

Overview of the Available Remedies for Market Abuse Victims under the Financial Markets Act 19 of 2012

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Abstract

This article analyses the use of selected and available remedies for market abuse victims as stipulated in the Financial Markets Act in order to investigate the adequacy of such remedies as regards the affording of adequate damages to the affected persons and the combating of market abuse practices in South Africa. To this end, the article provides an overview analysis of compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act in a bid to provide appropriate and equitable redress to the victims of market abuse practices in South Africa. Moreover, where possible, the article will also provide a comparative analysis of these remedies and those that were provided under the Securities Services Act. This is done to examine whether the market abuse remedies that were re-introduced under the Financial Markets Act have now adequately resolved the flaws and gaps that were associated with similar remedies under the former Act. This is further done to recommend, where possible, other measures that can be employed to combat such flaws in South Africa.

Keywords: remedies, insider trading, market abuse, financial markets, market manipulation.

1. Introduction

Notwithstanding the fact that the concept of "market abuse" is not statutorily and expressly defined in a number of jurisdictions globally,¹ the aforesaid concept shall be employed as a generic term referring to both insider trading and market manipulation² in this article. Notably, market abuse-related challenges have occurred in several financial markets globally.³ South Africa is no exception.⁴ For instance, it is submitted that market abuse practices were rampantly occurring in the South African financial markets in the mid 1990s.⁵ Over and above, although South Africa had anti-market abuse legislation in place since the late 1990s, the enforcement of such legislation has been inconsistent to date.⁶

¹ 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 activities usually give rise to a host of other negative effects such as low investor confidence and poor market integrity in the affected financial markets.

³ Myburgh & Davis "The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board" (25-03-2004) 8 <<http://www.genesis-analytics.com/public/FSBReport.pdf>> (accessed 09-07-2013); generally see Bhattacharya & Daouk "The World Price of Insider Trading" (Date unknown) <http://www.faculty.fuqua.duke.edu/~charvey/Teaching/BA453_2004/BD_The_world.pdf> (accessed 31-01-2014) & Van Deventer "Anti-Market Abuse Legislation in South Africa" (10-06-2008) 1-5 <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (accessed 05-05-2013). Generally see related views and comments in *Percival v Wright* [1902] 2 Ch 421, where it was *inter alia* argued that directors do not owe any common law fiduciary duties to individual shareholders hence such shareholders will not sue them for insider trading.

⁴ Van Deventer (10-06-2008) 1-4, available at <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (accessed 05-05-2013); Myburgh & Davis (25-03-2004) 8-13, available at <<http://www.genesis-analytics.com/public/FSBReport.pdf>> (accessed 09-07-2013); generally see Henning & Du Toit "The Regulation of False Trading, Market Manipulation and Insider Trading" 2000 *Journal for Juridical Science* 155 159 & Van Zyl "Aspekte van Beleggersbeskerming in die Suid-Afrikaanse Reg" 1992 *Transactions of the Center for Business Law* 231-357.

⁵ Henning & Du Toit 2000 *Journal for Juridical Science* 159; Myburgh & Davis (25-03-2004) 11, available at <<http://www.genesis-analytics.com/public/FSBReport.pdf>> (accessed 09-07-2013). Notwithstanding the fact that this Myburgh and Davis report was published in 2004 before the Securities Services Act 36 of 2004 and the Financial Markets Act 19 of 2012 came into effect and the fact that it was somewhat influenced by the opinions of the interviewees, 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 laws were enforced in South Africa prior to the enactment of the Securities Services Act 36 of 2004 and the Financial Markets Act 19 of 2012. Moreover, the Myburgh and Davis 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 19 of 2012.

⁶ Notably, in 1995 the Ministry of Finance appointed "The King Task Group into the Insider Trading Legislation", hereinafter referred to as "the King Task Group" and its report as "the King Report" in a bid to improve the regulation and combating of insider trading in South Africa. The King Task Group published its first draft report on 15 May 1997 and the final report on 21 October 1997; also see 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* 239 239-248; Benade et al *Entrepreneurial Law* (2003) 130; Bhana "Take-Over Announcements and Insider Trading Activity on the

It is against this background that this article analyses the use of selected and available remedies for market abuse victims as stipulated in the Financial Markets Act⁷ in order to investigate the adequacy of such remedies as regards the affording of adequate damages to the affected persons and the combating of market abuse practices in South Africa. To this end, the article provides an overview analysis of compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act in a bid to provide appropriate and equitable redress to the victims of market abuse practices in South Africa. Moreover, where possible, the article will also provide a comparative analysis of these remedies and those that were provided under the Securities Services Act.⁸ This is done to examine whether the market abuse remedies that were re-introduced under the Financial Markets Act have now adequately resolved the flaws and gaps that were associated with similar remedies under the former Act. This is further done to recommend, where possible, other measures that can be employed to combat such flaws in South Africa. In order to achieve this, the article will, firstly, provide the definition of selected key terms and concepts. Secondly, the available market abuse remedies under the Financial Markets Act will be outlined. Thirdly, the adequacy of the available market abuse remedies under the Financial Markets Act will be discussed. Fourthly, an overview comparative analysis of the market abuse remedies that were given under the Securities Services Act and those that are available under the Financial Markets Act will be provided. Lastly, possible measures that can be employed to combat market abuse in South Africa will be recommended, and some concluding remarks will be provided.

