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Statutory Challenges Affecting the Enforcement of the Insider Trading Prohibition in Zimbabwe[1]

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Abstract: Various challenges have to date marred the effective and consistent enforcement of the insider trading prohibition in Zimbabwe. As a result, the regulation of insider trading has remained flawed and problematic in Zimbabwe since the early 1980s to date. For instance, the Zimbabwean anti-insider trading regulatory framework has so far failed to curb insider trading activities owing to several statutory flaws that are imbedded in the Securities Act 17 of 2004 [Chapter 24:25] as amended (Securities Act), such as poor insider trading penalties, inadequate and flawed insider trading provisions and insufficient definitions of key terms for insider trading offences and related aspects. These and other flaws have negatively affected market efficiency, market integrity and public investor confidence in the Zimbabwean financial markets. Consequently, the article exposes the statutory flaws and challenges that are affecting the regulation and combating of insider trading in the Zimbabwean financial markets. Thereafter, possible measures that could be adopted by the relevant authorities to enhance the regulation and enforcement of the Zimbabwean anti-insider trading prohibition are provided.

Keywords: market integrity; penalties; offences; insider trading; financial markets

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1. Introductory Remarks

Insider trading refers to, *inter alia*, the abuse of price-sensitive non-public inside information by an insider or any other person that concludes illicit transactions in listed securities to which that information relates to the detriment of ignorant investors and other related persons that do not have such information (Osode, 2004, pp. 303; Botha, 1991, pp. 2-3). Notably, various challenges have to date marred the effective and consistent enforcement of the insider trading prohibition in Zimbabwe (Mataruka and Mahombera, 2018, page number unknown; see related discussion by Massawe and Kadilu, 2014, pp. 52-63; Cinar, 1999, pp. 345-353). As a result, the regulation of insider trading has remained flawed and problematic in Zimbabwe since the early 1980s to date (Mataruka and Mahombera, 2018, page number unknown). For instance, the Zimbabwean anti-insider trading regulatory framework has so far failed to curb insider trading activities owing to several statutory flaws that are imbedded in the Securities Act 17 of 2004 [Chapter 24:25] as amended (Securities Act), such as poor insider trading penalties, inadequate and flawed insider trading provisions and insufficient definitions of key terms for insider trading offences and related aspects. Both the Zimbabwe Stock Exchange (ZSE) and the Securities and Exchange Commission of Zimbabwe (SECZ) have so far failed to timeously detect all insider trading activities that occur in the Zimbabwean financial markets (Saungweme, Ricardo and Pradeep, 2013, pp. 1630-1639; Magaisa, 2006, page number unknown). Moreover, not even one case of insider trading has been successfully settled by the SECZ and/or the courts in Zimbabwe since 1980 to date (Mataruka and Mahombera, 2018, page number unknown). These and other flaws have negatively affected market efficiency, market integrity and public investor confidence in the Zimbabwean financial markets (Mwenda, 1997, pp. 29-46; Arshadi, 1998, pp. 70-84). Consequently, the article exposes the statutory flaws and challenges that are affecting the regulation and combating of insider trading in the Zimbabwean financial markets (Mwenda, 1996-1999, pp. 137-156; Chitimira and Lawack, 2013, pp. 200-217). Thereafter, possible measures that could be adopted by the relevant authorities to enhance the regulation and enforcement of the Zimbabwean anti-insider trading prohibition are provided (Karjala,1982, pp. 627-650; Spitz, 1989, pp. 265-290).

