisation of insider trading remedies, with the urgent need to enhance successful criminal prosecutions, through ensuring the easier of proving the offence.

Basically the informing tenets of this position rely on the fact that the use of the three sanctioning remedies broadly increases the compliance and the enforcement of insider trading provisions.[462] In resonance with this point of view, the theoretical lens of the unified misappropriation framework, argues that individuals who violate insider trading can be sanctioned either through the criminal, civil or administrative penalties.[463] The utilisation of different sanctioning tools enables the relevant authourities to use the appropriate disciplinary sanctions on different offenders.[464] Furthermore the efficient application of the three insider trading mechanisms depends on the nature of the financial market transgression.[465] Thus for example, criminal laws are critical for the protection of the financial markets and business transactions, whilst civil tools are efficient remedies when the amount of suffered losses is clearly definable, with administrative sanctions being appropriately applied in quite burdensome cases that have apparent criminal contraventions.[466] However it is desirable and essential that in instances of the criminalisation of insider dealing, the offence must be easier to prove.[467] Other progressive jurisdictions such as the UK and the USA have slightly different enforcement approaches, which emphasise a strict parallel system of extra-judicial penalties, with criminal sanctions having a subsidiary punitive role.[468] Thus in the determination of *the Dirks v SEC case*, the judiciary enforced administrative sanctions to some of the insider trading offenders.[469]

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[461] Walter 2012 op cit 522.
[462] Chitimira 2014b op cit 270; Kawadza 2015b op cit 399.
[463] Walter 2012 op cit 522.
[464] Chitimira 2014b op cit 270; Seredynska 2012 op cit 147.
[465] Seredynska 2012 op cit 232; Chitimira 2014b op cit 270.
[466] Seredynska 2012 op cit 231.
[467] Alexander 2007 op cit 202.
468 Kawadza 2015b op cit 398.
469 *Dirks v SEC* (1 July 1983) (463.U.S.646) No 82-276.

What can be gleaned from the different sanctioning positions is that the utilisation of the three remedies is equally important, with the urgent need to improve the criminal penalties and prosecutions, through ensuring that the offence can be easily proved. This proposed pragmatic position resonates with the prevailing South African financial market context, the unified misappropriation theoretical enunciations and would provide a prudent position for the enforcement of insider trading violations. Such a stand point would enhance the efficacy of legislation aimed at regulating insider trading in South Africa.

4.7. Institutional limitations in enforcing insider trading legislation

There are several challenges that constrain institutional capacity in enforcing insider trading regulations. The prominent limitations in the literature concern incapable staff, that lacks the necessary specialised expertise; the poor allocation of resources in government institutions mandated with insider trading sanctioning; with the FSCA costly and overwhelming extra-territorial responsibility and the lack of collaboration of establishments mandated to regulate insider trading relating to operational challenges, whilst the disintegrated FSCA roles and the operational challenges in insider trading prosecuting courts resonate with organisation structure constrictions. Thus a critical analysis reveals that insider trading establishments' challenges can be categorised and regarded as staffing, apparatus, operational and structural restrictions. It is important to highlight these institutional limitations that have led to few civil and administrative settlements and the unsuccessful criminal prosecutions being attained by the Directorate of Public Prosecutions.[470]

4.7.1. Incapable staff that lacks the necessary specialised expertise

Local literature explains that most of the establishments mandated with enforcing insider trading have human resourcing challenges. The talent acquisition challenges range from inadequate staff members, the lack of expertise specialised knowledge to prosecute and the low salaries within the different government establishments.[471] Such staffing challenges are prominent in the DMA, the South African Police

470 JSE 2015 op cit 4; Lugaju 2018 op cit 53; Chitimira 2014a op cit 959.
[471] Kawadza 2015 op cit 392 & 393; JSE 2015 op cit 4; Chitimira 2014a op cit 959; Kawadza 2018 op cit 368.

