

SHARE-REPURCHASE IS THE ULTIMATE INSIDER TRADING

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SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

LLM: CORPORATE LAW

**IN THE FACULTY OF LAW,
UNIVERSITY OF PRETORIA**

NOVEMBER 2016

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ACKNOWLEDGEMENTS

I gratefully acknowledge the following significant influences for their guidance and support during this process:

- First and foremost, my Heavenly Father for providing me with this opportunity, along with the strength and courage to follow through with this venture
- My supervisor, Prof PA Delport, for all the guidance and constructive criticism.
- My loving husband and family for all their support, love and encouragement.

LIST OF ABBREVIATIONS

FMA	Financial Markets Act 19 of 2012
FSB	Financial Services Board
IDC	Industrial Development Corporation
IOSCO	International Organization of Securities Commission
JSE	Johannesburg Stock Exchange
MOI	Memorandum of Incorporation
PELJ	Potchefstroom Electronic Law Journal
SAJAR	South African Journal of Accounting Research
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SENS	Stock Exchange News Service
TSAR	Tydskrif vir Suid-Afrikaanse reg
UK	United Kingdom
USA	United States of America

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CHAPTER 1

1 Literature review

With regard to the larger part of company law in South Africa, a company was prohibited to repurchase its own shares. Since 1 July 1999, with the promulgation of the *Companies Act 37 of 1999* (herein after referred to as the *Companies Act of 1999*), companies were allowed, in terms of the *Companies Act 61 of 1973* (herein after referred to as the *Companies Act of 1973*), *inter alia*, to repurchase its own shares, provided that the requirements of the solvency and liquidity test has been met. The regulation of share repurchases is currently regulated by the *Companies Act 71 of 2008* (herein after referred to as the *Companies Act*) which came into operation on the 1st of May 2011.

Share repurchase has become more common globally over the years, especially in countries like the United States of America (herein after referred to as the USA) and the United Kingdom (herein after referred to as the UK), with South Africa following in their footsteps since 1999.¹

There are various reasons why a company may engage in a share repurchase. Companies signal a commitment by paying a certain level of dividend. It is implied that they will continue paying that level of dividend.² Therefor when some uncertainty surrounds the ability to sustain a dividend, companies may choose to rather repurchase its own shares.³ Some flexibility is also offered by a share repurchase scheme as it allows the company to repurchase its shares over a longer period.⁴ The shareholders who do not sell their shares will be able to hold greater control over the company which might be a deterrent to a hostile takeover.⁵ By repurchasing shares, management signals confidence in the company and might buoy the share price when under threat. The optimum capital structure can also be achieved relatively easily with a share repurchase.⁶

¹ Visser *The Return of Capital to Shareholders by Means of a Repurchase of Securities* 6; Chivaka, Siddle, Bayne, *et al Reasons for Share Repurchase in South Africa: Theory versus Practice* 1.

² Correia, Flynn, Uliana, Wormald *Financial Management* 16-21.

³ Correia, Flynn, Uliana, Wormald *Financial Management* 16-21.

⁴ Correia, Flynn, Uliana, Wormald *Financial Management* 16-21.

⁵ Correia, Flynn, Uliana, Wormald *Financial Management* 16-22.

⁶ Correia, Flynn, Uliana, Wormald *Financial Management* 16-22.

The biggest criticism of the provisions in the current *Companies Act*⁷ must be the lack of protection for individual shareholders, as some shareholders might be selected to sell their shares and others not. The reason behind this is that in order to satisfy the requirements of section 48 of the *Companies Act*⁸ that governs the repurchase of shares, the provisions of section 46 simply needs to be met.⁹ This section simply requires the board to approve by resolution a distribution.¹⁰ This puts the board members in a position of power which might be open to abuse.

The legislation that regulates insider trading only applies to listed public companies on the Johannesburg Stock Exchange (herein after referred to as JSE), which thus excludes private companies. In essence only share repurchase of companies that are listed will be regulated by the insider trading provisions.

Insider trading has opened the door to a lot of debate as it makes headlines of the prejudiced majority who do not enjoy the same equality of information or opportunity as the relatively privileged minority who has access to non-public material information and uses this opportunity at the expense of others.¹¹ It is morally and legally inexcusable.¹²

To ensure that the South African financial markets remain fair, efficient and transparent in a stable environment which increases confidence by promoting the protection of regulated persons, clients and investors and the reduction of systematic risk the South African *Financial Markets Act* 19 of 2012 (herein after referred to as the FMA) was introduced.¹³ The aforementioned Act is also meant to increase the competitiveness of the South African financial markets.¹⁴

The FMA¹⁵ has better aligned the South African framework with international best practises and is particularly relevant to company directors dealing in its company's securities.

⁷ 71 of 2008.

⁸ 71 of 2008.

⁹ S 48 of the *Companies Act* 71 of 2008.

¹⁰ S 46 of the *Companies Act* 71 of 2008.

¹¹ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹² *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹³ 19 of 2012.

¹⁴ 19 of 2012.

¹⁵ 19 of 2012.

An important issue is however to consider what exactly constitutes a “person” in our legislation with specific reference to insiders.¹⁶ Whilst in some jurisdictions both natural and juristic persons can be insiders, others deem only natural persons to be insiders.¹⁷

In light of the afore stated the ambiguity in defining a person and the opportunity for abuse as allowed by the *Companies Act*¹⁸ begs the question that if a company is repurchasing its own shares, whether it is engaging in the ultimate form of insider trading. The company directors have access to material information which might influence the share price positively or negatively. This information will put them in a position to trade the securities of the company at an advantage to the average individual. This will benefit the juristic person to a great extent and satisfy the criteria of insider trading.

2 Research statement and relevance

The research problem is whether share repurchase by companies, as regulated in the *Companies Act*,¹⁹ can possibly amount to insider trading. Insiders are defined by the term “person”, which leads to ambiguity about whether juristic person such as corporate entities are included and can be held liable under the insider trading provisions. The fundamental research relevance is to investigate the possibility of insider trading where a company repurchase its own shares.

3 The objective of the dissertation

This dissertation is aimed at giving an overview of share repurchase by companies and the requirements and procedures that needs to be satisfied under the *Companies Act*²⁰.

In addition to that, an overview of the development of insider trading and the definition of insiders with specific emphasis on the term “person” and the inclusion of juristic persons is also included. The efficiency of the regulation of insider trading in South Africa in terms of current legislation and the comparison thereof to other

¹⁶ OICU-IOSCO 2003 <https://www.iosco.org>.

¹⁷ OICU-IOSCO 2003 <https://www.iosco.org>.

¹⁸ 71 of 2008.

¹⁹ 71 of 2008.

²⁰ 71 of 2008

common wealth countries will be discussed to determine if a public company that repurchase its owns shares can possibly be considered as insider trading.

4 Research methodology

The research methodology that will be used in this study is of literature nature. An interpretivist paradigm will be followed by doing in-depth study of literature and research available in order to gain knowledge and understanding relating to share repurchase and insider trading regulation.

The research will entail a comprehensive literature review of primary legal sources as well as secondary sources. The literature utilised will primarily consist of legislation in the form of the *Companies Act*,²¹ the FMA,²² which replaced the *Securities Services Act* 36 of 2004 (herein after referred to as Securities Services Act), and other relevant legislation. In addition to that, relevant literature dealing with the legislation or theory behind share repurchases and insider trading will be consulted. Also, case law that relates to share repurchase that is applicable will be used in this study. South African and foreign journals and general publications addressing the topic will be taken into account. Especially those that relate to insider trading with specific reference to insiders and the application thereof in other jurisdiction, especially the commonwealth.

²¹ 71 of 2008.

²² 19 of 2012.

CHAPTER 2

1 Share repurchase by listed companies in terms of *Companies Act 71 of 2008*

1.1 Introduction

The repurchase by a company of its own shares was prohibited, such an acquisition was not allowed or contained in any company legislation until some 50 years ago.²³ The *Companies Act* of 1973 that was amended allowed for share repurchase by companies if the solvency and liquidity test was met.²⁴ Before 1 July 1999 the acquisition of a company of its own shares were regulated by capital maintenance rules, these superfluous rules were abolished by the *Companies Amendment Act 37 of 1999*.²⁵

In *Capitec Bank Ltd v Qorus Holdings Ltd*²⁶, the first case dealing with the statutory provisions relating to share repurchases, the court found that the amendments dramatically changed the capital maintenance rule as well as the apparent protection it afforded to shareholders and creditors against the abuse of the power of a company to repurchase its own shares.²⁷

With the promulgation of the *Companies Act*,²⁸ companies can now, *inter alia*, repurchase its own shares, provided that they satisfy the requirements of the solvency and liquidity test. Therefor the capitalization of shares is permitted according to section 47 of the *Companies Act*,²⁹ unless to the extent that the company's Memorandum of Incorporation (herein after referred to as MOI) provides otherwise.

Share repurchase entails the company repurchasing its own shares from one or more of its shareholders. In such an instance the shares revert back to the

²³ *The Unisec Group Ltd and Others v Sage Holdings Ltd* 1986 (3) SA 259; Van Niekerk 2014 <http://www.inkundlajournal.org>.

²⁴ S 9-12 of the *Companies Amendment Act 37 of 1999*; Makasi and Kruger 2013 *Accounting and Taxation* 41.

²⁵ *Companies Amendment Act 37 of 1999*; *Capitec Bank Ltd v Qorus Holding Ltd and Others* 2003 (3) SA 302 (W) at 308H; Makasi and Kruger 2013 *Accounting and Taxation* 41.