2. Insufficient Definitions of Key Terms and Concepts

The concept of "insider trading" is not expressly defined under the Securities Act (sections 2 and 87 read with sections 88-94). Nonetheless, it appears that the Securities Act merely provides some conduct and/or practices that could amount to insider trading (section 88 read with sections 89-94 of the Securities Act; also see Jooste, 2000, pp. 283-286; Chitimira, 2014, pp. 939-971). For instance, the Securities Act provides that an individual who deals in relevant listed securities for his or her account or for another person's account or who encourages or discourages another person from dealing in such securities while he or she knows or ought to have known that he or she has non-public price-sensitive inside information relating to the affected securities will be liable for an insider trading offence (section 88 read with sections 89-94 of the Securities Act). The reference to an individual indicates that the insider trading offence is merely limited to individuals while companies and other juristic persons are excluded from the ambit of the insider trading prohibition under the Securities Act (section 88 read with sections 89-94 of the Securities Act). Moreover, it appears that the offenders will incur insider trading liability even if their dealing in the relevant listed securities is not likely to have a material effect on the price or value of such securities (section 88 read with sections 89-94 of the Securities Act). The offenders should also have the relevant knowledge before they can incur any insider trading liability under the Securities Act (section 88 read with sections 89-94 of the Securities Act). Accordingly, the absence of a specific insider trading definition in the Securities Act could have negatively affected the combating of insider trading offences in Zimbabwe since the early 1980s to date. Put differently, apart from the prohibited conduct that is merely outlined in the Securities Act, it is very difficult to enforce the insider trading prohibition since there are no clear guidelines on the statutory meaning of insider trading to aid the courts, the SECZ and other regulatory authorities in Zimbabwe (section 88 read with sections 89-94 of the Securities Act).

Similarly, the term "insider" is not expressly defined under the Securities Act (section 88 read with sections 89-94 of the Securities Act; Luiz and Van der Linde, 2013, pp. 458-491). However, before one can incur insider trading liability under the Securities Act, he or she must be an insider and/or he or she must have obtained inside information from an insider (section 88 read with sections 89-94 of the Securities Act; also see Jooste, 2000, pp. 283-286). The Securities Act enumerates some persons that could be held liable for insider trading to include any individual

or a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates (section 87 of the Securities Act). These persons are also known as primary insiders (Feldman and Logan, 1996, pp. 55-57; Warren, 1991, pp. 1037-1078). Nevertheless, the term "issuer of listed securities" is not defined in the Securities Act (sections 2 and 87). Insiders also include any individuals that directly or indirectly obtain inside information which relates to the affected listed securities from any of the aforesaid primary insiders (section 87 of the Securities Act). This category is known as secondary insiders (Hazen, 1982, pp. 845-860). Other categories of insiders such as fortuitous insiders are not defined in the Securities Act. Furthermore, the terms "tipper" and "tippee" are not expressly defined in the Securities Act (sections 2 and 87; see further related discussion Huang, 2006, pp. 40-300). This is another flaw since tippers, tippees and fortuitous insiders are not specifically covered under the insider trading prohibition in the Securities Act (Huang, 2012, pp. 379-403).

In terms of the Securities Act, the term "deal in securities" means to enter into an agreement so as to acquire, dispose of, subscribe for or underwrite any security or to secure a profit from the yield of any security or from fluctuations in the price of any security by any individual or an offer to enter into any such agreement or to attempt to induce a person to enter into any such agreement (section 2 of the Securities Act). Nonetheless, this definition seems to be applicable only to listed securities. This follows the fact that the term "listed security" refers to any security that is listed on the official securities exchange as stipulated under the Securities Act (section 2). The term "securities exchange" refers to a person or entity that constitutes, maintains or provides a market place or facility, including an electronic trading system at which or by means of which buyers and sellers of securities can buy, sell or exchange securities regularly (section 2 of the Securities Act). It is not certain whether this definition applies only to regulated markets rather than other trading platforms such as over the counter (OTC) markets, multilateral trading facilities (MTFs) and organized trading facilities (OTFs).

The Securities Act broadly defines the term "security" as any share or stock in the share capital of a company; or any debt security or instrument creating or acknowledging indebtedness which is issued or proposed to be issued by a company, including any debenture stock, loan stock, bond or note; or any loan, stock, bond or other instrument creating or acknowledging indebtedness which is issued on behalf of a government, statutory body or local authority; or any depositary receipt or a certificate or other record which is issued by or on behalf of

a person who holds any shares, debt securities or warrants of a particular issue (section 2 of the Securities Act). The term "security" further includes any rights in relation to securities of the same kind or any future or a right under a contract which provides for the acquisition or disposal of a security or commodity that is to be delivered at a future date at a price agreed when the contract is made or any a right under a contract which does not provide for the delivery of securities or commodities but whose purpose or professed purpose is to secure a profit or avoid a loss by reference to fluctuation in a share index or commodity index prices or the price of other particular securities or commodities or the interest rate available on money placed on deposit or the exchange rate available between two or more currencies (section 2 of the Securities Act). However, the term "security" does not include any bill of exchange, cheque or promissory note in terms of the Bills of Exchange Act [Chapter 14:02] or a treasury bill with an original maturity which is less than one year or a certificate of deposit issued by any bank (section 2 of the Securities Act).

