

Overview analysis of the regulation of insider trading in Zimbabwe during the corona virus pandemic

Regulation of
insider trading

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Abstract

Purpose – It is important to note that insider trading is currently outlawed under the Securities Act 17 of 2004 (Chapter 24: 25) as amended (Securities Act) in Zimbabwe. This Act enumerates some practices that may give rise to insider trading liability in the Zimbabwean financial markets. Nonetheless, numerous challenges, such as the lack of adequate financial resources, the lack of sufficient persons with the relevant skills and expertise on the part of the enforcement authorities, lack of political will, inadequacy of insider trading provisions, poor cooperation and collaboration between the relevant authorities and the ongoing coronavirus (Covid-19) pandemic have negatively impeded the effective regulation and combating of insider trading in Zimbabwe. To this end, the author explores the stated challenges and recommend measures that could be used by regulatory bodies and other relevant enforcement authorities to enhance the regulation and combating of insider trading in the Zimbabwean financial markets. This study aims to enhance the detection and combating of insider trading in Zimbabwe.

Design/methodology/approach – A qualitative research methodology is used through the analysis of relevant legislation and case law.

Findings – It is hoped that the findings and recommendations made in this study will be considered by the Zimbabwean policymakers.

Research limitations/implications – The study does not use empirical research methodology.

Practical implications – The findings and recommendations made in this study could enhance the combating of insider trading activities in Zimbabwe.

Social implications – The study seeks to curb insider trading in the Zimbabwean financial markets and financial institutions in the wake of the covid-19 pandemic-related regulatory and enforcement challenges.

Originality/value – The study provides original research on the regulation and combating of insider trading activities in Zimbabwe.

Keywords Covid-19, Challenges, Offences, Insider trading, Financial markets

Paper type Research paper

1. Introductory remarks

The article explores the current Zimbabwean anti-insider trading prohibition in terms of the Securities Act 17 of 2004 [Chapter 24:25] as amended (Securities Act). This is done in the context of the regulatory challenges that are caused by the ongoing corona virus (covid-19)

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pandemic. Accordingly, it is vital to note that the Securities Act enumerates some practices that may give rise to insider trading in the Zimbabwean financial markets and financial institutions (see sections 88–94). Nonetheless, numerous flaws and challenges such as the lack of adequate financial resources, the lack of sufficient persons with the relevant skills and expertise on the part of the enforcement authorities, lack of political will, inadequacy of insider trading provisions, poor cooperation and collaboration between the relevant authorities and the covid-19 pandemic have negatively impeded the effective regulation and combating of insider trading activities in Zimbabwe. To this end, the stated challenges are scrutinised so as to recommend measures that could be used by regulatory bodies and other relevant enforcement authorities to enhance the regulation and combating of insider trading in the Zimbabwean financial markets. It is hoped that such measures will be adopted by policymakers to revamp the current Zimbabwean anti-insider trading regulatory framework.

2. Current insider trading regulation and related challenges during the corona virus (covid-19) pandemic

2.1 *The regulation of insider trading under the Securities Act*

2.1.1 *Flawed definitions of key terms.* The Securities Act was enacted in 2004 and later amended in 2013 [1]. However, its enforcement has been marred by its numerous gaps and flaws, especially during the covid-19 pandemic. Notably, the term “insider trading” is not expressly defined under the Securities Act [2]. Nonetheless, for the purposes of this article, the term “insider trading” refers to 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 (Chitimira, 2021, pp. 8–9; Osode, 2004, p. 303; Botha, 1991, pp. 2-3). Moreover, other key insider trading-related terms are not expressly defined under the Securities Act. For instance, the term “insider” is not expressly defined under the Securities Act (sections 87 and 88 read with sections 89–94 of the Securities Act; Luiz and Van der Linde, 2013, pp. 458–491). Therefore, it was very difficult to effectively determine the different categories of insiders who could incur insider trading liability under the Securities Act during the covid-19 pandemic. This follows the fact that most people were working remotely from their homes during the covid-19 national lockdown period, making it very difficult for them to safely keep price-sensitive inside information from their family members. The status *quo* is exacerbated by the failure of the Securities Act to clearly provide the different categories of insiders in its insider trading provisions. It merely stipulates that the accused must be an individual who is an insider and/or an individual who obtained inside information from an insider (section 88 read with sections 89–94 of the Securities Act; also see Chitimira, 2021, pp. 9–13; Jooste, 2000, 2006, pp. 283–286).

Nonetheless, the term “individual” is not expressly defined in the Securities Act (section 87). It appears that the reference to “individual” in all insider trading provisions of the Securities Act means that they are limited individual offenders and does not apply to juristic persons (Osode, 2000, pp. 239–263; Cassim, 2007, pp. 44–70). Section 87 of the Securities Act merely stipulates that any individual or a director, employee, adviser, consultant or shareholder of an issuer of listed securities to which the inside information relates could be held liable for insider trading. It is not clear whether these persons could be regarded as primary insiders under the Securities Act (Feldman and Logan, 1996, pp. 55–57; Warren, 1991, pp. 1037–1078) [3]. Furthermore, the Securities Act does not provide how offenders who are not individuals *per se* could be held liable for insider trading offences in Zimbabwe [4]. Thus, it was possible for

juristic persons that commit insider trading offences to evade their liability during the covid-19 pandemic [5].