Services and the Directorate of Public Prosecution who lack the specialised knowledgeable expertise to effect successful prosecutions and convictions.[472] Poor remuneration within different government establishments mandated with enforcing insider trading legislations, leads to the attrition and does not attract specialised regulators – which hinder the effective sanctioning of insider trading malpractices.[473]

4.7.2. The FSCA costly and overwhelming extra-territorial responsibility

Another prominent operational institutional constrain concern the FSCA's overpowering mandate to investigate and prosecute perpetrators of cross-border market abuse activities.[474] Osode succinctly elucidates how such extra-territorial responsibilities are costly and far outweighs the sanctioning benefits.[475] Such broader investigative and prosecutorial roles have been alleged to be serving the interest of foreign markets as they protect the integrity of those financial markets.[476] Furthermore it is claimed that the most developed countries with prudent insider trading enactments have no provisions to sanction illegal cross-border transactions.[477] However the work of Chitimira and Lawack submits that these multilateral initiatives have helped in combating cross-border market abuse.[478] Such a claim is hardly substantiated with evidence of successful insider trading extra-territorial prosecutions and convictions. Weighing the different perspectives at hand, points to the fact that such extra-territorial operational functions and responsibilities are overambitious, irrational and overstraining in broadening the South African insider trading jurisdiction mandate.

4.7.3. The operational challenges in insider trading prosecuting courts

Similar to the above elucidations, are the claims that there are numerous administrative and operational challenges facing criminal courts and the NPA which are mandated with prosecuting and convicting insider trading offenders. The most challenging organisational hurdle relates to the numerous backlogs in the criminal

[472] JSE 2015 op cit 4; Lugaju 2018 op cit 53; Kawadza 2018 op cit 368.
[473] Kawadza 2015a op cit 393; Reamer & Downing 2016 op cit 195.
[474] Chitimira 2014 op cit 943; Osode 2000 op cit 260; JSE 2015 24; Chitimira & Lawack 2013 op cit 205.
[475] Osode 2000 op cit 260.
[476] ibid.
[477] Osode 2000 op cit 262.
[478] Chitimira & Lawack 2013 op cit 205.

courts, which impedes the successful prosecution of insider trading crimes.[479] Relatedly the NPA directorate has been expressed as lacking the capacity to effectively conduct timeous prosecutions.[480] In other words, the criminal courts have been explicated as finding it difficult and time-consuming to prosecute complex insider trading financial offences.[481] Another compounding factor in the operations of criminal courts has been the lack of specialised knowledge and skills to prosecute regulatory contraventions.[482] These several administrative and operational challenges facing the criminal courts prosecuting insider trading transgressions have led to unsuccessful criminal convictions to be obtained.[483] Thus the operational and administrative challenges facing criminal courts have hindered the successful criminal sanctioning of insider trading activities.

4.7.4. The poor allocation of resources that detect market-abuse irregularities in institutions mandated with sanctioning insider trading

Scholars attribute the poor financial resource allocation within different institutions mandated with insider trading sanctioning as deterring the acquisition of relevant material and equipment that enhances the effective sanctioning of this practice.[484] Local economic law literature explicate that national establishments such as the FSCA and the DMA do not have their own surveillance equipment resources that enable them to detect market-abuse irregularities in South African financial markets, timeously.[485] The procurement by the FSCA of its own market-abuse surveillance systems, would lead to the transfer of the entire financial markets surveillance responsibility from the JSE to the FSCA.[486] Such changes would enhance the efficient operation of the FSCA, as it can expeditiously, detect possible market abuse activities, rather than waiting for suspicious trading alerts from the JSE surveillance department.[487] There is sense and logic in placing such a mandate within the ambit of the FSCA, especially if it stripped of the extra-territorial insider trading sanctioning responsibilities. Scholarly insights express the limitations of

[479] Chitimira 2014a op cit 960.
[480] Ibid.
[481] Kawadza 2018 op cit 368.
[482] Ibid.
[483] Chitimira 2014a op cit 959; Kawadza 2018 op cit 368.
[484] Kawadza 2015 op cit 393; Chitimira & Lawack 2013 op cit 214.
[485] Chitimira & Lawack 2013 op cit 214 & 215; Chitimira 2014b op cit 271.
[486] Chitimira 2014b op cit 271.
[487] Chitimira 2014c op cit 52.

how the poor financial resource allocation leads to the unavailability of market-abuse surveillance apparatus-systems, which disempower the FSCA in effecting its insider trading mandate.