Under the Securities Act, the term "regulated exchange" means a registered securities exchange or a securities exchange that conducts business lawfully outside Zimbabwe (section 87 of the Securities Act). Nevertheless, this definition only applies to regulated markets and/or securities exchanges such as the ZSE as well as similar markets and/or securities exchanges in other countries. Thus, trading platforms such as OTC markets, MTFs and OTFs are not specifically covered under the "regulated exchange" definition which is contained in the Securities Act.

The term "affected security" refers to a listed security to which the inside information relates or a listed security whose price or value is likely to be materially affected if the relevant inside information is made public (section 87 of the Securities Act). Thus, an affected security is determined by the material changes that occur to its price or value after the relevant price-sensitive inside information is published in terms of the Securities Act. Moreover, affected securities are only determined in respect of listed securities. Thus, securities that are traded on other trading platforms, informal financial markets and/or unregulated markets are not covered under the definition of "affected security" contained in the Securities Act (Van Der Linde and Luiz, 2009, pp. 631-644).

Notably, "inside information" means specific or precise information that has not been made public which if it were made public, it would likely have a material effect on the price or value of a listed security, and such information should be

obtained or learned by an individual through being a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates or through direct or indirect communication from the stated persons (section 87 of the Securities Act; also see Schipani and Seyhun, 2016, pp. 327-378). This clearly suggest that inside information must be specific and/or precise information which does not constitute rumours, speculations, vague information or any information that was already made public in terms of the Securities Act (Schipani and Seyhun, 2016, pp. 327-378). Furthermore, it appears that in terms of this definition, inside information may only be learnt by individuals and not companies or other juristic persons (Morajane, 2017, pp. 506-523). Moreover, the Securities Act does not expressly specify the actual time when the non-public price-sensitive inside information will be regarded as having been made public or published (Schipani and Seyhun, 2016, pp. 327-378). This could enable some unscrupulous insider trading offenders to escape liability by arguing that they were ignorant of the actual time when the non-public price-sensitive information is statutorily regarded as having been published under the Securities Act (section 87). It appears that before information can be regarded as inside information there must be a likelihood that it will have some material effect on the price or value of the relevant listed securities when it is published (section 87 of the Securities Act). However, the Securities Act does not stipulate the magnitude of the effect that the non-public inside information must have on the price or value of the relevant listed securities (section 87 of the Securities Act). It seems that the determination of such magnitude and/or actual effect was left in the discretion of the relevant courts on a case by case basis.

The term "make public" entails that information is regarded as having been made public if it is published in accordance with the rules of a regulated exchange for the purpose of informing investors and their professional advisers; or contained in records which are maintained by the SECZ or by any person responsible for regulating or supervising a regulated exchange and if such records are open to inspection by the public; or if the information can be readily acquired by those likely to trade or deal in any listed securities to which the information relates and/or if it is issued by the person to whom the information relates (section 87 of Securities Act). Moreover, the term "make public" entails that information is regarded as published if it is derived from information which has already been made public and/or regarded as having been made public even though it can be acquired only by persons exercising diligence or expertise or through observation; or if it is communicated to a section of the public or communicated only on

payment of a fee or published in Zimbabwe (section 87 of the Securities Act). Although the term “make public” is satisfactorily and broadly defined, it does not specify whether it is the SECZ or the ZSE and/or issuer of the affected securities that is responsible for the publication of the non-public price-sensitive inside information that relates to the relevant listed securities in terms of the Securities Act (also see Schipani and Seyhun, 2016, pp. 327-378).

The term “individual” is not expressly defined in the Securities Act (section 87). However, the reference to “individual” in all insider trading provisions of the Securities Act could indicate that companies and other juristic persons may escape liability for their insider trading offences that are perpetrated through their employees (Osode, 2000, pp. 239-263; Cassim, 2007, pp. 44-70).