Most trading in listed securities on the Zimbabwe Stock Exchange (ZSE) during the covid-19 pandemic was either completely suspended or remotely conducted, especially during the national lockdown. This disruption somewhat led to a surge in securities regulation violations and illicit trading activities such as insider trading, market manipulation and money laundering. During the covid-19 pandemic, unscrupulous persons took advantage of the fact that the term “issuer of listed securities” is not defined in the Securities Act (sections 2 and 87) and try to evade insider trading liability on the basis that they were not issuers of affected securities and/or that they did not know that they were issuers of such securities. It was also not clearly and statutorily provided whether “issuer of listed securities” also include any individuals that directly or indirectly obtain inside information which relates to the affected listed securities from primary or secondary insiders (section 87 of the Securities Act; see further [Hazen, 1982](#), pp. 845–860). In addition, the terms “primary insiders”, “secondary insiders” and “fortuitous insiders” are neither used nor defined in the Securities Act.

Furthermore, the deliberate and inadvertent tipping and/or leaking of non-public price-sensitive inside information by insiders who were forced to work from their homes was more prevalent during the covid-19 pandemic national lockdown. Thus, the administration and handling of non-public price-sensitive inside information was very difficult for most insiders who were working from home, especially during the covid-19 pandemic national lockdown. This was also worsened by the fact that the terms “tipper” and “tippee” are not expressly defined in the Securities Act, and it appears that they do not form part of its anti-insider trading prohibition (sections 2 and 87; also see further [Huang, 2006](#), pp. 40–300; [Huang, 2012](#), pp. 379–403) [6]. It is crucial to note that tipping usually occurs when the insider tips or leaks non-public price-sensitive information to another person (tippee), who then deals on the basis thereof in the relevant affected securities. This is further complicated by the absence of an adequate statutory definition of the term “deal in securities” under the Securities Act. Section 87 is silent while section 2 of the Securities Act merely provides that 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. This suggests that any dealing in securities under the Securities Act also includes subscribing for shares and/or the buying and selling of shares or any other method that was used by the ZSE, brokers and other market participants during the covid-19 pandemic [7]. Unfortunately, the aforesaid definition is mainly restricted to listed securities and the term “listed security” merely entails any security that is listed on the official securities exchange as stipulated in section 2 of the Securities Act.

Section 87 of the Securities Act defines the term “regulated exchange” as a registered securities exchange or a securities exchange that conducts business lawfully outside Zimbabwe. This appears to refer to an international and/or foreign securities exchange. Moreover, section 2 of the Securities Act defines the term “securities exchange” as a person or entity that constitutes, maintains or provides a marketplace 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 such as the ZSE. It is not clear whether this definition applies to other trading platforms such as over the counter (OTC) markets, multilateral trading facilities (MTFs) and organized trading facilities (OTFs). Moreover, all trading on the securities exchange and/or the regulated exchange was severely affected by

the covid-19 pandemic in Zimbabwe. Both the Securities and Exchange Commission of Zimbabwe (SECZ) and the ZSE struggled to supervise and monitor the trading of securities to detect and combat money laundering during the covid-19 pandemic, particularly during the national lockdown. Moreover, the government failed to provide adequate financial resources to both the SECZ and the ZSE for them to effectively conduct their duties during the covid-19 pandemic.

Section 2 of the Securities Act provides a very wide definition of the term “security” to include 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 etcetera. However, the Securities Act does not clearly provide whether the aforesaid definition also applies to securities that traded in OTC markets, MTFs, OTFs and other unregulated markets. Consequently, this obscurity was exploited by some persons to perpetrate insider trading activities in unregulated markets during the covid-19 pandemic in Zimbabwe.

Section 87 of the Securities Act provides that 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. This definition is limited to securities listed on the regulated securities exchange such as the ZSE. Thus, insider trading activities that were possibly committed by some persons in unregulated markets were neither detected nor timeously prosecuted during the covid-19 pandemic.

Lastly, section 87 of the Securities Act provides that “inside information” refers to any 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 (see further [Schipani and Seyhun, 2016](#), pp. 327–378). Thus, only 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 amounts to inside information ([Schipani and Seyhun, 2016](#), pp. 327–378). Inside information should not have been made public, and it must be information that is likely to have a material effect on the price or value of listed securities. Section 87 of the Securities Act does expressly provide the degree of materiality required for insider trading purposes and/or how such materiality is determined. As indicated earlier, most insiders struggled to protect the non-public inside information of their companies, while they were working from home during the covid-19 pandemic, especially during the national lockdown.

2.1.2 Flawed insider trading offences. Some practices that could give rise to insider trading are currently outlawed under the Securities Act. However, its prohibition on insider trading is seemingly applicable only to individuals (section 88 of the Securities Act). For instance, any individual that deals for one’s own account or for another person’s account or encourages or discourages another person from dealing in listed securities while he or she who 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 under the Securities Act (section 88 read with sections 89–94). These and other related offences are unpacked below.

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 incur insider trading liability under the Securities Act (section 88(1)

(a)). Thus, any illicit dealing with 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 is treated as an insider trading offence under the Securities Act (section 88(1)(a)) [8]. Only individuals who are insiders may be liable for insider trading under the Securities Act. Moreover, the Securities Act does not expressly require that the offender should have received some benefit from the illicit dealing in question before he or she incurs insider trading liability (Chitimira, 2021, pp.13–15; Chitimira, 2015, pp. 86–107). Nevertheless, it was very difficult to detect and investigate the illicit trading activities in listed securities during the covid-19 pandemic owing to covid-19 restrictions.

