

OVERVIEW OF SELECTED ROLE-PLAYERS IN THE DETECTION AND ENFORCEMENT OF MARKET ABUSE CASES AND APPEALS IN SOUTH AFRICA

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1 INTRODUCTION

It is generally accepted that there is no comprehensive and satisfactory definition of “market abuse” that exists to date.¹ However, for the purposes of this article “market abuse” is used as a generic term referring to insider trading and market manipulation.² South Africa had anti-market abuse legislation in place since the late 1990s but nonetheless the enforcement of such legislation to combat market abuse activities has been inconsistent and problematic to date.³ It is against this background that this article analyses the role and effectiveness of selected key role-players that primarily deals with the detection of market abuse cases and the enforcement of appeals involving such cases in South Africa, namely, the Board of Appeal, the Johannesburg Stock Exchange Limited⁴ and the courts in order to increase awareness on the part of the general public, policy makers and other relevant stakeholders. In this regard, the article examines whether the relevant market abuse provisions are being effectively implemented by the role-players to detect and combat market abuse activities in the South African financial markets. Consequently, the article provides an overview analysis on the roles and distinct functions of the Board of Appeal (BOA),⁵ the JSE and the courts in the detection of market abuse practices and the enforcement of appeals involving such practices

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¹ See further Fischel & Ross “Should the Law Prohibit ‘Market Manipulation’ in Financial Markets” 1991 *Harvard Law Review* 503 506 & Avgouleas *The Mechanics and Regulation of Market Abuse: A legal and Economic Analysis* (2005) 104.

² These practices are outlawed in South Africa and several other countries globally in a bid to, *inter alia*, avoid their potential negative effects such as low investor confidence and poor market integrity.

³ Jooste “A critique of the insider trading provisions of the 2004 Securities Services Act” 2006 *SALJ* 437 441–460; Osode “The new South African Insider Trading Act: Sound law reform or legislative overkill?” 2000 *Journal of African Law* 239 239; Van Deventer “New watchdog for insider trading” 1999 *FSB Bulletin* 2 3; the King Task Group into Insider Trading Legislation *Minority Report on Insider Trading* 1997 para 3.4 as summarised in Beuthin & Luiz *Beuthin’s Basic Company Law* 3 ed (2000) 235–238; also see generally Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-dissertation, University of Fort Hare, 2008) 41–72.

⁴ Hereinafter referred to as the JSE.

⁵ It should be noted that for the purposes of this article, the term BOA is synonymously used to refer also to the “Appeal Board”.

in South Africa. Notably, other key role-players that primarily deal with the investigation, prevention and enforcement of the market abuse prohibition in South Africa, namely, the Financial Services Board (FSB), the Directorate of Market Abuse (DMA) and the Enforcement Committee (EC) will not be analysed in this article.⁶

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2.1 The Role of the JSE

The JSE⁷ plays a pivotal role in the detection, investigation and prevention of market abuse in South Africa.⁸ Specifically, the JSE has a Market Practices Department and a Surveillance

⁶ Notwithstanding the fact that the FSB, the DMA and the EC have an important and/or key role in the enforcement of market abuse ban in South Africa, these role-players were not considered in this article because they were extensively dealt with in Chitimira & Lawack “Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa” 2013 *Obiter* 200 200-217. Put differently, it was *inter alia* noted in Chitimira & Lawack 2013 *Obiter* 200-217, that the relevant courts, the JSE, the BOA, the FSB, the DMA and the EC all have inter-related and distinct functions with regard to the enforcement of the market abuse ban in South Africa. For instance, it was noted that the FSB depends on the DMA to investigate market abuse practices and the JSE’s Surveillance Division to detect the occurrence of such practices in the South African financial markets and listed companies. Likewise, it was stated that the FSB relies on the BOA to hear appeal cases of market abuse as well as the EC to impose unlimited administrative sanctions against the market abuse offenders in South Africa. See Luiz “Market Abuse and the Enforcement Committee” 2011 *SA Merc LJ* 151 151-172. On the other hand, it was acknowledged that although the FSB polices the enforcement of the market abuse ban, it may only prosecute criminal cases of market abuse in a competent court if the Director of Public Prosecutions (DPP) declines or neglects to prosecute them.

⁷ Notably, the JSE is an independent licensed exchange which regulates itself for the purposes of, *inter alia*, overseeing the listing and/or trading of securities on a regulated market by the relevant persons in South Africa. Generally see ss 7 to 12 of the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act, which deals with the requirements and other functions of a licenced exchange in South Africa. Put differently, the JSE is not regulated by the FSB, and consequently, the anti-market abuse co-operative relationship between the FSB and the JSE is governed by this *status quo*. For instance, the FSB usually investigate market abuse cases through the DMA, only after referral from the JSE. See generally the FSB *Annual Report* 2011 4 99-101; the FSB *Annual Report* 2013 3 128-130; Chitimira & Lawack 2013 *Obiter* 200-217 & Luiz 2011 *SA Merc LJ* 151-172 for further related analysis on the role and anti-market abuse enforcement efforts of the FSB.

⁸ See the JSE “Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)” in the *Insider Trading Booklet*, (2013) 23; 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser “Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)” in the *Insider Trading Booklet* final draft (02-10-2006) 24; 25-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013). Notwithstanding the fact that this Loubser report was published in 2006, it shall be referred to in this article where necessary, not as the only basis or evidence of the existence of market abuse activity in the South African financial markets but as a pointer on how market abuse activities are detected and discouraged in South Africa. Moreover, the Loubser report and a few other selected and available reports and/or sources will be referred to throughout this article because there are currently very few new sources on the regulation and enforcement of the market abuse prohibition in South Africa, especially under the Financial Markets Act.