3. The Adequacy of Prohibited Offences and Defences

3.1. Adequacy of Prohibited Offences

The Securities Act enumerates some instances where the insider trading offence may be committed by individuals in Zimbabwe (section 88 of the Securities Act). This shows that only individuals may commit insider trading under the Securities Act. For instance, as indicated earlier, dealing for one’s own account or for another person’s account or encouraging or discouraging another person from dealing in listed securities by an individual who knows or who ought to have known that he or she has non-public price-sensitive inside information relating to the affected securities will give rise to an insider trading offence under the Securities Act (section 88 read with sections 89-94). Thus, offenders may incur insider trading liability in about five instances. Firstly, any individual who deals directly or indirectly in any affected securities for his or her own account while he or she knows or ought to know that he or she has non-public inside information will be liable for insider trading under the Securities Act (section 88(1)(a). Thus, the misuse of non-public inside information by an individual who deals in any affected securities for his or her own account and/or for his or her own benefit will give rise to insider trading under the Securities Act (section 88(1)(a)). However, the Securities Act is silent on whether the relevant individual should have actually received some benefit or if a mere possibility that such benefit will accrue to the individual in the future suffices for the purposes of the insider trading offence in Zimbabwe (Chitimira, 2015, pp. 86–107). It appears that only individuals who are

either primary or secondary insiders may incur insider trading liability under the Securities Act.

Secondly, any individual who deals directly or indirectly in any affected securities for the account of another person while he or she knows or ought to know that he or she has non-public inside information will be liable for insider trading under the Securities Act (section 88(1)(a)). This suggests that tippers and tippees or any individuals that pass on inside information to others and/or individuals that deal in the affected securities for the benefit of other persons while in possession of inside information will be liable for insider trading under the Securities Act (section 88(1)(a)). Again, the Securities Act does not specify whether the other person on whose account the insider dealt with non-public inside information which relates to the affected securities should obtain actual benefit before the relevant insider is held liable for insider trading.

Thirdly, any individual who cause or encourage any other person to deal in any affected securities while he or she knows or ought to know that he or she has non-public inside information will be liable for insider trading under the Securities Act (section 88(1)(b)). Nonetheless, it is not certain whether the mere encouragement by the insider (tipper) suffices for the purposes of the insider trading liability even if the encouraged person (tippee) does not deal in the affected securities in respect thereof. Moreover, it is not clear whether both the tipper and tippee are jointly and severally liable for insider trading under the Securities Act (section 88(1)(b); see further Cox, 1990, pp. 455-481).

Fourthly, any individual who prevent or discourage another person from dealing in any affected securities while he or she knows or ought to know that he or she has non-public inside information will be liable for insider trading under the Securities Act (section 88(1)(c)). However, it is remains unclear whether mere discouragement of another person from dealing in the affected securities by an insider will give rise to insider trading liability under the Securities Act.

Fifthly, any individual who knows or ought to know that he or she has non-public inside information and discloses such information to any other person will be liable for insider trading under the Securities Act (section 88(2)). The Securities Act does not, however, specify if the person who received the inside information (tippee) is required to deal in any affected securities before the relevant insider (tipper) is held liable for insider trading under the Securities Act (section 88(2)). Moreover, this offence is mainly restricted to natural persons. The challenges associated with the improper disclosure of inside information by insiders and juristic persons that were

ignorant of the non-public price-sensitive nature of the inside information in their possession are overlooked in the Securities Act (section 88(2).

3.2. Adequacy of Defences

The offenders could still escape insider trading liability if they prove a few defences that are provided under the Securities Act (section 89). For instance, the insider may argue that he or she was acting on specific instructions from a client, and he or she did not disclose the inside information to that client (section 89(1)(a) of the Securities Act). It is submitted that such client instructions should be lawful and consistent with the Securities Act. The insider may also contend that he or she would have acted in the same way even without the inside information and/or that he or she was acting on behalf of a public-sector body in furtherance of monetary policy, a policy in respect of exchange rates, the management of public debt or the management of foreign exchange reserves (section 89(1)(b) and (c) of the Securities Act). The insider may further argue that he or she was trying to prevent the other person from contravening the relevant insider trading provisions (section 89(1)(d) of the Securities Act).