2. The Definition of Selected Key Terms and Concepts

2.1 The Concept of Market Abuse

Market abuse is a very difficult concept to define. As earlier stated,⁹ there is no comprehensive and satisfactory definition of this concept that exists to date.¹⁰ Market abuse involves the misuse of material information (price-sensitive information), the dissemination of false or misleading information and practices which abnormally or artificially affect, or are likely to affect, the formation of prices or volumes of trading of financial instruments.¹¹ This definition is nonetheless narrowly limited to market manipulation by way of misuse of price-sensitive information and engaging in prohibited trading practices. It does not clearly state or define insider trading as another form of "market abuse". Thus, although the

Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198 201-202; Osode "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688 690-695; Van Deventer "New watchdog for insider trading" 1999 *FSB Bulletin* 2 3; the King Task Group Minority Report paragraph 3.4 as summarised in Beuthin & Luiz Beuthin's *Basic Company Law* (2000) 235-238; 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. Also see further Jooste "Insider Trading: A New Clamp-Down" 1991 *BML* 248 248-250; the Explanatory Memorandum to the Objects of the Companies Second Amendment Bill of 1990 B 119-90 (GA); the Memorandum on the Objects of the Companies Second Amendment Bill of 1989 B 99-89 (GA); Botha "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1 4-6; Van der Lingen "Tougher Legislation to Combat Insider Trading" 1997 *FSB Bulletin* 10; Luiz "Insider Trading Regulation – If at First You Don't Succeed..." 1999 *SA Merc LJ* 136 139-145; Jooste R "Insider Dealing in South Africa—The Criminal Aspects" 1990 *De Ratione* 21 21-28; Botha D "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *SALJ* 504 504-508; the Van Wyk de Vries Commission of Inquiry into the Companies Act of 1973, hereinafter referred to as the "Van Wyk de Vries Commission" and its main report as the "Van Wyk de Vries Report". See the Van Wyk de Vries Report paragraphs 44.49 and 44.57; s 56 of the Companies Act 71 of 2008, hereinafter referred to as the Companies Act 2008; also see Pretorius and Another v Natal South Sea Investment Trust 1965 3 SA 410 (W) 417, for further discussion on the enforcement of the insider trading ban in South Africa prior to 2004.

⁷ Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act and it came into effect on 03 June 2013.

⁸ Securities Services Act 36 of 2004, hereinafter referred to as the Securities Services Act. This Act was recently repealed and will, therefore, only be referred to where necessary for historical comparative purposes. Likewise, other legislation which previously dealt with market abuse-related offences such as the Companies Act 61 of 1973, hereinafter referred to as the Companies Act; see s 162 and ss 229 to 233; the Financial Markets Control Act 55 of 1989, hereinafter referred to as the Financial Markets Control Act; see ss 20 to 23; the Stock Exchanges Control Act 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act; see s 40; the Insider Trading Act 135 of 1998; hereinafter referred to as the Insider Trading Act; the Companies Amendment Act 78 of 1989, hereinafter referred to as the Companies Amendment Act and the Second Companies Amendment Act 69 of 1990, hereinafter referred to as the Second Companies Amendment Act, will only be referred to where necessary for historical comparative purposes. Notwithstanding the fact that more may still need to be done and despite the paucity of convictions and settlements in civil and criminal cases involving market abuse, the legislature has relatively managed to improve and raise the South African financial markets up to a level that would make them more comparable to the highest standards of similar markets in the developed world and international best practice by enacting some definitions as well as civil and administrative sanctions against market abuse.

⁹ See paragraph 1 above.

¹⁰ See generally Fischel & Ross 1991 *Harvard Law Review* 506; Avgouleas *The Mechanics and Regulation of Market Abuse* 104.

¹¹ See the Forum of European Securities Commissions (the FESCO) "Market abuse: FESCO's Response to the Call for Views from the Securities Regulators under the EU's Action Plan for Financial Services Com (1999) 232" (2008) <<http://www.europefesco.org>> (accessed 10-05-2013), for further analysis.

European Union Directive on Insider Dealing and Market Manipulation¹² generally uses the term “market abuse” to refer to transaction and/or trade-based market manipulation as well as disclosure and/or information-based market manipulation and insider trading, it does not expressly define the concept of market abuse to cover all these forms of prohibited trading practices. Moreover, the concept of market abuse is not defined in the United States of America. However, in the *Cargil Inc v Hardin* case¹³ market abuse was defined as an act involving market manipulation or any activity, scheme or artifice that deliberately influences the price of a financial asset, resulting in a price other than the one that would have resulted in the absence of such intervention. This definition is once again narrow and does not expressly apply to insider trading and hence it has attracted similar criticisms from some scholars.¹⁴ Despite these definitional deficiencies, all the forms of market manipulation and insider trading are generally treated as “market abuse” in the United States of America.

The same approach was adopted in the United Kingdom, where the concept of market abuse was widely defined as behaviour, whether by one person alone or by two or more persons jointly or in concert, which occurs in relation to qualifying investments traded or admitted to trading on a prescribed market or in respect of which a request for admission to trading on such a market has been made and which falls within any one or more types of prohibited behaviour set out under the Financial Services and Markets Act.¹⁵ The term “market abuse” is broadly used to refer to a number of illegal practices like insider trading, improper disclosure, misuse of information, manipulating transactions, manipulating devices, dissemination and distortion and misleading behaviour.¹⁶ Notwithstanding the fact that these practices are different from each other, the use of the generic term “market abuse” has reduced confusion to a certain extent and enhanced the enforcement of market abuse prohibition in the United Kingdom.¹⁷

Similarly, in South Africa and for the purposes of this article, as earlier stated,¹⁸ the term “market abuse” is used as a generic term referring to insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive promises, statements or forecasts (disclosure-based market manipulation).¹⁹ Therefore, although the Financial Markets Act does not expressly define the concept of market abuse, this article employs the term “market abuse” to refer to all the forms of market manipulation and insider trading as outlawed in the Financial Markets Act and other jurisdictions such as the United States of America, Australia, the United Kingdom and the European Union for consistency and eradication of unnecessary confusion. As noted above, market abuse is not expressly defined in the Financial Markets Act. However, a number of practices that could give rise to criminal and civil liability for market abuse are merely stated in the Financial Markets Act.²⁰ For instance, three forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation relating to listed securities are prohibited under the Financial Markets Act. This status quo was directly borrowed from the Securities Services Act²¹ without any useful changes and/or definitions of the concepts of insider trading,²² market manipulation²³ or market abuse. Thus, notwithstanding the fact that insider trading is specifically prohibited in the Financial Markets Act;²⁴ it is still not expressly defined in this Act. For instance, any person who knew that he or she had

¹² See article 1(2)(a)-(c) of the Directive of the European Parliament and Council of 28 January 2003, on Insider Dealing and Manipulation (Market Abuse) 2003/6/EC OJ 2003, L 96/16. Also see Ferrarini “The European Market Abuse Directive” 2004 *Common Market Law Review* 711 724-728.

¹³ (1971) 452 F2d 1154 1163; 1167-1170.