²⁶ 2003 (3) S.A. 302 (W) at 308I-309A.

²⁷ *Capitec Bank Ltd v Qorus Holdings Ltd* 2003 (3) S.A. 302 (W) at 308I-309A.

²⁸ 71 of 2008.

²⁹ 71 of 2008.

authorized but unissued share capital of the company. Companies are prohibited by the *Companies Act*³⁰ to repurchase all of its own shares. The repurchase of shares can lead to exploitation of minority shareholders as well as creditors, therefore adequate protection must be provided by legislation.

The JSE was founded by Benjamin Woollan in November 1887.³¹ It provided a market place for the transaction of shares in some of the companies that was founded after the discovery of gold.³² An Act of Parliament, the FMA and the Listing Requirements of the JSE governs the JSE.³³

Since 1996 it is possible to trade securities electronically.³⁴ After the introduction of electronic securities trading, the trading volumes increased dramatically. In addition to this by 2002 all equity certificates are being held electronically.³⁵

The role of the JSE includes *inter alia* the raising of capital to finance expansion; ensuring there is a secondary market for share trading; borrowing loan finance at improved rates; financing the acquisition of other entities and engaging in share repurchasing if excess capital is available.³⁶

The JSE Listing Requirements regulates the repurchase of shares, which requires the repurchase of shares to be authorised in the MOI of the company as well as the approval of such repurchase by way of special resolution by shareholders who does not participate in the selective share repurchase.³⁷

The board of directors has the authority to decide to repurchase the company's shares in the market place. The repurchase of shares by listed companies has grown exponentially from a mere 45 in 2001 to about 312 in June 2007.³⁸

³⁰ 71 of 2008.

³¹ Correia *et al* *Financial Management* 13-5.

³² Correia *et al* *Financial Management* 13-5.

³³ Correia *et al* *Financial Management* 13-5.

³⁴ Correia *et al* *Financial Management* 13-5.

³⁵ Correia *et al* *Financial Management* 13-5.

³⁶ Correia *et al* *Financial Management* 13-6.

³⁷ *Financial Markets Act* 19 of 2012; Van Niekerk 2014 <http://www.inkundlajournal.org>.

³⁸ Makasi and Kruger 2013 *Accounting and Taxation* 41.

1.2 The regulation of share repurchases in terms of the Companies Act 71 of 2008

The *Companies Act*,³⁹ allows companies to repurchase its own shares, provided the provisions contained in section 46 and 48 has been complied with. The failure to adhere to these provisions may amount to personal liability of the company's directors for breach of fiduciary duties.⁴⁰

Share repurchase is a form of distribution under the *Companies Act*,⁴¹ which defines a distribution in section 1 as follows:

“distribution” means a direct or indirect—
transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one more holders of any of the shares of that company or of another company within the same group of companies, whether—
(i) in the form of a dividend;
(ii) as a payment in lieu of a capitalisation share, as contemplated in section 47;
(iii) is consideration for the acquisition—
by the company of any of its shares, as contemplated in section 48; or
by any company within the same group of companies, of any shares of a company within that group of companies; or
(iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164(19);
incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or
forgiveness or waiver by a company of a debt or other obligation owed to the company by one more holders of any of the shares of that company or of another company within the same group of companies,
but does not include any such action taken upon the final liquidation of the company.⁴²

In light of the abovementioned, a company's internal funds is being used to repurchase shares and therefore subject to the requirements of distribution

³⁹ 71 of 2008.

⁴⁰ S 77 of the *Companies Act* 71 of 2008; Kanamugire 2014 *Mediterranean Journal of Social Sciences* 84.

⁴¹ 71 of 2008.

⁴² 71 of 2008.

contained in section 46. The actions in terms of section 48 also falls under the ambit of a “distribution” as defined in the *Companies Act*.⁴³

1.2.1 Section 46: Distributions must be authorized by board

Distributions are regulated by section 46 of the *Companies Act*,⁴⁴ which stipulates that all distributions to shareholders requires board approval and it must reasonably appear that the company will satisfy the solvency and liquidity test, immediately after completing the proposed distribution.⁴⁵ Furthermore section 46 stipulates that a company must not make a distribution unless it is pursuant either to an existing legal obligation of the company or a court order, or the board of the company has authorized such a distribution by way of a resolution.⁴⁶ Section 46 is not an alterable provision as the MOI cannot validly impose any prohibitions, conditions or requirements relating to distributions.⁴⁷

The board of the company, by resolution, must acknowledge that it has applied the solvency and liquidity test.⁴⁸ In terms of section 46(3) of the *Companies Act*,⁴⁹ distribution must be made within 120 days after the test was applied, otherwise the acknowledgement resolution by the board must be taken again and the test must be applied again.⁵⁰

The solvency and liquidity test entails that a company must consider all reasonable foreseeable financial circumstances of the company at that time, the assets of the company, fairly valued, equal or exceed the liabilities of the company as fairly valued and it must appear that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered, or, in the case of a distribution, 12 months following that distribution.⁵¹ With reference to *Capitec Bank v Qorus Holdings Ltd*⁵² the solvency test means that payments may only be made out of the net assets of the company.

⁴³ 71 of 2008.

⁴⁴ 71 of 2008.

⁴⁵ S 46(1) of the *Companies Act* 71 of 2008.

⁴⁶ S 46(1) of the *Companies Act* 71 of 2008.

⁴⁷ 71 of 2008.

⁴⁸ Section 46(1) of the *Companies Act* 71 of 2008.

⁴⁹ 71 of 2008.

⁵⁰ 71 of 2008.

⁵¹ S 4 of the *Companies Act* 71 of 2008.

⁵² 2003 (3) SA 302 (W).

The solvency and liquidity test has been incorporated to provide adequate protection to minority shareholders and creditors in respect of the repurchasing of shares and is partly a substitute for capital maintenance rules. The test thus emphasizes that creditors enjoys priority over shareholders and expect to be paid on time. Only once the requirements of the solvency and liquidity test has been applied with, the board of directors will be authorized to distribute capital, as allowed within the boundaries of the *Companies Act*⁵³ and the company's MOI. Thus, a director will be held personally liable for any damages suffered by the company for not complying with the solvency and liquidity test.

1.2.2 Section 48: Company or subsidiary acquiring company's shares

Section 48(2)(a) regulates the repurchasing of its own shares by a company or its subsidiaries, provided it satisfies the requirements of section 46 of the *Companies Act*⁵⁴ which requirements entails board approval by way of simple majority – as special resolution is not a requirement anymore – and satisfying the solvency and liquidity test. This opens the door to abuse of power by the board of directors as shareholders generally do not need to approve share repurchases by the company.

However, shareholders' approval is needed when the company repurchases shares from directors, prescribed officers or persons related to them or where the repurchase of shares amounts to more than 5% of the particular class of issued shares of the company.

According to section 35(5) of the *Companies Act*⁵⁵, when shares have been repurchased in terms of the provisions of section 48, they have the same status as authorized but unissued shares.⁵⁶

A subsidiary company can purchase shares in its holding company subject to the condition that the number of shares in the holding company held by all its subsidiaries collectively is no more than 10% of the number of issued shares of any class of shares in the holding company, no voting rights attached to those shares

⁵³ 71 of 2008.

⁵⁴ 71 of 2008.

⁵⁵ 71 of 2008.

⁵⁶ S 35(5) of the *Companies Act* 71 of 2008.

may be exercised while shares are held by subsidiary of the company.⁵⁷ Section 48 further stipulates that a company or its subsidiary may not repurchase its shares if there will be no other shares left in the company in issue other than the shares held by one or more subsidiaries of the company, or convertible or redeemable shares.⁵⁸

The board of directors has implied authority to authorise the repurchase of shares with reference to section 46 which requires the board of directors to determine whether the solvency and liquidity test has been complied with together with other requirements, as this was not expressly dealt with in the *Companies Act*.⁵⁹ The requirements as stated in section 48(2) and 48(3) must be complied with before an agreement for repurchase of shares will be enforceable.⁶⁰ In light of the aforementioned authorised share capital provides protection to its existing shareholders against possible dilution of shareholding interests.

1.3 The disadvantages of share repurchase

1.3.1 Possibility of abuse

A company is allowed to repurchase its own share, but the possibility of abuse is great. In effect the possibility of abuse comprises of three different actions, firstly the repurchase of shares are in essence a distribution to shareholders, secondly it is the reorganisation of shareholding and lastly a share transfer.⁶¹ All of these actions needs to be regulated individually, even more so when combined.

When a company repurchase its own shares it re-organises the company which has an influence on the value as well as the control of the company.⁶²

A company can choose from which shareholder it wants to repurchase shares from. This selective repurchasing amounts to inequality among shareholders.⁶³ This type of exploitations of shareholders needs to be regulated more strictly.⁶⁴

⁵⁷ S 48(2) of the *Companies Act* 71 of 2008.

⁵⁸ S 48(3) of the *Companies Act* 71 of 2008.

⁵⁹ 71 of 2008.

⁶⁰ S 48(4) of the *Companies Act* 71 of 2008.

⁶¹ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁶² Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁶³ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁶⁴ Van Niekerk 2014 <http://www.inkundlajournal.org>.

