A comparative synopsis of the statutory prohibition of insider trading in Namibia and South Africa[1]

LLM student **Thabang Terrance MABINA**[2]
Associate professor **Howard CHITIMIRA**[3]

Abstract

Insider trading is statutorily prohibited in both Namibia and South Africa. Nonetheless, insider trading activities are reportedly still occurring with some degree of frequency in the Namibian and South African financial markets. Given this background, the article comparatively explores the regulation of insider trading in Namibia and South Africa. This is done to investigate and scrutinise the adequacy of such regulation. In this regard, the relevant provisions, penalties, remedies and other enforcement approaches contained in the Namibian and South African anti-insider trading legislation are discussed. The authors submit that the Namibian anti-insider trading regulatory framework is relatively more flawed and inadequate than that of South Africa. Accordingly, the article discusses the statutory prohibition of insider trading in Namibia prior to, and subsequent to 2004 in order to isolate such flaws. Thereafter, recommendations and enforcement approaches that could be incorporated in the relevant Namibian insider trading laws from the South African anti-insider trading regulatory framework are briefly discussed.

Keywords: *insider trading, enforcement framework, market abuse, penalties, regulation.*

JEL Classification: K22, K33

1. Introduction

Insider trading is a very difficult concept to define. Therefore, it is not surprising that insider trading is not expressly defined in most anti-insider trading legislation that have been enacted in several countries to date. Accordingly, in many countries, practices that could lead to insider trading offences are merely stated in such legislation. This approach is also followed in both the Namibian[4] and South African[5] insider trading legislation. Nonetheless, for the purposes of this article, insider trading is defined as a practice by which one person armed with

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[2] Thabang Terrance Mabina - LLB, LLM, Faculty of Law, North West University, South Africa, terrancemabina@gmail.com.

[3] Howard Chitimira - LLB, LLM (UFH), LLD (NMMU), Faculty of Law, North West University, South Africa, Howard.Chitimira @nwu.ac.za.

[4] See generally s 241 of the *Companies Act* 28 of 2004 (*Companies Act* 2004). See also clauses 155; 156 & 160 of the *Financial Institutions and Markets Bill*, 2012 (*Financial Institutions and Markets Bill* 2012).

[5] See ss 77; 78 & 82 of the *Financial Markets Act* 19 of 2012 (*Financial Markets Act*).

price-sensitive non-public (confidential) information, concludes a transaction in securities or financial instruments to which that information relates without sharing that information with others, to the detriment of such persons or other innocent and unwitting investors.[6]

As indicated above, insider trading is prohibited in both Namibia[7] and South Africa.[8] Nevertheless, insider trading activities are reportedly still occurring with some degree of frequency in the Namibian and South African financial markets.[9] Given this background, the article comparatively explores the regulation of insider trading in Namibia and South Africa. This is done to investigate and scrutinise the adequacy of such regulation. In this regard, the relevant provisions, penalties, remedies and other enforcement approaches contained in the Namibian and South African anti-insider trading legislation are discussed. The authors submit that the Namibian anti-insider trading regulatory framework is relatively more flawed and inadequate than that of South Africa. For instance, unlike the position in South Africa,[10] there is no legislation that adequately and expressly prohibits insider trading in Namibia. Put differently, insider trading is narrowly and indirectly prohibited in section 241 of the *Companies Act* 2004, which outlaws any dealing in shares by directors or anyone with inside information before a public announcement is made. On the other hand, South Africa has to some extent, managed to develop a relatively adequate anti-insider trading regulatory framework under the *Financial Markets Act*, the *Protection of Funds Act* and the *Financial Sector Regulation Act.*[11] Thus, notwithstanding the fact that the *Financial Sector Regulation Act* does not expressly prohibit insider trading, it requires the South African Reserve Bank to create the Prudential Authority (PA) and it replaces the Financial Services Board (FSB) with the Financial Sector Conduct Authority (FSCA) in order to strengthen consumer protection and enhance the integrity of the South African financial markets and financial services industry. South Africa also has the best anti-insider trading regulatory framework in the Southern African Development Community (SADC).[12] It is further submitted that the Johannesburg

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[6] Osode "Defending the Regulation of Insider Trading" 303; Chitimira 2016 *Journal of Corporate and Commercial Law & Practice* 30-31.

[7] See s 241 of the *Companies Act* 2004 read with clauses156 & 160 of the *Financial Institutions and Markets Bill* 2012.

[8] See ss 78 & 82 of the *Financial Markets Act* read with ss 6A-6I of the *Financial Institutions (Protection of Funds) Act* 28 of 2001 as amended (*Protection of Funds Act*).

[9] Osode "Defending the Regulation of Insider Trading" 303; Osode 2000 *Journal of African Law* 241 & Haoseb *Regulation of the Offence of Insider Trading* 4-42.

[10] See ss 78 & 82 of the *Financial Markets Act* read with sections 6A-6I of the *Protection of Funds Act*.

[11] *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*). See ss 46; 52; 69; 74 & 265.

[12] Notably, the SADC was established in 1992, to promote regional integration and combat poverty in member states by ensuring peace and security and optimum economic development in Southern Africa. Thus, like the European Union (EU), the SADC is a regional economic community of countries with common political and socio-economic needs and objectives. It comprises 15 member states namely, Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania,

Stock Exchange Limited (JSE) was rated as one of the best regulated exchanges in the world by the World Economic Forum in 2016 and 2017.[13]

To this end, the article comparatively discusses the statutory prohibition of insider trading in South Africa and Namibia prior to, and subsequent to 2004 in order to isolate the flaws in the relevant legislation. This discussion is undertaken in tandem, for the purposes of encouraging the enactment and consistent enforcement of anti-insider trading legislation in Namibia and South Africa. Moreover, the comparative analysis is carried out so as to recommend some measures that could promote public investor confidence and the integrity of the Namibian and South African financial markets. Thereafter, other enforcement approaches that could be incorporated in the relevant Namibian insider trading laws from the South African anti-insider trading regulatory framework are briefly discussed.

2. Overview historical background

No provision expressly prohibited insider trading under the 1926 *Companies Act*[14] in South Africa. The initial legislative effort to combat insider trading in the South African financial markets was introduced in 1973 by the *Companies Act*.[15] Nevertheless, its provisions were flawed since they were mainly limited to insider trading activities by directors, employees, officers or shareholders (primary insiders) of a company who dealt in listed securities with unpublished price-sensitive inside information to the detriment of others. Consequently, secondary insiders such as tippees and fortuitous persons who accidentally accessed non-public price-sensitive inside information relating to the affected securities were not statutorily prohibited from committing insider trading under the *Companies Act*. Additionally, the provisions of the *Companies Act* indirectly prohibited insider trading activities that were perpetrated through a regulated financial market.[16] Thus, no provision in the *Companies Act* expressly prohibited insider trading. Moreover, insider trading activities that could occur in unregulated financial markets were not statutorily prohibited. Due to these flaws, the *Companies Act* was amended and section 233 of this Act was repealed by the *Companies Amendment Act*.[17] The *Companies Amendment Act* introduced section

Zambia and Zimbabwe. See the SADC 2018 *About SADC,* https://www.sadc.int/ about-sadc accessed 12 June 2018 page unknown.