¹⁴ Easterbrook “Monopoly, Manipulation and the Regulation of Futures Markets” 1986 *J Bus S* 102 102-127; Avgouleas *The Mechanics and Regulation of Market Abuse* 104-106.

¹⁵ *Financial Services and Markets Act 2000* (c 8), hereinafter referred to as the *Financial Services and Markets Act*. See s 118(1)-(8) of the *Financial Services and Markets Act*. Also see *Swan Market Abuse Regulation* (2006) 29-33; 205.

¹⁶ *Swan Market Abuse Regulation* 205-206; *Barnes Stock Market Efficiency, Insider Dealing and Market Abuse* (2009) 130-139; *Rider B et al Market Abuse and Insider Dealing* (2009) 72-73.

¹⁷ *Barnes Stock Market Efficiency* 129-139; *Rider et al Market Abuse* 72-73.

¹⁸ See paragraph 1 above.

¹⁹ See ss 77; 78; 80; 81 and 82 and other relevant provisions in Chapter X entitled “Market Abuse” of the *Financial Markets Act*.

²⁰ See ss 78; 80; 81 and 82.

²¹ See ss 73; 75; 76 and 77.

²² Be that as it may, for the purposes of consistency and eradication of unnecessary confusion in this article, the concept of “insider trading” shall be referred to, and defined as a practice by which one person armed with price-sensitive non-public (confidential) information, unlawfully concludes a transaction in securities or financial instruments to which that information relates without sharing that information with others, to the detriment of such persons or other innocent and unwitting investors. See further Osode “Defending the Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory” in Okpaluba (ed) *Law in Contemporary South African Society* (2004) 303; also see generally Milne et al *Henechsberg on the Companies Act* (1975) 404-405.

²³ Nevertheless, for the purposes of this article, the concept of “market manipulation” shall be defined to, inter alia, include the misuse of material information (price-sensitive inside information); the dissemination of false, deceptive or misleading information and practices which abnormally or artificially affect, or are likely to affect, the formation of prices or volumes of trading of any securities or financial instruments by issuers or other persons who have such price-sensitive inside information to the detriment of other innocent and unwitting investors. See further the *FESCO* (2008), <<http://www.europesefesco.org>> (accessed 10-05-2013) for related comments and detailed discussion.

²⁴ See ss 78 and 82.

non-public price-sensitive information and who improperly disclosed it or encouraged or discouraged another person from dealing or who dealt directly or indirectly for his or her benefit or for the benefit of any other person in securities to which such information relates or where the price of such securities was likely to be affected by such dealing will incur criminal or civil liability for insider trading.²⁵ The same practices were also outlawed in the Securities Services Act²⁶ and later re-introduced in the Financial Markets Act²⁷ without providing any new insider trading-related definitions or offences such as an "attempted insider trading offence" and/or a specific "tipping" offence.

Likewise, trade-based market manipulation is further prohibited in the Financial Markets Act but it is not expressly defined in this Act.²⁸ Examples of activities that amounts to, or that are deemed to be manipulative include executing a transaction with no beneficial change of ownership of the securities and entering orders into the market near the close of the market or during the auctioning process for the purpose of creating a deceptive appearance in that market.²⁹ The same approach was employed in the Securities Services Act³⁰ and accordingly, similar conduct that amounts to, or that may be deemed to constitute trade-based market manipulation is also outlawed in the Financial Markets Act.³¹

Moreover, disclosure-based market manipulation is also prohibited in the Financial Markets Act but it has not been expressly defined under this Act.³² This prohibition on the making or publication of false, misleading or deceptive statements, promises and forecasts can be welcomed because such information often distorts the market price of securities, giving rise to direct or indirect prejudice to innocent market participants. The same practices were recycled from and/or prohibited in the Securities Services Act,³³ but nonetheless Internet-related manipulative disclosures are still not expressly outlawed in the Financial Markets Act.³⁴

Notwithstanding the fact that the Financial Markets Act was enacted as a separate piece of legislation that consolidates all previous market abuse provisions of the Securities Services Act, the regulation and enforcement of the market abuse ban and/or the affording of adequate market abuse remedies to the actual affected persons in South Africa have remained scant and inconsistent to date.³⁵ This could have been, *inter alia*, aggravated by the fact that it would only amount to market abuse if the accused person knew that he contravened, directly or indirectly, the relevant provisions of the Financial Markets Act. This suggests that the knowledge of the market abuse offence in question is required on the part of the offenders before any liability can be imputed on them. Nonetheless, the Financial Markets Act, like the Securities Services Act,³⁶ does not provide adequate definitions of the aforementioned key terms and/or presumptions which could be used to enhance the prosecution of market abuse cases in South Africa.³⁷ It is suggested that enacting a statutory provision for a definition of the concept of "market abuse" involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa.³⁸ Moreover, notwithstanding the difficulties that might have been encountered in relation to factors like repetition of same provisions, double jeopardy and over-criminalisation of market abuse practices in different statutes, the mere consolidation of the Securities Services Act's market abuse provisions into the Financial Markets Act on its own did not sufficiently provide appropriate and equitable redress or remedies to the victims of market abuse practices in South Africa.³⁹

2.2 The Meaning of Remedies

Remedies are generally defined to include the manner in which a right is enforced or satisfied by a court when some

²⁵ See ss 78 and 82 respectively.

²⁶ See ss 73 and 77.

²⁷ See ss 78 and 82.

²⁸ See s 80.

²⁹ See s 80(3).

³⁰ See s 75.

³¹ See s 80.

³² See s 81.

³³ See s 76.

³⁴ See s 81.

³⁵ Van Deventer (10-06-2008) 1-4, available at <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (accessed 05-05-2013). Notably, during the period between January 1999 and January 2002, 28 cases of insider trading were investigated. Only 22 cases were successfully settled for civil penalties and no convictions were obtained in the other six criminal cases. This information was obtained from an interview that was conducted at the Financial Services Board by the author, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse or the DMA) on 05 May 2009.

³⁶ See ss 73; 75; 76 and 77.

³⁷ See ss 78; 80; 81 and 82 of the Financial Markets Act.

³⁸ It is also hoped that the Financial Markets Act will be amended in the future to enact a more specific and adequate definition of market abuse to increase awareness and ensure that all the relevant persons and stakeholders do not unwittingly fall victim to market abuse activities. This will also help all persons not to contravene the market abuse prohibition ignorantly.