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Division⁹ which is mainly responsible for preventing and detecting market abuse activities.¹⁰ With regard to prevention, the JSE requires all the listed companies to promptly disclose non-public price-sensitive information relating to any securities in order to, *inter alia*, minimise the occurrence of market abuse activities.¹¹ This is done by ensuring that all the listed companies comply with the JSE Listing Requirements relating to the disclosure of non-public price-sensitive information.¹² For example, the JSE imposes a general obligation of disclosure on all the issuers of securities to make a public announcement, through the JSE's Securities Exchange News Service, of any developments or activities that might result in a material effect on the price of the issuer's listed securities.¹³

The JSE further requires, except for trading statements,¹⁴ that an issuer must immediately, unless the information is kept confidential for a limited period,¹⁵ release an announcement providing details of any developments in such issuer's activities that are not publicly known¹⁶ and which might lead to material movements of the reference price of such issuer's listed securities or illicit market abuse practices. All issuers other than those who publish quarterly results must comply with the JSE's disclosure requirements.¹⁷ All issuers are further required to publish a trading statement as soon they are satisfied that a reasonable degree of certainty exists that the financial results for a period to be reported upon next will differ by at least 20% from the most recent of the financial results for a previous corresponding period or of a profit forecast previously provided to the market in relation to such a period in order to curb market abuse activities.¹⁸ The determination of a reasonable degree of certainty referred above is a judgmental decision taken by the issuer and its directors, excluding the JSE itself.¹⁹ However,

⁹ This is now also known as the Market Regulation Division. See the JSE (2013) 23; 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014).

¹⁰ Loubser (02-10-2006) 24; 25-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013); also see similar discussion by the JSE (2013) 23; 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014).

¹¹ Loubser (02-10-2006) 9-17; 22; 24; 25-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013); also see similar discussion by the JSE (2013) 8-15; 21; 23; 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014).

¹² See generally s 3 of the JSE Listing Requirements.

¹³ See s 3.4 of the JSE Listing Requirements.

¹⁴ See s 3.4(b) of the JSE Listing Requirements.

¹⁵ See s 3.6 of the JSE Listing Requirements.

¹⁶ See s 3.4(a) of the JSE Listing Requirements.

¹⁷ See s 3.4(b)(i) to (vi) of the JSE Listing Requirements.

¹⁸ See s 3.4(b)(i) of the JSE Listing Requirements.

¹⁹ See s 3.4(b)(ii) of the JSE Listing Requirements.

the JSE provides procedures that must be followed during and after the publication of the trading statements by the issuers to enhance the accurate dissemination of price-sensitive information for the purposes of combating market abuse practices.²⁰ For instance, the JSE provides that price-sensitive confidential information may not be released to any third party, an analyst, printer or media during the JSE's trading hours until it is published in accordance with or outside of the JSE's trading hours or until such information has been authenticated or proved²¹ and arrangements have been made before the next business day's opening of the JSE's trading hours.²²

Above and beyond, price-sensitive information may only, in the strictest confidence, be disclosed to persons such as government departments, the South African Reserve Bank (SARB), the Takeover Regulation Panel (TRP), the FSB, investment analysts or any other statutory or regulatory body and may not be published unless there is a breach of confidentiality and the market is made aware of such information.²³ Nonetheless, it is submitted that the JSE should continue to adopt a robust approach as regards the dissemination of price-sensitive information to discourage its potential illicit use by the aforementioned persons and other unscrupulous market abuse offenders.

The JSE also requires issuers to disclose cautionary announcements and periodic financial information regarding their listed securities.²⁴ More to the point, issuers must, by way of notice and in writing, inform the JSE immediately of any proportion of the listed securities in the hands of the public which might have been affected or fallen below shareholder spread requirements.²⁵ This is probably done to combat insider trading and market manipulation. Issuers must yet again disclose all relevant information to holders of securities to enable them to exercise their rights.²⁶ Furthermore, issuers must disclose all the details of their transactions in securities relating to the issuer by or on behalf of the director, company secretary, any associate of the issuer or any independent entity, if such issuer may derive a beneficial interest.²⁷ Issuers who fail to comply with these disclosure requirements, especially to those that deal with the disclosure of annual financial statements, may risk suspension or possible

²⁰ See further s 3.4(b)(vii) to (viii) of the JSE Listing Requirements.

²¹ See paras 6; 7 & 8 of schedule 19 of the JSE Listing Requirements.

²² This provision is subject to s 3.6 to s 3.8 of the JSE Listing Requirements.

²³ See s 3.6 to s 3.8 of the JSE Listing Requirements.

²⁴ See s 3.9; s 3.11 & s 3.12 to s 3.22 of the JSE Listing Requirements.

²⁵ See s 3.42 & s 3.43 of the JSE Listing Requirements.

²⁶ See s 3.44 of the JSE Listing Requirements.

²⁷ See also para 3.83 of the JSE Listing Requirements.

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termination or delay of their securities from the JSE.²⁸ Nevertheless, the JSE is not statutorily empowered to prosecute or impose its own market abuse penalties against the offenders.