4.7.5. The lack of collaboration within establishments mandated to regulate insider trading

Local scholars express the lack of collaboration challenges within institutions mandated to regulate insider trading. This lack of cooperation is evident between the FSCA, DMA and EC. The nature of the lack of coordination is apparent in the operation of DMA which cannot execute its duties without confirmation from the FSCA.[488] The poor institutional collaboration also manifest in the EC operational model, of only instituting non-judicial sanctions against offenders on a referral base from the DMA, which weakens the EC enforcement functions and have the effect of restricting the administrative sanctioning of market abuse.[489] Whilst the recently introduced twin peak model has enhanced the cooperation and coordination of financial regulation between the FSCA and the PA,[490] - however no such framework has been envisaged for the other organisations compelled to regulate insider trading. Thus the poor interrelationship between the FSCA and DMA and that of EC and the DMA inhibits collaborations between these institutions, which basically operate in silos. Such organisational structures challenges hinder insider trading prosecution and extra-judicial sanctioning responsibilities.

4.7.6. Disintegrated FSCA roles

Another institutional problem which relates to the organisation structure challenges has been the separation of responsibilities between the FSCA and the Directorate of Public Prosecutions, with the former empowered to regulate insider trading whilst the latter executes the prosecution function.[491] The FSCA viz a viz the Directorate of Public Prosecution operational-structural arrangements leads to the poor coordination of the interrelated regulating and prosecuting function, which hinders the criminal prosecution mandate of market abuse cases in South Africa.[492] Such

[488] Chitimira & Lawack 2013 op cit 215; Chitimira 2014b op cit 259.
[489] Chitimira & Lawack 2013 op cit 214; Chitimira 2014b op cit 259; Financial Market Act 19 of 2012 s 99.
[490] Godwin 2017 op cit 152.
[491] Lugaju 2018 op cit 22; Chitimira 2014 op cit 960.
[492] Lugaju 2018 op cit 22.

institutional arrangements has been described as being awkward and strange if one considers that the National Home Builders Registration Council is permitted to arbitrate over contravention of its enabling legislation.[493] To improve the criminal prosecution of market abuse in South Africa, the same understanding as well as operational arrangements must be applied, with the FSCA being mandated to harmoniously regulate and prosecute insider trading contraventions.

4.8. Strengthening institutional capacity for enforcing insider trading legislation

Several recommendations have been suggested to improve the capacity of institutions that enforce insider trading legislation. Discussing approaches of enhancing the institutional capacity of insider trading establishments will enable the study to respond to the research question that concern, examining the strategies that can be used to strengthen organisations that enforce insider trading sanctions. Reflecting on the local insider trading context and challenges, the study postulate the importance of recruiting and retaining specialised personnel, encouraging localised national mandate for the FSCA, coordination of institutions enforcing insider trading prohibition, promoting integrated and harmonised FSCA roles, empowering the FSCA to procure its own surveillance equipment and the importance of capacitating criminal courts that prosecute insider trading offenders. These range of approaches and strategies strengthen the institutional capacity of establishments that enforce insider trading sanctions in South Africa.

4.8.1. Recruiting and retaining specialised knowledgeable personnel

Local and international economic law scholars have suggested solutions of overcoming the challenge of having both an inadequate and incapable staff that lacks the necessary specialised expertise. The two pronged approach solution of overcoming the incompetence problem is either recruiting specialised employees and expertise[494] or retraining and professionally developing the existing personnel with new skill-sets.[495] Such employees must be adequately and competitively

[493] Ibid.
[494] Montagano 2012 op cit 592; Kawadza 2015 op cit 393.
[495] FSCA 2018-2021 op cit 28; National Treasury 2021 op cit 66.

remunerated so as to avoid the attrition of such talent into the private sector.[496] The impact of recruiting adequate yet knowledgeable and proficient experts has resulted in the effective administration and successful criminal sanctioning of insider trading activities in the UK's Financial Service Authourity.[497] There is no doubt that recruiting and retaining specialised personnel that is well remunerated, would be the panacea to the effective sanctioning of insider trading that would lead to the successful conviction of insider dealing violation.