³⁹ Van Deventer (10-06-2008) 1-4, available at <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (accessed 05-05-2013).

harm or injury, that is known or recognised by the society as a wrongful act, is inflicted upon an individual by other persons intentionally or unintentionally.⁴⁰ Accordingly, remedies are usually concerned with the nature and extent of relief to which the affected person is entitled to receive either from the courts (including the relevant enforcement authorities) or directly from the defendant, once he or she has proved that he or she was prejudiced by the actions, conduct or dealings of that defendant. There are generally four main types of judicial remedies that a prejudiced person may claim against the offenders, namely damages; restitution; coercive remedies and declaratory remedies.⁴¹

For the purposes of this article, two main types of damages, namely, compensatory damages and punitive damages will be briefly defined and/or discussed here. Firstly, compensatory damages can be defined to include any kind of relief that is intended to compensate the injured or affected party for the harm he or she might have suffered as a result of the actions, conduct or dealings of another person.⁴² Compensatory damages are, in most instances, awarded to the affected party as a monetary amount equivalent to value and/or profit made or loss avoided by the defendant.⁴³ Secondly, punitive damages are mainly imposed upon the defendant in order to punish or deter him or her from committing certain prohibited practices, rather than to compensate the affected party.

With regard to restitution, it should be noted that restitutive remedies are mainly aimed at restoring the plaintiff or the affected party to the position he or she was before he or she was prejudiced by the defendant.⁴⁴ Restitutive remedies are mostly measured by the defendant's gains, as opposed to the affected party's losses. Consequently, in order to prevent the defendant from being unjustly enriched by the wrong or market abuse practices, restitutive remedies such as the recovery of property or disgorgement of profits and pecuniary penalties may be imposed against the defendant.

Likewise, coercive remedies are court orders imposed against the defendant to force him or her to do, or refrain from doing, something that will negatively affect other persons.⁴⁵ Coercive remedies may include other administrative remedies such as injunctions; order for specific performance; cease and desist orders; mandatory orders; order for the freezing of assets and public censure (name and shaming).

On the hand, declaratory remedies are available to the plaintiff when he or she wishes to be made aware or advised on matters regarding to the position of the law, in order that he or she may be able to take the appropriate action against the defendant.⁴⁶

Notably, for the purposes of this article damages; restitutive and coercive remedies such as compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act⁴⁷ will be discussed. This is done to establish whether these damages are appropriate and/or able to give equitable⁴⁸ redress to the victims of market abuse practices in South Africa.

⁴⁰ Burton WC "Burton's Legal Thesaurus" (2007) <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see Brown "SEC Civil Remedies for Insider Trading Actions under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5" 1988 Cincinnati Law Review 679 679-698.

⁴¹ See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis.

⁴² See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated "West's Encyclopedia of American Law" (2008) <<http://legal-dictionary.thefreedictionary.com /remedy>> (accessed 21-10-2013), for similar remarks.

⁴³ See s 82 of the Financial Markets Act.

⁴⁴ See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for similar remarks.

⁴⁵ See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for similar remarks.

⁴⁶ These remedies are mainly aimed at determining the affected party's rights in a particular matter and so that thereafter, he or she can take relevant action against the defendant or the offender. See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for similar remarks.

⁴⁷ See s 82.

⁴⁸ Remedies may be categorised as equitable or legal in nature. For instance, if compensatory damages such as money were awarded to a plaintiff because it could adequately compensate him or her for the infringement or loss he or she incurred, then such damages may be considered as legal remedies in this regard. On the other hand, an equitable remedy may be considered as one in which a payment or recovery of money would be an inadequate form of relief, redress or remedy to the affected party. Accordingly, it remains to be seen whether the courts, the Financial Services Board ("the FSB") and/or the Enforcement Committee ("the EC") will be able to timeously provide equitable remedies to all the persons affected by market abuse offences in South Africa. In this regard, it is submitted that the distinction between legal and equitable remedies could, if properly enforced, enable the FSB, the courts and other enforcement authorities to provide equitable remedies to all the persons affected by market abuse offences in South Africa. See further Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for a related discussion.

2.3 The Meaning of Damages

Damages may be broadly defined to include any measures aimed at providing some relief⁴⁹ to the plaintiff or the person affected by the offender or defendant's actions, conduct or dealings.⁵⁰ In light of this, it is submitted that damages should not be merely referred and/or limited to the costs or expenses incurred by the plaintiff when he or she instituted some legal proceedings against the defendant. There are generally three main types of damages, namely, compensatory damages,⁵¹ nominal damages⁵² and punitive damages.⁵³ In certain situations, two other forms of damages, namely, treble⁵⁴ and liquidated⁵⁵ damages may be imposed against the offenders. However, as stated earlier,⁵⁶ this article will mainly focus on compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act.⁵⁷

3. The Available Market Abuse Remedies under the Financial Markets Act

A relatively few remedies are available to the market abuse victims under the Financial Markets Act.⁵⁸ For instance, after a matter is lodged with the FSB and later referred to the EC, the EC may impose against the market abuse offender, an administrative sanction not exceeding the profit made or loss avoided by that offender.⁵⁹ This suggests that the Financial Markets Act provides some administrative damages which may be awarded to the persons affected by market abuse offences, especially insider trading.⁶⁰

Apart from administrative damages, the Financial Markets Act also provides compensatory damages to the market abuse victims.⁶¹ Precisely, any person affected by insider trading activities may claim part of the proceeds or the available R1 million⁶² compensatory damages from the FSB.⁶³ Furthermore, any person affected by insider trading may claim part of the treble damages proceeds, namely a compensatory amount that is up to three times the profit made or loss avoided by the offender from the FSB after it has recouped its costs.⁶⁴ Insider trading victims may also recover part of the proceeds obtained from the offenders by the FSB, in respect of any interests, investigation costs, legal costs and

⁴⁹ Such relief is usually awarded to the plaintiff as monetary compensatory damages to the extent of the loss that he or she might have suffered due the defendant's actions, conduct or dealings.