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)). It appears that this prohibition does not apply to juristic person offenders. Consequently, section 88(1)(a) of the Securities Act provides that individuals that knowingly leak inside information to others and/or deal in the affected securities for the benefit of other persons while in possession of inside information will be liable for insider trading. However, the poor protection of inside information challenges by insiders were worsened by the covid-19 restrictions which forced employees of many companies and other financial institutions to work remotely from their homes during the national lockdown. As a result, the tipping of non-public inside information for the benefit of other persons by employees of such companies and/or financial institutions was not easily detected by both the SECZ and the ZSE during the covid-19 pandemic.

Thirdly, section 88(1)(b) of the Securities Act stipulates that 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 incur insider trading liability. Again, the wording of this provision is apparently limited to individuals who must have the actual knowledge that they have non-public inside information prior to their illicit tipping activities [9]. It was somewhat possible for some insiders to intentionally or inadvertently tip-off non-public inside information to other persons while they were working from their homes during the covid-19 pandemic and claim that they did not know that such tipping was unlawful. Moreover, it was possible for such insiders to argue that they had no prior knowledge of the price-sensitive nature of the inside information they possessed in relation to their insider trading activities, especially during the covid-19 pandemic national lockdown. Nevertheless, the Securities Act does not expressly provide whether fault elements should be proved before the accused could incur insider trading liability. The Securities Act does not expressly provide for fortuitous insider trading liability, and it appears that any leaking of non-public inside information by insiders will give rise to insider trading liability (section 88(1)(b); see further Cox, 1990, pp. 455–481).

Fourthly, section 88(1)(c) of the Securities Act provides that any activity or conduct of preventing or discouraging another person from dealing in any affected securities by individuals who know or ought to know that they have non-public inside information constitutes an insider trading offence. It appears that mere discouragement of another person from dealing in the affected securities by any individual who has non-public inside information amounts to insider trading in terms of section 88(1)(c) of the Securities Act. Thus, the offender does not necessarily have to directly benefit from the discouragement of others to incur insider trading liability. Moreover, it seems that the discouragement need not have caused any material change in the price or value of affected securities for the accused individual to incur insider trading liability under the Securities Act. However, it was very difficult for the SECZ to impute liability on the insiders who violated section 88(1)(c) of the

Securities Act while working from their homes during the covid-19 pandemic. This is worsened by the fact that the Securities Act does not stipulate whether the recipient (tippee) of such discouragement information will be jointly and severally liable for insider trading with the insider concerned (tipper).

Section 88(2) of the Securities Act outlaws the improper disclosure of non-public inside information to any other person by any individual who knows or ought to know that he or she has such information. It appears that the mere disclosure of such information by the tipper to the tippee suffices for the purposes of imputing insider trading liability on the offender. It was a big challenge for insiders to protect the non-public inside information from their family members while working from home during the covid-19 pandemic. Non-public inside information was inadvertently leaked by insiders while answering their phones or working on their laptops from their homes during the covid-19 pandemic. Moreover, the prohibition on the improper disclosure of inside information by insiders does not expressly apply to juristic persons (section 88(2) of the Securities Act) [10].

2.1.3 Flawed defences. Some defences for insider trading offences are outlined in section 89 of the Securities Act. Notably, section 89(1)(a) of the Securities Act empowers the insider to 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. Thus, the offender may only rely on this defence if he or she was aware of the non-public inside information in question when such instructions were given by the client. Furthermore, this suggests that an insider who was aware of the non-public price-sensitive information and continued to deal in the affected securities on the basis of such information will not be able to rely on this defence. Notably, the aforesaid client instructions should be lawful and consistent with the Securities Act as well as the Constitution of South Africa, 1996 (Constitution). Most of the consultation between insiders and their clients was done virtually during the covid-19 pandemic and this culminated in various challenges of improper disclosure of non-public inside information between insiders and their clients.

Section 89(1)(b) of the Securities Act provides that an insider may argue that he or she would have acted in the same way even without the inside information. Therefore, the accused persons are required to prove that the inside information in question did not influence or cause them to deal in relevant listed securities as stipulated in section 89(1)(b) of the Securities Act [11]. The accused persons are probably required to prove further that they have a good track record of buying and selling of shares in the relevant listed securities, so that they could successfully rely on the stated defence [12]. This was somewhat onerous and very difficult to fulfil and comply with during the covid-19 national lockdown in Zimbabwe.

The accused individual could also submit that he or she was acting on behalf of a public-sector body in accordance with a monetary policy, a policy in respect of exchange rates, the management of public debt or the management of foreign exchange reserves in terms of section 89(1)(c) of the Securities Act. The accused person should prove that he or she was pursuing matters or policies of a public-sector body bona fide, in accordance with his or her work-related duties and/or functions. This defence seeks to protect accused persons that innocently deal in the relevant listed securities without the intention of harming other investors through illegal insider trading activities, especially during the covid-19 national lockdown. The defence was probably aimed at promoting bona fide securities trading by insiders in Zimbabwe, especially during the volatile period of the covid-19 pandemic.

Section 89(1)(d) of the Securities Act provides that the insider and/or accused person may contend that he or she was trying to prevent another person from contravening the relevant provisions of section 88 of the same Act. This defence is probably intended to protect insiders, market participants and other regulatory bodies that discourages others from

committing insider trading offences. However, the Securities Act does not specify how the accused may prove that his or her conduct was solely meant to combat insider trading. It was very difficult for the accused persons to rely on this defence during the covid-19 national lockdown, particularly when the trading in listed securities on the ZSE was either suspended or remotely conducted.