When a company wants to repurchase its shares, the *Australian Corporation Act*⁶⁵ requires that either a special resolution is passed at a general meeting, provided no person who will benefit from such repurchase votes in favour of such resolution or their associates or a resolution agreed to at a general meeting by all the ordinary shareholders to implement a share repurchase.⁶⁶

Some innovative protective measures to regulate selective share repurchases more stricter may include inserting in the company's MOI a higher provision of a higher standard or greater restriction that would otherwise apply to the company in terms of an unalterable provision of the *Companies Act*.⁶⁷ As such a company may impose a provision that requires shareholders' approval either by ordinary or special resolution, when a company repurchase its own shares.⁶⁸ Although such provisions will not provide adequate protection to minority shareholders, seeing as shareholders holding more than 75% in all possibility collude to acquire their shares at rate higher than market value.⁶⁹

Directors who does not act in the best interest of the company may personally be held accountable in terms of section 48 of the *Companies Act*⁷⁰ for approving a repurchase of shares at a rate higher than market value, therefor directors' approval may be more desirable.⁷¹

The *Companies Act*⁷² do not require companies to give notice to shareholders of a share repurchase which contributes to the abuse of minority shareholders.

When a company repurchase shares listed on the exchange operated by the JSE it must comply with the requirements in the *Companies Act*⁷³ but also with the JSE Listing Requirements.⁷⁴ When a listed company repurchase its own shares it is much

⁶⁵ *Australian Corporation Act* 50 of 2001.

⁶⁶ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁶⁷ S 15(2)(a)(iii) of the *Companies Act* 71 of 2008.

⁶⁸ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁶⁹ Van Niekerk 2014 <http://www.inkundlajournal.org>.
⁷⁰ 71 of 2008.

⁷¹ Van Niekerk 2014 <http://www.inkundlajournal.org>.
⁷² 71 of 2008.

⁷³ 71 of 2008.

⁷⁴ Van Niekerk 2014 <http://www.inkundlajournal.org>; Paragraph 3.1 of the JSE Listing Requirements <http://www.jse.co.za>.

stricter regulated by the JSE's requirements than by the *Companies Act*⁷⁵, by *inter alia*, subjecting specific repurchase to more onerous requirements.⁷⁶

Some strict regulations by the JSE Listing Requirements is prohibiting companies from generally repurchasing more than 20% of that company's issued share capital of that class in any one financial year.⁷⁷ Also if a shareholder of a company that issues its shares exercise its rights in terms of Section 164 of the *Companies Act*⁷⁸ and said company repurchase its shares from the shareholder, such acquisition of shares will not be regarded as a repurchase of shares.⁷⁹ A pro rata repurchase by the company of its shares from all its shareholders will not require shareholder approval, save to the extent required in terms of the *Companies Act*^{80, 81}. In terms of the JSE Listing Requirements all repurchases by a company of its shares or by a subsidiary of shares in its holding company – according to Section 48 of the *Companies Act*⁸² – will be regarded as a repurchase of shares. (“a general repurchase of securities”).⁸³

Furthermore, with regard to specific share repurchases – which also entails the grant of an option regarding a company that may or will be required to repurchase its shares in future and a specific offer – being an offer from shareholders expressly named – a company may only make a specific repurchase provided it complies with certain JSE Listing Requirements.⁸⁴

For a company to generally repurchase its shares, it is also required to comply with further certain JSE Listing Requirements such as:

- (a) the repurchase of securities being effected through the order book operated by the JSE trading system and done without any prior understanding or arrangement between the

⁷⁵ 71 of 2008.

⁷⁶ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁷⁷ S 5.68 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁷⁸ 71 of 2008.

⁷⁹ S 5.67 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁸⁰ 71 of 2008.

⁸¹ S 5.67 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁸² 71 of 2008.

⁸³ S 5.67 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁸⁴ S 5.69 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

- company and the counter party (reported trades are prohibited);
- (b) authorisation thereto being given by its MOI;
 - (c) approval by shareholders in terms of a special resolution of the company, in annual general/general meeting, which shall be valid only until the next annual general meeting or for 15 months from the date of the resolution, whichever period is shorter;
 - (d) repurchases may not be made at a price greater than 10% above the weighted average of the market value for the securities for the five business days immediately preceding the date on which the transaction is effected. The JSE should be consulted for a ruling if the applicant's securities have not traded in such five business day period;
 - (e) at any point in time, a company may only appoint one agent to effect any repurchase(s) on the company's behalf;
 - (f) [Repealed]
 - (g) a resolution by the board of directors that it has authorised the repurchase, that the company and its subsidiary/ies have passed the solvency and liquidity test and that, since the test was performed, there have been no material changes to the financial position of the group; and
 - (h) an issuer or its subsidiary may not repurchase securities during a prohibited period as defined in paragraph 3.67 unless they have in place a repurchase programme where the dates and quantities of securities to be traded during the relevant period are fixed (not subject to any variation) and has been submitted to the JSE in writing prior to the commencement of the prohibited period. The issuer must instruct an independent third party, which makes its investment decisions in relation to the issuer's securities independently of, and uninfluenced by, the issuer, prior to the commencement of the prohibited period to execute the repurchase programme submitted to the JSE.⁸⁵

Further JSE Listing Requirements relating to an announcement of repurchases, early redemption and cancellations are:

Any repurchases, early redemptions or cancellations of the issuer's securities, other than equity securities, must be announced when an aggregate of 3% of the initial number of the relevant class of securities has been purchased, redeemed or cancelled and for each 3% in aggregate of the initial number of that class acquired thereafter. Such announcement must be made as soon as possible and, in any event, by not later than 08h30 on the business day following the day on which the relevant threshold is reached or exceeded. The announcement must state the number of securities purchased, redeemed or cancelled since the most recent announcement, the number of the class of securities that remain outstanding, and when the

⁸⁵ S 5.72 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

securities repurchased are to be cancelled and the listing removed, if applicable.⁸⁶

If a juristic person needs to make an announcement with regard to Information that is required under the JSE Listing Requirements to be disclosed, such disclosure must be made through the JSE's Stock Exchange News Service (herein after referred to as SENS).⁸⁷ The JSE will not recognise an announcement about price-sensitive information if it is not published through the appropriate channel being SENS and may only be disclosed to the public after the publication.⁸⁸ Such information needs to be announced even though the details of the transaction has not yet been finalised.⁸⁹ Therefor a person who is in possession of unpublished, price-sensitive information is not allowed to trade, before the information has been published by SENS.⁹⁰

1.3.2 Lack of protection for individual Shareholders

The biggest criticism of the provisions in the current *Companies Act*⁹¹ must be the lack of protection for individual shareholders as some shareholders might be selected to sell their shares and others not, which amounts to unfair treatment.⁹² Such repurchase might either amount to voluntary or compulsory selective share repurchase.⁹³ Shareholders who did not participate in selective share repurchases will find their position materially different after the scheme even though they had no choice in the matter.⁹⁴ These shareholders' value of their shareholding as well as their percentage shareholding will be altered. The reason behind this is that in order to satisfy the requirements of section 48 of the *Companies Act*⁹⁵ that governs the

⁸⁶ S 5.79 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁸⁷ S 3 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>; *Insider Trading and the Market Abuses (Including the Effective Management of Price Sensitive Information)* 8-9.

⁸⁸ S 3 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>; *Insider Trading and the Market Abuses (Including the Effective Management of Price Sensitive Information)* 8.

⁸⁹ S 3 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>; *Insider Trading and the Market Abuses (Including the Effective Management of Price Sensitive Information)* 8.

⁹⁰ S 3 of the JSE Listing Requirements <http://www.jse.co.za>; Van Niekerk 2014 <http://www.inkundlajournal.org>; *Insider Trading and the Market Abuses (Including the Effective Management of Price Sensitive Information)* 10.

⁹¹ 71 of 2008.

⁹² Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁹³ Van der Linde 2010-2 TSAR 302.

⁹⁴ Van Niekerk 2014 <http://www.inkundlajournal.org>.

⁹⁵ 71 of 2008.

repurchase of shares, the provisions of section 46 simply needs to be met.⁹⁶ This section simply requires the board to approve a distribution by resolution.⁹⁷

1.3.3 Board of directors in position of power

The board of directors is regarded as the controlling mind of the company. In *Tesco Supermarkets Ltd v Natrass*⁹⁸, Lord Reid held that the company acts through a natural person and that such person's actions and mind – which directs his actions – is that of the company.⁹⁹ In essence the natural person is an embodiment of the company who acts through the persona of the company.¹⁰⁰

Usually the board of directors is the “controlling mind” of the company. Although Lord Hoffman emphasised in *Meridian Global Funds Management Asia Ltd v Securities Commission*¹⁰¹ case that the “controlling mind fiction” should not be regarded as a blanket rule and it should be a question of law whether the actions or mind of a natural person is that of the company or not.¹⁰²

The knowledge of the director is not necessarily the knowledge of the company if the director is a *particeps criminis*.¹⁰³ With reference to the *R v Kritzinger*¹⁰⁴ case as well as the *S v Vandenberg*¹⁰⁵ case, a person can defraud a company by way of misrepresentation made to the board of directors notwithstanding the fact that the board of directors (including the malefactor himself) is aware of its falsity.¹⁰⁶

Companies are allowed, *inter alia*, to repurchase its own shares, provided that the company satisfied the requirements of the solvency and liquidity test and board approval has been obtained. Furthermore, selective share repurchases does not

⁹⁶ S 48 of the *Companies Act* 71 of 2008.

⁹⁷ S 46 of the *Companies Act* 71 of 2008.

⁹⁸ [1972] AC 153; [1971] 2 ALL ER 127 (HL).

⁹⁹ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; [1971] 2 ALL ER 127 (HL) at para 170; Pretorius *et al Hahlo's South African Company Law through the Cases* 339.

¹⁰⁰ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; [1971] 2 ALL ER 127 (HL) at para 170; Pretorius *et al Hahlo's South African Company Law through the Cases* 339.