With regard to detection, the JSE's Market Regulation Division has in place a number of sophisticated proprietary surveillance systems that are specifically designed to detect suspicious trading volumes and price movements which could be indicative of insider trading or market manipulation.²⁹ These sophisticated surveillance systems are reportedly capable of identifying the names, addresses, telephone numbers and other details of the parties involved in the transactions.³⁰ Precisely, the staff in the Market Practices Department of the JSE's Market Regulation Division is specifically responsible for detecting any signs of market abuses using such surveillance systems which are updated every 30 minutes.³¹ Additionally, the staff in the Market Practices Department of the JSE's Market Regulation Division may analyse the trading history of any account holder in relation to a particular security to detect unusual trading patterns which could be a sign of insider trading activity or market manipulation.³² In other words, trading through different accounts at different brokerage firms can be linked, as well as accounts with similar details, such as addresses and telephone numbers to prevent market abuse practices.

Where suspicious trading is detected and there appears to be no clarity on the cause, surveillance officers may contact the directors of the affected listed company to find out whether they are aware of any price-sensitive information that is due to be made public. If this is the case, the company concerned is requested to make a relevant announcement as soon as possible through the JSE's Securities Exchange News Service. The detected unusual

²⁸ See s 3.23 of the JSE Listing Requirements.

²⁹ See Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Merc LJ* 177 196–198; see further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³⁰ See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24; 25-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³¹ See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³² See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

trading activity may further be reported to the DMA for further investigation.³³ Irrespective of this, the Financial Markets Act³⁴ does not clearly provide whether the JSE's Market Regulation Division is statutorily obliged to report incidences of market abuse to the DMA. Conspicuously, this flaw was also embedded in the Securities Services Act³⁵ and is still not addressed in the Financial Markets Act. When the publication of the suspicious trading announcement is delayed or not done, the JSE may stop trading in the affected company's shares until the announcement has been made to prevent market abuse activities.³⁶ Where the published announcements affect or may affect the prices of the listed securities, the JSE's Market Regulation Division examines the trading activity prior to the announcements to investigate whether there is evidence of possible market abuse.³⁷

Notwithstanding the fact that the JSE and the FSB have a relatively good co-operation,³⁸ the author submit that more may still need to be done to ensure that such co-operation continues to be utilised to combat market abuse activity in South Africa. In light of this, such co-operation could be further impeded by the absence of a provision in the Financial Markets Act,³⁹ which statutorily obliges the JSE's Market Regulation Division to report incidences of

³³ See Chitimira & Lawack 2013 *Obiter* 200-217 & Luiz 2011 *SA Merc LJ* 151-172 for related analysis on the role of the FSB, the DMA and the EC. See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³⁴ See the functions of the DMA as contained in s 85.

³⁵ 36 of 2004, hereinafter referred to as the Securities Services Act, see s 83. This Act is now repealed and will only be referred to where necessary for historical comparative purposes since there are currently very few sources on the regulation of market abuse under the Financial Markets Act.

³⁶ See Chitimira & Lawack 2013 *Obiter* 200-217 & Luiz 2011 *SA Merc LJ* 151-172 for related analysis on the role of the FSB, the DMA and the EC. See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³⁷ See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013).

³⁸ See further the JSE (2013) 23-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sflb.ashx (accessed 03-03-2014); Loubser (02-10-2006) 24-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013); also see generally Van Deventer "Harnessing Administrative Law in Encouraging Compliance" 2009 *FSB Bulletin* 3 3-4; Chitimira & Lawack 2013 *Obiter* 200-217 & Luiz 2011 *SA Merc LJ* 151-172 for related analysis on the role of the FSB, the DMA and the EC.

³⁹ See s 84 & other relevant provisions under Chapter X entitled "Market Abuse" and this could indicate that that the JSE's Market Regulation Division is not statutorily and expressly required to co-operate or report incidences of market abuse to the FSB or the DMA under the Financial Markets Act.

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market abuse to the FSB. Moreover, the FSB does not have its own market abuse surveillance systems in place to compliment the anti-market abuse enforcement efforts of the JSE.

2.2 The Role of the BOA

The BOA is an independent body established⁴⁰ to hear and afford all the aggrieved persons an opportunity to appeal or lodge their complaints against any decisions of the Registrar of Securities Services⁴¹ or the FSB executive officer regarding market abuse for them to be addressed. For example, under the Financial Markets Act,⁴² a person aggrieved by any decision of the Registrar of Securities Services may appeal to the BOA for further adjudication. Likewise, any person aggrieved by the decision of the claims officer as contemplated in the Financial Markets Act⁴³ may apply to the BOA for a redress. Even so, such an appeal must be consistent with the relevant provisions of the Financial Markets Act.⁴⁴ Apart from changing the name of the BOA to Appeal Board,⁴⁵ the Financial Markets Act retains substantially the same functions of this body.⁴⁶ For instance, all the persons aggrieved by any decision of the Registrar of Securities Services, independent clearing house, an exchange, claims officer and the central securities depository may now appeal or lodge their complaints with the Appeal Board under the Financial Markets Act.⁴⁷

⁴⁰ See s 26A of the Financial Services Board Act 97 of 1990, hereinafter referred to as the Financial Services Board Act.

⁴¹ See s 105(1)(a) of the Financial Markets Act. Notably, those aggrieved by the EC's determinations may now appeal to the High Court, (not to the BOA), as indicated in s 6F of the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended, hereinafter referred to as the Protection of Funds Act. However, notwithstanding the fact that s 111(1)(b) of the Securities Services Act which previously enabled persons aggrieved by the EC's determinations to appeal to BOA was repealed in 2008 it remains to be seen whether the High Courts will timeously hear such appeals given the pressure and everlasting backlog that exists in our courts. See generally the FSB *Annual Report* 2011 99-101 & the FSB *Annual Report* 2013 128-130 which, *inter alia*, shows the new and completed investigations, related issues on administrative penalties and/or appeals of market abuse cases in 2011 and 2013 respectively. Also see Luiz 2011 *SA Merc LJ* 155-172 for further related comments on the role of the BOA and the EC.