Section 89(2)(a) of the Securities Act stipulates that the accused person may argue that he or she objectively believed that no one would deal in any affected securities after the disclosure of the inside information. The accused person should indicate if there were certain circumstances that warranted the disclosure of non-public inside information. For instance, he or she may argue that the disclosure of non-public inside information was necessary and/or done in the proper performance of his or her duties, functions, employment or profession. Nevertheless, the term “proper performance” is not defined in the Securities Act, but one could assume that it means that the accused person was lawfully conducting and/or fulfilling his or her professional and employment duties. The accused person may contend that he or she disclosed that the relevant information was non-public inside information in terms of section 89(2)(b) of the Securities Act. This defence seeks to protect bona fide and lawful trading by market participants such as brokers, financial analysts and investment advisors.

All the stated defences must be successfully proved by the insiders and/or accused persons on a balance of probabilities to evade any insider trading liability. Moreover, all the insider trading defences are merely based on the knowledge of the accused person that he or she was in possession of non-public inside information at the time of the illicit trading. Accordingly, it remains possible for some offenders to claim ignorance of their illicit conduct to evade insider trading liability. Very few defences for insider trading are provided under the Securities Act. Interestingly, the covid-19 pandemic was sometimes used as a *de facto* defence for insider trading by accused persons in Zimbabwe.

2.1.4 Flawed penalties.

2.1.4.1 Criminal sanctions. Criminal penalties may be imposed on insider trading offenders in terms of section 90 of the Securities Act (also see section 88; [Chitimira and Lawack, 2012](#), pp. 548–565) [13]. Thus, any person who commits insider trading will be liable to a fine not exceeding level ten (Zim \$2m) or imprisonment for a period not exceeding five years or both such fine and imprisonment as stipulated in section 90 of the Securities Act (see further [Botha, 1991](#), pp. 2–3; [Luiz, 2011](#), pp. 151–172). These penalties are not deterrent enough for the purposes of combating insider trading activities in the Zimbabwean financial markets ([Saungweme et al., 2013](#), pp. 1630–1639; Magaisa, 2006, page number unknown; Blumberg, 1985, pp. 117–158). For instance, the illicit gains from insider trading activities could outweigh the minimal fine of Zim \$2m or jail term for only five years for convicted offenders (section 90 of the Securities Act; [Chitimira, 2021](#), pp. 7–26; [Saungweme et al., 2013](#), pp. 1630–1639; Magaisa, 2006, page number unknown).

The SECZ and the relevant courts have struggled to effectively enforce the current insider trading criminal sanctions to combat insider trading activities in the Zimbabwean financial markets, especially during the covid-19 pandemic. For instance, no single criminal case of insider trading was successfully prosecuted in Zimbabwe since 2004 to date ([Mataruka and Mahombera, 2018](#), page number unknown; Silver, 1985, pp. 960–1025). Insider trading cases increased during covid-19 pandemic since most people with inside information were working from home. Nonetheless, not even one criminal case of insider trading was successfully and timeously settled by the SECZ and the relevant courts during the covid-19 pandemic. This shows that the SECZ and other relevant authorities are using flawed enforcement approaches which do not enhance the prosecution and/or settlement of

all criminal cases of insider trading in Zimbabwe (Mataruka and Mahombera, 2018, page number unknown; Öberg, 2014, pp. 111–138). In this regard, policymakers should seriously consider introducing specialized market abuse courts that are manned by persons with the relevant expertise to prosecute and enforce the insider trading prohibition to enhance the combating of insider trading cases in Zimbabwe (Carr, 1999, pp.1187–1220). Such persons should have the relevant skills and expertise in corporate law, securities law, and financial markets law, so that they may be able to effectively enforce the anti-insider trading provisions in Zimbabwe. The Securities Act should be amended to enact adequate provisions for separate criminal penalties for natural and juristic persons to effectively combat insider trading activities that are constantly perpetrated in the Zimbabwean financial markets and financial institutions as evidence during the covid-19 pandemic. The recent Al Jazeera documentary on Zimbabwe's illicit gold trade and money laundering is a case in point that market abuse-related activities are rampantly perpetrated (Matambanadzo, 2023).

2.1.4.2 Civil sanctions. Section 91 of the Securities Act provides civil sanctions for insider trading. However, insider trading is broadly 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 in terms of section 91 (1) of the Securities Act (see further Tsaurai and Odhiambo, 2012, pp. 355–363; Chew, 1998, pp. 331–375). Consequently, all the elements of delict such as conduct, wrongfulness, fault, damage (harm) and causation should be proved before any civil liability is imposed on insider trading offenders in terms of section 91(1) of the Securities Act [14]. Affected persons as well as the SECZ are empowered to claim insider trading civil remedies from the offenders in terms of section 91(1)(d) of the Securities Act.

The insider trading offenders are liable for any profit which accrued to them, or any loss avoided or reduction in the price or value of affected securities which occurred through their illicit dealing and/or through any unlawful disclosure of price-sensitive non-public inside information which relates to the affected securities as stipulated in section 91(2) and (3) of the Securities Act. This essentially means that all persons affected by insider trading are entitled to claim civil remedies from the offenders in terms of section 91(2) of the Securities Act. Thus, offenders are liable for civil remedies in respect of any profit made and/or loss avoided through insider trading activities as stipulated in section 91(3) of the Securities Act. However, it was very difficult to institute delict proceedings in terms of section 91(4) of the Securities Act against the insider trading offenders during the covid-19 pandemic because the SECZ and the courts were sometimes operating remotely or closed.