¹⁰¹ [1995] 2 AC 500 (PC).

¹⁰² *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC); Pretorius *et al Hahlo's South African Company Law through the Cases* 339-340.

¹⁰³ Pretorius *et al Hahlo's South African Company Law through the Cases* 339-340.

¹⁰⁴ 1971 (2) SA 57 (A).

¹⁰⁵ 1979 (1) SA 208 (D).

¹⁰⁶ Pretorius *et al Hahlo's South African Company Law through the Cases* 340.

necessarily amount to voluntary repurchase but may even be compulsory selective share repurchase.¹⁰⁷

The board of directors can issue shares, without approval of the shareholders. However if shares are issued to a director, future director, prescribed officer, or future prescribed officer, a person related or inter-related to the company, or to a director or prescribed officer of the company or a nominee of a director/certain prescribed officers of the company then approval is necessary by way of special resolution or where the repurchase of shares amounts to more than 5% of the particular class of issued shares of the company.¹⁰⁸ The board of directors are clearly in a position of power which might amount to abuse.

Seeing as the provisions of the FMA are drafted widely, it is only realistic that these provisions should apply to a juristic person (company) that repurchase its own shares as it has inside information.¹⁰⁹

1.4 The advantages of share repurchase

Share repurchase has become more common over the years as it is an equity management tool and plays a vital role in the success of the corporate financial strategy.¹¹⁰ Share repurchase is becoming more popular than the other mechanisms at the disposal of a company to give money back to their shareholders.¹¹¹ Such mechanisms includes cash dividends, special cash dividends, and return of share capital.¹¹² A further advantage of share repurchases are that it increases the market value of its shares, it also strengthens the voting power of certain shareholders that protects the company against possible take-over threats.¹¹³

¹⁰⁷ Van der Linde 2010-2 *TSAR* 302.

¹⁰⁸ S 41(1) of the *Companies Act* 71 of 2008.

¹⁰⁹ Van Niekerk 2014 <http://www.inkundlajournal.org>.

¹¹⁰ Chivaka *et al* 2009 *SAJAR* 2.

¹¹¹ Chivaka *et al* 2009 *SAJAR* 4.

¹¹² Chivaka *et al* 2009 *SAJAR* 4.

¹¹³ Republic of South Africa Treasury Shares Guide IBA Corporate and M & A Law Committee 2014 2.

CHAPTER 3

1 Insider trading as regulated by the *Financial Markets Act 19 of 2012* and the *Companies Act 71 of 2008*

There have been various attempts over the years from legislatures – without any success – to improve legislation in order to successfully prosecute insider trading. The *Companies Act 46 of 1962* was promulgated, but because of its failure to effectively regulate insider trading, new provisions were introduced into the *Companies Act* of 1973.¹¹⁴ These provisions being sections 230 and 233 also did not curb insider trading as an insider could only be prosecuted criminally as there was no alternative statutory civil remedies available.¹¹⁵ It was later repealed by the *Companies Amendment Act 78 of 1989*.¹¹⁶

The inadequate insider trading legislation in South Africa led to the establishment of the King Task Group.¹¹⁷ The King Task Group investigated as well as consulted widely before the *Insider Trading Act 135 of 1998* (herein after referred to as *Insider Trading Act*) was enacted and came into effect on 17 January 1999.¹¹⁸ Still too many flaws were visible in the provisions and therefore the *Securities Services Act* replaced the *Stock Exchanges Control Act 1 of 1985*; the *Financial Markets Control Act 55 of 1989*; the *Custody and Administration of Securities Act 85 of 1992* as well as the *Insider Trading Act*.¹¹⁹

Further flaws – like its predecessors – were identified in the *Securities Services Act* which has been rectified and led to the replacement of the aforementioned Act and the enactment of the FMA that prohibits various insider trading offences, since 2013. In South Africa the principle is that insider trading is illegal and are therefore regulated to ensure healthy financial markets. A perpetrator that commits an insider trading offence could face serious sanctions.

¹¹⁴ Jooste 2000 *South African Law Journal* 284.

¹¹⁵ *Companies Act 61 of 1973*; Jooste 2000 *South African Law Journal* 284.

¹¹⁶ S 440F of the *Companies Act 61 of 1973*; Jooste 2000 *South African Law Journal* 284.

¹¹⁷ Jooste 2000 *South African Law Journal* 285.

¹¹⁸ Jooste 2000 *South African Law Journal* 285; Chitimira 2014 *Potchefstroom Electronic Law Journal* 939.

¹¹⁹ Jooste 2000 *South African Law Journal* 285; Chitimira 2014 *Potchefstroom Electronic Law Journal* 940-962.

1.1 Who are “insiders”?

1.1.1 The definition of a “person” in South African Law

The *Interpretation Act* 33 of 1957 is applicable to every law in force within the Republic of South Africa, unless the contrary is visible in the language or context of the law or it will be repugnant to such provision.¹²⁰

The definition of the term “insider” in the *Insider Trading Act* referred to an individual who has inside information through being a director; employee or shareholder of an issuer of securities or financial instruments to which the inside information relates; or having access to such information by virtue of his or her employment, office or profession; or where such individual knows that the direct or indirect source of the information was a person contemplated in the aforementioned *Act*.¹²¹

The word “individual” expressly excludes legal entities from being insiders as a juristic person can clearly not be an individual, which is identical in this regard to the UK legislation.¹²² This exclusion contributed to the possibility that individuals could commit insider trading offences through juristic persons, without the juristic person incurring any liability.¹²³

According to the Final Report by the King Task Group into Insider Legislation in October 1997, an “insider” should only be limited to the conduct of a natural person:

In view of the lack of development in our law of the jurisprudence concerning the efficacy of the Chinese Wall, the Task Group decided that both the criminal offence of insider trading and the civil remedy set out in the proposed legislation should be limited to conduct by an individual.¹²⁴

In terms of the *Companies Act* 78 of 1989, both juristic persons and natural persons could be found guilty of insider trading with reference to the word “person” as set out in section 440F(1) of the aforementioned *Act*, which is an extension from section 233

¹²⁰ S1 of the *Interpretation Act* 33 of 1957; Chitimira 2014 *Potchefstroom Electronic Law Journal* 955.

¹²¹ S1 of the *Insider Trading Act* 135 of 1998;

¹²² Jooste 2000 *South African Law Journal* 287; Chitimira 2014 *Potchefstroom Electronic Law Journal* 955-956.

¹²³ Jooste 2000 *South African Law Journal* 287; Chitimira 2014 *Potchefstroom Electronic Law Journal* 956.

¹²⁴ Final Report by the King Task Group into Insider Trading Legislation 1997 9; Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

of the *Companies Act* 1973.¹²⁵ In terms of the FMA transgressors can now be persons as opposed to individuals as previously defined under the definition “insiders” in the *Insider Trading Act*.¹²⁶

In terms of section 2 of the *Interpretation Act*¹²⁷ a person includes a juristic person such as company incorporated or registered as such under any law. The *Companies Act*¹²⁸ also interprets a person to include a juristic person.¹²⁹

The logic assumption is that the word “person” in the FMA must include a juristic person.¹³⁰

Unfortunately, the FMA¹³¹ neglected to define a “person”. In the absence of a clear definition of the term “person” the question arises whether the meaning of a person as defined in the *Interpretation Act*¹³² should take precedence over the recommendation of the King Task Group.

A juristic person is a body or association of natural persons being a separate legal entity with rights, duties and capacities that is distinct and separate from the individuals forming it, with reference to *Webb & Co Ltd v Northern Rifles*¹³³.¹³⁴ A juristic person comes into existence in terms of general enabling legislation (*Companies Act* 71 of 2008); specific legislation (Universities, Eskom, SABC, ArcelorMittal) and associations meeting the common law requirements (Churches, Trade Unions, Political parties).¹³⁵

A legal subject has rights in relation to a legal object. A legal object (movable property, immovable property, animals et cetera) has monetary value, which a legal subject controls and deals with and can be defined as the subject-object

¹²⁵ *Companies Act* 78 of 1989; Final Report by the King Task Group into Insider Trading Legislation 1997 9; Jooste 2000 *South African Law Journal* 287; Chitimira 2014 *Potchefstroom Electronic Law Journal* 955-956.

¹²⁶ Jooste 2006 *South African Law Journal* 438.

¹²⁷ 33 of 1957.

¹²⁸ 71 of 2008

¹²⁹ S1 of the *Companies Act* 71 of 2008.

¹³⁰ Jooste 2006 *South African Law Journal* 438.

¹³¹ 19 of 2012.

¹³² 33 of 1957.

¹³³ 1908 TS 462

¹³⁴ *Webb & Co Ltd v Northern Rifles* at para 464; Pretorius *et al Hahlo's South African Company Law through the Cases* 7-8.

¹³⁵ Delpont *The New Companies Act Manual* 10; Heaton J *The South African Law of Persons* 6; Pretorius *et al Hahlo's South African Company Law through the Cases* 7-8, 11.

relationship.¹³⁶ A legal subject can also be the bearer of rights, duties and capacities against other legal subjects, and in respect of a legal object that can be defined as the subject-subject relationship.¹³⁷

There are two leading theories that attempts to clarify the legal nature of a juristic person, being the fiction theory and the realist or organic theory.¹³⁸ The fiction theory describes a juristic person as a creation of law with no will or mind that cannot act in itself.¹³⁹ In contrast the realist theory describes a juristic person as a real person in an extra-legal sense whose actions are its own and who uses human beings as its organs.¹⁴⁰

Although there is no clear definition or explanation for the legal nature of a juristic person, a juristic person is seen as a legal-subject with the same capacities and powers as a natural person, except for those things that a juristic person cannot do, as it is not a natural person which can enter into a marriage.¹⁴¹ Which lean towards the realist theory.