⁵⁰ Also see Gibeaut "Pruning Punitives: High Court Stresses Guidelines for Deciding Damages" 2003 ABA Journal 26 26-28; Kagehiro & Minick "How Juries Determine Damages Awards" 2002 For the Defense 18-21 and 58-59; Reis "Measure of Damages in Property Loss Cases" 2002 Florida Bar Journal 32 32-55 and Robert Ward "Punitive Damages in Medical Malpractice: An Economic Evaluation" 2003 North Carolina Law Review 2371-2418.

⁵¹ See the discussion on compensatory damages in paragraph 2.2 above. See further Gibeaut 2003 ABA Journal 26-28; Kagehiro and Minick 2002 For the Defense 18-21; 58-59; Reis 2002 Florida Bar Journal 32-55 and Robert Ward 2003 North Carolina Law Review 2371-2418.

⁵² Nominal damages usually consists of a minimal or small amount of money which is awarded to a plaintiff who has suffered no substantial loss or injury but was nevertheless negatively affected by the offender or defendant's actions, conduct or dealings even though he or she was unable to provide proof of the actual loss and/or injury that he or she suffered. See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for a related discussion.

⁵³ See the discussion on punitive damages in paragraph 2.2 above. See further Gibeaut 2003 ABA Journal 26-28; Kagehiro & Minick 2002 For the Defense 18-21; 58-59; Reis 2002 Florida Bar Journal 32-55 and Robert Ward 2003 North Carolina Law Review 2371-2418.

⁵⁴ Notably, treble damages are, in most instances, imposed against the offenders in situations where it is provided or stipulated in the relevant statutes that such damages must be awarded to the affected persons. Treble damages are mostly used in the United States of America. See Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for a related remarks. It is, however, important to note that treble damages are also employed in South Africa, especially in matters involving market abuse. See s 82 of the Financial Markets Act.

⁵⁵ Liquidated damages may constitute any compensation agreed upon by the relevant parties to a contract, which must be paid by the party who breaches the contract to the other party who duly performed in terms of that contract. In relation to this, liquidated damages may be utilised when it would be difficult for the affected party to prove the actual harm or loss caused by the other party's breach of the contract. Therefore, the amount of liquidated damages must represent a reasonable estimate of the actual calculable damages caused by the offender or defendant's actions, conduct or dealings. Nonetheless, liquidated damages may not be employed if the parties involved made no attempt to calculate the amount of actual damages which must be awarded to the affected party. Generally see Burton (2007), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for related analysis; also see the Gale Group Incorporated (2008), available at <<http://legal-dictionary.thefreedictionary.com/remedy>> (accessed 21-10-2013), for a related discussion.

⁵⁶ See the discussion on damages in paragraph 2.2 above.

⁵⁷ See s 82.

⁵⁸ See s 82.

⁵⁹ See s 82(1)(a); (2)(a).

⁶⁰ See s 82(1)(a); (2)(a).

⁶¹ See s 82(1)(b); (2)(b).

⁶² Notably, this amount must be annually reviewed by the Registrar of Securities Services to ensure that it is consistent with the Consumer Price Index as published by the Statistics South Africa. See s 82(1)(b); (2)(b).

⁶³ See s 82(1)(b); (2)(b).

⁶⁴ See s 82(1)(b); (2)(b).

commission⁶⁵ as determined by the EC.⁶⁶

The Financial Markets Act further provides actual calculable damages which may be utilised by those who fall victim to insider trading practices.⁶⁷ Accordingly, any person prejudiced by insider trading may, (a) claim an amount equal to the difference between the price at which that person dealt and the price (as determined by the EC) that he or she might have dealt at if the inside information had been published at the time of dealing.⁶⁸ Likewise, any person prejudiced by insider trading may (b) claim an amount equal to the pro rata portion of the balance of R1 million plus three times the profit made or loss avoided by the offender, calculable with regard to the amount contemplated in paragraph (a) above,⁶⁹ and/or other amounts proved by the affected person, whichever is the lesser.⁷⁰

Now that the market abuse remedies as enumerated in the Financial Markets Act have been discussed, one question which could be asked is whether or not the aforementioned remedies are sufficient and/or robust enough to combat market abuse in South Africa. Therefore, in order to address this and other concerns, a related analysis will be undertaken in the next sub-heading.

3.1 The Adequacy of Available Market Abuse Remedies under the Financial Markets Act

The available market abuse remedies under the Financial Markets Act are only limited to insider trading cases.⁷¹ This could suggest that there are no statutory remedies available to the persons affected by other market abuse offences such as market manipulation under the Financial Markets Act.⁷² Consequently, it is submitted that these remedies are still very few⁷³ and/or less dissuasive for the purposes of combating market abuse practices in the South African financial markets and elsewhere⁷⁴ consistently. For instance, other market abuse remedies such as private rights of action, specific civil pecuniary penalties, punitive damages and class actions are not provided in the Financial Markets Act.⁷⁵

Moreover, any persons affected by insider trading will only get their compensatory damages after the FSB has recouped its expenses in relation to any successful settlements involving insider trading cases.⁷⁶ Consequently, the balance, if any, will only be paid to successful claimants.⁷⁷ This could imply that not all the affected persons will timeously receive their adequate insider trading damages either because such damages would have been completely consumed by the FSB costs or severely reduced by the recouped costs of the FSB.⁷⁸

Furthermore, notwithstanding the fact that the civil compensatory damages instituted through the FSB could conserve government resources and/or help the claimants to avoid private litigation costs, settling with the FSB alone could, if not properly enforced, give rise to bureaucracy and/or delays on the part of the insider trading victims to prove

⁶⁵ See s 82(2)(e).

⁶⁶ See s 82(1)(c) and (d); (2)(c) and (d).

⁶⁷ See s 82(6)(a).

⁶⁸ The amount for actual calculable damages is determined by the EC having regard to the differences or changes in the price of the affected securities. See s 82(6)(a).

⁶⁹ See s 82(6)(a).

⁷⁰ See s 82(6)(b). Be that as it may, the claims officer has the discretion to determine whether or not the affected person should receive a lesser or no amount for actual calculable damages.

⁷¹ See s 82.

