

**A comparative evaluation of the Financial Markets Act 19 of 2012 and
the Financial Sector Regulation Bill 2015 with reference to
the regulation of insider trading**

by

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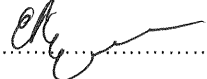
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A comparative evaluation of the Financial Markets Act 19 of 2012 and the Financial Sector Regulation Bill 2015 with reference to the regulation of insider trading

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October 2016

250 word summary

Inside information is information that is non-public and not generally available to non-insiders. It is also information that has, or may have, a material effect on the price of a security listed on a regulated market, if that information should become public. A person who has access to such information may enjoy a significant and arguably unfair advantage over others in relation to trading in securities.

The Financial Markets Act makes provision for the licensing and regulation of the activities of and on market infrastructures, namely exchanges, central securities depositories, clearing houses and trade repositories and also prohibits three forms of “market abuse”, namely insider trading, market manipulation and market disinformation.

An insider who has inside information is not allowed to trade on that information and is obliged to disclose it publicly via appropriate channels.

The Financial Markets Act is interwoven with other financial sector regulatory laws under the umbrella of the Financial Services Board Act, 97 of 1990. The latter Act is about to be replaced by a Financial Sector Regulatory Act. The proposed Act introduces a wide-ranging revision of financial sector law and impacts particularly on the regulatory framework for enforcing the prohibition of insider trading, more particularly administrative law aspects of regulating market abuse and insider trading.

The purpose of the dissertation is to analyse the Financial Markets Act and the proposed Financial Sector Regulation Act and to evaluate the changes in insider trading regulation that are effected by the Financial Sector Regulation Act.



Table of Contents

1. Introduction	4
1.1. The capitalisation process and market abuse	6
1.2. Insider trading	7
1.3. Market manipulation	8
1.4. Market disinformation	8
1.5. Purpose of dissertation	9
1.6. Methodology	9
2. Securities and securities markets	9
2.1. Securities and the securities markets	10
2.2. Securities transactions and market infrastructures	11
2.3. Institutional and administrative architecture	11
2.3.1. Clearing and settling: clearing houses and clearing members	12
2.3.2. Custody and administration of securities: central securities depositories	13
3. The prohibition on insider trading	14
3.1. Inside information	15
3.1.1. Specific or precise information	15
3.1.2. Information which has not been made public	16
3.1.3. Information likely to have a material effect on the price or value of a security	17
3.1.4. Obtained or learned as an insider	18
3.1.5. The mental element: insider “knowing” that he has inside information	19
3.2. Dealing for insider’s own account or for any other person	19
3.3. Person (who is not an insider) who deals for an insider	21
3.4. Insider trading by disclosure or encouragement	21
4. Administrative and criminal regulation of insider trading	21
4.1. Regulation prior to the Financial Sector Regulation Act	22
4.1.1. Referral of contravention to Enforcement Committee	23
4.1.2. Determination of contravention by Enforcement Committee	23
4.1.3. Appeal board	23
4.1.4. Determination of administrative sanction and compensation	24
4.1.5. Factors relevant to determination of administrative sanction	24
4.1.6. Administrative sanction and criminal offence	24
4.1.7. Notification of imposition of administrative sanction	25
4.2. Regulation and sanctions under the Financial Sector Regulation Act	25



4.2.1.	Administrative actions and decisions	26
4.2.2.	Organs of state.....	26
4.2.3.	The Authority, financial sector regulators and responsible authorities	27
4.2.4.	Executive Committee of the Authority and administrative action committees	27
4.2.5.	Administrative action by the Authority	28
4.2.5.1.	Licensing and debarment.....	29
4.2.5.2.	Investigations into insider trading and securities services.....	29
4.2.5.3.	Determination of contravention.....	30
4.2.5.4.	Determination of “appropriate” penalty	31
4.2.5.5.	Administrative sanction and compensation	32
4.2.6.	Right to be informed and right to reasons for decisions	32
4.2.7.	Procedurally fair administrative action.....	33
4.2.8.	Internal remedies and judicial review.....	33
4.2.9.	Right of reconsideration of decision of a decision maker	34
5.	The Financial Services Tribunal	35
5.1.	Internal remedies and reconsideration of Authority decisions	35
5.2.	Reconsideration and internal review by Tribunal.....	35
5.3.	Tribunal panel not bound by rules of evidence	36
5.4.	Tribunal orders	36
5.5.	Judicial review of Tribunal orders.....	37
6.	Conclusion	37

1. Introduction

The capitalisation of companies relies on two linked processes, namely the issuing, allocation and subscription¹ for securities in the primary market, and securities trading activities in the secondary securities market.² The primary and secondary securities markets are both important elements of the processes for the capitalisation of companies, although activities in the secondary securities market do not directly form part of the capitalisation process of companies.

The primary market is regulated by the Companies Act and the secondary market by the Financial Markets Act.³ The secondary securities market has been subject to a long line of evolving legislation culminating in enactment of the Financial Markets Act.⁴ The regulation in South Africa of market infrastructures in terms of the Financial Markets Act is substantially similar to the way in which secondary markets globally are regulated.

There are countless parties involved in trading in securities on the secondary securities market, to wit issuers of securities, buyers and sellers of securities, market infrastructures, and various other participants.

Modern trading in securities on the secondary securities market is typically conducted in high volumes and at high speed by numerous employees of companies utilising complex computerised systems.⁵ Market infrastructures and securities markets are comprised of systems of such size and complexity that their operations are typically inscrutable to, and indecipherable by “investors.”⁶ Despite the application of modern technology in the underlying operations,

¹ Subscription is described as the contract in respect of the issue of unissued shares in and by a company and is not applicable to the purchase of those shares. A company cannot sell shares – PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Durban, 1994) 174 (Issue 8).

² See P Delpont “Offers and the Companies Act 71 of 2008” (2011) 74 *THRHR* 280 on the distinction between the primary and secondary securities markets. See also L Gullifer and J Payne *Corporate Finance Law* (Oxford, 2015) 523 describing the secondary market as the market whereby securities that have previously been issued, can be resold.

³ Act 19 of 2012 (hereafter referred to as “the FMA”).

⁴ See s 440F of the Companies Act, 61 of 1973; the Insider Trading Act, 135 of 1998 (hereafter referred to as “the ITA”); the Securities Services Act 36 of 2004 (hereafter referred to as “the SSA”), and the FMA.

⁵ *The Financial Conduct Authority v Da Vinci Invest Limited* [2015] EWHC 2401 (Ch) par 113.

⁶ Defined as equity investors, employees and creditors in Department of Trade and Industry *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (May 2004) 37 (hereafter referred to as

these complex systems are nevertheless vulnerable to different forms of manipulation and “market abuse” by company “insiders” and others. Both criminal hacking and even state sponsored forms of cyber crime pose ever present dangers to private electronic systems and intellectual property of companies.

The legislation controlling market abuse and specifically insider trading is embodied principally in the Financial Markets Act,⁷ and in the proposed Financial Sector Regulation Act (currently still a bill).⁸ The principal aims of the Financial Markets Act (as set out in its long title) include the licensing and regulation of exchanges, central securities depositories, clearing houses, and trade repositories (“market infrastructures”), and the prohibition of certain forms of market abuse,⁹ namely insider trading,¹⁰ market manipulation (“trading practices”),¹¹ and false or deceptive communications (referred to herein as “market disinformation”).¹²

The Financial Markets Act forms part of a larger network of financial regulation wherein the Financial Sector Regulation Act will be central. The leading cases on market manipulation¹³ and insider trading¹⁴ were decided on the older financial sector laws, some of which remain partly in force (for example the Financial Institutions (Protection of Funds) Act.¹⁵ Extensive reference will consequently be made to these laws. The financial sector laws¹⁶ regulate trading in listed securities,¹⁷ the activities of the main financial sectors in the financial system,¹⁸ i.e.

“*Guidelines for Corporate Law Reform*”). “Investors” may include current shareholders as well as past and prospective shareholders.

⁷ 19 of 2012.

⁸ The latest version of the Bill as released by the Treasury is titled “July 2016 Draft Accompanying Response Matrix For Submissions Made On Tabled Version Of The Bill; B 34-2015”. Where this document is referred to in this dissertation reference will be made to “the Bill” or “the Financial Sector Regulation Act”.)

⁹ FMA, Ch X “Market Abuse”.

¹⁰ FMA, ss 78-79.

¹¹ FMA, s 80.

¹² FMA, s 81.

¹³ *Pather v Financial Services Board* [2014] 3 All SA 208 (GP).

¹⁴ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1.

¹⁵ 28 of 2001.

¹⁶ See Schedule 1 to the Bill. “Financial sector law” refers to any law listed in Schedule 1 (a specific financial sector law), a Regulation made in terms of the Bill, and a regulatory instrument made in terms of the Bill or a specific financial sector law – see the definitions of “financial sector law” and specific financial sector laws – Bill, s 1.

¹⁷ FMA.

¹⁸ The “financial system” is defined as the system of institutions and markets through which financial products, financial instruments and financial services are provided and traded, and includes the operation of a market infrastructure and a payment system – definition of “financial system” in the Bill.

banking institutions,¹⁹ pension funds,²⁰ insurance companies (long term²¹ and short term²²), collective investment schemes,²³ credit rating services²⁴ and financial advisory and intermediary services.²⁵ Provision is also made for financial supervision of the Road Accident Fund Act.²⁶ As at 30 September 2016 hedge funds had not yet become regulated. The financial sector regulatory ambit set out in the financial laws encompasses the activities of financial institutions,²⁷ financial product providers²⁸ financial service providers²⁹ and market infrastructures, and regulates financial markets and market abuse.³⁰

1.1. The capitalisation process and market abuse

Abuse of the capitalisation process may impact on investors: In *Financial Conduct Authority v Da Vinci* the Court observed as follows: “Market abuse can cause serious harm, not only to other market participants and the many millions of private citizens whose personal wealth and provision for retirement is invested on the financial markets, but also the reputation of those markets more generally.”³¹

The role of information is central to the capitalisation process, and the use, management and disclosure of information in relation thereto are extensively regulated by the Companies Act³² and the Financial Markets Act.³³ The Financial Markets Act governs trading in securities (the secondary market³⁴) and currently applies in conjunction with the Financial Services Board Act.³⁵ The latter Act provides a comprehensive administrative regulatory framework for

¹⁹ Banks Act 94 of 1990.