The insider may further escape liability if he or she objectively believed that no one would deal in any affected securities after the disclosure of the inside information (section 89(2)(a) of the Securities Act). Therefore, the insider should indicate that he or she had lawful and reasonable grounds to believe that no one would deal in any affected securities after the inside information was disclosed. Over and above, the insider may argue that he or she disclosed the inside information in the proper performance of the functions of his or her employment, office or profession and at the same time disclosed that the information was inside information (section 89(2)(b) of the Securities Act). This defence was probably aimed at protecting *bona fide* insiders and market participants such as brokers, financial analysts and investment advisors from incurring insider trading liability while executing their professional duties lawfully. Notably, any of the aforementioned defences must be successfully proved by the insiders on a balance of probabilities before they escape liability.

4. The Adequacy of Available Penalties and Remedies

4.1. Criminal Sanctions

Insider trading offenders are liable for criminal penalties under the Securities Act (section 90 read with section 88; also see Chitimira and Lawack, 2012, pp. 548-565). Consequently, any person who contravenes insider trading provisions shall be guilty of an offence and liable to a fine not exceeding level ten (Zim $2 million) or imprisonment for a period not exceeding five years or both such fine and imprisonment (section 90 of the Securities Act; also see Botha, 1991, pp. 2-3; Luiz, 2011, pp. 151-172). While the introduction of criminal penalties is welcome, both the criminal fine not exceeding level ten (Zim $2 million) or imprisonment for a period not exceeding five years are too minimal and not deterrent enough to effectively discourage all relevant persons from engaging in insider trading activities in the Zimbabwean financial markets (Saungweme, Ricardo and Pradeep, 2013, pp. 1630-1639; Magaisa, 2006, page number unknown; Blumberg, 1985, pp. 117-158). Some offenders could continue to engage in insider trading activities opting to pay a minimal fine of Zim $2 million or going to jail for five years without losing their illicitly gained profits (section 90 of the Securities Act; Saungweme, Ricardo and Pradeep, 2013, pp. 1630-1639; Magaisa, 2006, page number unknown).

The insider trading criminal sanctions that are provided under the Securities Act have not been effectively utilised by the SECZ and the relevant courts to combat insider trading activities in the Zimbabwean financial markets. For instance, no single criminal case of insider trading has been successfully settled by the SECZ and/or the courts in Zimbabwe since the inception of the Securities Act to date (Mataruka and Mahombera, 2018, page number unknown; Silver, 1985, pp. 960-1025). This could have been caused by, *inter alia*, the adoption of poor enforcement approaches and the higher evidentiary burden of prove which is required in the prosecution and/or settlement of all criminal cases of insider trading (Mataruka and Mahombera, 2018, page number unknown; Öberg, 2014, pp. 111-138). Furthermore, the lack of specialized courts as well as the lack of sufficient persons with the relevant expertise to investigate, prosecute and enforce the insider trading prohibition has so far contributed to the paucity of successful investigation, settlement and/or prosecution of insider trading cases in Zimbabwe (Carr, 1999, pp. 1187-1220). Accordingly, the Judicial Service Commission of Zimbabwe (JSCZ) should employ sufficient persons with the relevant skills and expertise in securities and financial markets law to adjudicate upon all insider trading cases in Zimbabwe.

This approach could enhance the settlement and prosecution of insider trading cases in Zimbabwe.

4.2. Civil Sanctions

Insider trading could also give rise to civil sanctions under the Securities Act (section 91). In this regard, it is important to note that insider trading is merely treated as a delict against the SECZ, issuers of any affected securities, holders of affected securities and every person who ignorantly dealt in the affected securities on the basis of non-public inside information (section 91(1) of the Securities Act; see further Tsaurai and Odhiambo, 2012, pp. 355-363; Chew, 1998, pp. 331-375). This implies that any person affected by insider trading should prove all the elements of delict such as conduct, wrongfulness, fault, damage (harm) and causation before he or she can successfully claim civil remedies under the Securities Act (section 91(1)). The SECZ and other affected persons are entitled to claim civil remedies for insider trading from the offenders in terms of the Securities Act (section 91(1)(d)). However, these civil remedies are only available to the affected persons if they successfully prove all the elements of delict in respect thereof.