⁷² Thus, unlike other jurisdictions such as the United States of America ("the USA"), the United Kingdom ("the UK"), Australia and the European Union ("the EU"), persons affected by market manipulation may not statutorily recover their damages from the offenders in terms of the Financial Markets Act. Also see Easterbrook & Fischel "Optimal Damages in Securities Cases" 1985 *The University of Chicago Law Review* 611 611-652; Slaughter & May "The EU/UK Market Abuse Regime – Overview" (2011) 1-60 <<http://www.slaughterandmay.com>> (accessed 24-10-2013) and The Organisation for Economic Co-operation and Development ("the OECD") "Remedies and Sanctions for Abuse of Market Dominance: Policy Brief" (2008) 1-8 <www.oecd.org/dataoecd/20/17/38623413.pdf> (accessed 24-10-2013), for further related analysis and historical background on the enforcement of market abuse remedies in the USA; the EU and the UK.

⁷³ See s 82 of the Financial Markets Act.

⁷⁴ This refers to the combating of cross-border market abuse activities.

⁷⁵ See s 82.

⁷⁶ See s 82(4) read with s 87 of the Financial Markets Act.

⁷⁷ See s 82(4)(b) read with subsection (5) of the Financial Markets Act.

⁷⁸ S 82(4)(a) and (b) read with subsection (5) of the Financial Markets Act; also see the FSB Annual Report 2011 4 99-101, which reveals that very few market abuse cases were successfully investigated, prosecuted and/or settled each year, from 1999 to 2010. The same report shows that many market abuse cases were either brought forward or carried forward each year, from 1999 to 2010. Moreover, relatively few market abuse cases (about 32 in total) have been successfully settled with the EC each year, from 2006 to 2014. In relation to this, see the EC "Enforcement Actions" Media Release (2014), available at <<https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx>> (accessed 02-02-2014), which merely lists a few settlements achieved as stated above without indicating the damages or compensatory amounts that were claimed and/or received by the actual affected persons. See further the FSB Annual Report 2013 3 128-130, which reveals that very few market abuse cases (317 in total) were investigated and/or prosecuted each year, from 1999 to 2013. In 2013, 17 market abuse cases were investigated, 11 of these cases were closed and about 186 affected persons lodged their claims with the FSB to receive part of the proceeds (an amount of about R2 173 367 in total) which were recovered from the offenders. Nonetheless, it is not clear whether all these claimants were successful in recovering their damages from the FSB.

their claims and receive adequate compensatory damages from the FSB timeously. Over and above, it remains somewhat difficult for the claimants to objectively prove, on a balance of probabilities, that they were affected by the insider trading offence in question because there are no statutory guidelines on how a claims officer may exercise his or her discretion to determine whether such claimants were actually affected.⁷⁹

It is noted that civil compensatory damages may increase deterrence due to the higher probability of different civil sanctions that could be imposed on the market abuse offenders.⁸⁰ Nonetheless, it is submitted that overreliance on civil compensatory damages alone could be less deterrent.⁸¹ Consequently, other remedies such as private rights of action,⁸² specific civil pecuniary penalties, punitive damages and class actions⁸³ should be considered to ensure that all the affected persons are given adequate and equitable market abuse remedies in the future.

It is, however, important to note that those who fall victims to market abuse practices may rely on any available and applicable common law remedies.⁸⁴ This further suggests that although there are no market abuse remedies that are expressly and statutorily available to those who are prejudiced by market manipulation activities under the Financial Markets Act,⁸⁵ such persons may, however, rely on the applicable common law remedies. Nevertheless, a claimant who successfully obtained any amount of common law damages⁸⁶ will have such amount deducted from the amount that he or she might have claimed in terms of the Financial Markets Act.⁸⁷

Given the analysis above, the next sub-heading will now provide an overview comparative analysis of the market abuse remedies that were given under the Securities Services Act and those that are available under the Financial Markets Act. This is done to examine whether the market abuse remedies that were re-introduced under the Financial Markets Act, as indicated above, have now adequately resolved the flaws and gaps that were associated with similar remedies under the Securities Services Act.

4. Overview Comparative Analysis of the Available Market Abuse Remedies under the Financial Markets Act and the Securities Services Act

The Financial Markets Act⁸⁸ re-introduced most of the market abuse remedies that were initially incorporated in the Securities Services Act.⁸⁹ For instance, the EC may impose against the market abuse offender, an administrative sanction not exceeding the profit made or loss avoided by that offender.⁹⁰ This provision was recycled from the Securities Services Act without providing any new administrative damages that could be utilised by those affected by market abuse practices in South Africa or elsewhere.⁹¹

Moreover, the Financial Markets Act also provides compensatory damages for an amount of up to three times the profit made or loss avoided by the offender,⁹² to those prejudiced by market abuse practices. This status quo was directly

⁷⁹ Notably, it is merely stated that the claimants must prove their insider trading claims to the reasonable satisfaction of the claims officer. See s 82(5)(b) of the Financial Markets Act.

⁸⁰ Avgouleas *The Mechanics and Regulation of Market Abuse* 468-469; see further Polinsky & Shavell "The Optimal Tradeoff between the Probability and Magnitude of Fines" 1979 *American Economic Review* 880 884-885; Duan "The Ongoing Battle Against Insider Trading: A Comparison of Chinese and US Law and Comments on how China Should Improve its Insider Trading Law Enforcement" 2009 *Duquesne Business LJ* 129 152.

⁸¹ See Shen "A Comparative Study of Insider Trading Regulation Enforcement in the US and China" 2008 *Journal of Business and Securities Law* 42 58; Atkins & Bondi "Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program" 2008 *Fordham Journal of Corporate and Financial Law* 367 367-387 & Chitimira & Lawack "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 1)" 2012 *Obiter* 548 553-555 for further related analysis.

⁸² See Swan *Market Abuse Regulation* 108-110; Duan 2009 *Duquesne Business LJ* 152-154 & Chitimira & Lawack 2012 *Obiter* 560-562, for further related analysis.

⁸³ Duan 2009 *Duquesne Business LJ* 148; 152-154 & Chitimira & Lawack 2012 *Obiter* 560-562, for further related analysis.

⁸⁴ See s 87 of the Financial Markets Act.