⁴² S 105(1)(a).

⁴³ S 105(1)(j) read with s 82. This status quo was recycled from s 111(1)(i) read with s 77 of the Securities Services Act without providing adequate guidelines on how the claims officer may exercise his or her discretion in market abuse-related matters under s 82 of the Financial Markets Act.

⁴⁴ S 105.

⁴⁵ S 1 of the Financial Markets Act.

⁴⁶ See s 105 of the Financial Markets Act which merely re-introduced most provisions that were previously contained in s 111 of the Securities Services Act without providing any alternative measures that could be employed by the relevant persons in market abuse appeal proceedings of the BOA to promote the timeous and fair settlement of such proceedings.

⁴⁷ S 105.

The BOA hearings must be conducted in public unless such publication will be contrary to the relevant provisions of the Financial Services Board Act⁴⁸ and/or the Financial Markets Act or there are exceptional circumstances that justify the keeping of the proceedings and final decision confidential. Nonetheless, unlike the previous position under the repealed Securities Services Act⁴⁹ where a similar provision was made; there is no such provision in the Financial Markets Act.⁵⁰ Moreover, the aggrieved person's appeal must be in writing, stating the person's telephone numbers, residential address and business address and particulars of the decision that is being appealed against.⁵¹ Such appeal must be accompanied with a R1000 appeal and/or administration fee.⁵² This suggests that the lodging of any appeal to the BOA by the aggrieved persons is not free of charge.

After the appeal has been lodged, the secretary of the BOA must without delay furnish a copy of the appeal to the decision-maker.⁵³ Thereafter, the decision-maker must within 30 days of receiving a copy of the appeal, furnish the reasons for the relevant decision against which an appeal was lodged in writing to the secretary of the BOA who must then inform or remit a copy thereof to the appellant (aggrieved person) as soon as possible.⁵⁴ The appellant must within 30 days of receiving a written copy of the reasons for the decision, deliver a written notice of appeal containing full particulars and details of the grounds of appeal to the secretary of the BOA.⁵⁵ Nonetheless, if the appellant fails to deliver a written notice of appeal within the stipulated time of 30 days, the appeal will lapse.⁵⁶ The secretary of the BOA must furnish the decision-maker with a copy of the appellant's most recent notice of appeal.⁵⁷ In addition, the secretary of the BOA must prepare a detailed report or record, if any, of the relevant proceedings during which the decision under appeal was taken.⁵⁸ Thereafter, the secretary of the BOA must inform or furnish the appellant with a copy of such report or

⁴⁸ S 26B(9) read with subsec (18). Nevertheless, neither the Financial Services Board Act nor the Financial Markets Act expressly provides whether the Registrar of Securities Services is obliged to act as the respondent where an appeal is lodged in the High Court against a decision of the EC.

⁴⁹ S 111(2).

⁵⁰ S 105 read with s 88.

⁵¹ See s 2(1)(a) & (b) of the National Treasury's Financial Services Board Act 97 of 1990: Regulations in Respect of Appeals to Appeal Board GN R 605 in GG 34475 of 22-07-2011, hereinafter referred to as the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵² S 2(1)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵³ S 2(2) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵⁴ S 2(3) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵⁵ S 2(4)(a) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵⁶ S 2(4)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵⁷ S 2(5)(a) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁵⁸ S 2(5)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

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record.⁵⁹ This is probably aimed at affording the appellant a chance to analyse such report in order to reconcile with his own version of facts before the commencement of the appeal hearing proceedings.

Moreover, after the date, time and place for the appeal hearing has been set, established and/or fixed,⁶⁰ the secretary of the BOA must submit the originals of all the relevant documents to the BOA.⁶¹ It is submitted that this is probably aimed at the promotion of equality and fairness among all the relevant parties concerned. It is further submitted that the furnishing of originals of all the relevant documents to the BOA could also help all the relevant parties to examine such documents and reconcile with their own copies before the commencement of any appeal hearing proceedings to promote transparency, equality and fairness among the parties concerned.⁶² The furnishing of originals of all the relevant documents to the BOA could also have been targeted at curbing the challenges associated with any of the parties to the appeal denying all or some of the documents or facts of what occurred during the appeal proceedings in question.⁶³ However, it is not clear whether the appellant will be allowed to lodge a further appeal to the relevant courts after the aforesaid lapse of the initial appeal proceedings.⁶⁴ Apparently, the appeal proceedings will not lapse if the decision-maker fails to furnish the reasons for the relevant decision against which an appeal was lodged in writing to the secretary of the BOA within the stipulated 30 days of receiving a copy of the appellant's appeal.⁶⁵ In relation to this, there appears to be no requirements or exceptions where the appeal proceedings may be re-lodged with the BOA after the lapse of the initial appeal proceedings.⁶⁶ It is submitted that the BOA should consider formulating adequate conditions for the exceptions where the appeal proceedings may, in some relevant instances, be re-lodged with the BOA after the lapse of the initial appeal

⁵⁹ S 2(5)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶⁰ See s 26B(6) of the Financial Services Board Act.

⁶¹ S 2(5)(c) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶² Generally see s 2(5) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶³ Generally see s 2(5) of the Regulations in Respect of Appeals to Appeal Board, 2011. It is submitted that if original documents are made available by the relevant parties involved it will be somewhat difficult for any of such parties to deny all or some of the documents or facts of what transpired during the appeal proceedings in question.