[13] Mayekiso and Thabane 2016 https://www.jse.co.za/articles/jse-among-top-regulated-exchanges accessed 11 October 2017 page unknown.

[14] *Companies Act* 46 of 1926 (*Companies Act* 1926), see ss 5-71.

[15] *Companies Act* 61 of 1973 as amended (*Companies Act*), see ss 224, 162 & 229-233. This followed various recommendations of the Van Wyk de Vries Commission of Inquiry into the *Companies Act* of 1926 *Main Report* (Van Wyk de Vries *Report*), see paras 44.49, 44.57.

[16] See ss 224, 162 & 229-233 of the *Companies Act*.

[17] *Companies Amendment Act* 78 of 1989 (*Companies Amendment Act*), see s 6 read with s 440F & the *Memorandum on the Objects of the Companies Second Amendment Bill*, 1989 [B99-89] (GA) (*Companies Second Amendment Bill* 1989).

440F and other related provisions in a bid to improve the regulation of insider trading in South Africa. Nonetheless, these provisions prohibited insider trading too broadly. Therefore, although section 440F was applicable to secondary insiders such as tippees and provided criminal and civil liability for the offenders, its provisions were largely ineffective and inconsistently enforced by the relevant authorities.[18] As a result, the *Second Companies Amendment Act*[19] was introduced to revise the provisions of section 440F and remedy the flaws of the *Companies Amendment Act*.[20] Nevertheless, despite introducing several definitions for key terms such as "securities" and "company" and expressly prohibiting insider trading in respect of all listed securities,[21] the provisions of the *Second Companies Amendment Act* replicated most of the flaws that were initially imbedded in the *Companies Amendment Act*. Consequently, the King Task Group into the Insider Trading Legislation 1997 (King Task Group),[22] recommended the enactment of adequate anti-insider trading legislation to remedy the shortcomings of the *Companies Act* and all its amendments. This culminated in the enactment of the *Insider Trading Act*.[23] Although this Act expressly prohibited insider trading, its provisions were merely applicable to individuals alone and they offered less dissuasive civil and criminal penalties against the offenders.[24] These and other flaws led to the repeal of the *Insider Trading Act* by the *Securities Services Act*.[25] This Act extended the prohibition of insider trading to all persons and introduced relatively more civil, administrative and criminal penalties against the offenders.[26] Nonetheless, its defences for insider trading offences were relatively few. Moreover, the criminal penalties for insider trading under the *Securities Services Act* remained insufficient and less dissuasive for deterrence purposes.[27] The *Securities Services Act* was repealed by the *Financial Markets Act*. This Act currently prohibits insider trading in respect of all securities that are listed on a regulated market as defined in the same Act.[28] It also provides civil, criminal and

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[18] See s 440F (2)(a) & (b) of the *Companies Amendment Act* and other relevant provisions that were contained in Chapter XVA "Regulation of Securities" of the same Act. See further Botha 1991 *SA Merc LJ* 7-11; Bhana 1987 *SAJBM* 201-202 & Chitimira 2014 *PELJ* 937-952.

[19] *Second Companies Amendment Act* 69 of 1990 (*Second Companies Amendment Act*), see the revised s 440F.

[20] *Memorandum on the Objects of the Companies Second Amendment Bill*, 1990 [B119-90] (GA) (*Companies Second Amendment Bill* 1990). See further Botha 1991 *SA Merc LJ* 11.

[21] See the revised s 440F read with ss 440A (1) of the *Second Companies Amendment Act* & ss 1-3 of the *Companies Act*.

[22] Notably, the King Task Group published its first draft report on 15 May 1997 and the final report on 21 October 1997. See the King Task Group *Minority Report* para 3.4 in Beuthin and Luiz *Basic Company Law* 235-238; Chitimira 2014 *PELJ* 937-939.

[23] *Insider Trading Act* 135 of 1998 (*Insider Trading Act*), see ss 2 & 6 read with ss 4 & 5.

[24] See ss 2 & 6 read with ss 4 & 5 of the *Insider Trading Act*. See Osode 2000 *Journal of African Law* 239-241.

[25] *Securities Services Act* 36 of 2004 (*Securities Services Act*), see ss 73; 77 read with ss 78; 87 & 115(a). See further Osode 2000 *Journal of African Law* 241.

[26] See ss 73; 77 read with ss 78; 87; 97-106 & 115(a) *of the Securities Services Act*.

[27] See ss 73; 77 read with ss 78; 87 & 115(a) *of the Securities Services Act*.

[28] See ss 78 & 82 read with ss 77; 79; 84-86; 99 & 109 (a) *of the Financial Markets Act*.

administrative sanctions against the offenders.[29] In spite of this, the *Financial Markets Act* retained the less deterrent insider trading criminal penalties that were contained in the *Securities Services Act*. Consequently, insider trading practices have continued to occur in the South African financial markets. The *Financial Markets Act* still does not expressly define the concept of insider trading. Moreover, notwithstanding the fact that a considerable number of civil and administrative cases have been successfully investigated and settled to date, it remains to be seen whether the introduction of the FCSA will enhance the enforcement of the insider trading prohibition in South Africa.

On the other hand, insider trading was initially treated as a type of corruption in Namibia between 1990 and 2004.[30] Notably, although insider trading was not statutorily defined in Namibia, it was generally referred to as an unlawful practice by a person that uses privileged information that he or she knowingly possesses due to his or her position, to deal in the affected securities on the basis of such information to gain an unfair advantage over others, for his or her personal benefit or for the benefit of another.[31] The statutory regulation of insider trading in Namibia commenced in 1973.[32] In this regard, it is important to note that Namibia was a Germany colony which was administered and later ruled by South Africa from about 1915 until 1990. Consequently, section 233 of the *Companies Act* was employed to indirectly control and combat insider trading in both Namibia and South Africa until 1990. Thereafter, the Namibian policy makers transposed the provisions of section 233 of the *Companies Act* into section 241 of their *Companies Act* 2004. The *Companies Act* 2004 currently prohibits insider trading by primary insiders in Namibia.[33] Nonetheless, its prohibition is only limited to securities listed on a regulated market.[34] Moreover, the *Companies Act* 2004 provides very few defences, less dissuasive civil and criminal penalties and few offences for insider trading.[35] Put differently, the insider trading prohibition contained in the *Companies Act* 2004 duplicated most of the flaws of the South African *Companies Act* as indicated above.[36] This approach has to date failed to

[29] See ss 78 & 82 read with ss 84-86; 99 & 109(a) of the *Financial Markets Act* read with ss 6A (2); 6F & ss 6B-6I of the *Protection of Funds Act*. Notably, the FSCA has replaced the FSB, the Enforcement Committee (EC) and the Directorate of Market Abuse (DMA). Thus, the FSCA is now responsible for the enforcement of civil and administrative sanctions for insider trading in South Africa. See ss 56-82 of the *Financial Sector Regulation Act.* See further remarks on the initial anti-market abuse regulatory and enforcement role of the FSB and its committees by Luiz 2011 *SA Merc LJ* 151-172 & Chitimira 2014 *Speculum Juris* 119-124.

[30] Hunter 2005 *The Namibian Institute for Democracy Report* 5.

[31] *Idem*; also see related comments by Van Eeden *Evaluation of the Financial Markets Act* 7 and Pretorius *Hahlo's South African Company Law* 330.