⁸⁵ See s 82 read with ss 80 and 81. Put differently, the Financial Markets Act does not specifically provide civil and administrative remedies for market manipulation as it does in respect of insider trading. Seemingly, civil and administrative remedies in the context of market manipulation are provided in the Financial Institutions (Protections of Funds) Act 28 of 2001 as amended, hereinafter referred to as Protections of Funds Act. See s 6A read with ss 6B to 6I of the Protections of Funds Act which inter alia empowers the EC to deal with such matters on a referral basis; also see Luiz "Market Abuse and the Enforcement Committee" 2011 *SA Merc LJ* 151 154-172. See further, s 99 of the Financial Markets Act which authorises the Registrar of Securities Services to refer contraventions of the aforesaid Act to the EC. Be that as it may and notwithstanding the fact that insider trading and market manipulation activities are different, it is submitted that the Financial Markets Act should have provided appropriate civil and administrative remedies in respect of both insider trading and market manipulation to enhance consistency in the enforcement of the market abuse ban in South Africa.

⁸⁶ See s 87 of the Financial Markets Act.

⁸⁷ See s 82(7) read with s 87.

⁸⁸ See s 82.

⁸⁹ See s 77.

⁹⁰ See s 82(1)(a); (2)(a).

⁹¹ See s 77(1)(c)(i); (2)(c)(i); (3)(b)(i); (4)(a) of the Securities Services Act.

⁹² See s 82(1)(b); (2)(b).

borrowed from the Securities Services Act.⁹³ Thus, as was the position under the Securities Services Act,⁹⁴ any person affected by insider trading activities may institute a claim for part of the proceeds and/or compensatory damages from the FSB under the Financial Markets Act.⁹⁵ It is, however, important to note that the Financial Markets Act now allows the affected persons to claim extra compensatory damages proceeds for an amount of up to R1 million⁹⁶ from the FSB.⁹⁷ Be that as it may, the Financial Markets Act dropped the words “penalty for compensatory and punitive purposes” which were previously employed in the Securities Services Act.⁹⁸ This could imply that no “penalty for compensatory and punitive purposes” damages are available for market abuse victims under the Financial Markets Act. It could also suggest that the available market abuse damages under the Financial Markets Act are no longer punitive and/or mainly imposed upon the defendant in order to punish him or her for committing certain prohibited practices.⁹⁹

Likewise, as was the position under the Securities Services Act,¹⁰⁰ insider trading victims may still recover part of the proceeds obtained by the FSB from the offenders, in relation to any interests, investigation costs, legal costs and commission¹⁰¹ as determined by the EC under the Financial Markets Act.¹⁰² However, the EC (not the courts as was stated in the Securities Services Act)¹⁰³ now determines the amount of commission, interests, investigation costs and legal costs that will be paid by the market abuse offenders under the Financial Markets Act.¹⁰⁴ It is submitted, notwithstanding the potential negative effects of bureaucracy and/or double jeopardy, that the Financial Markets Act should have concurrently empowered the FSB, the EC and courts to determine the commission, interests, investigation costs and legal costs that will be imposed upon the market abuse offenders. This could have enhanced the co-operation between the FSB, the EC and courts in combating market abuse practices in South Africa and elsewhere.

Furthermore, as earlier stated,¹⁰⁵ the Financial Markets Act provides actual calculable damages which may be utilised by those who fall victim to insider trading practices.¹⁰⁶ The same calculable damages were recycled from the Securities Services Act,¹⁰⁷ without providing any new measures or statutory guidelines that could be employed by the EC and/or the claims officer when determining the actual calculable damages that will be given to the market abuse victims.¹⁰⁸

Like the former position under the Securities Services Act,¹⁰⁹ the Financial Markets Act's market abuse remedies are still very few and restricted to insider trading cases alone.¹¹⁰ Consequently, as stated earlier,¹¹¹ apart from common law remedies,¹¹² there are no statutory remedies available to the persons affected by other market abuse offences such as market manipulation under the Financial Markets Act.¹¹³ This flaw was directly borrowed from the Securities Services Act.¹¹⁴ Furthermore, as it was under the Securities Services Act,¹¹⁵ a claimant who obtains any amount of common law damages¹¹⁶ will have such amount deducted if he also claims in terms of section 82 of the Financial Markets Act.¹¹⁷ This could have been targeted at curbing double jeopardy and/or over-criminalisation of market abuse offences in South

⁹³ See s 77(1)(c)(ii); (2)(c)(ii); (3)(b)(ii); (4)(b).

⁹⁴ See s 77(1)(c)(ii); (2)(c)(ii); (3)(b)(ii); (4)(b).

⁹⁵ See the related discussion under paragraph 3 above.

⁹⁶ See s 82(1)(b); (2)(b).

⁹⁷ See s 82(1)(b); (2)(b).

⁹⁸ See s 77(1)(c)(ii); (2)(c)(ii); (3)(b)(ii); (4)(b).

⁹⁹ See further related discussion on punitive damages in paragraphs 2.2 and 2.3 above.

¹⁰⁰ See further s 77(1)(c)(iii) and (iv); (2)(c)(iii) and (v); (3)(b)(iii) and (v); (4)(c) and (e); s 77(2)(c)(iv); (3)(b)(iv); (4)(d).

¹⁰¹ See s 82(2)(e).

¹⁰² See s 82(1)(c) and (d); (2)(c) and (d); see further related discussion in paragraph 3 above.

¹⁰³ See s 77.

¹⁰⁴ See s 82.

¹⁰⁵ See paragraph 3 above.

¹⁰⁶ See s 82(6)(a) and (b).

¹⁰⁷ See s 77(9)(a) and (b) read with s 77(8)(b).

¹⁰⁸ It remains very difficult for the claimants to objectively prove that they were affected by the insider trading offence in question because there are still no statutory guidelines on how a claims officer may exercise his discretion when determining the actual calculable damages that will be given to such claimants under the Financial Markets Act, see s 82(6)(a) and (b) read with s 82(5)(b) of the Financial Markets Act; see further related remarks under paragraph 3.1 above.

¹⁰⁹ See s 77.

¹¹⁰ See s 82.

¹¹¹ See further related remarks under paragraph 3.1 above.

¹¹² See s 87.

¹¹³ See s 82 read with ss 80 and 81 of the Financial Markets Act.

¹¹⁴ See ss 85; 77 read with ss 75 and 76.