4.8.2. Localised national mandate for the FSCA

Local economic law scholars have provided prudent solutions concerning the broader FSCA's mandate of investigating of cross-border market abuse violations. The resolve relate with elucidating the overburdening responsibilities of having unrestricted extra-territorial reach. Firstly, the FSCA extra-territorial mandate of conferring overseas enforcement is enormous and overburdens already overstretched local institutions.[498] Unlimited cross-border reach requires extra financial resources, to enable institutions to undertake such an unrestricted enforcement mandate.[499] In addition to the overstrain, South Africa is claimed to be one of the few countries in the globe that extents its jurisdiction to regulate foreign markets.[500]

However the work of Clacher, Hiller and Lhaopadchan differently argues that such cross-border initiatives are necessary for the bilateral sharing of information and the successful investigation and prosecution of insider trading violation.[501] A similar position is advocated for by the SEC but off cause with some conditions that permit for extra-territorial investigation of violations of US securities that occur in foreign jurisdictions.[502] These proclamations must be critically reflected upon, especially if one considers that even some of the most progressive developed countries such as Canada, Japan, Hong Kong and New Zealand have no provisions for sanctioning

[496] Reamer & Downing 2016 op cit 194; Kawadza 2015 op cit 393.
[497] Montagano 2012 op cit 592.
[498] Kawadza 2015a op cit 393; Jooste 2003 op cit 453; Osode 2000 op cit 263.
[499] Jooste 2003 op cit 453.
[500] Osode 2000 op cit 263.
[501] Clacher, Hiller & Lhaopadchan 2009 op cit 389.
[502] Osode 2000 op cit 262.

illicit transactions that could have taken place in foreign jurisdictions.[503] Thus weighing the facts for and against this practice, the South African financial markets contexts and the limited resources and financial capacity of such emerging states, it is logical and reasonable to recommend a more localised national mandate for the FSCA.

4.8.3. The collaboration and coordination of institutions enforcing insider trading prohibition

There is need for cooperation and coordination of institutions mandated with enforcing insider trading prohibitions. The twin peaks models envisage such institutional coordination, but however such collaboration is implicitly limited only to two financial authourities – that is the PA and the FSCA.[504] The need for the cooperation and coordination of institutions mandated with enforcing insider trading prohibition have been suggested between the Registrar of Companies, Securities Regulation Panel and the Department of justice to improve their success of sanctioning insider trading violations.[505] Such institutional coordination strategies should be also enhanced between the FSCA and the Director of Public Prosecutions so as to improve their enforcement of criminal sanctions for insider trading cases.[506] Such collaborative initiatives must also be extended between the FSCA and the DMA, so as to improve the successful execution of their market abuse duties.[507] Just as the twin peak model enhances the coordination culture between the PA and the FSCA,[508] the same philosophy must be utilised, to improve the cooperation ethos between the key institutions mandated with enforcing insider trading prohibition, especially between the FSCA and the DMA and the PA on the other hand.

4.8.4. Integrated and harmonised FSCA roles

Given the context of the challenges facing the FSCA and the Directorate of Public Prosecutions of having the separate responsibilities of regulating insider trading and

[503] Ibid.
[504] FSCA 2018-2021 op cit 20; FSCA 2018-2019 op cit 4.
[505] Chitimira 2014a op cit 952; Lugaju 2018 op cit 22.
[506] Chitimira & Lawack 2013 op cit 214; Chitimira 2014a op cit 960.
[507] Chitimira & Lawack 2013 op cit 214; Chitimira 2014b op cit 259.
[508] Godwin 2017 op cit 151.

executing the prosecution function[509] – there have been suggestions for integrated FSCA roles. The regulatory and prosecutorial functions must be harmonised so that they can be coordinated by the FSCA which must undertake these related insider trading responsibilities, thus enhance the sanctioning of insider trading activities in South Africa.[510] Empowering the FSCA to comprehensively adjudicate market abuse cases, has been suggested as being similar to the operational position of the National Home Builders Registration Council, which regulates the home building industry and has jurisdiction to adjudicate over contraventions of its enabling legislation.[511] The same administrative and operational strategy should be encouraged for the FSCA, under which it must be mandated to harmoniously coordinate the regulation and prosecution of insider trading, so as to improve the criminal sanctioning of market abuse cases.