1.1.2 *The definition of “legal personality”*

A natural person being any human being and a juristic person acquires legal personality *ex lege*. A company is a juristic person, in essence it is a separate legal person.¹⁴²

With reference to the *Salomon v Salomon*¹⁴³ case a company acquires legal personality (rights, duties and capacities) upon legitimate incorporation.¹⁴⁴As the judge stated:

It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the

¹³⁶ Heaton *The South African Law of Persons* 1-2.

¹³⁷ Heaton *The South African Law of Persons* 2.

¹³⁸ Pretorius *et al Hahlo's South African Company Law through the Cases* 9.

¹³⁹ Pretorius *et al Hahlo's South African Company Law through the Cases* 9.

¹⁴⁰ Pretorius *et al Hahlo's South African Company Law through the Cases* 9.

¹⁴¹ Delpont *The New Companies Act Manual* 10.

¹⁴² Davis *et al Companies and other Business Structures in South Africa* 29,33; Pretorius *et al Hahlo's South African Company Law through the Cases* 11.

¹⁴³ [1897] AC 22 (HL).

¹⁴⁴ *Salomon v Salomon* [1897] AC 22 (HL) at para 30; Pretorius *et al Hahlo's South African Company Law through the Cases* 12.

promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.¹⁴⁵

A company is incorporated after a notice of incorporation has been filed and a certificate of incorporation is issued, in other words a company is a separate legal entity upon incorporation and acquire rights, duties and capacities separate from its members.¹⁴⁶

In view of the above stated it is clear that a company can enter into a contract, have *locus standi*, that is, being capable of suing and being sued in its own name by virtue of a duly appointed agent being a natural person, therefore where the company is wronged, it is the company that must seek redress, not the shareholders of the company.¹⁴⁷ A company can therefore acquire ownership with reference to *Airport Cold Storage (Pty) Ltd v Ebrahim*¹⁴⁸ that the asset of a company is the exclusive property of the company and does not vest in the shareholders of the company, as determined in *Dadoo Ltd v Krugersdorp Municipal Council*¹⁴⁹.¹⁵⁰

Despite the fact that it has been said that a company does not have a body to kick nor a soul to be damned.¹⁵¹

The members of a company enjoy limited liability, in other words its members are generally liable for the debt the company has incurred except if it is a personal liability company for example an attorney's firm where the directors of the firm are jointly and severally liable for the debts and liabilities incurred during the period that they held office.¹⁵²

It was determined in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*¹⁵³ that although the incorporation of a company can provide for limitation of liability for

¹⁴⁵ *Salomon v Salomon* [1897] AC 22 (HL) at para 30; Pretorius *et al Hahlo's South African Company Law through the Cases* 12.

¹⁴⁶ Delpont *The New Companies Act Manual* 11.

¹⁴⁷ *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C); Delpont *The New Companies Act Manual* 11.

¹⁴⁸ 2008 (2) SA 303 (C).

¹⁴⁹ 1920 AD 530.

¹⁵⁰ Davis *et al Companies and other Business Structures in South Africa* 33; Pretorius *et al Hahlo's South African Company Law through the Cases* 14.

¹⁵¹ Pretorius *et al Hahlo's South African Company Law through the Cases* 11.

¹⁵² Davis *et al Companies and other Business Structures in South Africa* 29; Pretorius *et al Hahlo's South African Company Law through the Cases* 13-14.

¹⁵³ 1995 (4) SA 790 (A).

its members that this principle may not be abused.¹⁵⁴ Therefore the court will under exceptional circumstances lift the corporate veil¹⁵⁵ and dispense with this principle that a company is a separate legal entity and will hold the members of the company liable in their personal capacities for the debts and liabilities incurred by the company.¹⁵⁶

In terms of the *Cape Pacific*-case¹⁵⁷ such exceptional circumstance would be fraud, dishonesty or improper conduct that will justify the lifting of the corporate veil.¹⁵⁸ According to section 22 of the *Companies Act*¹⁵⁹, reckless trading, with gross negligence and the intention to defraud will also amount to the lifting of the corporate veil and will hold the members and directors of the company personally liable for the debt incurred by the company.¹⁶⁰

With reference to *Hülse-Reutter v Gödde*¹⁶¹ if the members and directors have gained an unfair advantage the corporate veil can also be lifted, provided there is evidence of misuse or abuse of the distinction between the company and those who is in control of the company.¹⁶² It is thus clear that the protection of a company's members and directors against personal liability is not absolute and that the corporate veil can be lifted under exceptional circumstances.

1.1.3 The definition of "insiders"

An insider is defined in the FMA as a person with inside information and who is dealing directly or indirectly, or through an agent for his/her own account in the securities listed on a regulated market to which the inside information relates; a person who discloses inside information to another person and lastly a person with

¹⁵⁴ Pretorius *et al Student Case Book on Business Entities* 30.

¹⁵⁵ The piercing of the corporate veil originated in common law and this position with regard to the lifting of the corporate veil has subsequently been adopted by statute with reference to s 20(9) of the *Companies Act* 71 of 2008.

¹⁵⁶ Davis *et al Companies and other Business Structures in South Africa* 30-32.

¹⁵⁷ 1995 (4) SA 790 (A).

¹⁵⁸ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A); Delpont *The New Companies Act Manual* 12.

¹⁵⁹ 71 of 2008.

¹⁶⁰ *Companies Act* 71 of 2008; Delpont *The New Companies Act Manual* 12.

¹⁶¹ 2001 (4) SA 1336 (SCA).

¹⁶² *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA); Delpont *The New Companies Act Manual* 12-13.

inside information who encourages another person to deal in securities listed on a regulated market to which the inside information relates.¹⁶³

A primary insider is a person who knowingly deals with non-public information that is specific or precise and who has obtained or learned of such information through their position within the company.¹⁶⁴ Pertaining to information which would likely have a material effect on price or value of any security listed on a regulated market.¹⁶⁵

A secondary insider is a person who deals after obtaining precise or specific non-public information directly or indirectly from a primary insider.¹⁶⁶ In other words the secondary insider must know it obtained inside information from an insider.¹⁶⁷

Therefore potential insiders are not only confined to people occupying a position of trust in the company. It can also include persons who inadvertently became “insiders” in a social setting or overhearing a discussion about price-sensitive information, even tip-offs will meet the criteria of an insider.¹⁶⁸ In essence when a person becomes aware of information and knows the source is an insider, that person will become an insider.¹⁶⁹ Such information must be specific or precise which will have a material effect on the price or value of any securities or financial instrument.¹⁷⁰

1.2 What is “inside information”?

Inside information is specific or precise non-public information.¹⁷¹ This information is obtained or learned by a person (insider) who has such inside information because of his/her role as director, employee or shareholder of an issuer of securities listed on a regulated market, or has access to such information because of his/her employment, office or profession or where such person is aware that the source of the information was an insider.¹⁷² If such information were made public it will likely

¹⁶³ S 77 of the *Financial Markets Act* 19 of 2012.

¹⁶⁴ Jooste 2006 *The South African Law Journal* 442.

¹⁶⁵ Jooste 2006 *The South African Law Journal* 442.

¹⁶⁶ Jooste 2006 *The South African Law Journal* 442-443.

¹⁶⁷ Jooste 2006 *The South African Law Journal* 442-443.

¹⁶⁸ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁶⁹ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁰ Jooste 2006 *The South African Law Journal* 442-443.

¹⁷¹ S 77 of the *Financial Markets Act* 19 of 2012.

¹⁷² S 77 of the *Financial Markets Act* 19 of 2012.

have a material effect on the price or value of any security listed on a regulated market.¹⁷³

Unfortunately, legislatures neglected to define what is specific or precise in the FMA and the exact meaning may differ from case to case.¹⁷⁴ Precise in this regard is defined by the European court of Justice as:

- (a) The information indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so; and
- (b) The information is specific enough to enable conclusion to be drawn as to the possible effect of that set of circumstances or event on the price of a share.¹⁷⁵

The meaning of the word “material” is also not defined in the FMA¹⁷⁶. The general point of view is that when information leads the person to make an investment decision that would otherwise not have been made, the information is material.¹⁷⁷ The received information will thus bring about a change in decision to be material.¹⁷⁸ It is also important to note that inside information does not necessarily have to be financial in nature but can be any information that will affect the operating performance of the entity in future.¹⁷⁹

In terms of section 79 of the FMA information is regarded as public under the following circumstances, which is not exhaustive:

- (a) When the information is published in accordance with the rules of the relevant regulated market for the purposes of informing clients and their professional advisers;
- (b) when the information is published in accordance with the rules of the relevant regulated market for the purpose of informing clients and their professional advisers;
- (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

¹⁷³ S 77 of the *Financial Markets Act* 19 of 2012.