¹¹⁵ See s 77(10) read with s 85.

¹¹⁶ See s 87 of the Financial Markets Act.

¹¹⁷ See s 82(7) read with s 87; see further related remarks under paragraph 3.1 above.

Africa. Nonetheless, as it was under the Securities Services Act,¹¹⁸ other alternative market abuse remedies such as specific civil pecuniary penalties, punitive damages, class actions and private rights of action are still not considered under the Financial Markets Act.¹¹⁹

As earlier indicated,¹²⁰ any persons affected by insider trading will only get their compensatory damages after the FSB has recouped its expenses in relation to any successful settlements involving insider trading cases.¹²¹ This could further suggest, as was the position under the Securities Services Act,¹²² that not all the affected persons will get their adequate insider trading damages because such damages might still be reduced or completely consumed by the FSB's recouped costs in terms of the Financial Markets Act.¹²³

As indicated above, one could argue that the market abuse remedies that were re-introduced under the Financial Markets Act have, to a great extent, not been able to adequately resolve the flaws and gaps that were associated with similar remedies under the Securities Services Act.

5. Concluding Remarks

The article has provided an overview analysis of compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act in a bid to provide appropriate and equitable redress to the victims of market abuse practices in South Africa.¹²⁴ In relation to this, it is noted that these market abuse remedies are still very few and/or less dissuasive for the purposes of combating market abuse practices in the South African financial markets and elsewhere consistently.¹²⁵ For instance, other market abuse remedies such as private rights of action, specific civil pecuniary penalties, punitive damages and class actions are not expressly provided in the Financial Markets Act.¹²⁶ Accordingly, it is submitted that the Financial Markets Act should be amended to expressly provide for the aforementioned remedies and other coercive market abuse remedies such as injunctions; specific performance orders; cease and desist orders; mandatory orders; order for the freezing of assets and name and shaming.¹²⁷

Furthermore, it was revealed that apart from common law remedies, there are no statutory remedies available to the persons affected by other market abuse offences such as market manipulation under the Financial Markets Act.¹²⁸ In light of this, it is hoped that the Financial Markets Act will be reviewed to enact adequate market abuse remedies that will be applicable to both the insider trading and market manipulation victims.

The article further provided an overview comparative analysis of the market abuse remedies that were given under the Securities Services Act and those that are available under the Financial Markets Act.¹²⁹ Nonetheless, it was indicated that the Financial Markets Act recycled most of the market abuse-related flaws that were previously embedded in the Securities Services Act.¹³⁰ For example, as was the position under the Securities Services Act, Internet-related manipulative disclosures are still not expressly outlawed in the Financial Markets Act.¹³¹ In this regard, it is submitted that the Financial Markets Act should be amended to enact provisions that expressly prohibit Internet-related market manipulation practices and provide sufficient remedies to those prejudiced by such practices. It was also highlighted that the market abuse practices which were previously outlawed in Securities Services Act were re-introduced in the Financial Markets Act¹³² without providing any new insider trading-related definitions or offences such as an "attempted insider trading offence" and/or a specific "tipping" offence. Consequently, it is suggested that the Financial Markets Act should be amended to enact additional provisions for new market abuse-related definitions and/or offences such as an "attempted insider trading offence", "attempted market manipulation offence" and a specific "tipping" offence. It is further submitted,

¹¹⁸ See s 77.

¹¹⁹ See s 82; also see related remarks under paragraph 3.1 above.

¹²⁰ See related remarks under paragraph 3.1 above.

¹²¹ See s 82(4) read with s 87 of the Financial Markets Act.

¹²² See s 77(7) read with s 85.

¹²³ While claiming insider trading damages through the FSB could be economical, it could on the other hand, also give rise to bureaucracy and/or delays on the part of the insider trading victims to prove their claims and receive adequate compensatory damages from the FSB timeously. Like the former position under the Securities Services Act, see s 77(7)(b), the balance (if any), could only be paid to successful claimants under the Financial Markets Act, see s 82(4)(b) read with s 82(5) and (6). See further related remarks under paragraph 3.1 above.

¹²⁴ See related remarks in paragraphs 3 and 3.1 above.

¹²⁵ See related remarks in paragraphs 3 and 3.1 above.

¹²⁶ See s 82; also see related remarks in paragraphs 3 and 3.1 above.

¹²⁷ See related discussion in paragraph 2.2 above.

¹²⁸ See related remarks in paragraph 3.1 above.

¹²⁹ See related remarks in paragraph 4 above.

¹³⁰ See related remarks in paragraph 4 above.

¹³¹ See s 81; see related remarks in paragraph 2.1 read with paragraph 4 above.

¹³² See ss 78; 82; 80 and 81.

as highlighted earlier,¹³³ that enacting a statutory provision in the Financial Markets Act for a definition of the concept of "market abuse" involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa.

Furthermore, it was stated that settling market abuse cases with the FSB alone could, if not properly enforced, give rise to bureaucracy and/or delays on the part of the insider trading victims to prove their claims and receive adequate compensatory damages from the FSB timeously.¹³⁴ It is, therefore, hoped that the Financial Markets Act will be reviewed in the future to expressly provide for other alternative anti-market abuse measures and remedies such as private rights of action and class actions to enable all the affected persons to directly and timeously claim their damages from the offenders. It is further submitted that the policy makers should consider amending the Financial Markets Act to enact specific statutory provisions and/or guidelines that could be employed by a claims officer when exercising his or her discretion to determine the actual calculable market abuse damages that will be paid to successful claimants.¹³⁵

In a nutshell, the article has revealed that the market abuse remedies stipulated in the Financial Markets Act are still very few and/or less dissuasive for the purposes of combating market abuse practices in South Africa consistently. Moreover, given the fact that the Financial Market Act's market abuse provisions recycled some of the flaws previously contained in the Securities Services Act, it remains questionable whether the Financial Markets Act's market abuse prohibition will enhance the combating of market abuse in South Africa. 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, other academics are further encouraged to conduct more legal research on anti-market abuse measures and remedies as well as the challenges associated and/or faced by market abuse victims 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.

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¹³³ See related remarks in paragraph 2.1 above.

¹³⁴ See related remarks in paragraph 3.1 above.

¹³⁵ See related remarks in paragraph 3.1 above.

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