²⁰ Pension Funds Act 24 of 1956.

²¹ Long-term Insurance Act 52 of 1998.

²² Short-term Insurance Act 53 of 1998.

²³ Collective Investment Schemes Control Act 45 of 2002.

²⁴ Credit Rating Services Act 24 of 2012.

²⁵ Financial Advisory and Intermediary Services Act 37 of 2002.

²⁶ Road Accident Fund Act 56 of 1996.

²⁷ In terms of the definition of “financial institution” in s 1 of the Bill this includes a financial product provider, a financial service provider, a market infrastructure, a holding company of a financial conglomerate, and a person licensed or required to be licensed in terms of a financial sector law.

²⁸ See the definitions of “financial product provider” and “financial product”, read with s 2 of the Bill.

²⁹ See the definitions of “financial service provider” and “financial service”, read with s 3 of the Bill.

³⁰ Par (c) of the definition of “financial institution” – FMA, s 1. In terms of the FMA “market infrastructures” include a licensed central counterparty, central securities depository, clearing house, exchange, and trade repository.

³¹ [2015] EWHC 2401 (Ch) par 260.

³² See, for example, the Companies Act 71 of 2008 (hereafter referred to as “the CA”) sections 26, 30, 33, 56, 75, 76 and 95 - 111.

³³ I.e. the prohibitions of the different forms of market abuse.

³⁴ See also Gullifer and Payne (n 2) 523.

³⁵ Act 97 of 1990.

financial institutions, products and services. This Act will be repealed and its structures replaced when the Financial Sector Regulation Act comes into force.

Three forms of market abuse in particular have attracted legislative concern. These are insider trading, market manipulation, and the dissemination of disinformation regarding listed securities and companies. This is jointly referred to as “market abuse”.³⁶ In Europe the term “market abuse” applies to prohibitions on insider trading and market manipulation; in the US the term “market abuse” does not refer to both insider dealing and market manipulation.³⁷

1.2. Insider trading

Inside information is information that is non-public and not generally available to non-insiders. It is also information that has, or may have, a material effect on the price or value of a security listed on a regulated market, if that information should become public. A person who has access to such information may enjoy a significant advantage over others in relation to trading in securities. Insider trading is therefore concerned with the legitimacy of securities transactions. This concern arises in relation to securities transactions when (a) persons become privy to information about the company that is not generally available to the public; and (b) such information has been obtained by a person through a particular connection with the securities markets or with the company, namely by a person being a director, employee or shareholder, or by virtue of the person’s employment, office or profession.

The use of inside information in relation to dealing in securities on such markets, and various other forms of market abuse, can often be detected only by means of the use of sophisticated technologies that are not available to the general public.

The court in *Financial Mail Limited v Sage Holdings*³⁸ approved of the general proposition that any disclosure of private facts acquired by means of an unlawful act of intrusion and their disclosure would constitute an infringement of the right of privacy of the person whose information has been unlawfully acquired and disclosed, namely the company. This is subject, however, to the qualification that where private or confidential information has been obtained by means of an unlawful intrusion, there may, given the nature of the information in question, nevertheless be grounds for the public to be informed thereof.

³⁶ FMA, Ch X, ss 77-88.

³⁷ See *Gullifer and Payne* (n 2) 578 – 579.

³⁸ 1993 (2) SA 451 (A) 463.

1.3. Market manipulation

“Market manipulation” in essence involves the use of, or participation in practices which have, or are likely to have, the effect of creating an artificial price for a security or a false or deceptive appearance of the demand for, the supply of, or trading activity in connection with a security listed on a regulated market.³⁹ Specific instances of market manipulation include approving, or entering on a regulated market an order to buy or sell a security listed on that market, which approving or entering involves no change in the beneficial ownership of that security, and is made with the intention of creating (i) a false or deceptive appearance of the trading activity in that security⁴⁰ or (ii) an artificial price for that security.⁴¹ The buying or selling of a listed security with a similar intention, with the knowledge that an opposite order or orders, at substantially the same price, have been or will be entered by or for the same or different persons, is an example of a manipulative practice.⁴²

1.4. Market disinformation

A company’s ability to attract equity or debt capital, to obtain suppliers or markets, to source human or capital resources, and even to conduct and continue its business operations on a day to day basis, can be significantly affected by public sentiment due to the withholding or suppression of negative information about the securities of the company, or due to the disclosure of overly positive information about the company’s commercial prospects (its past or likely future performance). Section 81(1) of the Financial Markets Act prohibits two types of false statements concerning a company – namely a statement, promise or forecast which is false, misleading or deceptive (hereafter referred to as a “false statement”) (a) about securities of the company listed on a regulated market or (b) about the past or future performance of a company whose securities are listed on a regulated market. For the purposes of section 81 a false statement can also be made by means of non-disclosure of a material fact,⁴³ namely where the person making a statement knows that the statement is rendered false by the omission of such material fact.

³⁹ FMA, s 80(1)(a). See also See *S v Marks* [1965] 2 All SA 415 (W), citing *Rex v McLachlan and Bernstein* 1929 WLD 149 155.

⁴⁰ FMA s 80(1)(a)(i).

⁴¹ FMA s 80(1)(a)(ii).

⁴² FMA s 80(1)(b).

⁴³ FMA s 81(1)(b).

1.5. Purpose of dissertation

The purpose of the dissertation is to analyse the Financial Markets Act and to evaluate the changes in insider trading regulation that will be brought about by the Financial Sector Regulation Act and proposed amendments to the Financial Markets Act.

1.6. Methodology

The dissertation consists of a review and analysis of the provisions of the Financial Markets Act, the Bill, relevant financial sector laws and case law, text books, and articles in legal journals.

2. Securities and securities markets

In *Guidelines for Corporate Law Reform* it is emphasised that -

- shareholders should be provided with information that is publicly available, including information presented to analysts; and
- one of the key functions of company law is to provide protection for investors in companies.⁴⁴

Legislatures globally attach great importance to maintaining and supporting the integrity of, and confidence in the securities markets, particularly the secondary securities market. Many legislatures have prohibited various forms of “market abuse” so as to ensure the proper and regular functioning of the securities markets and to preserve their transparency and integrity.⁴⁵ In *Financial Conduct Authority v Da Vinci* (a judgment relating to market manipulation), the Court held that the protection of the integrity and the proper functioning of the financial markets was of substantial importance to individuals as well as to national and international economic interests, and that there was a clear policy imperative to prevent and deter market

⁴⁴ Department of Trade and Industry (n 6) 38.

⁴⁵ Ian MacNeil *An Introduction to The Law on Financial Investment* (Oxford, 2012) 405.

abuse.⁴⁶ It should be noted, however, that the theoretical case for prohibiting or regulating market abuse, particularly insider trading, remains the subject of vigorous debate.⁴⁷

2.1. Securities and the securities markets

Securities may consist of shares⁴⁸ that are issued or authorised to be issued in exchange for consideration that will be employed as equity capital,⁴⁹ and of debentures or other instruments that are issued in exchange for funds that will be employed as loan or debt capital.⁵⁰ Securities come into existence when they have been authorised, issued and subscribed for, and may subsequently be traded by means of “transactions”⁵¹ between buyers and sellers of the securities. For the purposes of the Companies Act securities⁵² are defined as any shares, debt instruments⁵³ or other instruments irrespective of their form or title, issued or authorised to be issued by a profit company.⁵⁴ Being movable property transferable in any manner provided for or recognised by the Companies Act or other legislation,⁵⁵ securities (once issued) may be traded either as unlisted or as listed securities⁵⁶ on the informal or formal secondary securities market.

The capitalisation processes relating to the primary market are regulated in terms of Part D of Chapter 2 of the Companies Act.⁵⁷ Save where securities holders return securities to a company (for example when the company re-acquires a number of its shares in the hands of securities holders subject to the prescribed procedures),⁵⁸ the consideration for an exchange of a security on the secondary market by its holders flows to the selling securities holder and not to the

⁴⁶ [2015] EWHC 2401 (Ch) par 260.

⁴⁷ See R Jooste “The Regulation of Insider Trading in South Africa – Another Attempt” *SALJ* 2000 284; MS Blackman, RD Jooste, GK Everingham, JL Yeats, FHI Cassim, R de la Harpe *Commentary on the Companies Act* (Claremont, 2002) 5-375 – 5-379.

⁴⁸ A “share” is one of the units into which the proprietary interest in a company is divided – CA s 1.

⁴⁹ In the context of the UK companies’ legislation “equity share capital” means issued share capital excluding any part of that capital that, neither as respects dividends, nor as respects capital, carries any right to participate beyond a specified amount in a distribution – see E Ferran and LC Ho *Corporate Finance Law* (Oxford, 2014) 85.

⁵⁰ Companies obtain debt finance either by issuing securities in the (form of bonds) directly into the capital markets, or by borrowing from banks or other lenders – *Ferran and Ho* (n 46) 269.

⁵¹ “... a contract of purchase and sale of securities...” - definition of “transaction”, FMA, s 1.

⁵² Definition of “securities”, CA, s 1.

⁵³ A debt instrument is defined as including any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document - definition of “debt instrument”, CA s 43(1)(a)(i).

⁵⁴ See also the definition of “securities”, FMA, s 1.

⁵⁵ CA, s 35.

⁵⁶ Listed securities means securities included in the list of securities kept by an exchange in terms of section 11 FMA – definition of listed securities, FMA, s 1.

⁵⁷ CA, ss 35-48 (“Capitalisation of profit companies”).