⁶⁴ S 2(4)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶⁵ S 2(3) of the Regulations in Respect of Appeals to Appeal Board, 2011. It appears that if the decision-maker takes longer than 30 days to furnish the reasons for his decision against the appellant, the appeal proceedings will continue. However, such proceedings are terminated when the appellant (affected party) fails to provide a written notice of appeal within 30 days of receiving the reasons for the decision from the decision-maker.

⁶⁶ S 2(4)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

proceedings.⁶⁷ The author also submit that the appellant, decision-maker and other relevant parties to any appeal proceedings lodged with the BOA must be given sufficient time to respond or prepare for such proceedings.⁶⁸ This could, if properly enforced, enable the BOA and/or the relevant courts to provide adequate and timeous redress to all the aggrieved persons.⁶⁹

In determining its decision, the BOA takes into account several factors which include, among others, the reasons for the decision appealed against, the grounds of appeal, documentary or verbal evidence submitted or given by any person at the request or with the permission of the BOA and any other information at the disposal of the BOA.⁷⁰ Furthermore, the BOA must make its decision within a reasonable time and that decision is binding on the parties to the appeal.⁷¹ Once a respondent has exhausted all the available remedies, he may still have the decision of the BOA reviewed by a competent court.⁷²

Notwithstanding the BOA's enforcement efforts, not many persons have so far utilised its appeal proceedings as indicated in table 1 below.⁷³

⁶⁷ Generally see further s 2(4)(b) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶⁸ Generally see s 2(3) & (4)(a) of the Regulations in Respect of Appeals to Appeal Board, 2011.

⁶⁹ In relation to this comment, generally see the relevant provisions of s 2 of the Regulations in Respect of Appeals to Appeal Board, 2011. See Van Deventer 2009 *FSB Bulletin* 3-4 for further related remarks.

⁷⁰ S 26B(3) to (5) & subsecs (7) to (19) read with ss 26 & 26A of the Financial Services Board Act. However, notwithstanding the possible negative effects of overregulation, it is submitted that neither ss 26; 26A & 26B of the Financial Services Board Act nor s 105 of the Financial Markets Act expressly provides adequate conditions that must be taken into account by the BOA before making any decision pertaining to the aggrieved persons' appeal. Also see Luiz 2011 *SA Merc LJ* 155-172 & Van Deventer 2009 *FSB Bulletin* 3-4 for further related remarks.

⁷¹ S 26B(6) read with subsecs (13) to (19) of the Financial Services Board Act. Notably, similar provisions were contained in s 111(6) & (7)(a) of the Securities Services Act before they were repealed. However, it is submitted that these relevant provisions should have been re-introduced under s 105 of the Financial Markets Act to expressly and mandatorily require the BOA to timeously conclude its market abuse appeal proceedings.

⁷² Such review is usually done by the High Courts. See Van Deventer 2009 *FSB Bulletin* 3-4 for further related remarks. Also see Luiz 2011 *SA Merc LJ* 155-172.

⁷³ See Van Deventer 2009 *FSB Bulletin* 3-4 for further related remarks; also see the *FSB Annual Report* 2011 99-101 & the *FSB Annual Report* 2013 128-130 for related comments on the new and completed investigations, related issues on administrative penalties and/or appeals of market abuse cases in 2011 and 2013 respectively. Also see Luiz 2011 *SA Merc LJ* 155-172 for further related discussion on the role of the BOA and the EC; Luiz "Market Abuse II—Prohibited Trading Practices and Enforcement" 2002 *JBL's Quarterly Law Review for People in Business* 180 180-183; see generally related comments on the enforcement efforts of the DMA by Loubser (02-10-2006) 25-26 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013) & the JSE (2013) 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sf lb.ashx (accessed 03-03-2014).

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Table 1: The BOA’s financial markets decisions during the period between 1999 and 2012.

YEAR	CASES FORWARDED TO THE BOARD OF APPEAL
2012	1. Victor Farkas & 2 Others 2. Decision: AD Potgieter, JC Herbst v JSE Limited
2011	1. Brown v Directorate of Market Abuse 2. Decision: NL Hittler v Directorate of Market Abuse 3. Marius Meyer v Directorate of Market Abuse
2010	1. Metropolitan Collective Investments Limited 2. AH-Vest Limited
2009	1. Michael Berman 2. Corwil Invesments LTD
2004	1. WJ Morgan & Associates (PTY) Ltd
2003	1. Hamilton Smith & Co. (PTY) Ltd
1999	1. Federal Credit Corporation of SA (PTY) Ltd

The information in table 1 above was adapted from the FSB website.⁷⁴

As indicated in table 1 above, only twelve cases involving financial markets decisions and appeals by the aggrieved persons were referred to the BOA during the period between 1999 and 2012. Most of these appeals were, nonetheless, unsuccessful. Furthermore, only five of these twelve cases dealt with and/or involved the appeals on market abuse cases.⁷⁵ This could indicate that some persons are unaware of the role of the BOA or that no persons are being aggrieved by the decisions or sanctions imposed by the Registrar of Securities Services, the FSB or the claims officer. While the latter may be true, it remains to be seen how successful the BOA which was re-introduced in the Financial Markets Act will be in relation to the

⁷⁴ Generally see the statistics and decisions of the BOA “Financial Markets Decisions” (2013) <ftp://ftp.fsb.co.za/public/Legal/AppealDeterminat/FM/DMA.pdf> (accessed 28-03-2013).