4.8.5. Procuring surveillance equipment

If the above envisaged solution is to be adapted, then the FSCA must be appropriately empowered to procure its own market abuse surveillance equipment.[512] The currently prevailing circumstances are incongruent, as the insider trading detection function depends on the JSE surveillance system, because the FSCA lacks such apparatus that enables them to detect market abuse activities in the South African financial markets.[513] Given this challenge and with the intention to enhance the efficient operation of detecting the possible market abuse activities, the FSCA must procure its own surveillance equipment rather than relying for suspicious trading alerts from the JSE surveillance department.[514] The resultant arrangement would lead to the transfer of the entire financial markets surveillance responsibility from the JSE to the FSCA.[515] Placing the insider trading detection responsibility within the ambit of FSCA is a legal feasible and practical resolution that would improve the effective operation of the authority. This operational and functional

[509] Lugaju 2018 *LLM Research report* 22; Chitimira 2014 op cit 960.
[510] Lugaju 2018 op cit 22.
[511] Ibid.
[512] Chitimira 2014c op cit 56; FSCA 2018-2021 op cit 30.
[513] JSE 2015 op cit 23; Chitimira 2014c op cit 52; Chitimira & Lawack 2013 op cit 214 & 215; Chitimira 2014b op cit 271.
[514] Chitimira 2014c op cit 52.
[515] Chitimira 2014b op cit 271.

solution resonates with the argued suggestion of having integrated and harmonised regulatory and prosecutorial functions for the FSCA, which the study earlier on claimed would improve the criminal sanctioning of market abuse cases in South Africa. Furthermore there is logic in placing such a mandate within FSCA, especially if the extra-territorial insider trading sanctioning responsibilities are removed amongst its core functions.

4.8.6. Capacitation of criminal courts that prosecute insider trading offenders

The recurring problem of the low prosecution rates of insider trading criminal offenders has highlighted the need to enhance the capacitation of courts that prosecute insider trading offenders. There is need to recruit[516] and professionally develop[517] personnel that work in the NPA, the SAPS commercial crime department and criminal courts that are mandated with prosecuting insider trading offenders. Employing workers with specialised financial markets skills sets will enable the authourities to successfully prosecute complex insider trading offences.[518] As previously alluded such talent must be competitively remunerated so as to avoid the attrition of such skills into the private sector.[519] The UK financial markets authourities have employed knowledgeable and proficient experts that resulted in the effective sanctioning of insider trading activities in their country.[520]

Similar to the proposition for the FSCA,[521] the study similarly recommends the establishment of more offices and divisions of the NPA, criminal courts and SAPS commercial units departments in the different regions of South Africa, so as to enhance the enforcement of insider trading prohibitions on the financial markets. The staffing solution and the increased national offices would effectively capacitate the authourities, courts and directorate mandated with prosecuting insider trading offenders to increases the potential for successful convictions.

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[516] Montagano 2012 op cit 592; Kawadza 2015 op cit 393.
[517] FSCA 2018-2021 op cit 28; National Treasury 2021 op cit 66.
[518] Kawadza 2018 op cit 368.
[519] Reamer & Downing 2016 op cit 194; Kawadza 2015a op cit 393.
[520] Montagano 2012 op cit 592.
[521] Chitimira & Lawack 2013 op cit 217.

4.9. The institutional limitations and strengthening institutional capacity

In the light of the institutional limitations and the suggestions proposed to enhance insider trading prohibition, the study illustrate how each challenge can be overcome through the proposed insinuations. The table below indicates the nature of the challenge as well as the envisaged solution.

Institutional limitations	Strengthening institutional capacity
Incapable staff that lacks the necessary specialised expertise	Recruiting and retaining specialised personnel,
The FSCA costly and overwhelming extra-territorial responsibility	Encouraging localised national mandate for the FSCA
Disintegrated FSCA roles	Promoting integrated and harmonised FSCA roles
The lack of collaboration within establishments mandated to regulate insider trading	Collaboration and coordination of institutions enforcing insider trading prohibition
The operational challenges in insider trading prosecuting courts	Capacitation of criminal courts that prosecute insider trading offenders
The poor allocation of resources that detect market-abuse irregularities in institutions mandated with sanctioning insider trading	Procuring surveillance equipment

Table 2: Insider trading institutional challenges and solutions

The interpretation and an analysis of insider trading institutional limitations and strategies of strengthening establishment capacity revealed that the problem of incapable staff that lacks the necessary expertise could be overcome through recruiting and retaining specialised personnel. The institutional limitations of FSCA entailing its costly and overwhelming extra-territorial responsibilities and disintegrated roles could be respectively strengthened through encouraging a localised national mandate for the FSCA as well as promoting integrated and harmonised roles for FSCA. On the other hand the poor allocation of resources that help detect market-abuse irregularities could be solved through the procurement of surveillance equipment. The institutional constrictions of operational challenges in insider trading prosecuting courts could be overcome through the capacitation of criminal courts that prosecute insider trading offenders. The solutions envisaged to strengthen institutional capacity could overally help improve the efficacy of institutions aimed at regulating insider trading in South Africa.