[32] See s 241.

[33] *Idem.*

[34] *Idem.*

[35] *Idem.*

[36] See ss 233 and 241 of the *Companies Act* and the *Companies Act* 2004 of South Africa and Namibia respectively.

produce even a single case of insider trading that has been successfully prosecuted or settled by the relevant authorities in Namibia.[37]

3. The adequacy of the anti-insider trading enforcement framework prior to 2004

As stated earlier,[38] the statutory prohibition of insider trading in the *Companies Act* and all its amendments was flawed and inconsistently applied in South Africa.[39] Notably, before the *Companies Act*'s amendments of 1989 and 1990, no regulatory body was specifically empowered to enforce the insider trading prohibition in South Africa. It appears that the JSE, the Registrar of Companies, the Department of Trade and Industry and the Department of Justice (Attorney-General's Office) were jointly responsible for enforcing the insider trading prohibition in South Africa between 1989 and 1990. The Attorney-General's Office was responsible for the criminal prosecution of insider trading cases while the JSE was obliged to detect the occurrence of insider trading in the South African financial markets.[40] Moreover, the JSE was required to monitor trading activities of all market participations in order to detect insider trading activities. Thereafter, the JSE was required to report any suspected insider trading activities to the Registrar of Companies for further investigation. Nevertheless, due to the difficult evidentiary burden of proof that was imposed on the prosecution to prove beyond reasonable doubt that the alleged offender was guilty of insider trading and flawed enforcement approaches that were adopted by the relevant authorities, no successful prosecutions of insider trading cases were brought under the *Companies Act* between 1973 and 1990. Furthermore, the criminal penalties for insider trading offences that were available during the same period were insufficient for deterrence purposes.[41] The absence of civil and administrative penalties for insider trading also aided offenders to continue with their illicit trading activities with impunity. Consequently, no meaningful civil and administrative remedies were available to any persons that were prejudiced by insider trading activities. This clearly shows that the anti-insider trading enforcement framework under the *Companies Act* was flawed and inconsistently utilised to combat insider trading in the South African financial markets.[42]

This gave birth to the purported anti-insider trading enforcement framework under the *Companies Amendment Act* which empowered the Securities

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[37] Haoseb *Regulation of the Offence of Insider Trading* 6.

[38] See related comments in paragraph 2 above.

[39] See s 233 of the *Companies Act*; s 440F of the *Companies Amendment Act* & the revised s 440F of the *Second Companies Amendment Act*.

[40] See ss 224; 230-233, 440-441 of the *Companies Act*; see further Chitimira 2014 *PELJ* 946-948; Botha 1991 *SA Merc LJ* 5-7.

[41] See s 441(1)(b) of the *Companies Act*; see further Chitimira 2014 *PELJ* 947; Botha 1991 *SA Merc LJ* 5.

[42] Osode 1999 *AJICL* 694-695; Bhana 1987 *SAJBM* 201; Botha 1991 *SA Merc LJ* 6.

Regulation Panel (SRP) to enforce the insider trading prohibition in South Africa.[43] For instance, the SRP had relatively broad powers to subpoena and interrogate any suspected insider trading offenders. It was also authorised to oversee any dealings in listed securities by market participants in order to discourage and prevent insider trading activities.[44] The SRP also obliged certain persons, especially primary insiders, to disclose any information regarding their beneficial holding of listed securities to avoid insider trading.[45] Nonetheless, although the criminal penalties for insider trading were increased to a fine of R500 000 or imprisonment for a period not exceeding ten years or both, no insider trading cases were successfully investigated and prosecuted under the *Companies Amendment Act* since its insider trading provisions never came into operation.

Eventually, another anti-insider trading enforcement framework was introduced by the *Second Companies Amendment Act*.[46] However, no single regulatory body was exclusively authorised to enforce the insider trading prohibition. Therefore, instead of a single regulator model, a multi-regulator approach involving the SRP, the Registrar of Companies and the Department of Justice was adopted to enforce the insider trading provisions under the *Second Companies Amendment Act*. The *Second Companies Amendment Act* did not provide private rights of action for insider trading. Nevertheless, it empowered the SRP to provide a platform for the victims of insider trading to report any illicit trading practices and claim their civil remedies from the offenders through the SRP.[47]

The prosecution of insider trading cases remained problematic. As a result, additional measures such as presumptions were introduced in a bid to improve the prosecution of the insider trading cases under the *Second Companies Amendment Act*.[48] The *Second Companies Amendment Act* retained the same minimal insider trading criminal penalties that were initially provided under the *Companies Amendment Act*. Accordingly, no person was convicted for insider trading under the *Second Companies Amendment Act*.[49] This could have been worsened by the fact that the SRP did not have a surveillance department to detect and combat insider trading activities in the South African financial markets. Furthermore, the absence of adequate administrative and civil penalties impeded the enforcement of the insider trading prohibition under the *Second Companies Amendment Act*.[50] Due to these flaws, the anti-insider trading enforcement framework contained in the

[43] See s 440B of the *Companies Amendment Act.*
[44] S 440C (1)(b) read with ss 440D & 440C(6)(c) of the *Companies Amendment Act*.
[45] S 440G of the *Companies Amendment Act*; also see the *Companies Second Amendment Bill* 1989; Botha 1991 *SA Merc LJ* 7; Osode 1999 *AJICL* 690-695; Chitimira *The Regulation of Insider Trading* 23.
[46] See the revised s 440F.
[47] S 440B of the *Second Companies Amendment Act*; see further s 140A (3) as introduced under the *Companies Amendment Act* 37 of 1999; Chitimira 2014 *PELJ* 951-952.
[48] S 440F (3) read with s 440F(1)(a) or (b) of the *Second Companies Amendment Act*.
[49] Cokayne *Business Report* 28 April 2004 page number unknown.
[50] Botha 1991 *SA Merc LJ* 18.

Companies Act and its amendments was repealed by the *Insider Trading Act*.[51] This Act empowered the FSB, courts, the Insider Trading Directorate (ITD) and the Director of Public Prosecutions (DPP) to enforce its civil and criminal provisions for insider trading.[52] The FSB was the main regulatory board that enforced the insider trading prohibition while the ITD had powers to investigate all suspected insider trading cases.[53] The ITD had powers to institute civil action against the offenders and/or to refer related criminal matters to the DPP for prosecution.[54] Offenders were liable to a fine not exceeding R2 million or to imprisonment for a period not exceeding ten years, or both such a fine and such imprisonment.[55] Despite this, very minimal settlements and convictions were successfully obtained by the enforcement authorities in civil and criminal cases of insider trading respectively.[56] Moreover, these civil and criminal penalties were still insufficient and unable to effectively discourage all persons from engaging in insider trading practices.[57] Both the DPP and the FSB failed to consistently obtain more prosecutions and settlements in insider trading cases respectively.