⁵⁸ CA, s 48.

company, in contrast to the position in the primary market. The secondary securities market allows subscribers for securities issued in the primary market and other holders of securities to sell, trade in, or use their securities as security. The primary and secondary securities markets are thus interrelated and interdependent.

2.2. Securities transactions and market infrastructures

Trading in securities on a secondary market occurs when buyers and sellers of securities enter into contracts for the purchase and sale of securities (“transactions”).⁵⁹ Securities transactions occur impersonally by means of activities in exchanges operating in the secondary securities market. A completed transaction requires a trade and its settlement. Only “authorised users” who comply with the requirements of section 24 of the Financial Markets Act may carry on the business of buying or selling listed securities.⁶⁰ No person may act as an authorised user unless authorised by a licensed exchange in terms of the exchange rules.⁶¹ The Memorandum of Incorporation of a private company must both prohibit the company from offering any of its securities to the public and must restrict the transferability of its securities.⁶²

2.3. Institutional and administrative architecture

The institutional and administrative elements of the regulation of market infrastructures are largely incorporated in the relevant provisions of the Financial Markets Act relating to each particular market infrastructure.⁶³ The Financial Sector Conduct Authority established in terms of section 56 of the Bill (hereafter referred to as “the Authority”) is in this regard essentially assigned a supervisory role. This is dealt with further below in section 4 (**Administrative and criminal regulation of insider trading**).

The trade in listed securities requires, in addition to the actions of buyers and sellers of the securities, interaction by a group of parties each of whom has a different role to play. The actual trading in securities occurs in a licensed exchange,⁶⁴ utilising services rendered by various

⁵⁹ Definition of “transaction” FMA, s 1. The FMA consequently does not apply to subscriptions for shares in the primary market as such exchanges for consideration by an issuing company and a subscribing shareholder are not contracts for the purchase and sale of securities – see also Delport (n 1) 174.

⁶⁰ FMA, s 4(1)(b).

⁶¹ FMA, s 4(1)(a). A decision of an exchange to refuse an application by a person to be admitted as an authorised user, to withdraw the authorisation of an authorised user, or to direct an authorised user to terminate the access to the exchange by an officer or employee of such an authorised user is subject to reconsideration by the Tribunal – FMA, s 105(1)(b) - (c).

⁶² CA, s 8(2).

⁶³ FMA, Chapters III – IX.

⁶⁴ FMA, s 7, read with s 9.

other market infrastructures, to wit a licensed central securities depository,⁶⁵ a licensed clearing house,⁶⁶ and a licensed trade repository.⁶⁷ The Authority may, with the concurrence of the Prudential Authority⁶⁸ and the South African Reserve Bank, cancel or suspend a licence of a market infrastructure under the circumstances set out in section 60 of the Financial Markets Act.

A matched bid and offer for securities constitutes a transaction. In order for transactions in listed securities to take place between large numbers of buyers and sellers of securities, an “infrastructure” (i.e. an exchange⁶⁹) is required to provide for (a) bringing together buyers and sellers of securities; (b) matching bids and offers for securities. The matching of bids and offers requires clearing⁷⁰ and settlement⁷¹ services. An exchange must set listing requirements.⁷² The requirements must, amongst others, prescribe the manner in which securities may be listed or removed from the list or in which the trading in listed securities may be suspended.⁷³

2.3.1. Clearing and settling: clearing houses and clearing members

The process of “clearing”, in relation to a transaction or group of transactions in securities, consists of calculating and determining, before each settlement process, the exact number or nominal value of securities of each kind to be transferred by or on behalf of a seller, and, the amount of money to be paid by or on behalf of a buyer, to enable settlement of a transaction or group of transactions.⁷⁴ “Clear” may also refer to the process by means of which these functions are performed, and the due performance of the transaction or group of transactions by the

⁶⁵ FMA, s 27, read with s 29.

⁶⁶ FMA, s 47, read with s 49.

⁶⁷ FMA, s 54, read with s 56.

⁶⁸ See ss 32 – 55 of the Bill.

⁶⁹ See the discussion of the JSE as a licensed exchange by Delpont (n 1) 41.

⁷⁰ “Clearing services” refers to services offered and activities performed by a clearing member in terms of the exchange rules of clearing house rules to facilitate clearing of transactions in securities – definition of “clearing services”, FMA, s 1.

⁷¹ “Settlement services” means any services offered and activities performed by an authorised user, a participant or a clearing member in terms of the relevant rules to facilitate settlement of transactions in securities – definition of “settlement services”, FMA, s 1.

⁷² FMA, s 11(1). A decision of an exchange to defer, refuse or grant an application for the inclusion of securities in the list or to remove securities from the list or to suspend the trading in listed securities is subject to reconsideration by the Tribunal – FMA, s 105(1)(d).

⁷³ FMA, s 11(1)(a).

⁷⁴ Paragraph (a) of the definition of “clear” – FMA, s 1. In certain circumstances “clear” also includes the process of by means of which the functions referred to in paragraph (a) are performed and the due performance of the transaction or group of transactions by the buyer and the seller is underwritten from the time of trade to time of settlement.

buyer and the seller is underwritten, from the time of trade to the time of settlement.⁷⁵ Clearing services are performed by a “clearing house”⁷⁶ according to clearing house rules⁷⁷ that may employ clearing house directives.⁷⁸ A clearing member, in relation to an associated clearing house or a licensed central counterparty, means a person licensed by a licensed exchange with which it is in association to perform clearing or settlement services or both such services.⁷⁹ A clearing member, in relation to a licensed independent clearing house, means a person authorised by that independent clearing house to perform clearing services or settlement services or both such services.

“Settle”, in respect of listed securities (other than listed derivative instruments) means the completion of a transaction by effecting transfer of a security in the relevant uncertificated securities registers and the payment of funds or any consideration payable in respect of that transaction, through a settlement system as defined in the rules.⁸⁰ In respect of unlisted securities (other than money market securities or derivative instruments) “settle” means the crediting and debiting of the accounts of the transferee and transferor, respectively, with the aim of completing a transaction in securities and receipt of a notification that payment has been received.⁸¹ If the Authority prescribes otherwise, or the parties have appointed a licensed independent clearing house or a licensed central securities depository to settle a transaction, “settle” has the meaning assigned to it in respect of listed securities.⁸²

2.3.2. Custody and administration of securities: central securities depositories

⁷⁵ Paragraph (b) of the definition of “clear” - FMA, s 1.

⁷⁶ Defined as a person who constitutes, maintains and provides an infrastructure to clear transactions in securities – definition of “clearing house”, FMA, s 1.

⁷⁷ Defined as the rules made by a licensed independent clearing house or a licensed central counterparty in accordance with the FMA – definition of “clearing house rules” - FMA, s 1.

⁷⁸ Defined as a directive issued by a licensed independent clearing house or a licensed central counterparty in accordance with its rules – definition of “clearing house directive” – FMA, s 1.

⁷⁹ Paragraph (a) of the definition of “clearing member”, FMA, s 1. A decision of an independent clearing house to refuse an application by a person to be admitted as a clearing member, to withdraw the authorisation of a clearing member, or to terminate the access to the independent clearing house by an officer or employee of such clearing member, is subject to reconsideration by the Tribunal – FMA, s 105(1)(e) – (f).

⁸⁰ Paragraph (b) of the definition of “clearing member”, FMA, s 1.

⁸¹ A different arrangement applies where otherwise prescribed by the registrar or the parties have appointed a licensed independent clearing house or central securities depository to settle a transaction – see par (c) of the definition of “settle”, FMA, s 1.

⁸² Par (c) of the definition of “settle”, FMA, s 1. Separate definitions are also assigned to the term “settle” in respect of listed derivative instruments, money market securities, and unlisted derivative instruments.

The transfer of uncertified securities in an uncertificated securities register may be effected only by a participant⁸³ or central securities depository.⁸⁴ The custody and administration of securities are governed by Chapter IV of the Financial Markets Act. “Securities” for the purposes of Chapter IV, are uncertificated securities, including money market securities. A central securities depository is a type of infrastructure that is necessary for trading in uncertificated securities to be able to take place. This infrastructure enables the making of entries in respect of uncertificated securities, and includes a securities settlement system.⁸⁵ A “participant” means a person authorised by a licensed central securities depository to perform custody and administration services or settlement services or both in terms of the deposit rules. Under certain circumstances a “participant” includes an external participant.⁸⁶ A “trade repository” means a person who maintains a centralised electronic database of records of transaction data. Only a person who is licensed as a trade repository in terms of section 56 of the Financial Markets Act may perform the functions of a trade repository.⁸⁷

3. The prohibition on insider trading

“An insider who knows that he or she has inside information and who deals ... in the securities listed on a regulated market to which the inside information relates ... commits an offence.”⁸⁸ The Financial Markets Act prohibits insider trading, namely dealing⁸⁹ in the securities of a company by a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market, or who has inside information by virtue of employment, office or profession.⁹⁰ A “tipper” (the person who discloses inside information but who does not necessarily also trade on that information,⁹¹ must be

⁸³ In terms of s 1 of the CA “participant” has the meaning set out in s 1 of the SSA. (This Act has been repealed by the FMA.)

⁸⁴ CA, s 53(1)(a).

⁸⁵ Definition of “central securities depository” in the FMA, s 1.

⁸⁶ Definition of “participant” – FMA, s 1. A decision of a central securities depository to refuse an application by a person to be accepted as a participant, to terminate the participation of a participant or to direct a participant to terminate the access to the central securities depository by an officer or employee of the participant is subject to reconsideration by the Tribunal – FMA, s 105(1)(e) – (f).

⁸⁷ FMA, s 4(1)(g).

⁸⁸ FMA, s 78(1).

⁸⁹ “Deal” includes conveying or giving an instruction to deal – definition of “deal” FMA, s 77.

⁹⁰ Definition of “insider”, FMA s 77.