¹⁷⁴ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁵ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁶ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁷ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁸ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁷⁹ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

(d) when the information is derived from information that has been made public.¹⁸⁰

1.3 What is “insider trading”?

Insider trading occurs when a person sells or buys securities because of his/her knowledge of the aforementioned non-public information that is private and not readily available to the general public about the security. It is thus when a person deals in securities before the information is known to the rest of the market which would likely have a material effect on price or value of any security listed on a regulated market.¹⁸¹

In *Zietsman and Another v The Directorate of Market Abuse and Another*¹⁸² – an appeal from the Financial Services Board enforcement committee’s finding – the facts were that Mr Gavin Lyonel Zietsman (herein after referred to as Zietsman) for and on behalf of Harrison and White Investments (Pty) Ltd started to purchase shares in Africa Cellular Towers Ltd (herein after referred to as AC Towers), in pursuance of acquiring the controlling share in AC Towers, a company listed on the alternative exchange of the JSE.¹⁸³ Zietsman started to purchase shares from the 30th of August 2010. Various purchases took place from the 30th of August 2010 till the 14th of March 2011. In accordance with the strategy to acquire the controlling share in AC Towers, DP Cohan Consulting was requested to do a valuation of AC Towers.¹⁸⁴

The Industrial Development Corporation (hereinafter referred to as the IDC) however sent a letter to AC Towers on the 24th of January 2011 where it agreed to make funding in the amount of R99 million available.¹⁸⁵ This fact was communicated to

¹⁸⁰ *Insider Trading Booklet* 2015 <https://www.jse.co.za>.

¹⁸¹ S 78 of the *Financial Markets Act* 19 of 2012.

¹⁸² 2016 (1) SA 218 (GP).

¹⁸³ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 11.

¹⁸⁴ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP).

¹⁸⁵ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 13.

Zietsman by a member of AC Towers' board, Mr Jacques de Villiers.¹⁸⁶ No substantiating information such as interest rates et cetera was however disclosed.¹⁸⁷

Subsequently a SENS announcement was made in which shareholders were informed that AC Towers was successful in obtaining a debt facility.¹⁸⁸ Zietsman continued to acquire shares and became aware of the debt funding before the 9th of February 2011.¹⁸⁹ The detail of the loan was made public during a SENS announcement on the 28th of January 2011 and thereafter on the 11th of March 2011 the share price increased by 54%.¹⁹⁰

The Pretoria High Court had to determine if the information was indeed "inside information". In other words firstly if the said information was learned as an "insider" as defined in the *Companies Act*¹⁹¹; secondly if such information would have a material impact on the price movement of the security and lastly was the information "specific" or "precise".¹⁹² The High Court in *Zietsman and Another v The Directorate of Market Abuse and Another*¹⁹³ held – after review of European and UK insider trading laws – that the information need not be in a final form to be deemed "specific or precise" information. Therefor even though the "insiders" might genuinely *bona fide* believe that the information at their disposal is not "inside information" as nothing was signed, it will not suffice as a defence.¹⁹⁴ Secondly the determination of whether the said information has material effect on the price or value of any security listed on a regulated market, will hinge upon the behaviour of the "reasonable investor" test as determined in Article 1(2) of the Europe Directive 2003/124 and whether they would

¹⁸⁶ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 14, 17.

¹⁸⁷ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 18.

¹⁸⁸ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 19.

¹⁸⁹ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 21.

¹⁹⁰ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 22.

¹⁹¹ 71 of 2008.

¹⁹² *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 32(b).

¹⁹³ 2016 (1) SA 218 (GP).

¹⁹⁴ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 78-80.

have made another decision if the information had been in the public domain.¹⁹⁵ Evidence that the information was material could possibly be that after the SENS announcement the share price deviated and in this instance it increased. The Pretoria High Court was of the opinion after that the ruling of the Financial Services Board regarding the administrative penalty against Gavin Lyonel Zietsman as well as Harrison and White Investments (Pty) Ltd must be upheld even if they made no actual profit from the insider trading.¹⁹⁶

¹⁹⁵ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) at para 82.

¹⁹⁶ *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP).

CHAPTER 4

1 International jurisdictions

In this chapter only a review with regard to the application of insider trading law to corporations of several jurisdictions have been conducted – Australia and the UK. It is impossible to examine the laws of every governing system that regulates insider trading. Primarily there the focus will be on whether a corporation is included in the definition of a “person” in other jurisdiction and to do a comparative review to ensure for variety.

1.1 Regulation of insider trading

1.1.1 Who is an “insider”?

Both natural and juristic persons can be regarded as insiders according to Australian Law.¹⁹⁷ The laws of the UK and that of South Africa limits the definitions of insiders to natural persons.¹⁹⁸ However, natural persons are not absolved from prosecution by simply dealing through an entity.¹⁹⁹ Juristic persons are nevertheless not excluded from the definition “insider” in other jurisdictions such as the USA and Canada.

In the UK, the reasons for confining to natural persons are predominantly concerned with merchant banks whilst in South Africa, the King Task Group advised that the legislation should be limited to conduct by natural persons.²⁰⁰ The confining of applicable legislation to natural persons, has the effect of absolving companies from insider trading regulations when issuing their own securities.²⁰¹

The Australian view of defining insiders based on the “information connection” approach is supported by the following commentary:

¹⁹⁷ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

¹⁹⁸ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

¹⁹⁹ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

²⁰⁰ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

²⁰¹ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 23.

Nothing more needs to be said other than an insider is a person in possession of inside information. In other words, the definitional burden in the legislation should fall on deciding what is inside information and the definition of insider should follow as a secondary consequence of this primary definition The proposal that insiders should be defined as those in possession of inside information would to some extent reduce uncertainty, because the only question that would have to be asked is whether the individual was in possession of inside information and the additional question of whether the individual met the separate criteria for being classed as an insider would be relevant.²⁰²

The “information connection” was an amendment to the Australian Corporations Law made in 1991.²⁰³ It superseded the previous “Persons Connection”. The rationale is that being privy to certain information irrespective of connection to a company is the determining factor in acting on that information and gaining an unfair advantage.²⁰⁴

It is further important to note that in all of the above jurisdictions, there is a distinction between primary and secondary insiders.

Primary insiders usually fall within one of the three classifications:

1. Direct connection: This includes individuals who have a direct connection to the entity in question – examples include directors, related parties et cetera.²⁰⁵
2. Employment: Individuals who by holding a certain office et cetera will be privy to the said information.²⁰⁶
3. Fiduciary duty: Individuals who has a fiduciary duty to affected entity.²⁰⁷

Secondary insiders usually obtain information from the primary insider.

²⁰² Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 24.

²⁰³ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 23.

²⁰⁴ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 23.

²⁰⁵ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 25.

²⁰⁶ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 25.

²⁰⁷ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 25.

In Australia the specific insider trading provisions are applicable to both natural and juristic persons.²⁰⁸ Australian law, whilst holding corporate entities liable will also provide them with the so-called Chinese Wall defence.²⁰⁹ This will provide the entity with a defence if they have a Chinese Wall in place.

Cranston explains the Chinese Walls as follows:

.... designed to stem the flow of information between different parts of the bank. Institutionally a Chinese wall can involve physical separation (in some cases the occupation of different buildings); separate files for the functions separated by the Chinese wall with no access for someone on one side of the wall to a file on the other side; consequent restrictions on physical access and controls on computer access and fail-safe systems; and controlled procedures for the movement of personnel between different parts of the bank. In some financial institutions Chinese walls are underpinned by stop lists and no-recommendation policies.²¹⁰

In the UK though there exists a deep mistrust of the effectiveness of the Chinese Wall provisions. This is due to the legal principle that information in possession of one part of an institution will be regarded as being known to the institution as a whole.²¹¹ South African legislatures on the other hand has not considered the Chinese Wall – to a large extent – as evident in the new provisions.²¹²

In Australia, no corporation has been successfully charged with violating insider trading legislation even though insider trading laws apply to companies.²¹³ This can be attributed to:

1. corporations that may not take part in insider trading; and
2. reluctance by prosecutors to pursue companies due to ambiguities in the legislation; and
3. prosecutors rather elect to prosecute the individuals than the corporations.²¹⁴

²⁰⁸ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 22.

²⁰⁹ Jooste 2006 *The South African Law Journal* 440.

²¹⁰ Jooste 2006 *The South African Law Journal* 439-440.

²¹¹ Jooste 2006 *The South African Law Journal* 439.

²¹² Jooste 2006 *The South African Law Journal* 440.

²¹³ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform* 8.

²¹⁴ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform* 8.

1.1.2 What is “inside information”?

The jurisdiction examined adopt the broad approach with regard to the definition of inside information The Australian Corporations law defines inside information as information:

that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate.²¹⁵

In terms of section 56(1)(a) of the UK *Criminal Justice Act* 1993 inside information is:

information which relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not securities generally or to issuers of securities generally.²¹⁶

Jurisprudence in both Canada and the US have also included the so-called broad approach to what constitutes inside information.²¹⁷ The difference between the broad and narrow approach to what is inside information, comes down to whether inside information only includes non-public price-sensitive information coming from the entity itself (the narrow approach) or any non-public price-sensitive information not necessarily coming from the affected entity (the broad approach).²¹⁸ When compared to South Africa’s definition of inside information, it seems as if the consensus is to follow the “broad approach”.

Definitions in United Kingdom Criminal Justice Act the source of the information need not be the company itself. In order for it to be considered insider information.²¹⁹

²¹⁵ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 19.

²¹⁶ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 20-21.

²¹⁷ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 128 and 146.

²¹⁸ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 19.

²¹⁹ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 19 and 42.

1.1.3 *Liabilities of insiders*

Under Australian law, any person who is aware of inside information is prohibited from trading whether trading for their own or someone else's account has no bearing on the prohibition thereof.²²⁰

Both the UK and South African legislations however offers an alternative. If the insider can show that they would have made the trade in question without knowing the information, the trade might be permitted.²²¹

None of the jurisdictions however prohibits the cancellation of trades when an insider became aware of any information.²²²

1.1.4 *What is "insider trading"?*

The FMA neglected to make provision to describe the word "dealing". It is however submitted that it is not necessary to proof that a profit was realised or a loss avoided to satisfy the "dealing" requirement of insider trading.²²³ The assumption is that if securities are acquired based on price-sensitive non-public information, then they were acquired at a bargain price even though the profit was not realised. Similarly, when a sale was made on price-sensitive non-public information, the insider made the sale knowing that if the said information would have become public, the price of the security will be negatively affected.²²⁴

The repurchase of shares will thus be classified as a dealing even though the company cannot realise a profit or avoid a loss by repurchasing its own shares.²²⁵

The price of a share can be manipulated by insiders, who, by buying shares could send false signals to the market resulting in a price increase and subsequent profit to the shareholder.²²⁶

²²⁰ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 28.