Thereafter, the *Securities Services Act* replaced the ITD with the Directorate of Market Abuse (DMA). The FSB remained the main regulatory body to oversee the enforcement of the insider trading prohibition in South Africa. The DMA was obliged to investigate insider trading cases while the Enforcement Committee (EC) was empowered to administer administrative sanctions for insider trading on a referral basis. The DPP continued with its prosecuting role on all matters involving insider trading in South Africa. Be that as it may, very few insider trading cases were successfully and timeously settled and/or prosecuted by the relevant enforcement authorities under the *Securities Services Act*.[58] This could have been caused by the absence of definitions to key terms such as "insider trading", "tippee" and "tipping" in the insider trading provisions.[59] Moreover, the fact that the FSB did not have its own adequate surveillance systems to detect and curb insider trading activities in South African financial markets probably had a further negative influence on the enforcement of the insider trading prohibition. The FSB relied too much on the JSE's surveillance department and this at times,

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[51] See ss 2 & 6 read with ss 4 & 5.

[52] Chitimira 2014 *PELJ* 958-960; Osode 2000 *Journal of African Law* 239-248.

[53] Ss 11(1) and (2) (a) to (i) and subsections (3)-(11) & s 12 of the *Insider Trading Act*; Osode 2000 *Journal of African Law* 239-248.

[54] S 11(10) of the *Insider Trading Act*; see further Osode 2000 *Journal of African Law* 239-248 Luiz 1999 *SA Merc LJ* 145.

[55] S 5 read with ss 2 and 6 of the *Insider Trading Act*.

[56] See further Osode 2000 *Journal of African Law* 239-248; Luiz 1999 *SA Merc LJ* 139-145; Jooste 2000 *SALJ* 284-305.

[57] Van der Lingen 1997 *FSB Bulletin* 10.

[58] S 82(9) read with s 79 of the *Securities Services Act*; see further Osode 2000 *Journal of African Law* 239-248; Luiz 1999 *SA Merc LJ* 139-145; Botha 1991 *SA Merc LJ* 4-18; Van der Lingen 1997 *FSB Bulletin* 10.

[59] See further comments by Osode 2000 *Journal of African Law* 242; Jooste 2000 *SA Merc LJ* 296; Lyon and Du Plessis *Insider Trading in Australia* 2; Jeunemaître A *Financial Markets Regulation* 188, for further comments on definitions for related insider trading key terms.

led to delays in the investigation, settlement and prosecution of insider trading cases.[60]

On the other hand, Namibia did not have its own anti-insider trading enforcement framework prior to 2004. As indicated earlier,[61] the insider trading regulatory and enforcement framework under the *Companies Act* and its amendments was similarly applied in Namibia. It appears that the Namibian legislature was reluctant to enact insider trading laws. Namibia relied too much on the *Companies Act* of South Africa and it failed to develop its own anti-insider trading enforcement framework prior 2004.[62]

The Namibian policy makers blindly adopted the anti-insider trading enforcement framework that was employed under the *Companies Act*. This approach did not yield any successful prosecution and/or settlements of insider trading cases. Furthermore, the overall investigation of insider trading cases was flawed and inconsistently executed since there was no specific Namibian regulatory body that was statutorily empowered to enforce the insider trading prohibition.[63]

Numerous flaws that were embedded in the South African anti-insider trading enforcement framework were simultaneously transferred to Namibia.[64] Put differently, Namibia inherited all the flaws that were embedded in the *Companies Act* as amended and later transposed into section 241 of their *Companies Act* 2004. The *Companies Act* 2004 of Namibia did not provide any anti-insider trading enforcement approaches apart from those that were provided under the *Companies Act* of South Africa. Therefore, administrative penalties, naming and shaming and whistle blower immunity provisions and other enforcement approaches were not provided under the *Companies Act* 2004. Moreover, unlike South Africa, Namibia did not introduce any new anti-insider trading amendments and/or new legislation apart from the *Companies Act* 2004.[65] Offenders could only incur minimal criminal penalties of N$8 000 fine or imprisonment for a period not exceeding 2 years or both the fine and imprisonment.[66] As discussed above, the Namibian anti-insider trading enforcement framework prior to 2004 was flawed and inconsistently utilised to combat insider trading in the Namibian financial markets.

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[60] Van der Lingen 1997 *FSB Bulletin* 10; Borkum 2003 https://www.iol.co.za/business-report/opinion/inside-the-jse-watchers-keep-tabs-on-insidertrading-770606 accessed 26 October 2017 page number unknown.

[61] See related analysis in paragraph 2 above.

[62] See related analysis in paragraph 2 above.

[63] See Haoseb *Regulation of the Offence of Insider Trading* 9.

[64] See generally s 2 of the *Companies Act*; see further Hengari and Saunders 2014 http://www.kas.de/upload/Publikationen/2014/namibias_foreign_relations/Namibias_Foreign_Relations_hengari_saunders.pdf 169-178 accessed 09 August 2017.

[65] S 241.

[66] S 241 of the 2004 *Companies Act*; see further Haoseb *Regulation of the Offence of Insider Trading* 10.

4. The statutory prohibition of insider trading and its adequacy subsequent to 2004

4.1 The definition of insider trading

The term "insider trading" is not expressly defined in the *Financial Markets Act*.[67] Moreover, only a few practices that may give rise to insider trading offences are listed in the *Financial Markets Act*.[68] In addition, although the *Financial Markets Act* provides some definitions of related terms such as "inside information", "insider", "market abuse rules", "person", "regulated market" and "market corner", other equally important terms such as "tipping" and "tippee" are not expressly defined in the same Act.[69]

Similarly, the term "insider trading" is not expressly defined under the *Companies Act* 2004.[70] However, unlike the position in the *Financial Markets Act* of South Africa,[71] the *Companies Act* 2004 does not provide any specific practices that may result in the commission of insider trading offences in Namibia.[72] Moreover, key insider trading-related terms such as "inside information", "insider", "market abuse rules", "person", "regulated market", "market corner", "tipping", "tippee" and "dealing" are not expressly defined under the *Companies Act* 2004.[73] Nevertheless, it is important to note that terms such as "inside information", "insider", "market abuse rules", "affected transaction", "securities", "made public", "public sector body", "securities", "regulated market" and "market corner" are now defined under the *Financial Institutions and Markets Bill* 2012.[74] In spite of these developments, the concept of insider trading is still not defined in the *Financial Institutions and Markets Bill* 2012.[75] Moreover, like the position under the *Financial Markets Act*,[76] other key-related terms such as "tipping" and "tippee" are not expressly defined in the *Financial Institutions and Markets Bill* 2012.[77] In this regard, it appears that the Namibian anti-insider trading prohibition will once again blindly copy the current South African enforcement approaches that are enshrined in the *Financial Markets Act*. Therefore, Namibia is likely to enforce such approaches in the near future when the *Financial Institutions and Markets Bill* 2012 is signed into law. To this end, it is submitted that Namibia should not have

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[67] See s 77 read with ss 78 & 82 of the *Financial Markets* Act; see further related discussion by Luiz and Van Der Linde 2013 *SA Merc LJ* 463-470.
[68] See s 77 read with ss 78 & 82 of the *Financial Markets* Act.
[69] See s 77 read with ss 78 & 82 of the *Financial Markets* Act.
[70] See s 1 read with s 241 of the *Companies Act* 2004.
[71] See s 77 read with ss 78 & 82 of the *Financial Markets* Act.
[72] See s 1 read with s 241 of the *Companies Act* 2004.
[73] See s 1 read with s 241 of the *Companies Act* 2004.
[74] See clause 155 read with clauses 156 & 160-163.
[75] See clause 155 read with clauses 156 & 160 of the *Financial Institutions and Markets Bill* 2012.
[76] See s 77 read with ss 78 & 82 of the *Financial Markets* Act.
[77] See clause 155 read with clauses 156 & 160 of the *Financial Institutions and Markets Bill* 2012.

blindly adopted the South African approach to avoid duplicating its flaws in the relevant insider trading laws.