Section 91(5) of the Securities Act provides that individuals that concludes a securities contract through misrepresentation and insider trading will incur civil remedies against the prejudiced persons. It is not clear how criminal elements of misrepresentation are employed to enforce civil sanctions against insider trading offenders under section 91(5) of the Securities Act. Nonetheless, the affected party to the contract may rescind it if he or she was unaware of the insider trading contravention in terms of section 91(5) of the Securities Act. The SECZ may 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 to recover insider trading damages from the offenders as stipulated in section 92(1) of the Securities Act (also see Banerjee *et al.*, 2018, pp. 2685–2719). 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) [15]. Nonetheless, class actions have not been effectively enforced by the SECZ to curb insider trading in the Zimbabwean financial markets and financial

institutions. This status quo was worsened by the effects of the covid-19 pandemic, especially during the national lockdowns.

Sections 91 and 92 of the Securities Act which provide civil sanctions are inadequate and less dissuasive for deterrence purposes. This follows the fact that they do not provide specific civil monetary fines for insider trading. Furthermore, the available insider trading provisions under the Securities Act do not expressly provide separate and distinct civil sanctions for juristic and natural persons offenders. Sections 91 and 92 of the Securities Act also do not provide private rights of action, punitive damages, and compensatory damages against the insider trading offenders. This culminated into the paucity of insider trading civil cases that were successfully and timeously settled by both the SECZ and the relevant courts in Zimbabwe during the covid-19 pandemic (see further [Bromberg et al., 2016](#), pp. 1–49). Nonetheless, both the SECZ and other affected persons struggled to prove and comply with the elements of delict for the purposes of the insider trading civil remedies, especially during the covid-19 pandemic national lockdown periods.

2.1.4.3 Administrative sanctions. The Securities Act does not expressly provide specific administrative sanctions for insider trading (sections 87–95 read with sections 100–107). This suggests that the SECZ and the courts do not rely on administrative sanctions to curb insider trading even though these sanctions are relatively easy to use compared to both criminal and civil sanctions. Consequently, sections 87–95 read with sections 100–107 of the Securities Act do not give the SECZ and the courts express authority to rely on administrative sanctions to combat insider trading activities in Zimbabwe. This flaw negatively affected the enforcement of the insider trading prohibition in Zimbabwe during the covid-19 pandemic. Thus, the SECZ and the courts missed a good opportunity to use administrative sanctions which are easy to prove than criminal cases at a critical time of the covid-19 pandemic in Zimbabwe. In this regard, the Securities Act should be amended to introduce insider trading administrative sanctions. This approach empowers the SECZ and the courts to timeously obtain more settlements in insider trading cases. Accordingly, the Securities Act should provide 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) [16] and higher monetary sanctions for juristic persons to deter all persons from committing insider trading activities in the Zimbabwean financial markets and financial institutions ([Du Plessis and Lyon, 2005](#), pp. 107–157; [Chitimira and Lawack, 2012](#), pp. 548–565). Moreover, search and seizure orders and the asset forfeiture orders should be introduced to empower the SECZ to confiscate all proceeds of insider trading activities from the insider trading offenders for deterrence purposes, especially during crises such as the covid-19 pandemic ([Basdeo, 2014](#), pp. 1048–1069; [Chitimira, 2015](#), pp. 86–107). Nonetheless, it must be noted that no search and seizure orders were issued by both the SECZ and the courts against insider trading offenders during the covid-19 pandemic. It was obviously not possible for the SECZ to undertake and enforce search and seizure orders during the covid-19 pandemic national lockdown even if such orders were provided for under the Securities Act or any other relevant laws.

The SECZ may cancel or amend the terms or conditions of a license or registration of a registered person that violates the provisions of a licensed person, registered securities exchange, or a central securities depository (section 105(1)(i) of the Securities Act; see further [Du Plessis and Lyon, 2005](#), p. 140). In other words, the SECZ is empowered to 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). Section 100(2) and (3) of the Securities Act provides that any person who is not registered or licensed to carry on any business in terms of the Securities Act may incur administrative sanctions if they violate its provisions. It appears the SECZ may investigate all persons to detect unlawful trading activities in the Zimbabwean financial institutions and financial markets in terms of section 100(2) and (3) of the Securities Act. Accordingly, the SECZ may impose administrative sanctions against the offenders in accordance with the Securities Act. However, the Securities Act does not describe circumstances under which the SECZ is empowered to cancel the license or registration and/or amend the terms or conditions of the registered offender or person that violates its provisions (section 105(1)(i) of the Securities Act; [Shen, 2008](#), pp. 65–66). It is also not clear how the aforesaid cancellation or amendment of the license or terms and conditions of registration could be imposed against insider trading offenders in Zimbabwe, particularly during crises such as the covid-19 pandemic.

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 commit prohibited offences in terms of section 105(1)(a) of the Securities Act ([Chitimira, 2021](#), pp. 7–26; [Pfaeltzer, 2014](#), pp.134–148). Nonetheless, the warning letter from the SECZ alone is not deterrent enough to discourage and curb illicit trading activities such as insider trading in the Zimbabwean financial institutions and financial markets (section 105(1)(a) of the Securities Act; see further [Smith and Block, 2016](#), pp. 47–53). This is exacerbated by the fact that the Securities Act does not expressly empower the SECZ to impose insider trading administrative sanctions against the offenders.