⁹¹ FMA, s 78(4)(a)).

distinguished from a person who, having inside information, deals in related securities.⁹² Insider trading is prohibited conduct only in respect of securities listed on a regulated market,⁹³ and only in respect of securities to which “inside information” relates or to securities which may be “affected by inside information”, and which information has been obtained by a person as an “insider”. In *Zietsman v Directorate of Market Abuse* the court held that inside information, owing to its non-public and precise nature and its ability to significantly influence the prices of financial instruments, confers on the insider who is in possession thereof an advantage in relation to all the other actors on the market who are unaware of it.⁹⁴ In *Lafonta v Autorités des marchés financiers* the Cour de Cassation observed that the possession of inside information enables the insider to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market.

3.1. Inside information

“Inside information” is defined⁹⁵ as information (a) of such a nature as to be likely to have a material effect on the price or value of any security listed on a regulated market if that information should be made public; (b) that is either specific or precise; (c) that has been obtained or learned as an insider; and (d) that has not been made public.⁹⁶

The purpose of the prohibition expressed by Article 2(1) of EU Directive 2003/6 has been said to be to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is consequently in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those who are unaware of it.⁹⁷

3.1.1. Specific or precise information

The terms “specific” or “precise” are not defined in the Financial Markets Act. These terms were considered in *Zietsman v Directorate of Market Abuse*⁹⁸ with regard to the similarly

⁹² FMA, s 78((1)(a); 78(2)(a).

⁹³ Defined in s 77 of the FMA as any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.

⁹⁴ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 32, citing *Spector Photo Group NV, Chris van Raemdonck v Commissie Voor Het Bank-Financie- En Assuranzewezen* (CBFA) [2009] EUECJ C-45/08 (23 December 2009) at paragraphs [50] - [52].

⁹⁵ See the definition of “inside information” in s 77 FMA.

⁹⁶ See the definition of “publication” in relation to “inside information” in s 79 of the FMA.

⁹⁷ *Jean-Bernard Lafonta v Autorités des marchés financiers* ECLI: EU C:2015:1626/9.

⁹⁸ [2015] JOL 34007 (GP) 1.

worded definition of “inside information” occurring in s 72 of the Securities Services Act.⁹⁹ In *Zietsman* the information alleged to have constituted inside information was comprised of information relating to the granting of a loan by a financier (Industrial Development Corporation) to a company (AC Towers), as well as to the amount of the loan and the identity of the lender. This information was communicated to Z and to H&W (“the appellants”) by the board of AC Towers. H&W was a shareholder of AC Towers. Z was chairman of the board of H&W. H&W had been conducting negotiations over an extended period regarding the acquisition of a controlling interest by H&W in AC Towers.

AC Towers was simultaneously pursuing debt funding. Information in this regard had been made public in a SENS announcement (“the first SENS announcement”). The scope of this announcement was limited. The name of the potential lender and the magnitude of the loan were not disclosed. The announcement had no effect on the share price of AC Towers.¹⁰⁰ The loan had actually been granted in a substantial amount. H&W and Z consequently had advance knowledge of the actual granting of the loan, its magnitude and the identity of the lender. The subsequent publication of a “second SENS announcement” disclosing that it was the Industrial Development Corporation that had granted the loan in the particular amount exerted a material effect on the share price of AC Towers. The share price increased by 54.5% on the day of the announcement.¹⁰¹

The appellants (Z and H&W) contended that the information alleged to be inside information (the identity of the lender and the amount of the loan) was not specific or precise as the contemplated loan had not yet been concluded and final loan agreements signed at the time when the alleged dealing in the securities of AC Towers had occurred, and that it was also unknown at that stage whether AC Towers was in a position to satisfy any conditions precedent for the loan.¹⁰² The Court held that sufficient information about the approval of the loan had been communicated to Z and H&W to render the information specific or precise.

3.1.2. Information which has not been made public

For the purpose of the definition of “inside information” information is regarded as having been made public in circumstances which include, but are not limited, to the following: (a)

⁹⁹ 36 of 2004.

¹⁰⁰ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 19.

¹⁰¹ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 19.

¹⁰² *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 18.

when the information is published in accordance with the rules of the relevant regulated market; (b) when the information is contained in records which by virtue of any enactment are open to inspection by the public; or (c) when the information can be readily acquired by those likely to deal in any listed securities (i) to which the information relates; or (ii) of an issuer to which the information relates; or (d) when the information is derived from information which has been made public.¹⁰³ In *Zietsman* the appeal board and the court on appeal rejected the contention by the appellants that the information of which they had had knowledge was not materially different to the information that had already been disclosed publicly by means of the first SENS announcement.

3.1.3. Information likely to have a material effect on the price or value of a security

The range of information that would be likely to have a material effect on the price or value of any security listed on a regulated market (thus rendering it “price sensitive”) is exceedingly broad. In *Zietsman* it was held that “likely” in this context meant “less than a probability but more than a mere possibility”.¹⁰⁴ In order to determine whether information is inside information it is not necessary to examine whether its disclosure actually had a significant effect on the price of the financial instruments – it is the capacity of this information to have a significant effect on prices that must be assessed in the light of the content of the information and the context in which it arises.¹⁰⁵ The Court found this capacity to have a material effect in the facts that the amount of the loan would be viewed by the reasonable investor as being sufficient for a small company requiring funding.¹⁰⁶

The Court also viewed the fact that the lender was the IDC (a government investment institution not subject to commercial banking constraints, as an indication that the terms of the loan would be less onerous than those that might be offered by a commercial bank. This could also be seen as having a positive effect on the share price.¹⁰⁷ Apart from these considerations the publication of the second SENS announcement “had an impact on the share price by increasing it from 11c to 17c per share.” The Court viewed this outcome as an *ex post facto* indicator that the

¹⁰³ FMA, s 79(a) - (d).

¹⁰⁴ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 21, relying on *Tshisonga v Minister of Justice and Constitutional Development* 2007 4 SA 135 LC.

¹⁰⁵ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 33.

¹⁰⁶ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 22.

¹⁰⁷ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 22.

information was price sensitive.¹⁰⁸ The court approved of the view expressed in *Daimler*¹⁰⁹ that it was only necessary, where the potential of the information for affecting share prices is significant, that the occurrence of the future set of circumstances or event, albeit uncertain, not be impossible or improbable.¹¹⁰ Exposed information can also be used in order to check the presumption that the *ex ante* information was price sensitive.¹¹¹ The Court held that the (real) prospect of the conclusion of the loan agreement with the Industrial Development Corporation for the stated amount described “a set of circumstances which would realistically or on the probabilities materialise.”¹¹²

3.1.4. Obtained or learned as an insider

An “insider” is a person who has inside information (a) through (i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or (ii) having access to such information by virtue of employment, office or profession; or (b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a) of the definition of “insider” in section 77 of the Financial Markets Act.¹¹³

While the fiduciary obligations of a director extend to the company of which that person is a director,¹¹⁴ shareholders have no fiduciary obligations to the company (although it is possible that such an obligation may be created by means of a shareholder’s agreement.) Employees may have fiduciary obligations to the company which employs them.¹¹⁵ The relationships of service providers (particularly providers of professional services) and the company may be regulated by a contract between the company and its service provider (for example an auditing firm or a firm of attorneys), by common law principles,¹¹⁶ or by some form of professional regulation.

¹⁰⁸ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 23.

¹⁰⁹ *Geltl v Daimler AG* [2012] EUECJ C-19/11 [2015] JOL 34007 (GP) 1 33.

¹¹⁰ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 33

¹¹¹ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 33.

¹¹² *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 18.

¹¹³ FH Cassim, MF Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* (Claremont, 2012) 943 criticise the definitions of inside information and insider as being cumbersome and counter intuitive and as fundamentally incoherent. It is submitted, however, that the definition has actually proved relatively durable.

¹¹⁴ CA s 76; *Cyberscene Ltd v I-Kiosk Internet and Information (Pty) Ltd* [1999] JOL 5198 (C).

¹¹⁵ *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA).

¹¹⁶ *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA).

3.1.5. The mental element: insider “knowing” that he has inside information

The insider’s subjective appreciation of the price sensitivity of inside information is of limited relevance in determining whether given information is likely to have a material effect on the price or value of a security. Knowledge means knowledge of the facts, and does not necessarily mean knowledge of the legal consequences flowing from those facts.¹¹⁷ In *Zietsman* the appellants contended that while they had been aware of the information as such, they had not regarded it as inside information. Although they had had information as to the identity of the lender and the amount and breakdown of the loan, they did not regard this information as constituting inside information because the approval, in their assessment, was merely an in-principle approval that was vague and uncertain.¹¹⁸

The Court found that the appellants’ (subjective) view that the advance information was uncertain was not based on reasonable grounds as they had also been warned by various persons (including bankers) that the information was price sensitive. The Court then expresses the view that the provisions of s 73(1)(a) of the Securities Services Act merely require knowledge of the insider information at the time of dealing in the relevant shares. “The appellants, knowing of the inside information regarding the IDC loan, dealt in AC Towers shares, thereby committing the offence of insider trading.”¹¹⁹ Having considered the position in various foreign jurisdictions, Avvakoumides AJ in *Zietsman* came to the conclusion that a genuine and *bona fide* belief that known information was not inside information, would not found a defence where such belief is not based on reasonable grounds; and, that whether the information is price sensitive is determined with reference to the reasonable investor and whether he would regard the information as relevant to a decision to deal in such securities or not.¹²⁰

3.2. Dealing for insider’s own account or for any other person

The offences specified in terms of section 78(1)(a) and 78(2)(a) of the Financial Markets Act occur when an insider who knows that he or she has inside information deals in securities listed on a regulated market to which the inside information relates, or which listed securities are

¹¹⁷ Delpont (n 1) 28.

¹¹⁸ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 23.

¹¹⁹ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 24.