4.2 Insider trading offences

South Africa has over the years made commendable efforts to establish a relatively adequate anti-insider trading regulatory and enforcement framework.[78] For instance, insider trading practices are currently outlawed in the *Financial Markets Act*.[79] Accordingly, any contravention of the insider trading prohibition will result in civil, criminal and administrative penalties on the part of the offenders under the *Financial Markets Act*. Notably, actual dealing directly, indirectly or through an agent in securities listed on a regulated market by an insider who know that he or she has inside information that relates to such securities or that is likely to affect those securities for personal benefit will give rise to an insider trading offence under the *Financial Markets Act*.[80] However, the adequacy of this provision is marred by the lack of a clear and precise definition of the term "through an agent". This obscurity could still enable some unscrupulous persons to contravene the insider trading prohibition through other persons who are not necessarily "agents" *per se* and escape liability. Additionally, the same obscurity could enable both agents and non-agents that deal on behalf of insiders to escape their insider trading liability. The prohibition is also merely applicable only to securities listed on a regulated market.[81] Thus, actual illicit trading activities that are conducted by insiders or other persons directly, indirectly or through an agent for their own account in securities that are not listed on a regulated market are not expressly prohibited under the *Financial Markets Act*.

Furthermore, an insider who knows that he or she has inside information and who deals directly, indirectly or through an agent for any other person in the securities listed on a regulated market to which such information relates or which are likely to be affected by that information will be liable for an insider trading offence.[82] This prohibition also fails to define the term "through an agent", hence both agents and non-agents that deal on behalf of insiders or other persons could still evade their insider trading liability. Moreover, offenders will only incur liability if they were aware that they had price-sensitive inside information at the time of their dealing. It appears that any actual dealing in non-listed securities that are traded on other trading platforms such as over-the-counter markets (OTC), organised trading facilities (OTFs) and multilateral trading facilities (MTFs) by insiders that have the relevant price-sensitive inside information, on behalf of other

[78] See ss 78 & 82 of the *Financial Markets Act*; see further Osode 2000 *Journal of African Law* 239-263; Luiz and Van Der Linde 2013 *SA Merc LJ* 463-470; Luiz 1999 *SA Merc LJ* 139-145; Botha 1991 *SA Merc LJ* 4-18; Van der Lingen 1997 *FSB Bulletin* 10.

[79] Ss 78 & 82 of the *Financial Markets Act* read with sections 6A-6I of the *Protection of Funds Act*.

[80] See s 78(1) (a).

[81] See s 78(1) (a); generally see Osode 2000 *Journal of African Law* 241, for related comments.

[82] Section 78(2) (a) of the *Financial Markets Act*; see further Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

persons does not expressly amount to insider trading under the *Financial Markets Act*.[83]

Any person who knowingly deals directly or indirectly or through an agent for an insider in listed securities to which the inside information possessed by that insider relates or which are likely to be affected by such information will be liable for insider trading.[84] It appears that this prohibition is aimed at discouraging insiders from committing insider trading offences through other persons. While this is commendable, the tippee or any person that deals on behalf of an insider only incurs liability if his or her dealing was knowingly influenced by the price-sensitive inside information that was possessed by the insider at the time of dealing. In this regard, it is obviously very difficult for the DPP or the FSCA to establish the required causal nexus between the dealing and the inside information in question for the purposes of insider trading offences in most cases. Additionally, the accused person will only incur liability if he or she knew that the person on whose behalf he or she dealt for in the affected securities was actually an insider as defined in the *Financial Markets Act*.[85] It is also not clear whether the prohibition is applicable to fortuitous offenders that accidentally and unknowingly dealt in the affected listed securities for the benefit of insiders with price-sensitive inside information.

Moreover, an insider who knows that he or she has inside information and who unlawfully discloses it to another person commits an insider trading offence in terms of the *Financial Markets Act*.[86] Nonetheless, the use of the words "he or she" and requirement of prior knowledge about the inside information on the part of the offender, could imply that this prohibition is only restricted to individuals. Thus, notwithstanding the fact that juristic persons are also capable of disclosing price-sensitive inside information through their agents, they are not expressly covered by the aforesaid prohibition.[87] Consequently, possible improper disclosure of price-sensitive inside information that relates to listed securities by juristic persons is not expressly prohibited under the *Financial Markets Act*.

An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it will be liable for insider trading.[88] This prohibition is aimed at curbing tipping practices in the South African financial markets. While this is commendable, the fact that the accused person will only incur liability if he or she knew that the information he or she had at the time of "tipping" was inside information may once again result in some

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[83] Section 78(2) (a) of the *Financial Markets Act*.

[84] Section 78(3) (a) of the *Financial Markets Act*.

[85] See s 77, for the definition of "insider".

[86] S 78(4)(a) of the *Financial Markets Act*; also see Luiz and Van Der Linde 2013 *SA Merc LJ* 470; Osode 2000 *Journal of African Law* 242; Chitimira 2016 *Journal of Corporate and Commercial Law & Practice* 24-41, for similar discussion.

[87] S 78(4) (a) of the *Financial Markets Act*.

[88] Section 78(5) of the *Financial Markets Act*; see further Chitimira 2016 *Journal of Corporate and Commercial Law & Practice* 24-41; Osode 2000 *Journal of African Law* 242.

offenders evading liability on the basis that they were ignorant of the price-sensitive nature of such information.[89]

On the contrary, insider trading is currently prohibited under the *Companies Act* 2004 in Namibia.[90] This Act prohibits every director, past director, officer or person who has knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company which, if it is published, may be expected to materially affect the price of the shares or debentures of that company from dealing in any way to his or her advantage, directly or indirectly, in those shares or debentures while that information has not been publicly announced on a stock exchange or in a newspaper or through the medium of the radio or television, or through other electronic media.[91] Ironically, this prohibition is strikingly similar to section 233 of *Companies Act* of South Africa which was repealed owing to its numerous flaws by the *Companies Amendment Act* in 1989. The *Companies Amendment Act* was also flawed, hence it was later repealed by the *Second Companies Amendment Act* in 1990.[92] This implies that most of the flaws that were imbedded in section 233 of the *Companies Act* are still currently duplicated in the Namibian insider trading prohibition. For instance, the current Namibian insider trading prohibition is only applicable to natural persons.[93] Thus, any insider trading activities by companies and other juristic persons are not expressly prohibited under the *Companies Act* 2004. Moreover, the current Namibian insider trading prohibition is also restricted to primary insiders such as directors, past directors and officers of a company. It is also not clear whether the prohibition is applicable to securities listed on a regulated market as well as securities that are traded on other alternative platforms such as OTC, OTFs and MTFs. Additionally, section 241 of the *Companies Act* 2004 does not expressly prohibit the encouraging and discouraging of other persons as well as other forms of improper disclosure of non-public price-sensitive inside information by insiders. As a result, insiders and other offenders could still escape insider trading liability for tipping and improperly disclosing non-public price-sensitive inside information relating to securities in Namibia. Given this background, it appears that the Namibian legislature overlooked the essence of prohibiting tipping and improper disclosure of non-public price sensitive.