⁷⁵ Such cases include *Brown v Directorate of Market Abuse*; *Decision: NL Hittler v Directorate of Market Abuse*; *Marius Meyer v Directorate of Market Abuse*; *AH-Vest Limited* and *Michael Berman*. Generally see the BOA (2013) <ftp://ftp.fsb.co.za/public/Legal/AppealDeterminat/FM/DMA.pdf> (accessed 28-03-2013); also see the FSB *Annual Report* 2011 99-101 & the FSB *Annual Report* 2013 128-130 for related comments on the new and completed investigations, related issues on administrative penalties and/or appeals of market abuse cases in South Africa.

affording of all the aggrieved persons' appropriate and adequate redress timeously.⁷⁶ Nonetheless, the FSB is reportedly co-operating with the BOA in a number of ways, such as providing oral and/or written evidence⁷⁷ or any other relevant information required by the BOA. Moreover, in order not to interfere with the proceedings of the BOA, the FSB directs all queries relating to an appeal by the aggrieved persons to the secretaries of the BOA.

Be that as it may, consistency on the part of the FSB to comply with the requests from the BOA remains uncertain. In other words, the actual extent or degree of co-operation between the FSB and the BOA is not very clear.

2.3 The Role of the Courts

Only the competent courts⁷⁸ may hear criminal and/or administrative⁷⁹ cases of market abuse in South Africa. Therefore, the relevant High Courts or regional courts usually have a prerogative to hear all the market abuse cases referred to them by the FSB. Nevertheless, unlike the previous position under the Securities Services Act,⁸⁰ the Financial Markets Act does not expressly provide which courts could be regarded as "courts of competent jurisdiction" in relation to market abuse-related proceedings.⁸¹ However, like the former position under the Securities Services Act,⁸² the Financial Markets Act⁸³ stipulates that the prosecution of all the criminal cases of market abuse rests mainly with the DPP.⁸⁴ Even so,

⁷⁶ This follows the fact that s 105 of the Financial Markets Act merely recycled some of the provisions that were initially contained in s 111 of the Securities Services Act without providing any alternative measures that could be employed by the BOA to promote the timeous settlement of its market abuse appeal proceedings. See related concerns by Luiz 2002 *JBL's Quarterly Law Review for People in Business* 180-183; also see Luiz 2011 *SA Merc LJ* 155-172 & the JSE (2013) 24-25 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sf lb.ashx (accessed 03-03-2014) for further related discussion on the role of the BOA and the DMA.

⁷⁷ See s 26B of the Financial Services Board Act, which outlines how the BOA appeal proceedings are conducted.

⁷⁸ These competent courts include the High Courts and regional courts.

⁷⁹ Unlike the former position under s 77 read with s 82 of the Securities Services Act which provided for a civil remedy which was mainly enforced by the FSB, the Financial Markets Act now mainly provides for an administrative sanction that is imposed against the market abuse offenders by the EC. See s 82 read with s 84 of the Financial Markets Act; also see s 6F of the Protection of Funds Act. This could suggest that there are no more civil compensatory amounts that may be claimed by the FSB in the relevant courts. Instead, there are now administrative sanctions that are imposed on the offenders by the EC subject to appeals in terms of s 6F of the Protection of Funds Act read with s 99 of the Financial Markets Act. See further Luiz 2011 *SA Merc LJ* 151-172.

⁸⁰ See s 79 which previously provided that the only High Courts and regional courts were competent to hear market abuse cases.

⁸¹ S 77 & other relevant provisions under Chapter X entitled "Market Abuse" of the Financial Markets Act.

⁸² S 82(9) read with s 79.

⁸³ S 84(10) read with s 77.

⁸⁴ See Luiz 2011 *SA Merc LJ* 151-172; generally see Loubser (02-10-2006) 2-27 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013); also see similar discussion by

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the DPP may only exercise its prosecutorial powers on a referral basis. In relation to this, like the former position under the Securities Services Act's civil penalty regime,⁸⁵ any person accused of an administrative offence of insider trading could only be liable if he fails to prove on a balance of probabilities that he did not commit that offence as stipulated under the Financial Markets Act.⁸⁶ Likewise, a person accused of a criminal offence of insider trading or market manipulation⁸⁷ could only be liable if the DPP proves beyond reasonable doubt that he actually committed that offence. Nonetheless, notwithstanding the constitutional and/or over-criminalisation challenges that could be associated with presumptions, no appropriate presumptions are provided in the Financial Markets Act⁸⁸ to enable the DPP to obtain more convictions in criminal cases of market abuse.⁸⁹

the JSE (2013) 2-26
http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sf
lb.ashx (accessed 03-03-2014).

⁸⁵ S 77.

⁸⁶ S 82 read with s 78. Although s 82 does not expressly provide any defences that could be utilised by any person accused of an administrative offence of insider trading, it is reasonably expected that such person will rely on some of the defences enumerated in s 78 of the Financial Markets Act.

⁸⁷ Ss 78; 80 & 81 of the Financial Markets Act.

⁸⁸ Ss 78; 80 & 81. It should be noted, notwithstanding the constitutional challenges that could ensue from the use of presumptions (possible violation of s 35(3) of the constitution), that apart from the defences enumerated in s 78 (which should not be confused with presumptions or other regulations that could be made by the Minister under s 107), the Financial Markets Act does not provide any presumptions that could be employed in criminal cases of market abuse in South Africa, see relevant provisions in Chapter X.