¹²⁰ *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 38.

likely to be affected by it, directly or indirectly or through an agent and whether for his or her own account or for any other person.¹²¹

The prohibitions in s 78 contain both objective and subjective elements – objective elements in terms of the definitions of deal, insider, inside information and regulated market, and subjective elements in terms of the “knows” requirement in sections 78(1)(a) and 78(2)(a). An accused charged with a contravention of either of these sections must “know” that he has inside information. It is submitted that it is not necessary for the knowledge of the unlawfulness of the facts constituting the definitional elements in s 77 to be proven, i.e. that the accused has information which (a) is likely to have a material effect on the price or value of any security listed on a regulated market if it were made public; (b) is either specific or precise; (c) has been obtained or learned as an insider; and (d) has not been made public. It is submitted that *Zietsman* is authority for the proposition that it would be sufficient for the respondent to have known of the alleged information, and not necessarily for knowledge of such information to have comprised all the definitional elements referred to.¹²²

If it is alleged that the person dealing did so for his or her own account (section 78(1)(a)), such insider is not guilty of the offence specified in this section if he proves the existence of certain facts on a balance of probabilities. The first of two defences available in this respect is that the accused only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she had become an insider.¹²³

The second defence available in this regard is that the accused is permitted to prove, on a balance of probabilities, that he or she was acting in pursuit of a transaction in respect of which (aa) all the parties to the transaction had possession of the same inside information; (bb) trading was limited to the parties referred to in paragraph (aa); and (cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information.

If an offence in terms of section 78(2)(a) is alleged (i.e. that the person dealing did so for another person), the accused has available the same special defence as is available in respect of an offence in terms of section 78(1)(a), provided, however, that the accused has an additional

¹²¹ FMA s 78(1)(a). The provisions of s 78(1)(a) of the FMA are identical to the provisions of s 73(1) of the SSA.

¹²² See *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 37. See also Delpont (n 1) 28.

¹²³ FMA s 78(1)(b)(i).

defence in that he may prove that he is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time.¹²⁴

3.3. Person (who is not an insider) who deals for an insider

A person who, in the circumstances contemplated in sections 78(1) or (2) of the Financial Markets Act deals for the insider directly or indirectly or through an agent, knowing that such person is an insider, also commits an offence.¹²⁵ Such a person will not be guilty of this offence if the person on whose behalf the dealing was done has any of the defences available to him in terms of section 78(2)(a)(ii)-(iii).

3.4. Insider trading by disclosure or encouragement

The offence in section 78(4)(a) of the Financial Markets Act is committed by an insider who discloses the inside information to another person. It is a defence against a charge in terms of section 78(4)(a) if the alleged insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so “for the purpose of the proper performance of the functions of his or her employment, office or profession” in circumstances unrelated to dealing in any security listed on a regulated market and that he or she at the same time disclosed that the information was inside information.¹²⁶ In terms of section 78(5) of the Financial Markets Act a person who knows that he has inside information and who encourages or causes another person to deal, or discourages or stops another person from dealing in the securities, commits an offence. There is no special defence in respect of an offence stipulated in terms of section 78(5).

4. Administrative and criminal regulation of insider trading

Insider trading, as prohibited in the Insider Trading Act constituted an offence subject to trial in the High Court.¹²⁷ The Insider Trading Act also allowed for the recovery by administrative

¹²⁴ FMA s 78(2)(b)(ii).

¹²⁵ FMA s 78(3)(a).

¹²⁶ FMA, s 78(4)(b).

¹²⁷ ITA, ss 2, 9.

means by the Financial Services Board of certain amounts and penalties from the transgressor. The provision for criminal¹²⁸ as well as civil¹²⁹ sanctions provided for in the Insider Trading Act was retained in the Securities Services Act,¹³⁰ where provision was made for a criminal penalty in section 115 and for the imposition of an administrative penalty in section 104. The administrative penalty could be claimed from a respondent by the Financial Services Board in a civil suit in terms of section 77. These provisions were also carried forward to the Financial Markets Act.¹³¹ A contravention of the provisions of section 78 of the Financial Markets Act is an offence. A person who contravenes a prohibition in section 78 is moreover liable to pay an administrative sanction subject to the limits set out in section 82(1)(a) - (d) of the Financial Markets Act.¹³²

4.1. Regulation prior to the Financial Sector Regulation Act

The Insider Trading Directorate was established in terms of s 12 of the Insider Trading Act.¹³³ The Securities Services Act repealed the Insider Trading Act and provided for replacement of the Insider Trading Directorate by the Directorate of Market Abuse.¹³⁴ In terms of the Financial Markets Act the Directorate of Market Abuse is authorised to refer a contravention of section 78 to the Enforcement Committee after it has carried out an investigation.¹³⁵ The Enforcement Committee was originally established by section 97 of the Securities Services Act¹³⁶ but was subsequently absorbed into the Enforcement Committee established by sections 10(A) and 10(3) of the Financial Institutions (Protection of Funds) Act.¹³⁷

¹²⁸ ITA, ss 2, 9.

¹²⁹ 135 of 1998.

¹³⁰ See *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 220.

¹³¹ FMA, s 82, read with s 109 (criminal penalty) and with s 6D(2)(b)(ii) of the Financial Institutions (Protection of Funds) Act (administrative sanction).

¹³² FMA, s 82(1).

¹³³ 135 of 1998.

¹³⁴ In terms of Schedule 4 item no 60 of the Bill, and s 85(1)(a) of the FMA as amended thereby, the Directorate of Market Abuse continues to exist. In terms of section 85(1)(c) of the amended FMA the Authority may determine the functions, powers and duties of the directorate, including the consideration and making of recommendations of investigations into offences referred to in sections 78, 80 and 81 of the FMA and section 135 of the Bill.

¹³⁵ S 6A(2) of the Financial Institutions (Protection of Funds) Act, 28 of 2001.

¹³⁶ 36 of 2004.

¹³⁷ 28 of 2001. According to Kgomo J in *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 222 the principal difference between the two committees was that the new Enforcement Committee was given jurisdiction to deal with offences of all Financial Services Board administered legislation, as is reflected by the contrast between the definition of law in section 6A of the Financial Institutions (Protection of Funds) Act, and the definition of "law" introduced into section 1 of this Act (amendment by s 156 of the Financial Services Laws General Amendment Act, 45 of 2013).

4.1.1. Referral of contravention to Enforcement Committee

A referral to the Enforcement Committee in terms of section 6A(2) of the Financial Institutions (Protection of Funds) Act¹³⁸ must be accompanied by a notice setting out the details and nature of the alleged contravention as well as by an affidavit by the applicant setting out the facts and documents supporting the notice. The notice must also set out the administrative sanction that should, in the opinion of the applicant (the Directorate of Market Abuse), be imposed. A respondent must be afforded the opportunity to submit an answering affidavit within 30 days of the delivery of the notice and affidavit to the respondent.¹³⁹ Legal representation is not allowed as a matter of right but it may be allowed by the chairperson of the Enforcement Committee.¹⁴⁰

4.1.2. Determination of contravention by Enforcement Committee

The Enforcement Committee must determine whether the respondent has contravened a law.¹⁴¹ As distinguished from the Directorate of Market Abuse, the Enforcement Committee is not an investigative body. It is required to determine a matter purely on the documentary evidence referred to it, and to adjudicate an already investigated case.¹⁴² If the Enforcement Committee is satisfied that there has been a contravention of any law it may impose certain administrative sanctions.¹⁴³

4.1.3. Appeal board

There is provision for an appeal against a determination of the Enforcement Committee to the board of appeal established by s 26A of the Financial Services Board Act.¹⁴⁴ The appeal board was established as “a specialist tribunal with a wide range of expertise available to it.”¹⁴⁵ This “board of appeal” was renamed an “appeal board” in terms of the insertion of section 26A in

¹³⁸ 28 of 2001.

¹³⁹ Financial Institutions (Protection of Funds) Act s 6B(2)(b).

¹⁴⁰ Financial Institutions (Protection of Funds) Act s 6C(5)(e). See further PAJA, s 3(3)(a) and Burns (n 155) 517 regarding access to legal representation before an administrator.

¹⁴¹ Financial Institutions (Protection of Funds) Act s 6D(1).

¹⁴² *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 239.

¹⁴³ Financial Institutions (Protection of Funds) Act, s 6D(2).

¹⁴⁴ S 26A of the FSBA was introduced by s 29 of the Financial Services Laws General Amendment Act, 22 of 2008.

¹⁴⁵ *Nichol v Registrar of Pension Funds* [2005] 7 BPLR 559 (SCA) 565.

the Financial Services Board Act by s 28 of the Financial Services Laws General Amendment Act, 22 of 2008.

4.1.4. Determination of administrative sanction and compensation

If the Enforcement Committee is satisfied on a balance of probabilities¹⁴⁶ that there has been a contravention of section 78 of the Financial Markets Act, the committee may impose any one or more of the several administrative sanctions contemplated in section 6D(2) of the Financial Institutions (Protection of Funds) Act,¹⁴⁷ read with section 82 of the Financial Markets Act. This includes the equivalent of the profit that the person charged could have made or the loss avoided through the dealing, plus a penalty in an amount of R1 million.¹⁴⁸ Where an amount has been recovered by the Financial Services Board in terms of section 82 of the Financial Markets Act any balance remaining after the Board (now the Authority) has been reimbursed for expenses reasonably incurred must be distributed to claimants, subject to the limits set out in section 82(6) of the Financial Markets Act.¹⁴⁹ Any further balance remaining accrues to the Authority.¹⁵⁰ In terms of section 271 of the Bill a person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court of competent jurisdiction against the other person and against any person who was knowingly involved in the contravention.

4.1.5. Factors relevant to determination of administrative sanction

In determining an appropriate administrative sanction, the Enforcement Committee may have regard to a range of factors stipulated in section 6D(3) of the Financial Institutions (Protection of Funds) Act. There is no guidance in the Act as to the weighting or relative importance of any individual factor.