However, the position is seemingly going to be different under the *Financial Institutions and Markets Bill* 2012. This Bill provides that actual dealing directly, indirectly or through an agent in securities traded on a regulated market by an insider who knew that he or she had inside information to which the securities relates or which are likely to be affected by it for personal benefit commits an

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[89] See generally Alexander *Insider Dealing and Money Laundering in the EU: Law and Regulation* 66.

[90] See generally s 241 of the *Companies Act* 2004. See also clauses 155; 156 & 160 of the *Financial Institutions and Markets Bill* 2012.

[91] S 241 of the *Companies Act* 2004.

[92] See related comments in paragraph 2 above; paras 44.49, 44.57 of the Van Wyk de Vries *Report*; Cassim 2007 *SA Merc LJ* 56.

[93] S 241 of the *Companies Act* 2004.

offence.[94] Ironically, this provision is relatively similar to section 78(1)(a) of the *Financial Markets Act*. This suggest that most of the flaws that were earlier stated in respect of section 78 (1) (a) of the *Financial Markets Act* are also applicable to clause 156(1) of the *Financial Institutions and Markets Bill* 2012.

Moreover, actual dealing directly, indirectly or through an agent by an insider who has non-public price-sensitive inside information relating to securities that are traded on a regulated market or which is likely to affect those securities for the benefit of another person will be liable of an insider trading offence.[95] Accordingly, the current shortcomings of section 78 (2) (a) of the *Financial Markets Act* that were stated earlier are retained by clause 156 (3) of the *Financial Institutions and Markets Bill* 2012.[96] For instance, this prohibition still fails to define the words "through an agent" and its provisions are only limited to insider trading practices that are related to securities listed on a regulated market.

Additionally, any unlawful and improper disclosure of non-public inside information relating to listed securities is prohibited under the *Financial Institutions and Markets Bill* 2012.[97] For instance, an insider who knows that he or she has inside information and who discloses such information to another commits an offence.[98] However, the *Financial Institutions and Markets Bill* 2012 does not provide adequate guidelines on how non-public price-sensitive inside information can be lawfully disclosed by insiders and/or issuers of securities in the Namibian financial markets. This could give rise to a host of other regulatory challenges. For instance, insiders could escape insider trading liability upon claiming ignorance on how non-public price-sensitive inside information can be properly disclosed in the Namibian financial markets. Additionally, this prohibition resembles section 78 (4) (a) of the *Financial Markets Act*. Consequently, several flaws that were initially stated in respect of section 78 (4) (a) of the *Financial Markets Act*[99] are also retained in clause 156 (5) of the *Financial Institutions and Markets Bill* 2012.

The *Financial Institutions and Markets Bill* 2012 also provide that an insider who encourages another person to deal or who discourages another person from dealing in listed securities while in possession of non-public price-sensitive inside information that relates to such securities will be liable for insider trading.[100] However, although this provision prohibits insiders from tipping, it does not clearly prohibit tippees from dealing on the basis of their tipped information and/or from

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[94] Clause 156 (1) read with clauses 160-162 of the *Financial Institutions and Markets Bill* 2012; see related comments on insider trading regulation by Osode 2000 *Journal of African Law* 241; Luiz and Van Der Linde 2013 *SA Merc LJ* 463.

[95] Clause 156 (3) of the *Financial Institutions and Markets Bill* 2012.

[96] Section 78 (2) (a) of the *Financial Markets Act*; see further Luiz and Van Der Linde 2013 *SA Merc LJ* 465.

[97] See clause 156(5) of the *Financial Institutions and Markets Bill* 2012.

[98] Clause 156(5) of the *Financial Institutions and Markets Bill* 2012.

[99] S 78(4)(a) of the *Financial Markets Act*; also see Luiz and Van Der Linde 2013 *SA Merc LJ* 470; Osode 2000 *Journal of African Law* 242; Chitimira 2016 *Journal of Corporate and Commercial Law & Practice* 24-41, for similar discussion on insider trading regulation in South Africa.

[100] Clause 156 (7) of the *Financial Institutions and Markets Bill* 2012.

committing other insider trading offences. Furthermore, clause 156(7) of the *Financial Institutions and Markets Bill* 2012 has adopted similar shortcomings that were discussed above in respect of section 78(5) of the *Financial Markets Act*. Moreover, unlike the position in South Africa,[101] the *Financial Institutions and Markets Bill* 2012 does not prohibit any dealing in listed securities for an insider by a person who has the relevant non-public inside information that relates to such securities or which is likely to affect those securities. Additionally, it appears that the Namibian legislature blindly adopted and duplicated most of the *Financial Markets Act*'s current insider trading provisions. This follows the fact that most of the flaws embedded in the *Financial Markets Act* appears to be also embedded in the *Financial Institutions and Markets Bill* 2012. Nonetheless, in light of the aforesaid flaws, it is evident that South Africa has established a relatively more adequate and stronger anti-insider trading regulatory framework than that which is currently employed in Namibia. Accordingly, the authors submit that some of the provisions of the *Financial Markets Act* should be carefully integrated in the *Financial Institutions and Markets Bill* 2012 to enhance the prohibition of insider trading in Namibia when this Bill is passed into law.

4.3 Available penalties

In South Africa, insider trading offenders will incur civil, criminal and administrative penalties.[102] Notably, insider trading offenders are liable to pay a fine not exceeding R50 million or imprisonment for a period not exceeding ten years or both the fine and imprisonment.[103] The criminal and civil sanctions for insider trading are exclusively provided under the *Financial Markets Act*.[104] Additionally, the adjudication of all insider trading cases is primarily vested in the courts. In light of this, it must be noted that the FSCA will only prosecute insider trading cases if the DPP declines to prosecute such cases.[105] Thus, the FSCA has restricted prosecutorial authority in respect of insider trading cases under the *Financial Markets Act*. However, no such authority is statutorily given to the FSCA in terms of the *Financial Sector Regulation Act*.[106] The authors also submit that the current criminal penalties for insider trading are relatively low and insufficient to discourage all perpetrators of insider trading offences. This follows the fact that offenders could make huge profits from their insider trading activities and afford to pay the prescribed fine and/or to go to jail without necessarily forfeiting their illicitly gained profits. Furthermore, the high evidentiary burden of

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[101] Section 78 (3) (a) of the *Financial Markets Act*.

[102] See ss 82; 109(a) read with ss 84 & 85 of the *Financial Markets Act*; ss 6A-6I of the *Protection of Funds Act*; ss 56-75 of the *Financial Sector Regulation Act* & also see related comments by Chitimira 2014 *Mediterranean Journal of Social Sciences* 119-133.

[103] S 109 (a) of the *Financial Markets Act*; see further related comments by McGee *Corporate Governance in Transition Economies* 53-69.

[104] See ss 109(a) and 82 respectively.

[105] S 84 (10).

[106] S 58.

proof required in criminal cases of insider trading has contributed to the current paucity of successful prosecutions achieved in such cases by the South African courts. This could have been exacerbated by the absence of separate and distinct insider trading criminal penalties for individuals and juristic persons that are found guilty of insider trading offences. For example, the *Financial Markets Act* does not provide separate and distinct criminal penalties for insiders or other persons that commit insider trading for their own account, or for other persons' account and/or those that merely encourage or discourage others from dealing in the affected listed securities while armed with non-public price-sensitive inside information. This argument stems from the fact that the nature of the stated insider trading offences is different.