Insider trading offenders are liable for civil remedies in respect of any profit which accrued to them or any avoidance of loss or reduction in the price or value of affected securities which occurred through any unlawful dealing and/or through any unlawful disclosure of price-sensitive non-public inside information which relates to the affected securities (section 91(2) and (3) of the Securities Act). Accordingly, insider trading offenders are obliged to pay civil remedies to all prejudiced persons such as issuers of the affected securities, holders of all the affected securities and/or any persons who innocently and ignorantly dealt in the affected securities with non-public inside information (section 91(2) of the Securities Act). In other words, the perpetrators of insider trading activities are liable for any profit made and/or loss avoided through actual dealing in the affected securities for their own benefit or for the benefit of other persons or through the unlawful disclosure of non-public inside information which relates to the affected securities (section 91(3) of the Securities Act). Furthermore, delict proceedings may be instituted against the offenders for any contravention of the insider trading provisions even if criminal proceedings are pending in respect of the same contravention (section 91(4) of the Securities Act).

Any person that concludes a securities contract through misrepresentation and violation of the insider trading provisions will be liable for civil remedies under the Securities Act (section 91(5)). In this regard, the other party to the affected contract is entitled to rescind it if he or she was unaware of the insider trading contravention (section 91(5) of the Securities Act). The Securities Act also empowers the SECZ to institute a class action in terms of the Class Actions Act [Chapter 8:17] (Class Actions Act), on behalf of all the persons affected by insider trading in order to recover damages and/or other remedies for insider trading from the offenders (section 92(1) of the Securities Act; also see Banerjee, Humphery-Jenner, Nanda and Tham, 2018, pp. 2685-2719). Any affected persons may also institute class actions against the insider trading offenders in terms of the Class Actions Act (section 92(2) of the Securities Act). However, class actions have not been effectively utilised by the SECZ to curb insider trading in the Zimbabwean financial markets since the inception of the Securities Act to date.

Moreover, the civil sanctions provided in the Securities Act are not deterrent enough because they do not provide specific civil monetary fines that could be imposed on the insider trading offenders (see sections 91 and 92 of the Securities Act). Furthermore, the Securities Act's provisions for insider trading civil sanctions do not distinguish between juristic and natural persons. Consequently, there are no separate insider trading civil penalties for both natural and juristic persons under the Securities Act. Other civil remedies such as private rights of action, punitive damages and compensatory damages are also not expressly provided in the Securities Act (sections 91 and 92; see further Bromberg, Gilligan, Hedges and Ramsay, 2016, pp. 1-49).

4.3. Administrative Sanctions

Notably, administrative sanctions are easily enforced against the insider trading offenders because their required burden of proof is lower than that of criminal penalties. Nonetheless, there are no specific administrative sanctions for insider trading under the Securities Act (sections 87-95 read with sections 100-107). Therefore, the SECZ and the courts do not have express authority to impose administrative sanctions against the insider trading offenders under the Securities Act (sections 87-95 read with sections 100-107). Accordingly, the introduction of insider trading administrative sanctions in the Securities Act could empower the SECZ and the relevant courts to obtain more insider trading settlements in

Zimbabwe. For example, the enactment of adequate provisions for insider trading administrative sanctions such as cease and desist orders, warning and suspension orders, search and seizure orders, asset forfeiture orders, asset freezing orders, cancellation of licenses, name and shaming (public censure) and higher monetary sanctions under the Securities Act could statutorily empower the SECZ and the courts to effectively combat insider trading in the Zimbabwean financial markets (Du Plessis and Lyon, 2005, pp. 107-157; Chitimira and Lawack, 2012, pp. 548-565). The stated administrative sanctions could further deter unscrupulous persons from committing insider trading activities in the Zimbabwean financial markets. For instance, the search and seizure orders and the asset forfeiture orders could empower the SECZ to confiscate illicitly gained assets and/or proceeds of insider trading activities from the insider trading offenders (Basdeo, 2014, pp. 1048-1069). This could discourage all persons from committing insider trading activities in the Zimbabwean financial markets for their own unlawful benefit and/or for the unlawful benefit of other persons (Chitimira, 2015, pp. 86–107).