4.10. Conclusion

Reflecting on the five research questions framing this study the interpretation and discussion of the research findings initially revealed that the legislative shortcomings and limitations makes insider trading offences not ‘easier to prove’ and difficult to discern the nature of insider dealing violations. In a related manner the proposed legislative solutions could be critical in ensuring that offences are easier to prove and that the authourities have the ability that enables the discerning of the nature of insider contraventions. Drawing from the unified misappropriation theoretical perspective and emanating from the intersection of national securities law and corporate insights, the research argues for contemporary, prudent, business and ethically informed alternative insider trading enforcement strategies. The argumentation for a pragmatic position regarding the enforcement of insider trading revealed the importance of the three-pronged utilisation of insider trading remedies, with the urgent need to enhance successful criminal prosecutions, through ensuring the easier of proving the offence. The analysis and discussion also revealed that insider trading establishments’ challenges entail staffing, apparatus, operational and structural category restrictions. The study finally provided several approaches and strategies that strengthen the institutional capacity of establishments that enforce insider trading sanctions in South Africa. A critical reflective prognosis of the challenges and the solutions suggested herein shows that the current legislative, institutional and enforcement challenges, hinders the efficacy of the legislation and institutions aimed at regulating insider trading. On the other hand the envisaged legislation, institutional and enforcement solutions improves the effectiveness of legislation and institutions aimed at regulating insider trading in South Africa.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusions of the study

The broader and main purpose of this study was to investigate the efficacy of legislation and institutions aimed at regulating insider trading in South Africa. The research also examined the limitations in the legislation enforcing insider trading, and it relatedly also analysed the institutional restrictions in the core establishments that enforces insider trading? These shortcomings provided the study with the impetus to explore both how legislation that enforce insider trading can be strengthened as well as the strategies that can be used to strengthen institutions that enforce insider trading prohibitions. Given the prevalence of the three-pronged regulatory enforcement tools, the study explores the most pragmatic position for the enforcement of insider trading sanctions.

Analysing the inadequacies of the insider trading legislation through an examination of the Financial Markets Act indicated the that the legislative limitations and shortcomings makes insider trading offences not 'easier to prove' and difficult to discern the nature of insider dealing contraventions. Such legal technicalities perpetuate the on-going and elusive challenge of not achieving successful criminal convictions on insider trading activities. Similarly the envisage legislative solutions, which foreground the insights of securities law and resonate with the unified misappropriation theory's elucidations, highlight the importance of ensuring that offences are easier to prove and that the authourities are able to the discern the nature of insider trading contraventions, which enhances insider trading legislation.

Given the elusive and unsuccessful insider criminal prosecution, the study critically reconsidered a pragmatic insider trading perspective for the enforcement of insider trading contraventions. Such a stand point would enhance the efficacy of legislation aimed at regulating insider trading in South Africa. The argumentation for a pragmatic position regarding the enforcement of insider trading revealed the importance of the three-pronged utilisation of insider trading remedies, with the urgent need to enhance successful criminal prosecutions, through ensuring the easier of proving the offence. Strengthening criminal sanctioning methods would

provide an exemplary showcase that would help set national legal precedence and enhance the deterrence of insider trading offences.

Drawing from the intersection of the legislative related methods and corporate informed perspectives, the research argues for contemporary, prudent, business and ethically informed alternative insider trading enforcement strategies. Such approaches should be critically considered in the South African financial markets given the evolving nature of market abuse practices.

A critical interpretation and discussion of the regulatory institutions limitations reveals that insider trading establishments' challenges can be categorised and regarded as staffing, apparatus, operational and structural restrictions. Reflecting on the institutional challenges, the research recommended several suggestions and approaches that would enhance the institutional capacity of insider trading establishments. The recommendations would improve the capacity of institutions that enforce insider trading legislation and enhance the authourities to attain successful criminal prosecutions.