⁸⁹ This flaw was also embedded in the Securities Services Act, see ss 73; 75 & 76; also see Chanetsa "Insider Trading is Notoriously Hard to Prosecute" *Business Report* 26 April 2004; *Pretorius and Another v Natal South Sea Investment Trust* 1965 3 SA 410 (W), where the courts failed to convict the suspected insider trading offenders; Blincoe "Datatec Directors Pay Up on Insider Trading Charges" (2001) http://www.theregister.co.uk/2001/05/23/datatec_directors_pay_up/ (accessed 03-03-2014), where two Datatec directors, Jens Montanana and Robin Rindel were reportedly fined about R1 million each for insider trading by the FSB; Barron "Greg Draws a Blank in Belfort Parallel" (2014) <http://www.timeslive.co.za/Feeds/2014/02/02/greg-draws-a-blank-in-belfort-parallel> (accessed 03-03-2014), where Greg Blank was reportedly sentenced to eight years imprisonment for stock market-related fraud and front running in 1992 & see further Loubser (02-10-2006) 2-27 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 27-08-2013), and has remained unresolved under the Financial Markets Act. See further the FSB *Annual Report* 2011 99-101; the FSB *Annual Report* 2013 128-130 which reveals that relatively few market abuse cases have been successfully investigated, settled and/or prosecuted in South Africa to date; also see Luiz 2011 *SA Merc LJ* 153-172, for a related analysis on the criminal, civil and administrative sanctions for market abuse as well as the constitutional challenges involved in respect of these sanctions. See generally the JSE (2013) 2-26 http://www.jse.co.za/Libraries/JSE_Regulatory_Environment_Insider_Trading/InsiderTrading_Booklet.sf lb.ashx (accessed 03-03-2014) for a related discussion on the regulation and enforcement of the market abuse ban in South Africa. In other words, notwithstanding the instances enumerated in s 79 where inside information is regarded to have been published, the Financial Markets Act should have expressly provided certain practical and/or less complex rebuttable market abuse-related presumptions that are applicable in: (a) exceptional criminal matters only; and (b) instances where they are in accordance with s 35(3) of constitution, which gives and protects the right of an accused person to have a fair trial.

It is hoped, as was the position under the Securities Services Act,⁹⁰ the competent courts will continue to play a crucial role in the determination and calculation of appropriate damages in cases involving insider trading, namely the administrative compensatory amounts to be paid to the FSB or to the actual prejudiced persons by the offenders under the Financial Markets Act.⁹¹ It is further submitted that this could enable all the affected (claimants) persons to have an opportunity to get appropriate monetary remedies awarded to them by the EC⁹² and/or the relevant courts from the FSB. Nevertheless, the Financial Markets Act, like its predecessor, does not extend the same role of the competent courts in respect of market manipulation.⁹³ However, as indicated earlier,⁹⁴ the competent courts may also hear an appeal by any person aggrieved by the decision of the FSB, the Registrar of Securities Services, the EC or the BOA and review such decision.

3 CONCLUDING REMARKS

This article has outlined the roles of the JSE, the BOA and the courts as well as their distinct functions in the detection of market abuse practices and the enforcement of appeals involving such practices in South Africa.⁹⁵ In relation to this, the article highlighted that all the role-players stated above have to date played a significant and distinct role in the enforcement of the market abuse prohibition in South Africa. Nevertheless, the article also indicated that each of the aforesaid role-players have some shortcomings which could have, to some extent, impeded their anti-market abuse enforcement efforts in South Africa to date.⁹⁶ Moreover, it was noted that the Financial Markets Act's market abuse provisions that deal with the functions of the aforesaid role-players recycled some of the flaws that were previously contained in similar provisions under the Securities Services Act.⁹⁷ This could have further impeded the anti-market abuse enforcement efforts of the JSE, the BOA and the courts under the Securities Services Act's market abuse regime and the same status quo is set to continue

⁹⁰ See s 77(1)(c)(i) to (iv); subsecs (2)(c)(i) to (v); (3)(b)(i) to (v) & (4)(a) to (e).

⁹¹ S 82. Notably, unlike the former position under s 77 of the Securities Services Act, these administrative compensatory amounts or sanctions are now mainly determined by the EC in terms of s 82 of the Financial Markets Act.

⁹² See s 82(4) to (7) of the Financial Markets Act. It appears that these provisions were recycled from s 77(7) to (10) of the Securities Services Act which previously dealt with similar matters.

⁹³ See s 82 of the Financial Markets Act which provides that administrative sanctions as determined by the EC will only be paid to prejudiced persons in cases of insider trading and there are no other provisions under Chapter X entitled "Market Abuse" of the Financial Markets Act which empower the courts to determine appropriate administrative sanctions in respect of market manipulation cases.

⁹⁴ See similar comments in para 2 2 above.

⁹⁵ See paras 2 1; 2 2 & 2 3 above.

⁹⁶ See paras 2 1; 2 2 & 2 3 above.

⁹⁷ See paras 2 1; 2 2 & 2 3 above.

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under the Financial Markets Act. Given this background, it is recommended, with regard to the disclosure of price-sensitive information, that the JSE should continue to adopt a robust approach as regards the dissemination of price-sensitive information to discourage its potential illicit use by authorised persons such as government departments, the SARB, the TRP, the FSB, investment analysts or any other statutory or regulatory body as well as other unscrupulous market abuse offenders.⁹⁸

It is further submitted, notwithstanding the possible negative effects associated with balkanisation, over-criminalisation and/or double jeopardy, that policy makers should consider statutorily empowering the JSE to prosecute and/or impose its own market abuse penalties against those who fail to comply with its disclosure requirements, especially where the DPP and/or the FSB⁹⁹ neglects, delays or fails to prosecute such persons.¹⁰⁰ With regard to detection,¹⁰¹ it is submitted that the policy makers should consider introducing a specific provision into the Financial Markets Act that obliges and empowers the JSE's Market Regulation Division to report incidences of market abuse to the FSB or the DMA.¹⁰² Another option is to financially and statutorily empower the FSB to procure its own market abuse surveillance systems and transfer the entire financial markets anti-market abuse surveillance responsibility from the JSE to the FSB. Moreover, it is recommended that the JSE and the FSB should continue employing practically applicable anti-market abuse proposals from other jurisdictions such as the back testing process, real-time risk monitoring and market surveillance measures. It is further recommended that the JSE should continue co-operating with the FSB, the TRP and other relevant enforcement authorities in order to curb market abuse practices, especially in relation to listed securities as well as cross-border market abuse activity.