The SECZ is merely empowered to monitor and take administrative action against licensed persons, any committee of a registered securities exchange, operators of a central securities depository, employees of licensed persons, registered securities exchanges and the central securities depository that violate the relevant provisions of the Securities Act (section 100(1) of the Securities Act). Therefore, the SECZ may impose certain administrative sanctions against a registered securities exchange, a central securities depository, licensed persons and other persons that violate the relevant provisions of the Securities Act. Likewise, any person who is not registered or licensed to carry on any business in terms of the Securities Act may incur administrative sanctions for any contravention of the relevant provisions of the Securities Act (section 100(2) and (3)). This is probably done by the SECZ to prevent, investigate and/or detect unlawful trading activities by individuals who purchase or sell affected securities on a registered securities exchange in Zimbabwe (section 100(2) and (3) of the Securities Act). Thus, although the Securities Act does not expressly provide for insider trading administrative sanctions, the SECZ may issue a warning to a licensed person, any committee of a registered securities exchange, operators of a central securities depository, employees of licensed persons, registered securities exchanges, the central securities depository or any person that violates the provisions of the Securities Act (section 105(1)(a); Pfaeltzer, 2014, pp.134-148). Nonetheless, the Securities Act does not outline the circumstances under which the SECZ may issue a warning to the offenders in Zimbabwe (section 105(1)(a) of the Securities Act). It is submitted

that a mere warning letter from the SECZ is a less stringent and ineffective way to curb illicit trading activities in the Zimbabwean financial markets. The policy makers overlooked the fact that mere warnings against the offenders do not deter them from committing insider trading and other serious illegal trading offences that affect public investor confidence in the Zimbabwean financial markets (section 105(1)(a) of the Securities Act; see further Smith and Block, 2016, pp. 47-53).

The SECZ may require the affected person, committee of a registered securities exchange or operators of a central securities depository to appoint someone who is qualified to advise them on how to conduct their businesses properly (section 105(1)(b) of the Securities Act). This suggest that the SECZ may instruct the offenders to appoint qualified professional persons to enable them to comply with their own company and/or organisational policies well (section 105(1)(b) of the Securities Act; also see Dalko and Wang, 2016, pp. 704-715). However, the Securities Act does not provide clear guidelines and instances on which this administrative sanction may be imposed on the offenders in Zimbabwe (section 105(1)(b) of the Securities Act). Moreover, this administrative sanction does not expressly apply to insider trading offenders.

The SECZ may issue a written instruction to the affected person, committee of a registered securities exchange or operators of a central securities depository to undertake remedial action in respect of the contravention or wrongful conduct in question (section 105(1)(c) of the Securities Act; see further Luchtman and Vervaele, 2014, pp. 192-220). While an instruction to the offender to undertake remedial action is an administrative disciplinary sanction which gives the offender a chance to correct their wrongful conduct, the Securities Act does not expressly provide how this sanction could be effectively utilised by the ZSE, the SECZ and the courts to discourage and combat insider trading in the Zimbabwean financial markets (section 105(1)(c) of the Securities Act). Furthermore, the Securities Act does not provide the consequences that could be suffered by the offenders for their none compliance with a stipulated remedial action. This could also enable the insider trading offenders to ignore and/or fail to correct their wrongful conduct timeously, without incurring any liability.

Moreover, the SECZ may impose a monetary penalty not exceeding level five or Zim $200 000 on the offenders for each day that the contravention has continued (section 105(1)(d) of the Securities Act). This monetary penalty is too minimal and less dissuasive for the purposes of curbing illegal trading practices such as insider

trading in the Zimbabwean financial markets (*Pather and Another v Financial Services Board and Others* 2018 (1) SA 161 (SCA); Luiz, 2011, pp. 151-172).

The SECZ may direct or instruct the affected person, committee of the registered securities exchange or operators of a central securities depository to suspend or remove all or some of their officers or employees from conducting their duties or businesses (section 105(1)(e) and (f) of the Securities Act; see further Shen, 2008, pp. 41-74). However, the mere suspension or removal of the offender's employees from their duties or business activities and/or employment is not stringent enough to deter all persons from committing insider trading and other unlawful activities in the Zimbabwean financial markets. For instance, the offender can resign or be sacked and look for another job and still continue to commit insider trading activities. Perhaps, the Securities Act should have provided for the disqualification of the offenders from their profession so as to deter and discourage all persons from engaging in insider trading activities in the Zimbabwean financial markets.