²²¹ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 29.

²²² Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 29.

²²³ Jooste 2006 *The South African Law Journal* 444.

²²⁴ Jooste 2006 *The South African Law Journal* 445.

²²⁵ Jooste 2006 *The South African Law Journal* 445.

A ground-breaking Australian case, dealing with whether insider trading laws were intended to apply to companies was the *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*²²⁷ case.²²⁸ Young J of the Supreme Court of New South Wales held that only a natural person could be “connected to a body corporate”.²²⁹ Therefore insider trading could only apply to a natural person.²³⁰ This interpretation was questioned in the *Brockley Investments v Black*²³¹ case where the selling corporation asked for the claim to be struck out based on the interpretation in the *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*²³² case that only natural persons can engage in inside trading.²³³ Master White however did not concur with the interpretation of Young J and ruled that both natural and juristic persons can be insiders.²³⁴ The difference in the interpretations of both these cases is due to the ambiguous drafting of the Security Industry codes. In the *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*²³⁵ case one could argue that the individual in possession of the inside information was not in a position to influence the corporation’s actions whilst the information was held by a director in the *Brockley Investments v Black*²³⁶ case. This serves as an explanation on the divergent nature of the cases.²³⁷

²²⁶ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 15.

²²⁷ (1986) 10 ACLR 462.

²²⁸ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 76*.

²²⁹ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 77*.

²³⁰ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 77*.

²³¹ (1991) 9 ACLC 255.

²³² (1986) 10 ACLR 462.

²³³ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 78*.

²³⁴ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 78*.

²³⁵ (1986) 10 ACLR 462.

²³⁶ *Brockley Investment Ltd v Black* (1991) 9 ACLC 255.

²³⁷ Overland *The Criminal Liability of Corporations for Insider Trading in Australia: Proposal for Reform 78-79*.

CHAPTER 5

1 The correlation between share repurchase by listed companies and insider trading

Insider trading is illegal in South Africa, but unfortunately our statutory provisions only regulated natural persons as it does not deem a company to be an “insider” even if it repurchases its own shares based on material non-public information.²³⁸ In essence a company cannot be convicted of “insider trading”. However a director who encourages a company to deal in securities based on material non-public information, will be held liable and not the company itself.²³⁹ Other commonwealth jurisdictions, in particular New Zealand, Australia and Canada, do however treat a company as an insider when repurchasing its own shares. The term “ultimate insider” is a term used by the New Zealand Law Commission Report.²⁴⁰ The reason a company is not included in the definition of an “insider” might be due to the fact that the *Insider Trading Act* was enacted long before companies were permitted to repurchase its own shares.²⁴¹

There is no single agreed model for effectively combatting insider trading. South African insider trading law is compared to the insider trading laws of Australia, New Zealand and the United States where a juristic person repurchases its issued shares. Perhaps after such comparison meaningful recommendations can be made and useful approaches adopted pertaining to whether or not South African insider trading law should also include juristic person under the definition of “insiders” when repurchasing its shares.

How to deal with a juristic person such as a company that repurchase its own shares whilst being informed of insider information:

In the case of *Exicom Limited v Futuris Limited*²⁴², a company was excluded from being an insider based on the following:

²³⁸ Cassim 2008 *South African Mercantile Law Journal* 186; Cassim 1999 *South African Law Journal* 290.

²³⁹ S 2(1)(b) of the *Insider Trading* 135 of 1998.

²⁴⁰ Report 9, Company Law Reform and Restatement 1989 at para 413.

²⁴¹ *Companies Act* 37 of 1999 companies were allowed, in terms of the *Companies Act* 61 of 1973, *inter alia*, to repurchase its own shares.

²⁴² (1995) 18 ACSR 404.

the theory behind insider trading is a breach of fiduciary duty and ... the whole genesis of this aspect of the law from the law of fiduciary obligation shows that one does not owe a fiduciary duty to oneself.²⁴³

This effectively absolves Australian companies from prohibitions regarding share repurchase.²⁴⁴ The ruling in the *Exicom*²⁴⁵ case is however problematic as fiduciary duty is not a prerequisite for insider trading in Australian legislation.²⁴⁶

Companies in the United States may be prosecuted in terms of the fiduciary duty rationale if they repurchase shares whilst in possession of inside information.²⁴⁷ For companies to not risk prosecution under insider trading provisions, the directors would have had to have made the decision to repurchase shares before becoming aware of any inside information.²⁴⁸

1.1 Directors' duties

The board of directors has the highest authority, in other words the board manage all the affairs of the company, provided that such exercising of powers is not prohibited in the company's Memorandum of Incorporation or the *Companies Act 71* of 2008.²⁴⁹

A director must act in the best interest of the company. As previously established, the directors are the embodiment of the company. Notwithstanding the fact that a company cannot have fiduciary obligation²⁴⁵ to itself, the brain of the company is the board of directors.

The principle is that directors should maximise profits for shareholders. A director repurchasing share may prejudice certain shareholders and that is in direct contravention of their fiduciary duty.

²⁴³ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 58.

²⁴⁴ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 58.

²⁴⁵ (1995) 18 ACSR 404.

²⁴⁶ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 58.

²⁴⁷ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 59.

²⁴⁸ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 59.

²⁴⁹ Delpont *The New Companies Act Manual* 89-90.

Directors have a fiduciary duty towards the company of which they are directors, which includes non-executive directors with reference to *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd*²⁵⁰. In other words, directors must act *bona fide* (in good faith) and avoid a conflict of interest between his/her interest and those of the company.²⁵¹

The duties of directors contained in the *Companies Act*²⁵² are subject to and does not substitute their common law duties, thus common law duties that are not codified by the *Companies Act*²⁵³ still applies, for example the director must carry out an independent and unfettered discretion.²⁵⁴ According to section 75 of the *Companies Act*²⁵⁵, this duty entails in principle that the director must disclose any personal financial interest in matters of the company.

A director may also not in his/her capacity as a director use the position of director or obtain information as director to gain an advantage for himself or another person, or to knowingly cause harm to the company or a subsidiary.²⁵⁶ There is a duty on directors to inform the Board of Directors of any material information that comes to a director's attention.²⁵⁷ Directors must at all times:

1. act in good faith and for a proper purpose²⁵⁸;
2. in the best interest of the company²⁵⁹; and
3. with a reasonable degree of care, skill and diligence²⁶⁰ when
4. exercising powers and performing the functions of a company.²⁶¹

The reasonable person test will be applied to determine if the director acted with a required degree of care and skill, which is an objective test with subjective elements. In other words, would a reasonable person in the same position as that director with the same knowledge, skill and experience as that director have acted the same way

²⁵⁰ 2000 (3) SA 806 (C).

²⁵¹ Delpont *The New Companies Act Manual* 90.

²⁵² 71 of 2008.

²⁵³ 71 of 2008.

²⁵⁴ Delpont *The New Companies Act Manual* 92-93.

²⁵⁵ *Companies Act* 71 of 2008.

²⁵⁶ S 76(2)(a) of the *Companies Act* 71 of 2008.

²⁵⁷ S 76(2)(b) of the *Companies Act* 71 of 2008.

²⁵⁸ S 76(3)(a) of the *Companies Act* 71 of 2008.

²⁵⁹ S 76(3)(b) of the *Companies Act* 71 of 2008.

²⁶⁰ S 76(3)(c) of *The New Companies Act* 71 of 2008.

²⁶¹ Delpont *The New Companies Act Manual* 92-93.

in exercising the same functions of the company as exercised by that director.²⁶² Even if a person is a non-executive director it does not exclude the assumption of liability as section 76(1) of the *Companies Act*²⁶³ does not differentiate between a director and a non-executive director.

1.2 The liabilities of directors

However, without any prejudice to any rights a third party may have to claim damages on the grounds of breach of contract pursuant to the unlawful act performed by the company, on the condition that the third party dealt with the company in good faith and did not have actual knowledge of the limitations, qualifications or restrictions as set out in the Memorandum of Incorporation.²⁶⁴

In such an instance, each shareholder will have a claim for damages against the directors or any representative of the company who fraudulently acted without the necessary authority and capacity or due to gross negligence causing the company's action to be inconsistent with the *Companies Act*²⁶⁵ or the powers of the company as set out in the Memorandum of Incorporation, seeing as directors with reference to section 76(3)(a)²⁶⁶ must always act in good faith and for a proper purpose.²⁶⁷

According to section 77(2)(a) and (b) a company can claim damages suffered as a result of a director or directors' acting in breach of their fiduciary duties or breach of duty to act with the necessary degree of care and skill in terms of common law principles.²⁶⁸ In terms of section 77(3)(a) directors may incur liability for breach of its fiduciary duty if the directors are the cause of the company acting beyond its authority with reference to section 218(2).²⁶⁹ Referring to section 77(3)(b) of the *Companies Act*²⁷⁰ a director may also be held liable for damages suffered by the

²⁶² S 76(3)(c) (i) & (ii) of the *Companies Act* 71 of 2008; Delpont *The New Companies Act Manual* 93.