Likewise, administrative sanctions for insider trading are provided under both the *Financial Markets Act*[107] and the *Protection of Funds Act*.[108] Precisely, the *Financial Markets Act* provides that any person guilty of insider trading is liable to pay a civil and/or administrative sanction not exceeding the profit made or that would have been made had that person dealt in the affected transaction or the loss avoided in respect thereof.[109] Furthermore, insider trading offenders will incur administrative sanctions such as the R1 million fine plus an additional amount not exceeding the profit made or would have been made or the loss avoided by the offenders as well as interest and legal costs as determined by the relevant committees of the FSCA.[110] These civil and administrative sanctions may also be imposed against the offenders under the *Protection of Funds Act*.[111] To date, a considerable number of settlements have been obtained by the relevant authorities in some civil and administrative cases of insider trading. While this is commendable for the purposes of enhancing market integrity,[112] it remains to be seen whether the introduction of the FSCA will increase the civil and administrative settlements of insider trading cases in South Africa.

On the other hand, the *Companies Act* 2004 provides that insider trading offenders are liable to pay a fine of N$8 000 or imprisonment for a period not exceeding 2 years or both the fine and imprisonment in Namibia.[113] Thus, the current Namibian anti-insider trading laws only impose criminal penalties against the offenders. Moreover, these penalties are very minimal for deterrence purposes. The *Companies Act* 2004 also fails to provide separate and distinct criminal penalties for individuals and juristic persons. Given this status *quo*, it is submitted that the *Companies Act* 2004 should be amended to introduce civil and

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[107] See s 82.
[108] See ss 6A-6I.
[109] S 82 (1) (a).
[110] S 82(1) read with subsections (2)-(8). See related comments by Chitimira *Enforcement of Market Abuse Provisions* 14-15.
[111] See ss 6A-6I. See Cassim 2007 *SA Merc LJ* 68-70, for further related discussion.
[112] See related comments by Schindler M *Rumors in Financial Markets* 37-79.
[113] S 241 of the *Companies Act* 2004; see further Haoseb *Regulation of the Offence of Insider Trading* 10.

administrative sanctions for insider trading.[114] However, it is encouraging to note that civil penalties for insider trading are now provided under the *Financial Institutions and Markets Bill* 2012.[115] For instance, this Bill provides that any person or insider that commits insider trading for his or her own account and fails to rely on the available defences[116] is liable to pay to Namibia Financial Institutions Supervisory Authority (NAMFISA), the equivalent of the profit made or loss avoided; a penalty for compensatory and punitive purposes; interest and legal costs as determined by the High Court.[117] Similar penalties, legal costs and commissions are imposed on any person or insider that commits insider trading for another person's account[118] and fails to rely on the available defences.[119] The same penalties are imposed on any person that discloses non-public price-sensitive inside information to another person[120] and fails to rely on the available defences.[121] Relatively same penalties are further imposed on any person that encourages another person to deal in listed securities while in possession of non-public price-sensitive information.[122] Nevertheless, it appears that those that discourage others from dealing in listed securities are exempted from insider trading liability. Interestingly, insiders are jointly and severally liable with their tippees to pay the stated civil penalties to the NAMFISA.[123] While these civil sanctions are welcome, their potential success remains subject to the coming into effect of the *Financial Institutions and Markets Bill* 2012 and its effective enforcement thereafter. Furthermore, the *Financial Institutions and Markets Bill* 2012 does not expressly empower the NAMFISA to impose its own additional administrative sanctions against the offenders. Reliance on criminal and civil penalties alone could still be insufficient to effectively combat insider trading in Namibia. It is submitted that the *Financial Institutions and Markets Bill* 2012 should be amended in line with the position in South Africa to introduce administrative penalties and other anti-insider trading enforcement approaches for the purposes of enhancing the combating in insider trading in the Namibian financial markets.[124] Put differently, all types of penalties such as civil, criminal and administrative penalties should be used interchangeably to increase the combating of insider trading in Namibia. Given this background and some settlements that have been obtained by the relevant authorities in South Africa to date, it could be concluded that the current South African insider trading penalties are enforced more effectively than those of

[114] S 241 of the *Companies Act* 2004. See related comments by Haoseb *Regulation of the Offence of Insider Trading* 10.
[115] Clause 160 read with clauses161-164.
[116] See clause 156(2).
[117] See clause 160(1) & (2).
[118] See clause 160(3) & (4).
[119] See clause 156(4).
[120] See clause 160(5) & (6).
[121] See clause 156(6).
[122] See clause 160(7).
[123] See clause 160(8).
[124] Chitimira *Enforcement of Market Abuse Provisions* 117.

Namibia. To this end, Namibia could take some lessons from the South African insider trading regulatory regime to enhance the curbing of insider trading in the Namibian financial markets.

4.4 Defences

The *Financial Markets Act* provides some defences to protect any persons that allegedly commit insider trading *bona fide* and/or unwittingly. Such persons will only escape liability when they prove on a balance of probabilities any of the defences that are enumerated in the *Financial Markets Act*.[125] For instance, an insider that allegedly committed insider trading for his or her account will evade liability if he or she proves on a balance of probabilities that he or she only became an insider after giving the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider.[126] However, the *Financial Markets Act* does not clearly state other instances where such instruction could be lawfully given to authorised users by insiders for them to avoid insider trading liability. Moreover, an insider could escape liability if he or she can prove that he or she was acting in pursuit of a transaction in respect of which all the parties to the transaction were in possession of the same inside information.[127] This defence is aimed at promoting lawful conclusion of contracts and/or financial transactions between the parties in possession of the same non-public inside information. The alleged offender could further escape liability if he or she proves that the trading in the affected securities was restricted to parties with the same inside information and those parties did not necessarily secure any benefit from such trading.[128] In this regard, it appears that perpetrators of insider trading could escape liability as long as they did not receive any personal benefit from such trading. The aforesaid defences are also available to an insider that allegedly committed insider trading for the account of another person.[129] Likewise, any person that allegedly committed insider trading for an insider could escape liability if he or she relies on the same defences.[130]

Moreover, the accused could escape liability if he or she prove, on a balance of probabilities, that he or she is an authorised user that acted on specific instructions from a client unaware that the client was an insider at the time of dealing.[131] Nevertheless, negligent insiders who failed to take reasonable steps to determine whether their clients were insiders at the time of dealing could still incur liability for insider trading.

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[125] S 78 of the *Financial Markets Act*; see further Jooste 2000 *SALJ* 296.
[126] S 78 (1) (b) (i) of the *Financial Markets Act*; see further Cassim *et al Contemporary Company Law* 958.
[127] S 78(1) (b)(ii)*(aa)* of the *Financial Markets Act*.
[128] S 78(1) (b)(ii)*(bb)* & *(cc)* of the *Financial Markets Act*.
[129] S 78(2) (b)(ii) & (iii) of the *Financial Markets Act*.
[130] S 78(2) (b)(ii) & (iii) read with (3)(a) & (b) of the *Financial Markets Act*.
[131] S 78(2) (b)(i) of the *Financial Markets Act*; also see Osode 2000 *Journal of African Law* 251.