The SECZ may appoint a supervisor to monitor the affairs of the affected person, committee of the registered securities exchange or operators of a central securities depository (section 105(1)(g) of the Securities Act). This is probably done to foster compliance with the provisions of the Securities Act among all relevant persons. Moreover, in respect of juristic persons or a body corporate, the SECZ may convene a meeting with the affected person, committee of the registered securities exchange or operators of a central securities depository to discuss the remedial measures undertaken or to be undertaken by the offenders (section 105(1)(h) of the Securities Act). This could be aimed at encouraging all juristic persons to effectively comply with the relevant provisions of the Securities Act.

The SECZ may cancel the licence or registration and/or amend any terms or conditions of such licence or registration of a licensed and/or registered person (section 105(1)(i) of the Securities Act). However, it is not clear how the cancellation of licenses and/or registration of the relevant market participants will enable the SECZ to effectively curb insider trading in Zimbabwean financial markets. Despite this, it is hoped that the cancellation of a license and/or registration of the offender or market participant will prohibit or bar them from engaging in illegal trading practices on a regulated securities exchange. This in turn could deter all market participants from committing insider trading offences in the Zimbabwean financial markets. Likewise, the SECZ may direct the operator of a central securities depository to dissolve it or amend any rules governing its operation in terms of the Securities Act (section 105(1)(j)). Nevertheless, it remains

unclear how this administrative sanction could be effectively utilised by the SECZ to curb insider trading in the Zimbabwean financial markets.

5. Concluding Remarks

As indicated above, the regulation of insider trading is still flawed and problematic in Zimbabwe. For instance, there are poor insider trading penalties, inadequate and flawed insider trading provisions and insufficient definitions of key terms for insider trading offences and related aspects in the Securities Act (sections 2 and 87 read with sections 88-94). The concept of "insider trading" is not expressly defined under the Securities Act (sections 2 and 87 read with sections 88-94). Furthermore, the terms "tipper", "tippee", "individual", "insider" and "issuer of listed securities" are not expressly defined in the Securities Act (sections 2 and 87 read with section 88-94 of the Securities Act). Consequently, the Securities Act should be amended to define terms such as "tipper", "tippee", "individual", "insider" and "issuer of listed securities". The Securities Act should also be amended to enact provisions that cover other categories of insiders such as fortuitous insiders which are currently not defined in the Securities Act. The Securities Act should be further amended to provide an adequate definition of the term "securities exchange" which expressly apply to regulated markets and other trading platforms such as the OTC markets, the MTFs and the OTFs.

The Securities Act should be amended to enact provisions for additional defences of insider trading which could be utilised by the accused persons (see section 89 of the Securities Act). The policy makers should consider revamping the Securities Act to introduce higher criminal fines and imprisonment terms for insider trading offenders so as to deter and discourage them from continuing to engage in insider trading activities in the Zimbabwean financial markets (Saungweme, Ricardo and Pradeep, 2013, pp. 1630-1639). In this regard, it is submitted that policy makers should seriously consider introducing separate, specific and robust criminal penalties for individuals and juristic persons, with much higher criminal penalties (fines) being imposed on juristic persons so as to deter them from committing insider trading offences in the Zimbabwean financial markets.

It submitted that the Securities Act should amended to enact adequate provisions for additional civil remedies such as private rights of action, punitive damages and compensatory damages which could be utilised by those who fall victim to insider trading activities in Zimbabwe. Moreover, the Securities Act should be carefully

revised to enact adequate provisions for specific insider trading administrative sanctions in Zimbabwe (sections 87-95 read with sections 100-107 of the Securities Act). The aforesaid provisions should empower the SECZ and the courts with express authority to impose administrative sanctions against the insider trading offenders under the Securities Act (sections 87-95 read with sections 100-107; see further Palan and Stockl, 2017, pp. 104-129; Van Deventer, pp. 3-4). This approach could also enable both the SECZ and the courts to timeously settle and/or prosecute insider trading cases in Zimbabwe to enhance market efficiency, market integrity and public investor confidence in the Zimbabwean financial markets (see O'Hara, 2001, pp. 1046-1063; Bainbridge, 1986, pp. 35-68; Beny, 2007, pp. 237-300; Chitimira, 2014, pp. 254-271, for further related discussion).

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