²⁶³ 71 of 2008.

²⁶⁴ Davis *et al Companies and other Business Structures in South Africa* 56.

²⁶⁵ 71 of 2008.

²⁶⁶ *Companies Act* 71 of 2008.

²⁶⁷ *Companies Act* 71 of 2008; It was determined in *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) that a director acts in breach of his fiduciary duty to the company if the director sabotages the company's contractual opportunities for his own benefit, or where he uses privileged information to advance the interests of a rival concern or his own business to the prejudice of those of his company.

²⁶⁸ *Companies Act* 71 of 2008.

²⁶⁹ *Companies Act* 71 of 2008; Delpont *The New Companies Act Manual* 98.

²⁷⁰ 71 of 2008.

company as a result of consequence of the director having acquiesced in the carrying on of the company's business in spite of knowing that it was being conducted in a manner prohibited by section 22 (1).²⁷¹

Remedies against a breach of the duty of care and skill may be based on a delictual claim for damages, provided all the elements of a delict has been proven. In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, a court may excuse the director from liability if the court has satisfied itself that a director has acted in the best interests of the company and with the required degree of care, skill and diligence, in other words if the director:

1. took reasonable diligent steps to become informed about the matter;
2. had no material personal financial interest in the subject matter of the decision or knew of anybody else having a financial interest in the matter, or disclosed his interests; and
3. made, or supported a decision and had a rational basis for believing and had actually believed that the decision was in the best interest of the company.²⁷²

Provided the decision was taken in the presence of the director, otherwise the business judgement rule will not apply.

It is clear with the enactment of the new *Companies Act*²⁷³ that directors are not just liable to their company but also to third parties. In other words, third parties can hold directors personally liable for damages suffered as a result of the director's actions with reference to the decision of the South Gauteng High Court in *Rabinowitz v Van Graan*²⁷⁴ as well as section 218(2) of the *Companies Act*²⁷⁵ that states that any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.²⁷⁶

²⁷¹ *Companies Act* 71 of 2008; Delpont *The New Companies Act Manual* 98-99.

²⁷² Delpont *The New Companies Act Manual* 94.

²⁷³ 71 of 2008.

²⁷⁴ 2013 (5) SA 315 (GSJ).

²⁷⁵ 71 of 2008.

²⁷⁶ Delpont *The New Companies Act Manual* 100-101.

The *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd*²⁷⁷ case involved complex contractual arrangements which entailed the buying and selling of financial instruments based on debts.²⁷⁸ The claimant based its claim on the fact that the directors (defendants) of the company acted negligently in failing to ensure that the representation were “at all times material”.²⁷⁹ In the alternative, that the directors were in breach of section 76(3) of the *Companies Act*²⁸⁰, by acting recklessly, alternatively negligently, in their capacities as directors of the company.²⁸¹ The Johannesburg High Court handed down a judgment in the aforementioned case that any person can be held personally liable to any other person for any loss or damages suffered for infringing any provisions of the *Companies Act*²⁸², in terms of section 218(2).²⁸³ In other words any person, which can include a director, creditor, shareholders et cetera can rely on section 218(2) of the *Companies Act*²⁸⁴ to claim back for any loss or damages suffered as a result of any other person for any contravention of the *Companies Act*^{285, 286}.

It is evident that it is the legislature’s intention that directors be held accountable for their actions against the company as well as stakeholders of the company (shareholders, employees, creditors, member of the community et cetera) which includes personal liability in instances where someone suffered loss or damages caused by a director whose conduct has contravened the *Companies Act*²⁸⁷.

²⁷⁷ [2014] ZAGPJHC 134; [2014] 3 ALL SA 454 (GJ).

²⁷⁸ *Sanlam Capital Markets v Mettle Manco* 2014 (3) ALL SA 454 (GJ) at para 3.

²⁷⁹ *Sanlam Capital Markets v Mettle Manco* 2014 (3) ALL SA 454 (GJ) at para 11.
²⁸⁰ 71 of 2008.

²⁸¹ *Sanlam Capital Markets v Mettle Manco* 2014 (3) ALL SA 454 (GJ) at para 14.
²⁸² 71 of 2008.

²⁸³ *Sanlam Capital Markets v Mettle Manco* 2014 (3) ALL SA 454 (GJ) at para 42.
²⁸⁴ 71 of 2008.

²⁸⁵ 71 of 2008.

²⁸⁶ *Sanlam Capital Markets v Mettle Manco* 2014 (3) ALL SA 454 (GJ) at para 42 the plaintiff is entitled to base its alternative action on the provisions of s 218(2) read in conjunction with s 76 and the various other sections of the *Companies Act* 71 of 2008 identified in the particulars, save for s 77(3)(b). The reliance on s 77(3)(b) may be misplaced but, the presiding officer is of opinion the basis remains s 218(2) of the Act, Havenga 2013-2 TSAR 276.

²⁸⁷ 71 of 2008.

1.3 Shareholders protection against listed companies taking advantage of inside information

Remedies that are at the disposal of the shareholders who has been prejudiced by a selective repurchase is as follows:

The board of directors owes a common law fiduciary duty towards the company and may therefore be held personally accountable if the directors did not act in the best interest of the company.²⁸⁸

A shareholder has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything in contravention of the *Companies Act*²⁸⁹ or a limitation, restriction or qualification in the company's MOI.²⁹⁰

In terms of the *Companies Act*²⁹¹, a shareholder of a company is allowed to apply to a court for relief if, *inter alia*, any act or omission of the company, or a related person, has had an effect that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the shareholder.²⁹²

²⁸⁸ Van Niekerk 2014 <http://www.inkundlajournal.org>.

²⁸⁹ 71 of 2008.

²⁹⁰ S 20(6) and S 218(2) of the *Companies Act* 71 of 2008; Van Niekerk 2014 <http://www.inkundlajournal.org>.

²⁹¹ 71 of 2008.

²⁹² S 163(1) of the *Companies Act* 71 of 2008; Van Niekerk 2014 <http://www.inkundlajournal.org>.

CHAPTER 6

1 Conclusions and recommendations

According to South African law that regulates insider trading, only a natural person can commit insider trading. Although a natural person such as a director of a company who acts on behalf of a company will be held liable for insider trading either in terms of section 78(2) of the FMA that states an insider who deals for another person is guilty of insider trading or in terms of section 78(3) of the FMA that states a person who knowingly deals for an insider is guilty of insider trading, unless the director has a defence as set out in subsection (2)(b)(ii) and (iii) it has however been found in this study that the brain of a company is its board of directors and if the board of directors act, the company acts. In other words, if the board of directors committed insider trading by allowing a company to repurchases its shares, while in possession of non-public, price-sensitive information, then the company must also be found guilty of insider trading.

If a juristic person such as a company is in possession of non-public price-sensitive information and deals by repurchasing its own shares at a price which is lower than their real value and after the information is published by SENS sells the shares at a higher price, it meets the definition criteria as discussed which amounts to insider trading. Even though there is no clarity if an “insider” includes a juristic person, it should be considered seeing as this repurchase generates abnormal profits for the company that is to the detriment of the shareholders who sold the shares at a lower price.

The ability of juristic persons to engage in share repurchase programs to the detriment of individual minority shareholders goes against the principle of equality to all shareholders. This principle is one of the key attributes of the South African *Companies Act*²⁹³. The South African legal framework has not kept abreast of the newest legislation pertaining to share repurchases as most of the countries with whom we share a common legal history i.e. commonwealth countries who have all addressed the challenges going with share repurchases. Although a relatively new phenomenon in South African company’s law, the emergence of the share repurchases have necessitated a fresh look at the possibilities for abuse.

²⁹³ 71 of 2008.

Anomalous profits are realised at the cost of shareholders for the benefit of insiders by utilising the share repurchase mechanisms.²⁹⁴ Insiders may deal around the time of repurchases unaffected by utilising their access and position to acquire information to gauge the market.²⁹⁵

It has been established through an empirical study that insiders dispose of more shares after a repurchase announcement buy high before announcements.²⁹⁶ Further evidence was found to suggest insiders sell at a higher price.²⁹⁷

Juristic persons should not be allowed to take advantage of non-public price-sensitive information, by delaying publication of such information by SENS. Therefore equality of access to information is key as all investors should be furnished with a similar set of information when trading. This will ensure that the development of active markets is not hindered.

A juristic person such as a company that participates in insider trading by repurchasing its share while in possession of non-public, price-sensitive information should not be exempt from the insider trading provisions. It also a deterrent as a juristic person does not see the need to control the flow of price-sensitive information as it cannot be held accountable for insider trading.²⁹⁸

South Africa is a society that is founded on the rule of law²⁹⁹, therefore a juristic person must be included when interpreting a “person” in our legislation with specific reference to insiders. In future legislatures should give adequate definitions for some of the insider trading terms.

The historical background of the regulation of insider trading in South Africa can be seen as a valuable attempt to curb insider trading, but much more still needs to be done to ensure successful prosecution of insiders, who participate in insider trading.

²⁹⁴ Hamouda and Arab 2011 *Springer Science and Business Media* 406.

²⁹⁵ Hamouda and Arab 2011 *Springer Science and Business Media* 406.

²⁹⁶ Hamouda and Arab 2011 *Springer Science and Business Media* 407.

²⁹⁷ Hamouda and Arab 2011 *Springer Science and Business Media* 407.

²⁹⁸ Insider Trading Discussion Paper by the Companies and Securities Advisory Committee 2001 23.

²⁹⁹ S 1(c) of the *Constitution of the Republic of South Africa*, 1996.

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