Section 105(1)(b) of the Securities Act provides that 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 curb illicit activities and/or to effectively conduct their businesses. However, it has been very difficult for the SECZ to enforce this provision and ensure that accused persons or affected persons appoint qualified professional persons to enable them to comply with their own company and/or organisational policies to effectively combat illicit trading activities in the Zimbabwean financial markets and financial institutions (section 105(1)(b) of the Securities Act). This also renders the Zimbabwean anti-insider trading prohibition ineffective (see further [Dalko and Wang, 2016](#), pp. 704–715). Moreover, section 105(1)(b) of the Securities Act does not provide any guidelines on how this administrative sanction could be used to combat insider trading in Zimbabwe.

Section 105(1)(c) of the Securities Act empowers the SECZ to issue a written instruction to the affected person, committee of a registered securities exchange or operators of a central securities depository to provide remedial action in respect of the offence or wrongful conduct in question ([Chitimira, 2021](#), pp. 7–26). However, this administrative sanction is not expressly provided to combat insider trading under the Securities Act (section 105(1)(c) of the Securities Act; [Luchtman and Vervaele, 2014](#), pp. 192–220). Moreover, the administrative penalties that could be imposed on the insider trading offenders for their non-compliance with a stipulated remedial action are not expressly provided under the Securities Act. This is likely to encourage unscrupulous offenders to deliberately perpetrate insider trading offences with impunity. In other words, it is not clear whether a minimal monetary penalty not exceeding level five or Zim \$200,000 may also be imposed on the insider trading offenders for each day that the contravention has continued in terms of section 105(1)(d) of the Securities Act ([Pather and Another v Financial Services Board and Others 2018](#) (1) SA 161 (SCA); [Luiz, 2011](#), pp. 151–172). It is also required that the courts and/or the SECZ

should carefully assess and consider any award or penalty previously made against the offender which arises from the same facts to avoid double jeopardy and/or related challenges [17].

Section 105(1)(e) and (f) of the Securities Act stipulates that 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. However, this administrative sanction is not expressly provided against persons that commit insider trading and other illicit trading activities in the Zimbabwean financial markets and financial institutions.

In a bid to effectively ensure compliance with the provisions of the Securities Act, 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 in terms of section 105(1)(g) of the Securities Act. Section 105(1)(h) of the Securities Act entails that 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 if they are juristic persons or a body corporate. Nonetheless, these sanctions are not expressly provided for insider trading cases under the Securities Act.

Section 105(1)(j) of the Securities Act provides that the SECZ may direct the operator of a central securities depository to dissolve it or amend any rules governing its operation in a bid to combat illegal trading activities. This provision does not expressly apply to insider trading cases. Consequently, this and other administrative sanctions enumerated above were not applicable against insider trading offenders in Zimbabwe during the covid-19 pandemic. This negatively affected the detection, investigation and combating of insider trading cases in Zimbabwe.

2.2 Lack of adequate financial resources

The enforcement of the insider trading provisions is always marred by the lack of adequate financial resources in Zimbabwe (Chitimira, 2021, pp. 7–26). Put differently, the government and other relevant stakeholders do not always provide adequate financial resources to the SECZ, the ZSE and the courts to enable them to effectively enforce the insider trading prohibition in the Zimbabwean financial markets and financial institutions (Chitimira, 2014, pp. 937–971). Most financial resources were channelled towards combating the effects of the covid-19 pandemic rather than the negative effects of insider trading. Thus, due to covid-19 lockdowns, various onsite investigations, detection measures, and the prosecution of insider trading cases were very difficult to conduct in Zimbabwe. The government and other relevant stakeholders did not take a balance approach to deal with the negative effects of both the covid-19 pandemic and insider trading. Consequently, insider trading and other related illicit activities such as money laundering were reportedly rampant in the Zimbabwean financial markets and financial institutions during the covid-19 pandemic (Matambanadzo, 2023).

2.3 Lack of sufficient persons with the relevant skills and expertise

The lack of sufficient persons with the relevant skills and expertise on the part of the enforcement authorities is another big challenge which has negatively affected the enforcement of insider trading provisions in Zimbabwe, especially during the covid-19 pandemic to date (Chitimira, 2014, pp. 254–271; Chitimira, 2021, pp. 7–26; Matambanadzo, 2023). Consequently, the SECZ, the ZSE and the relevant courts are manned by a few persons with relevant skills. This has culminated into numerous delays in the detection,

investigation, settlement and prosecution of insider trading cases in Zimbabwe. Moreover, very few insider trading activities were successfully and timeously detected, investigated and prosecuted during covid-19 pandemic in Zimbabwe. The covid-19 lockdowns made it difficult for the SECZ, the ZSE and the courts to hire persons with relevant expertise for onsite investigations, detection and prosecution of insider trading cases (Chitimira, 2021, pp. 7–26; Matambanadzo, 2023). Due to covid-19 lockdown restrictions, the SECZ and the ZSE were forced to abandon onsite investigations and other activities that required the face-to-face execution of persons with the relevant expertise. Accordingly, insider trading investigations were ineffectively conducted via video calls or online meetings with suspected offenders during the covid-19 pandemic.