Overally, the study's challenges shows that the current legislative, institutional and enforcement limitations hinders the efficacy of the legislation and institutions, whilst on the other hand the research suggested that the envisaged solutions indicate that the South African legislative, institutional and enforcement limitations resolutions improves the efficiency of the legislation and institutions aimed at regulating insider trading.

5.2. Recommendations

Given the legislative, institutional limitations and solutions as well as the proposed pragmatic insider trading position for the enforcement of insider trading activities, the research makes the following recommendations.

In the context of the legal drawbacks and the suggested solutions highlighted in the study, the research recommends that the regulatory authourities must ensure that

offences are easier to prove and have the ability to enable the discerning of the nature of insider dealing contraventions.

An examination of the approaches that can be used to strengthen insider trading legislation, lead to the suggestions that entail the need for less stringent evidentiary requirements that admits circumstantial evidence, clear definition and illustration of insider trading concepts and cases, establishing the regulatory proof of the defendant's inside information knowledge and distinguishing between the different insider trading offenders. State insider regulatory authourities must consider the range of proposed legislative solutions which can be incorporated in future South African market abuse legislation amendments.

To strengthen institutional capacity for enforcing insider trading legislation, the study recommends that state establishments regulating the practices must consider the importance of recruiting and retaining specialised personnel, encouraging localised national mandate for the FSCA, coordination of institutions enforcing insider trading prohibition, promoting integrated and harmonised FSCA roles, empowering the FSCA to procure its own surveillance equipment and the importance of capacitating criminal courts that prosecute insider trading offenders. The implementation of these recommendations would enhance the institutional capacity of establishments that enforce insider trading sanctions in South Africa.

The range of alternative strategies highlighted by the research which include sentencing guidelines, specialised commercial courts, banning orders, whistle-blowing mechanisms, Chinese wall and corporate governance measures, should be considered in strengthening approaches for enforcing insider trading activities. The fact that such approaches are contemporary, prudent, evolving, business and ethically informed alternative insider trading enforcement strategies makes them liable for adoption by corporate businesses and within economic law statutes.

The proposition for the pragmatic position for the enforcement of insider trading sanctions envisaged in this study that argues for the importance of the continuous utilisation of the three-pronged insider trading remedies, that enhance successful criminal prosecutions, through ensuring the easier of proving the offence - is an

enforcement model worth considering. The nature and the propositions of the envisaged enforcement model should be considered for adoption by the insider trading state regulatory authourities.

5.3. Suggestions for further study

In the purview of the unified misappropriation theory and the insights from the law statutes the study proposed a range of alternative strategies that can be used to strengthening approaches for enforcing insider trading activities. The envisaged mechanisms which include sentencing guidelines, specialised commercial courts, banning orders, whistle-blowing mechanisms, Chinese wall and corporate governance measures, should be further researched on to investigate the efficacy of these approaches in the South African financial markets. Such alternative measures need to be thoroughly investigated and piloted with both the corporate World and the regulatory authourities before there are adopted. There is thus need for further studies to examine the effectiveness and the implementation of such strategies in the South African insider trading regulation context.

The need to strengthening criminal sanctioning methods, given the low insider trading prosecution rates insinuated the argumentation for a pragmatic position regarding the enforcement of insider trading activities, which revealed the importance of the three-pronged utilisation of insider trading remedies, with the need to enhance successful criminal prosecutions, through ensuring the easier of proving the offence. The proposition of an enforcement model of insider trading sanctions in South Africa should be fully investigated to see how practical and feasible would be such a framework. The notion of an enforcement model has been implicitly implied in both local and international economic law studies and has been foregrounded in this study, however the development and the prudence of such a framework needs further studies and research.

There are limitations in the research approach that was used in the study that primarily relied on data and information that was gathered through both the textual analysis method and the desktop research approach. The information used in the study entailed examining and analysing a range of commercial law books, pertinent

corporate booklets, local and international journals, South Africa legislation prohibiting insider trading and prominent local and other jurisdictions insider trading cases. The sole reliance on documentary evidence approach compromised the validity and reliability of the findings of this research study. Thus to enhance and improve the authenticity and the trustworthiness of this study other data gathering methods such as key participants interviews or focus groups would have strengthened the findings of this study. Thus there is need that further studies include other data gathering methods that would improve the validity and the reliability of the overall findings.

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