⁹⁸ See similar remarks in para 2 1 above.

⁹⁹ See s 84(10) of the Financial Markets Act.

¹⁰⁰ However, this recommendation should be carefully interpreted and employed by the JSE having regard to the accused person's right to a fair trial as enshrined in s 35(3) of the constitution and other related proceedings or penalties that could have been instituted against the accused person in other appropriate forums such as the FSB, the EC, the BOA and the relevant courts. This will not amount to balkanisation, over-criminalisation and/or double jeopardy; in that the JSE or the latter tribunal must take into account any decision, administrative sanction or other penalties imposed by the former tribunal. See Van Deventer 2009 *FSB Bulletin* 4 for further related remarks.

¹⁰¹ See related remarks in para 2 1 above.

¹⁰² Put differently, the legislature should consider introducing a specific provision into the Financial Markets Act to empower and enable the JSE, in addition to its Listing Requirements, to statutorily co-operate with the FSB so as to increase the combating of market abuse activities in South Africa. See generally the *FSB Annual Report 2011* 99-101 & the *FSB Annual Report 2013* 128-130 which shows that relatively few new and completed investigations of market abuse cases were obtained by the FSB in 2011 and 2013 respectively.

Moreover, notwithstanding the fact that most decisions that are referred to the BOA could be involving or affecting sophisticated parties,¹⁰³ it is submitted that the FSB and other relevant enforcement authorities should consider embarking on more educational campaigns and other related programmes to increase awareness of the role and/or functions of the BOA among all the market participants. It is additionally submitted that the BOA should consider formulating adequate conditions and/or exceptions where the appeal proceedings may, in some relevant instances, be re-lodged with the BOA after the lapse of the initial appeal proceedings.¹⁰⁴ The author also submit that the appellant, decision-maker and other relevant parties to any BOA market abuse-related appeal proceedings must be given sufficient time to respond or prepare for such proceedings.¹⁰⁵ It is further suggested that the FSB and the BOA should continue to co-operate with each other, especially with regard to market abuse-related appeal proceedings in order to provide adequate and appropriate redress to all the aggrieved persons timeously.¹⁰⁶

Furthermore, it is hoped, given the everlasting backlog in our criminal courts, that additional specialised market abuse courts or tribunals and self-regulatory organs will be established in the future to complement the enforcement efforts of the FSB¹⁰⁷ and enhance the criminal prosecution of market abuse cases in South Africa. Moreover, notwithstanding the constitutional¹⁰⁸ and/or over-criminalisation challenges that could be associated with presumptions, it is submitted that the Financial Markets Act should be amended to expressly provide certain practical and/or less complex rebuttable market abuse-related presumptions that are applicable in: (a) exceptional criminal matters only; and (b) instances where they are

¹⁰³ These are persons who are already aware of the role of the BOA and who know how to rely on the BOA proceedings for their legal redress.

¹⁰⁴ See related remarks in para 2 2 above.

¹⁰⁵ See related remarks in para 2 2 above.

¹⁰⁶ Be that as it may, the co-operation between the FSB and BOA should be carefully utilised in order for the FSB not to interfere with the independence and functions of the BOA. See related remarks in para 2 2 above.

¹⁰⁷ In other words, this could, not giving less regard to some practical considerations such as the severe stress on the judicial resources and/or the availability of sufficient resources on the part of the FSB and other relevant stakeholders, further increase the market abuse settlements and convictions by the FSB and/or other enforcement authorities in South Africa. Put differently, although a considerable number of settlements have been obtained by the FSB in civil cases of market abuse to date, the same cannot be said in respect of criminal cases. See further the FSB *Annual Report* 2011 99-101; the FSB *Annual Report* 2013 128-130 which shows that relatively few market abuse cases have been successfully investigated, settled and/or prosecuted in South Africa to date; also see Luiz 2011 *SA Merc LJ* 153-172, for a related analysis on the criminal, civil and administrative sanctions for market abuse & related remarks in para 2 3 above.

¹⁰⁸ These constitutional challenges that could ensue from the use of presumptions, *inter alia*, include the possible violation of s 35(3) of the constitution. See related remarks in para 2 3 above.

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in accordance with s 35(3) of constitution (which gives and protects the right of an accused person to have a fair trial), to enable the DPP to obtain more convictions in criminal cases of market abuse.¹⁰⁹

Accordingly, it is hoped that the recommendations as enumerated in this article will be utilised by the relevant stakeholders in the future to enhance the combating of market abuse activities in South Africa. In relation to this, researchers and academics are also encouraged to conduct more legal research on the functions as well as the challenges of the aforesaid role-players in order to increase awareness on the part of the general public, policy makers and other relevant stakeholders and to innovate possible solutions that could be employed to enhance the enforcement of the market abuse ban in South Africa.

¹⁰⁹ See related remarks in para 2 3 above; see further the FSB *Annual Report* 2011 99-101; the FSB *Annual Report* 2013 128-130 which indicates that relatively few market abuse cases have been successfully investigated, settled and/or prosecuted in South Africa in 2011 and 2013 respectively.