2.4 Lack of political will

Lack of political will is another challenge that has negatively affected the enforcement of the insider trading prohibition in Zimbabwe. The Zimbabwean Government and its policymakers did not commit sufficient resources to the enactment and enforcement of adequate anti-insider trading laws. This status *quo* was worsened by the advent of the covid-19 pandemic, which diverted all the government's attention and resources to the combating of the spread of covid-19 virus while neglecting to curb the negative effects of illicit trading practices such as insider trading (Chitimira, 2021, pp. 7–26; Matambanadzo, 2023). More attention was given to covid-19 at the expense of combating insider trading practices. Likewise, most financial resources were channelled towards combating covid-19 rather than insider trading. It appears that the Zimbabwean Government used covid-19 as an excuse for not providing sufficient resources to the SECZ, the ZSE and the courts for them to effectively conduct their anti-insider trading regulatory and enforcement roles. Over and above, covid-19-related corruption marred the regulatory work of the SECZ, the ZSE and the courts in relation to the combating of insider trading in the Zimbabwean financial markets and financial institutions (see further Cinar, 1999, pp. 345–353).

2.5 Poor cooperation and collaboration between the relevant authorities

The poor and inconsistent cooperation and collaboration between the relevant authorities such as the SECZ, the ZSE and the courts also affected the enforcement of the anti-insider trading provisions in Zimbabwe, particularly during the covid-19 pandemic (Chitimira, 2021, pp. 7–26; Matambanadzo, 2023). As indicated in the preceding paragraphs above, the covid-19 pandemic negatively affected the regulatory and enforcement duties of the SECZ and the ZSE. For instance, due to covid-19 restrictions and lockdowns, a suspension of trading on ZSE was effected in Zimbabwe. This forced the ZSE to abandon its market surveillance duties that are mainly aimed at the detection of illicit trading activities such as insider trading in the Zimbabwean financial markets and financial institutions. Similarly, the SECZ was unable to conduct onsite investigations into all suspected insider trading violations. Moreover, the suspension and/or slow adjudication of cases by the relevant courts gave rise to the poor enforcement of the anti-insider trading prohibition. This was exacerbated by the poor cooperation and collaboration between the SECZ, the ZSE, the courts and other relevant authorities during the covid-19 pandemic. The government's misplaced priorities which merely focussed on imposing severe covid-19 restrictions and lockdowns also gave rise to the poor cooperation and collaboration between the SECZ, the ZSE, the courts and other relevant authorities. Furthermore, the SECZ, the ZSE and the courts are not statutorily obliged to cooperate and collaborate with each other to curb insider trading in terms of the Securities Act (Chitimira, 2021, pp. 7–26; Matambanadzo, 2023). It

also appears that there are no formal cooperation and collaboration memorandum of understanding (MOUs) between the SECZ, the ZSE and the courts. Consequently, no insider trading cases were successfully and timeously detected, investigated, settled and/or prosecuted during the covid-19 pandemic in Zimbabwe.

3. Concluding remarks

As discussed above, various challenges affected the enforcement of the anti-insider trading provisions in Zimbabwe during the covid-19 pandemic. For instance, challenges such as the lack of adequate financial resources, the lack of sufficient persons with the relevant skills and expertise on the part of the enforcement authorities, lack of political will, inadequacy of insider trading provisions, poor cooperation and collaboration between the relevant authorities and the covid-19 pandemic impeded the combating of insider trading in Zimbabwe. In this regard, it is submitted that the Securities Act should be amended to clearly provide adequate definitions of all key terms that are applicable all securities including those that are traded in OTC markets, MTFs, OTFs and other unregulated markets. Moreover, the Securities Act should be amended to enact adequate provisions for insider trading offences such as attempted insider trading, tipping and/or attempted tipping. The improper disclosure of non-public inside information should be effectively outlawed under the Securities Act to curb the challenges of inadvertent leaking of such information by insiders while answering their phones or working on their laptops from their homes, especially during the crises such as the covid-19 pandemic. Moreover, the prohibition on the improper disclosure of inside information by insiders should be effectively outlawed under the Securities Act to expressly apply to juristic persons.

The Securities Act should be amended to enact more defences for insider trading in light of the covid-19 pandemic. In other words, the covid-19 pandemic should not be used as a *de facto* defence for insider trading by accused persons who misuse non-public inside information to commit insider trading offences in Zimbabwe.

Moreover, the Securities Act should be amended to enact adequate provisions for separate criminal penalties for natural and juristic persons to effectively combat insider trading activities in the Zimbabwean financial markets and financial institutions, especially during possible crisis such as the covid-19 pandemic. Sections 91 and 92 of the Securities Act should be amended to provide private rights of action, punitive damages, and compensatory damages against insider trading offenders. The Securities Act should be amended to remove the requirement for the SECZ and other affected persons to prove and comply with the elements of delict for the purposes of the insider trading civil remedies, especially during crises such as the covid-19 pandemic national lockdowns. This could enable both the SECZ and the relevant courts to obtain more settlements in all civil cases of insider trading in Zimbabwe. The Securities Act should also be amended to enact adequate and specific insider trading administrative sanctions. This approach empowers the SECZ and the courts to minimise bureaucracy and timeously obtain more settlements in insider trading cases.

The government and other relevant stakeholders should consistently provide adequate financial resources to the SECZ, the ZSE and the courts to enable them to effectively enforce the insider trading prohibition in the Zimbabwean financial markets and financial institutions.

The SECZ, the courts and other enforcement authorities should be manned by sufficient persons with the relevant skills and expertise to enhance the enforcement of insider trading provisions in Zimbabwe, especially during crises such as the covid-19 pandemic. In addition,

there should be sufficient political will on the part of the government and policymakers to empower and promote the regulatory work of the SECZ, the ZSE and the courts to enable them to combat insider trading in the Zimbabwean financial markets and financial institutions.