4.1.6. Administrative sanction and criminal offence

¹⁴⁶ The balance of probabilities standard of proof is applied when administrative proceedings are used – see *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 254; *Zietsman v Directorate of Market Abuse* [2015] JOL 34007 (GP) 1 18.

¹⁴⁷ 28 of 2001.

¹⁴⁸ FMA, ss 82(1) and (2).

¹⁴⁹ FMA, s 82(4).

¹⁵⁰ FMA, s 82(4)(c).

The civil and criminal sanctions are not available concurrently.¹⁵¹ In the assessment of any penalty in terms of section 5 of the Insider Trading Act the court had to take into account any award arising from the same cause previously made under section 6 of that Act, and *vice versa*. In terms of section 104(6) of the Securities Services Act the Enforcement Committee may not impose an administrative penalty contemplated in section 103 of that Act, if the respondent has been charged with a criminal offence in respect of the same set of facts. This provision was held in *Pather v Financial Services Board*¹⁵² to have conferred on the authorities an election as to whether or not to pursue a criminal charge. The effect of section 79(1) of the Securities Services Act was simply to specify the jurisdiction of a High Court or a regional court in relation to criminal offences, and did not preclude the Enforcement Committee from imposing an administrative penalty, despite the fact that the respondent could have been charged with a criminal offence.¹⁵³ In terms of section 6D(3)(f) of the Financial Institutions (Protection of Funds) Act,¹⁵⁴ any previous fine imposed or compensation paid for a contravention based on the same set of facts may be taken into consideration by the Enforcement Committee when determining an appropriate administrative sanction in terms of the Financial Markets Act. In terms of section 168(4) of the Bill the responsible authority may not impose an administrative penalty on a person if a prosecution for an offence arising out of the same set of facts has been commenced.

4.1.7. Notification of imposition of administrative sanction

As soon as the Enforcement Committee has issued a determination it must cause a copy thereof to be delivered to the applicant and the respondent and, in a simultaneous written notice, advise the respondent to comply within a specified period with the administrative sanction imposed by the Enforcement Committee. The Enforcement Committee must simultaneously advise the respondent of the possibility of an appeal in terms of section 6F of the Financial Institutions (Protection of Funds) Act.

4.2. Regulation and sanctions under the Financial Sector Regulation Act

¹⁵¹ *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 221.

¹⁵² *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 226. The provision is referred to as s 103(6).

¹⁵³ *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 226.

¹⁵⁴ 28 of 2001.

As noted above, the prohibitions on insider trading contained in section 78 of the Financial Markets Act are enforceable either by means of criminal justice procedures, or by means of administrative action. The requirements of administrative justice consequently play an important role, both (a) in respect of the selection of a remedy by the Authority (i.e. either criminal or administrative) and (b) in relation to the imposition of an administrative sanction (whether in terms of section 82 of the Financial Markets Act, or alternatively section 168(1) of the Bill).

4.2.1. Administrative actions and decisions

The notion of action of an administrative nature on the part of a public body or functionary is said to be at the core of the definition of “administrative action”.¹⁵⁵ A “decision” for the purposes of the Promotion of Administrative Justice Act means any decision taken, or any failure to take a decision, by an organ of state (as defined) or by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision.¹⁵⁶

Section 219(1) of the Bill identifies specific kinds of decisions for the purposes of the provisions of Chapter 15 of the Bill (provisions pertaining to the Tribunal). These decisions include (a) a decision by a financial sector regulator or the Ombud Council in terms of a financial sector law¹⁵⁷ in relation to a specific person (for example the imposition of an administrative sanction by the Authority in terms of section 82 of the Financial Markets Act); and (b) a decision in relation to a specific person by a market infrastructure (being a decision in terms of rules of the market infrastructure contemplated by the Financial Markets Act, or a decision contemplated in section 105 of the Financial Markets Act, i.e. decisions that are subject to a right of appeal).

4.2.2. Organs of state

An “organ of state” is defined in section 239 of the Constitution as including, in addition to any department of state or administration in the national, provincial or local sphere of

¹⁵⁵ *Bhugwan v JSE Ltd* [2009] JOL 23989 (GSJ) 3, citing *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) 937 - 938. See also *JSE Limited v Registrar of Securities Services and ZAR X (Pty) Ltd* (Case A8/2016; 29/07/2016, Appeal Board of the Financial Services Board).

¹⁵⁶ Definition of “administrative action, PAJA, s 12. It is essential for a decision to have been taken, i.e. that “the decisional process” has been completed” – see *Bhugwan v JSE Ltd* [2009] JOL 23989 (GSJ) 6.

¹⁵⁷ This includes the Bill, a law listed in Schedule 1 thereof, a regulation or a regulatory instrument made in terms of the Bill or a financial sector law in Schedule 1 to the Bill.

government, any functionary or institution exercising a public power or performing a public function in terms of any legislation. Both the Authority and the Financial Services Tribunal (hereafter referred to as “the Tribunal”) are clearly organs of state as contemplated in section 1 of the Promotion of Administrative Justice Act.¹⁵⁸ The various licensed market infrastructures (exchanges, central securities depositories, clearing houses and trade repositories) have powers of licensing (authorisation) and debarment as well as investigative and disciplinary powers similar to some of the powers exercised by the Authority.¹⁵⁹ Whether these bodies constitute organs of state will depend on the outcome of the application of the following criteria,¹⁶⁰ namely whether the body concerned has exercised a power or performed a function in terms of the Constitution or a provincial constitution, or has exercised a public power or performed a public function in terms of any legislation. It is submitted, however, that, to the extent that their activities do constitute “administrative action”, the exercise of such activities on the part of market infrastructures will be subject to the requirements of the Promotion of Administrative Justice Act, irrespective of whether any such body can be classified as an organ of state.

4.2.3. The Authority, financial sector regulators and responsible authorities

The Authority is designated in Schedule 2 to the Bill as the responsible authority for the Financial Markets Act.¹⁶¹ The Authority, in accordance with the financial sector laws (including the Financial Markets Act),¹⁶² regulates and supervises the conduct of financial institutions, as well as the operation of the financial markets and the conduct of market infrastructures.¹⁶³

4.2.4. Executive Committee of the Authority and administrative action committees

In terms of section 60(1) of the Bill an “Executive Committee” consisting of the Commissioner and Deputy Commissioners¹⁶⁴ will be established for the Authority. The Executive Committee must act for the Authority to grant, vary, suspend and revoke licences in terms of a financial

¹⁵⁸ The Tribunal does not fall within the ambit of the definition of “court” in section 1 of PAJA. A “tribunal” is defined in section 1 of PAJA as any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of PAJA.

¹⁵⁹ See *Bhugwan v JSE Ltd* [2009] JOL 23989 (GSJ).

¹⁶⁰ See the discussion in Y Burns *Administrative Law* (Durban, 2013) 136.

¹⁶¹ Bill, s 5, read with the definition of “responsible authority” in section 1 and Schedule 2 to the Bill.

¹⁶² Schedule 1 to the Bill.

¹⁶³ Bill, s 58(1)(a).

¹⁶⁴ S 60(2).

sector law,¹⁶⁵ and regarding any other matter assigned to the Executive Committee in terms of a financial sector law.¹⁶⁶ It appears that the role of the Enforcement Committee which, under the present regulatory regime, has responsibility for the enforcement of the market abuse prohibitions by adjudicating proceedings for an administrative sanction initiated by the Directorate of Market Abuse, or by instigating prosecutions of market abuse offences, will effectively be absorbed by an Administrative Action Committee reporting to the Authority.¹⁶⁷ As a financial sector regulator the Authority may delegate to its Administrative Action Committee the Authority's power to impose administrative penalties specified in the delegation.¹⁶⁸

4.2.5. Administrative action by the Authority

The Bill and other financial sector laws provide for “administrative action” to be taken by financial sector regulators. “Administrative action” is defined in the Bill in terms similar to the definition thereof in the Promotion of Administrative Justice Act.¹⁶⁹ The administrative action procedures of a financial sector regulator must be reviewed at least once every three years (referred to as a “review” of administrative action procedures).¹⁷⁰

Sections 33(1) and (2) of the Constitution reinforce the fundamental right of fair administrative action.¹⁷¹ The Promotion of Administrative Justice Act applies to any administrative action taken by a financial sector regulator in terms of the Bill or a specific financial sector law (including the Financial Markets Act).¹⁷² Any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair and comply with the requirements of sections 3 - 6 of the Promotion of Administrative Justice Act. Any person may institute proceedings in a court or a tribunal¹⁷³ for the judicial review of an administrative action.¹⁷⁴

¹⁶⁵ Bill, s 60(1)(b)(vii).

¹⁶⁶ Bill, s 60(1)(b)(ix). No specific functions are assigned to the Executive Committee in terms of the FMA.

¹⁶⁷ Bill, s 87.

¹⁶⁸ Bill, s 71(2)(b).

¹⁶⁹ Definition of “administrative action”, Bill, s 1.

¹⁷⁰ Bill, s 94.

¹⁷¹ *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province & Mpumalanga* 2003 (1) SA 373 (SCA); *Bhugwan v JSE Ltd* [2009] JOL 23989 (GSJ).

¹⁷² Bill, s 91, read with the definition of “financial sector law” in s 1, and Schedule 4 to the Bill.

¹⁷³ A “tribunal” is defined in s 1 of PAJA as any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of PAJA.

¹⁷⁴ PAJA, s 6(1).