An insider may evade insider trading liability if he or she prove that the inside information that he or she disclosed was necessary for the proper performance of the functions of his or her employment, office or profession.[132] The insider must also prove that the disclosed inside information was not related to any dealing in the affected listed securities to avoid insider trading liability. The insider must further prove that he or she disclosed to all the relevant persons that the information in question was inside information.[133] Accordingly, offenders could escape liability if they prove that they were not aware that the information they disclosed was inside information. This defence was aimed at protecting *bona fide* disclosures made by insiders in the course of their employment. However, the absence of the definition of the term "proper performance" could lead to the abuse of this defence by some insiders unwittingly. Furthermore, the *Financial Markets Act* does not expressly provide defences for those that encourage or discourage others from dealing in listed securities on the basis of non-public inside information.[134]

On the contrary, the *Companies Act* 2004 does not provide any defences for insider trading.[135] This suggests that the accused persons may not statutorily rely on any defences to avoid insider trading liability even if they inadvertently commit insider trading offences in Namibia. Furthermore, this implies that even those who committed insider trading while acting *bona fide* and in the proper performance of their office or employment functions will incur insider trading liability. Nonetheless, some defences for insider trading are provided under the *Financial Institutions and Markets Bill* 2012. For instance, an insider that allegedly committed insider trading for his or her account will evade liability if he or she proves on a balance of probabilities any of the defences enumerated in clause 156(2) of the *Financial Institutions and Markets Bill* 2012. Notably, some of these defences are similar to those provided under the *Financial Markets Act*.[136] Therefore, similar flaws discussed in respect of the related South African defence are also applicable to clause 156(2)(b) of the *Financial Institutions and Markets Bill* 2012. However, unlike the *Financial Markets Act*,[137] the *Financial Institutions and Markets Bill* 2012 provides that an insider could escape insider trading liability if he or she proves on a balance of probabilities that he or she was acting in pursuit of the completion of an "affected transaction" as defined in the same Bill.[138] Nonetheless, although the term "affected transaction" is broadly defined in the *Financial Institutions and Markets Bill* 2012,[139] its definition does not stipulate how insider trading affects such transactions. On the other hand, an insider that commits insider trading for another person may escape liability if he or she prove

[132] S 78(4)(b) of the *Financial Markets Act*; see further Osode 2000 *Journal of African Law* 252.
[133] *Idem.*
[134] S 78(5) of the *Financial Markets Act*.
[135] S 241.
[136] S 78(1)(b)(i).
[137] S 78(1)(b).
[138] Clause 156(2)(a) read with clause 155.
[139] Clause 155.

on a balance of probabilities that he or she only became an insider after giving the instruction to deal to a registered user and the instruction was not changed in any manner thereafter.[140] The same insider could avoid insider trading liability if he or she proves that he or she is a registered authorised representative of a registered authorised user or registered securities dealer and was acting on specific instructions from a client, except where the inside information was disclosed to him or her by that client.[141] This defence could be abused by insiders that collude with their clients not to disclose the price-sensitive nature of the inside information in question to other relevant persons.

The offenders could also evade insider trading liability if they prove that they were acting on behalf of a public sector body in pursuance of monetary policy, policies in respect of exchange rates, the management of public debt or external exchange reserves.[142] This defence is probably aimed at helping insiders that inadvertently contravened the insider trading provisions while conducting their national duties in the public interest. No similar defence is found in the *Financial Markets Act* in South Africa. However, like the position under the *Financial Markets Act*,[143] the *Financial Institutions and Markets Bill* 2012 provides that an insider that unlawfully disclose non-public inside information to another may avoid insider trading liability if he or she prove that the inside information that he or she disclosed was necessary for the proper performance of the functions of his or her employment, office or profession.[144] Consequently, the flaws discussed above in respect of the South African defences applies to this defence. In this regard, it seems the Namibian legislature has blindly followed the South African approach on insider trading defences. Thus, numerous shortcomings entrenched in the *Financial Markets Act* are also imbedded in the *Financial Institutions and Markets Bill* 2012.

5. Concluding remarks

As discussed above, it is clear that both the South African and Namibian anti-insider trading regulatory frameworks have some shortcomings in respect of the detection, investigation, prosecution and settlement of insider trading offences in their respective jurisdictions. For instance, both the Namibian and South African insider trading laws do not expressly define the concept of insider trading and other related key definitions.[145] Both the *Companies Act* 2004 and the *Financial Markets Act* do not provide separate and distinct criminal penalties for individuals and juristic persons. Moreover, both the Namibian and South African insider trading laws do not provide robust criminal penalties for deterrence purposes. However,

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[140] Clause 156(4)(d) read with clause 156(3) of the *Financial Institutions and Markets Bill* 2012.
[141] Clause 156(4)(a) read with clause 156(3) of the *Financial Institutions and Markets Bill* 2012.
[142] Clause 156(4)(b) read with clause 156(3) of the *Financial Institutions and Markets Bill* 2012.
[143] S 78(4)(b) of the *Financial Markets Act*; see further Osode 2000 *Journal of African Law* 252.
[144] Clause 156(6) read with clause 156(5) of the *Financial Institutions and Markets Bill* 2012.
[145] See paragraphs 2-4 above.

unlike the position in South Africa, the current Namibian insider trading laws do not provide administrative penalties and other measures that could be imposed against the offenders.[146] The current Namibian insider trading regulatory framework does not provide civil sanctions as well as the defences for the suspected offenders. Furthermore, there appears to be no provisions in the *Companies Act* 2004 that deal with other related insider trading practices such as front running. In this regard, it is submitted that both the *Companies Act* 2004 and the *Financial Markets Act* should be amended to expressly provide separate and distinct criminal penalties for individuals and juristic persons. Both these Acts should be amended to expressly define the concept of insider trading and other key definitions. This could enhance the combating of insider trading in the Namibian and South African financial markets. Moreover, although the South African insider trading regulatory framework has its own flaws, it is submitted that Namibia should consider following the South African anti-insider trading regulatory approaches since they are relatively comparable to the international best practices. In this regard, like position in South Africa, Namibia should consider introducing civil and administrative penalties and/or other measures to curb insider trading in its regulated financial markets. The *Companies Act* 2004 of Namibia should also be amended in line with the *Financial Markets Act* of South Africa to enact adequate provisions that prohibits all persons (individuals and juristic persons) and provide defences that can be utilised by the suspected insider trading offenders. The *Companies Act* 2004 should also be amended in line with the *Financial Markets Act* to enact provisions that prohibits all primary, secondary and fortuitous insiders from committing insider trading. The other option is to ensure that the *Financial Institutions and Markets Bill* 2012 is speedily passed into law to enhance the combating of insider trading in Namibia.

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List of abbreviations:

DMA	Directorate of Market Abuse
DPP	Director of Public Prosecutions
EC	Enforcement Committee
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
ITD	Insider Trading Directorate
JSE	Johannesburg Stock Exchange Limited
NAMFISA	Namibia Financial Institutions Supervisory Authority
PA	Prudential Authority
SADC	Southern African Development Community
SA Merc LJ	South African Mercantile Law Journal
SRP	Securities Regulation Panel