Lastly, the Securities Act should be reviewed to enact provisions that require that there should be formal cooperation and collaboration MOUs between the SECZ, the ZSE and the courts. This should be introduced to increase insider trading cases that are successfully and timeously detected, investigated, settled and/or prosecuted by the courts and the SEZ, particularly during systemic risks and/or crises such as the covid-19 pandemic.

Notes

1. The Securities Act was amended by the section 1 of the Securities Act 2 [Chapter 24:25] of 2013; Saungweme, P, Ricardo, P. and Pradeep, B. (2013), "A framework for combating insider trading on developing stock exchanges: Evidence from the Zimbabwean Stock Exchange", *African Journal of Business Management*, Vol.7, No 17, pp. 1630-1639; Mokone LLD thesis 35-52.
2. Section 87 of the Securities Act; see related comments by Chitimira H., (2021), "Statutory challenges affecting the enforcement of the insider trading prohibition in Zimbabwe", *Acta Universitatis Danubius Juridica*, Vol. 17, No. 2, pp. 7-26; Jooste R. (2000), "The regulation of insider trading in South Africa: Another attempt", *South African Law Journal*, p. 284, 293-294.
3. See related comments by Luiz S.M., (1999), "Insider trading regulation – If at first you don't succeed", *South African Mercantile Law Journal* pp. 136, 143; Jooste R. (2006), "A critique of the insider trading provisions of the 2004 Securities Services Act", *South African Law Journal* pp. 437, 438.
4. Sections 87 and 88 of the Securities Act; see related comments by Jooste, n 2 at 289-290; Osode P. C., (1999), "Insider trading regulation in South Africa: A public choice perspective", *African Journal of International and Comparative Law* 688, 700.
5. Sections 87 and 88 of the Securities Act; also see Jooste, n 2 at 293-294; Chitimira H, (2016), "Unpacking selected key elements of the insider trading and market manipulation offences in South Africa", *Journal of Corporate and Commercial Law and Practice* 24, 31-32.
6. Sections 87 & 88 of the Securities Act; see further Jooste, n 3 at 443; Brodsky D.M., (1984), "Insider trading and the Insider Trading Sanctions Act of 1984: New wine into new bottles?", *Washington and Lee Law Review*, Vol. 41, No. 3, pp. 921-941; Rider B.A.K, Macmillan F., and Tajima Y., *Commercial law in a global context: Some perspectives in Anglo-Japanese law* (Kluwer Law International Ltd London 1998) 159-231.
7. Sections 2; 87 and 88 of the Securities Act; see further Luiz, note 3 at 138; Cassim, R. (2007), "Some aspects of insider trading-Has the Securities Services Act 36 of 2004 gone too far", *South African Mercantile Law Journal*, Vol. 19, No. 1, pp. 44-70.
8. See further Chitimira, H. (2015), "The regulation of insider trading in Australia: A historical and comparative analysis", *Speculum Juris*, Vol. 29, No.1, pp. 86-107.
9. Section 88(1)(b) of the Securities Act; see related comments by Langevoort, D.C., "What were they thinking? Insider trading and the scienter requirement" in Bainbridge, S.M. (2013). *Research handbook on insider trading* (Edward Elgar Publishing Limited, Cheltenham, United Kingdom) 52-67; Osode, P.C. (2000), "The new south african insider trading act: Sound law reform or legislative overkill?", *Journal of African Law*, Vol. 44, No. 2, pp. 239-263; Jooste, n 2 at 293-294.

10. See further [Karsch, M. \(1984\)](#), “The insider trading sanctions act: Incorporating a market information definition”, *Journal of Comparative Business and Capital Market Law*, Vol.6, pp. 283-305; Osode, *n 9*, at 239-263; Jooste, *n 2* at 293-294.
11. Chitimira, *n 2* at 7-26.
12. Chitimira, *n 2* at 7-26.
13. See related comments by Öberg J “Is it ‘essential’ to imprison insider dealers to enforce insider dealing laws?” 2014 *Journal of Corporate Law Studies*, Vol.14, No. 1, pp. 111-138; Luiz, S.M. (2011), “Market abuse and the enforcement committee”, *South African Mercantile Law Journal*, Vol. 23, No. 2, pp. 151-172.
14. See related comments by Adams B.J., Perry, T. and Mahoney, C. (2018), “The challenges of detection and enforcement of insider trading”, *Journal Business Ethics*, Vol. 153, No. 2, pp. 375-388.
15. See further Zimmerman, A.S. and Jaros, D.M. (2011), “The criminal class action”, *University of Pennsylvania Law Review*, Vol. 159, pp. 1385-1455; Porrini, D. and Ramello, G.B. (2011), “Class action and financial markets: Insights from law and economics”, *Journal of Financial Economic Policy*, Vol. 3, No. 2, pp. 140-160; Sahu, G.K. (2016), “The class action suit: A challenge for protection of interest of investors”, *International Journal of Law*, Vol. 2, No. 2, pp. 12-18.
16. See further Pfaeltzer, J.J.W. (2014), “Naming and shaming in financial market regulations: A violation of the presumption of innocence?”, *Utrecht Law Review*, Vol. 10, No.1, pp. 134-148.
17. Section 93 of the Securities Act; see related comments by Wilkie, D.C.H and Johnson, L.W. (2017), “The existence of double jeopardy within the order of entry effect”, *Journal of Strategic Marketing*, Vol. 25, No. 4, pp.334-341. See further [Mokone, P. \(2018\)](#). *The Regulation of Insider Trading in Zimbabwe: Proposals for Reform*, LLD Thesis, North West University, pp. 35-52.

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