4.2.5.1. Licensing and debarment

A person may not provide, as a business or part of a business, a financial product, financial service or market infrastructure, except in accordance with a licence in terms of a specific financial sector law, the National Credit Act 34 of 2005 or the National Payment System Act 78 of 1998.¹⁷⁵ The responsible authority for a financial sector law may make a debarment order in respect of a natural person if the person has, amongst others, contravened a financial sector law in a material respect, or in a material respect contravened an enforceable undertaking that was accepted by the responsible authority in terms of section 151(1) of the Bill.¹⁷⁶

4.2.5.2. Investigations into insider trading and securities services

If the Authority receives a complaint, charge or allegation that a person who provides securities services (irrespective of whether the respondent is licensed or authorised in terms of the Financial Markets Act or not) is contravening or is failing to comply with any provision of that Act, or if the Authority has reason to suspect that such a contravention or failure is taking place, the Authority may investigate the matter in terms of the Financial Markets Act.¹⁷⁷

The Authority may investigate any matter relating to an offence or contravention referred to in sections 78, 80 and 81 of the Financial Markets Act. Being the responsible authority for the Financial Markets Act, the Authority may instruct an investigator appointed by it¹⁷⁸ to conduct an investigation in terms of Part 4 of Chapter IX of the Bill in respect of any person, if the Authority suspects a contravention by such a person of that Act.¹⁷⁹ The Authority may determine the functions, powers and duties of the Directorate of Market Abuse. This may include the consideration and the making of recommendations relating to investigations into offences referred to in section 78 (insider trading), section 80 (trading practices) and section 81 (false statements) of the Financial Markets Act, and section 135(2) of the Bill.¹⁸⁰

A person is not required to answer a question, or to comply with a requirement to produce a document or information in terms of Chapter IX of the Bill,¹⁸¹ to the extent that the person is

¹⁷⁵ Bill, s 111(1). For a view on the role of the licensing concept see *R v Wholesale Travel Group* [1991] 3 SCR 154, cited in *Platinum Asset Management (Pty) Ltd v Financial Services Board* [2006] JOL16599 (W).

¹⁷⁶ Bill, s 153(1)(a) – (b). See also s 206 in relation to debarment orders with respect to ombud schemes.

¹⁷⁷ FMA, s 94(1), as amended by item 65 of Schedule 4 to the Bill.

¹⁷⁸ Bill, s 134(1).

¹⁷⁹ Bill, s 135(1)(a).

¹⁸⁰ FMA, s 85(1)(c), as amended by item 60 of Schedule 4 to the Bill.

¹⁸¹ Bill, ss 129 – 140.

entitled to claim legal professional privilege in relation to the answer, contents of the relevant document or the information.¹⁸² If the person (contemplated in section 130(1)(a) of the Bill) is a legal practitioner, that person is entitled or required to claim the privilege on behalf of a client of the person. Section 130(1) does not limit any right of a person.¹⁸³

4.2.5.3. Determination of contravention

An administrative penalty in respect of a contravention of the Financial Markets Act must be imposed by the Authority. (The Authority may delegate to its administrative action committee its power to impose administrative penalties.¹⁸⁴) The Authority¹⁸⁵ may, by order served on a person, impose on the person an “appropriate”¹⁸⁶ administrative penalty, which penalty must be paid to the Authority if the person (a) has contravened a financial sector law,¹⁸⁷ or (b) has contravened an enforceable undertaking accepted by the Authority.¹⁸⁸ An administrative penalty is not a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act 51 of 1977.¹⁸⁹ It is submitted that the civil onus of proof is appropriate in the context of the imposition of an administrative penalty.¹⁹⁰

It is submitted that the power conferred by s 168(1)(a) of the Bill to impose an administrative penalty can only be validly exercised if the person has “contravened” a financial sector law (for present purposes section 78 of the Financial Markets Act). It is consequently also submitted that no such penalty can be imposed on a person unless a valid determination has first been made that a person has contravened section 78 (or has contravened an enforceable undertaking accepted by the Authority).

Once “determinations” have been made that (1) a relevant contravention has occurred or (2) that an administrative penalty is to be “imposed” (or a prosecution requested from the Director

¹⁸² Bill, s 130(1)(a).

¹⁸³ Bill, s 130(2).

¹⁸⁴ Bill, s 71(2)(b).

¹⁸⁵ Bill, s 1, definition of “financial sector regulator”.

¹⁸⁶ The factors that the responsible authority must and may have regard to in determining an “appropriate administrative penalty” for particular conduct are set out in sections 168(2)(a) and 168(2)(b) of the Bill respectively. The policy of the Financial Services and Markets Act 2000 (UK) in relation to financial penalties states that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business. See *Tariq Carrimjee v The Financial Conduct Authority* [2015] UKUT 0079 (TCC) par 13.

¹⁸⁷ I.e. including the FMA – Schedule 1 to the Bill.

¹⁸⁸ Bill, s 168(1)(a) - (b).

¹⁸⁹ Bill, s 168(5).

¹⁹⁰ *Pather v Financial Services Board* [2014] 3 All SA 208 (GP) 255.

of Public Prosecutions), the question then arises in terms of what procedure and on what basis (3) a further determination is to be made as to what penalty would satisfy the requirements of being “appropriate”? The procedures to be followed must evidently comply, in so far as may be applicable, with the Financial Markets Act, the Promotion of Administrative Justice Act and the Bill.

It is submitted that as the imposition of an administrative penalty constitutes administrative action which materially and adversely affects the rights or legitimate expectation of a person, the processes for making the various determinations, including the imposition of an administrative penalty, must therefore be procedurally fair, as required by section 3(1) of the Promotion of Administrative Justice Act.

4.2.5.4. Determination of “appropriate” penalty

It is further submitted that procedures that are similar to the procedure specified in section 6D of the Financial Institutions (Protection of Funds) Act may be viewed as affording a general framework for a valid administrative assessment of an “appropriate” penalty. The wording of the Bill does not provide a structured framework or process for the calculation of administrative penalties that rationally relate to the circumstances or relative “seriousness” of particular contraventions of the Financial Markets Act, such as is provided for by sections 6D(1) (Enforcement Committee to make a determination of a contravention) and 6D(2) (imposition of administrative sanction after assessment on balance of probabilities) of the Financial Institutions (Protection of Funds) Act.

It is submitted that the provisions of section 168(2)(a) - (b) of the Bill and section 6D(3)(f) of the Financial Institutions (Protection of Funds) Act merely offer vague indications for the calculation and calibration of administrative penalties and that greater clarity is required as to categories and levels of penalties for different classes of contravention. There is simply no means of applying any weighting to individual criteria nor of making any rational connection between the criteria provided and any particular contravention or class of contravention, either jointly or severally.

How is the Tribunal or a court, for example, to deal with criteria such as the “nature, duration, seriousness and extent of the contravention”,¹⁹¹ as opposed to “the effect of the conduct on the financial system and financial stability”.¹⁹² In *Da Vinci* the court noted that appropriate guidelines could furnish the starting point for the imposition of penalties, (although the court would not be bound by such guidelines): “To do otherwise would risk introducing an inequality of treatment of defendants depending on whether the proceedings were taken against them under the regulatory route or the court route.”¹⁹³

4.2.5.5. Administrative sanction and compensation

It is submitted that the powers of the Authority in terms of section 82 of the Financial Markets Act and of sections 6A – 6I of the Financial Institutions (Protection of Funds) Act remain intact notwithstanding the provisions of the Bill (see discussion in section 4.1.4 above). In terms of section 271 of the Bill a person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court of competent jurisdiction against the other person and against any person who was knowingly involved in the contravention.

4.2.6. Right to be informed and right to reasons for decisions

Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.¹⁹⁴ Such reasons must be furnished within 90 days after receipt of the request.¹⁹⁵

In terms of section 230(1) of the Bill a person who has not already been given the reasons for the decision may request a statement of the reasons for the decision from the decision maker within 30 days after the person was notified of the decision.¹⁹⁶ The decision maker must give the aggrieved person a statement of the reasons for the decision within one month after receiving a request in terms of section 230(1). The statement must include a statement of the

¹⁹¹ Bill, s 168(2)(b)(i).

¹⁹² Bill, s 168(2)(b)(v).

¹⁹³ *The Financial Conduct Authority v Da Vinci Invest Limited* [2015] EWHC 2401 (Ch) par 201.

¹⁹⁴ PAJA, s 5(1).

¹⁹⁵ PAJA, s 5(2).

¹⁹⁶ The difference in the periods allowed under PAJA and the Bill should be noted.

material facts upon which the decision was based.¹⁹⁷ An application in terms of section 230(1) must be made in accordance with the Tribunal Rules.¹⁹⁸ Unless the Tribunal so orders, neither an application for the reconsideration of a decision, nor the proceedings on the application, suspends the operation of the decision.¹⁹⁹

4.2.7. Procedurally fair administrative action

As submitted above (section 4.2.5.4), the procedures specified in sections 6A - 6I of the Financial Institutions (Protection of Funds) Act furnish a procedural framework that may approximate procedural fairness for the purpose of making a determination of a contravention or the imposition of an “appropriate” penalty.

Schedule 4 to the Bill effects certain amendments to the Financial Institutions (Protection of Funds) Act. These amendments include the substitution of the word “Authority” for the word “registrar”, and the deletion of the words “determination” and “Enforcement Committee”. It is submitted that the procedures provided for in sections 6A - 6I will apply to the making of a determination of a contravention of section 78 of the Financial Markets Act or the imposition of an administrative penalty arising from such a determination.

4.2.8. Internal remedies and judicial review

Administrative action is subject to “judicial review” by a court or a tribunal.²⁰⁰ There are, however, circumstances when the right of judicial review of administrative action may be curtailed by a requirement that the complainant must, prior to having recourse to a court, first exhaust all possibilities of internal review, typically review by an (internal) tribunal. It is submitted that the requirements for impartiality and independence of an appeal tribunal which is a higher authority than the decision maker, but still within the same hierarchy forming part of a system of administrative adjudication, may be less rigorous than where such appeal tribunal does not form part of a structure of internal appeal.²⁰¹

¹⁹⁷ Bill, s 230(2).

¹⁹⁸ Bill, s 231(3).

¹⁹⁹ Bill, s 232.

²⁰⁰ PAJA, s 6(1). A tribunal for purposes of PAJA is defined in s 1 thereof as any independent or impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of PAJA.

²⁰¹ See *Financial Services Board v Pepkor Pension Fund* 1998 (11) BCLR 1425 (C) 1432 – 1433. See Burns (n 155) 516 as to “decentralised” tribunals.

4.2.9. Right of reconsideration of decision of a decision maker

A person aggrieved by a decision of the Authority under a power conferred or duty imposed upon the Authority by or under the Financial Markets Act may approach the Tribunal for a reconsideration of the decision in terms of the Promotion of Administrative Justice Act.²⁰² A person who is aggrieved by a decision of the Authority or of a particular market infrastructure may approach the Tribunal in terms of the Financial Markets Act for a reconsideration of the decision.²⁰³ No court or tribunal may review an administrative action in terms of the Promotion of Administrative Justice Act unless any internal remedy provided for in any other law has first been exhausted.²⁰⁴ The effect of section 105 of the Financial Markets Act and section 231(1)(b) of the Bill, read with the provisions of section 7(2) of the Promotion of Administrative Justice Act, is consequently clearly to exclude the possibility of any application for review directly to the High Court unless an application for reconsideration of the decision has been entertained by the Tribunal.

If a court or tribunal is not satisfied that any available internal remedy has been exhausted, it must direct that the person concerned should first exhaust such remedy before instituting proceedings in a court or tribunal in terms of the Promotion of Administrative Justice Act for judicial review.²⁰⁵ In exceptional circumstances a court or tribunal may, on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court deems it in the interest of justice.²⁰⁶

A reasonable perception of bias on the part of a decision maker and procedural unfairness may constitute “exceptional circumstances” for the purposes of s 7(2)(c) of the Promotion of Administrative Justice Act.²⁰⁷ In *Gold Fields Limited v Connellan* the Court noted that, when confronted with a particularly hostile takeover (something which the Securities Regulation Panel (hereafter referred to as the “SRP”) generally had not previously had to deal with) the functionalities of the SRP had been placed under extreme pressure; involved legal issues had

²⁰² FMA, s 105.

²⁰³ Bill, s 231.

²⁰⁴ PAJA, S 7(2)(a).

²⁰⁵ PAJA, S 7(2)(a).

²⁰⁶ PAJA, s 7(2)(c). In *Nichol v Registrar of Pension Funds and Others* [2005] 7 BPLR 559 (SCA) 565 the Supreme Court of Appeal held that for circumstances to be exceptional the immediate intervention of the Courts must be required, rather than resort to the applicable internal remedy.

²⁰⁷ See *Gold Fields Limited v Connellan NO and others* [2005] 3 All SA 142 (W) 155-169. See PAJA s 6(2)(a)(iii) bias or reasonable suspicion of bias).

arisen, and there were fundamental disputes between the decision maker and the applicant.²⁰⁸ It is submitted that this approach indicates that the Court will be prepared to countenance additional grounds to justify “exceptional circumstances” for the purposes of section 7(2)(c) of the Promotion of Administrative Justice Act.

5. The Financial Services Tribunal

The Tribunal is intended to replace the appeal board²⁰⁹ that was established in terms of section 26(1) of the Financial Services Board Act.²¹⁰ The Tribunal will have the power to reconsider decisions by financial sector regulators, including findings of the Authority in respect of charges of contraventions or offences of insider trading and the other market abuse prohibitions. The Chairperson of the Tribunal may make rules, not inconsistent with the Bill, in respect of the procedure to be followed in connection with proceedings on applications for reconsideration of decisions in terms of Chapter 15.²¹¹ The Chairperson must constitute a panel of the Tribunal for each application for reconsideration of a decision.²¹²

5.1. Internal remedies and reconsideration of Authority decisions

The functions of the Tribunal are to reconsider those decisions that are defined in s 219 of the Bill, and to perform the other functions conferred on the Tribunal by the Bill and by specific financial sector laws.²¹³ A “decision” as defined in section 219(c) (see discussion in par 4.2.1 above) includes the imposition of an administrative sanction by the Authority in terms of section 82 of the Financial Markets Act. In terms of section 105(1)(a) of the Financial Markets Act a person aggrieved by a decision of the Authority under a power conferred or a duty imposed upon the Authority under that Act (including the imposition of an administrative sanction in terms of section 82) may approach the Tribunal for reconsideration of the decision. (A decision to conduct a supervisory on-site inspection or an investigation is excluded from the definition of “decision” in section 219 of the Bill).

5.2. Reconsideration and internal review by Tribunal

²⁰⁸ *Gold Fields Limited v Connellan NO* [2005] 3 All SA 142 (W) 170.

²⁰⁹ S 1A(9) of the FMA inserted by Schedule 4 of the Bill: Amendments and Repeals FMA, item 3.

²¹⁰ 97 of 1990.

²¹¹ Bill, s 228(1).

²¹² Bill, s 226(1).

²¹³ Bill, s 220.

A reconsideration of a decision in terms of Part 2 of Chapter 15 of the Bill constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act. With respect to proceedings for the imposition of an administrative penalty contemplated in section 168(1) of the Bill it is submitted that both the decision of the Authority (or of an administrative action committee) whereby an administrative penalty is imposed, as well as a reconsideration by the Tribunal of a determination that a contravention has occurred and that a particular penalty is appropriate, are subject to the rules of fair administrative action. In other words – it is both the conduct of the Authority and the conduct of the Tribunal that must comply with the requirements of fair administrative action.

5.3. Tribunal panel not bound by rules of evidence

In proceedings for reconsideration of a decision the panel is not bound by the rules of evidence.²¹⁴ The Tribunal may, subject to section 233, inform itself on any relevant matter in “any appropriate way”.²¹⁵ While Tribunals are generally not strictly bound by rules of evidence, it can be pointed out that adherence to rules of evidence is not required at any of the levels of investigation and determination of market abuse contraventions, starting with investigation by the Directorate of Market Abuse, proceeding to adjudication by the administrative action committee, and culminating in a further administrative adjudication by the Tribunal.

5.4. Tribunal orders

In proceedings on an application for reconsideration of a decision the Tribunal may, by order, set the decision aside and remit the matter to the decision maker for further consideration,²¹⁶ or dismiss the application.²¹⁷

The powers of the Appeal Board in terms of s 26B(15) of the FSB Act were restricted to confirming, setting aside or varying the decision under repeal, or remitting the matter for reconsideration by the decision maker concerned. In the case of a decision in terms of Chapter

²¹⁴ Bill, s 233(4).

²¹⁵ Bill, s 233(4). The reference to “any appropriate way” is undefined and obscure.

²¹⁶ Bill, s 235(1)(a).

²¹⁷ Bill, s 235(1)(c). In terms of s 235(4) of the Bill the Tribunal may, by order, summarily dismiss an application for reconsideration of a decision if the application is frivolous, vexatious or trivial.

13 (administrative penalties)²¹⁸ or a decision referred to in paragraph (b)²¹⁹ or (c)²²⁰ of the definition of “decision” in section 218 (sic),²²¹ or a decision of a kind prescribed by Regulation for the purposes of s 235,²²² the Tribunal may also make an order setting aside the decision and substituting the decision of the Tribunal.²²³ Subsections 235(1) and (2) are subject to any provision of a financial sector law that excludes, restricts, or qualifies the orders that the Tribunal may make in proceedings for reconsideration of a decision.²²⁴

5.5. Judicial review of Tribunal orders

Any party to proceedings on application for reconsideration of a decision who is dissatisfied with an order of the Tribunal on a ground set out in sections 6(2) or (3) of the Promotion of Administrative Justice Act may institute proceedings in terms of that Act for a judicial review of the order.²²⁵

6. Conclusion

The Bill effects amendments, amongst others, to the Financial Markets and the Financial Institutions (Protection of Funds) Acts. The amendments impact on the administrative law procedures relating to the enforcement of the prohibition of insider trading in the Financial Markets Act.

In respect of contraventions of the Act that not only constitute an offence but in respect of which administrative penalties can also be imposed the Bill, read with the Financial Markets Act makes provision that the Authority and the Tribunal are not bound by the rules of evidence. While this is not unusual in respect of Tribunals in general, it is submitted that this approach underestimates the importance of the critical fact finding and determination role of the insider

²¹⁸ Bill s 235(1)(b)(i)-(ii).

²¹⁹ Bill s 219(b) refers to a decision by an authorised financial services provider, as defined in s 1 of FAIS, in terms of s 14 of that Act, in relation to a specific person.

²²⁰ Bill s 219(c) refers to a decision by a market infrastructure, being in terms of the rules of the market infrastructure contemplated by the FMA, or a decision contemplated in s 105 of the FMA (right of appeal by a person aggrieved by a decision of the Authority).

²²¹ This is apparently a reference to paragraphs (b) or (c) s 219 of the of Bill.

²²² Bill s 235(1)(b)(iii).

²²³ Bill, s 235(1)(b). See *Potgieter and Herbst v Howie* NO unreported case, North Gauteng High Court 50574/2012 par 36, where it was held that s 26B of the Financial Services Board Act, 97 of 1990, does not permit the Appeal Board to reconsider a decision under appeal.

²²⁴ Bill, s 235(3).

²²⁵ Bill, s 236.

trading authorities. As regards the imposition of an “appropriate penalty” there is no matrix or guidance for the allocation of weights to specific penalty criteria, nor is there any guidance as to how individual criteria are to be related to other criteria, quite apart from any weightings.²²⁶

The effect of certain amendments of the Financial Institutions (Protection of Funds) Act by the Bill are not clear, and the fairness of revised administrative procedures in the making of determinations or the imposition of administrative penalties in respect of contraventions of the prohibitions on insider trading are ambiguous.²²⁷ Certain time bar provisions in the Bill are stricter than the equivalent provisions in the Promotion of Administrative Justice Act.²²⁸

It is submitted that the provisions of the Bill in relation to these matters warrant further attention before the Act is promulgated.

²²⁶ See section 4.2.5.4 above.

²²⁷ See section 4.2.7 above.

²²⁸ See section 4.2.6 above.

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