

PUBLIC HEALTH EMERGENCY AND INSIDER TRADING IN THE CORPORATE SECTOR

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Abstract

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As governments in different parts of the world seek solutions to the public health emergency created by the COVID-19 pandemic and the impacts on corporate enterprises, different steering committees are constituted to implement measures aimed at containing the spread of the disease. Information that has the potential to impact materially on companies' securities when made public is shared among committee members in the course of their deliberations. That realization informs the purpose of this paper which is to explore through doctrinal research method the law on insider trading in South Africa in such a manner as would reaffirm the position of the law on insider, inside information, and the prohibited conducts. The findings indicate a propensity by those entrusted with business information to leverage such information for personal benefits which creates a problem of uncertainties on the integrity of the securities market. The paper concludes by advocating the application of the law in such a manner as would ensure that the conduct of persons entrusted with inside information is guided by the legal threshold on insider trading.

Keywords: COVID-19, Public Health Emergency, Insider, Inside Information, Company, Securities

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1. INTRODUCTION

The outbreak of the coronavirus pandemic (COVID-19) has redefined the global outlook in several ways, not the least the operations of corporate enterprises. The virus has continued to spread its venom on human lives and threatening the sustainability of that important sector that provides sustenance to society, i.e., the corporate sector. Companies are counting their financial losses as business activities are stalled, wages are not paid, workers are being laid off (Gillett & Bowden, 2020), and availability of new job offers retarded as companies device survival strategies (Businesstech, 2020a, 2020b). As companies downsize their workforce, productivity and earnings are downsized, and this impacts directly on the value of affected companies' securities.

Governments all over the world have adopted different containment and palliative measures, just as scientists are burning midnight candles in search of medical solutions. In one of his broadcasts to the nation, the President of South Africa observed that: "It is exactly 10 weeks since we declared a national state of disaster in response to the coronavirus pandemic. Since then, we have implemented severe and unprecedented measures — including a nationwide lockdown — to contain the spread of the virus" (News24, 2020, p. 1). The President sounded apologetic where he said, "I am sorry that these measures imposed a great hardship on you — restricting your right to move freely, to work and eke out a livelihood" (News24, 2020, p. 1). That notwithstanding, further down the line, the President reeled out restrictions on the operations of certain enterprises as follows:

“To ensure that we maintain social distancing, certain high-risk economic activities will remain prohibited. These include:

- Restaurants, bars and taverns, except for delivery or collection of food.
- Accommodation and domestic air travel, except for business travel, which will be phased in on dates to be announced.
- Conferences, events, entertainment and sporting activities.
- Personal care services, including hairdressing and beauty services” (News24, 2020, p. 7).

These are suggestions that the days of uncertainties are not over. Corporate bodies that operate in those sectors of the economy would continue to experience a drop in their economic worth as the days of restrictions progressed.

The focus of the paper, however, is on the conduct of those assigned the responsibility of instituting and implementing restriction policies to contain the pandemic. Those persons are by the nature of their engagements, expected to have foreknowledge of the restriction measures instituted by the government before such measures are made public. Some of them could also have interests in some of the companies that could be affected by those restrictions. The conduct of those government officials in relation to their securities interests in the affected companies in a bid to avoid losses or gain profits for themselves or their acquaintances are regulated by the law on insider trading. While insider trading forms an essential focus of this paper, it is intended to address only three arms of that subject, namely; insider, inside information, and prohibited conducts, but without necessarily delving into the expanded scope of market abuse. The identified scope will be discussed in the context of the impact of a public health emergency, as created by COVID-19, on corporate enterprises.

The focus of the paper is primarily on South African law on insider trading, however, in analyzing the law, inferences will be drawn from factual developments, the statutes and judicial pronouncements in cognate jurisdictions such as the United Kingdom (UK) and the United States of America (US). The aim is to portray the unconscionable abuse of inside information by public officials for economic reasons even in the face of a pandemic and the attendant problem of prejudicial impact on market integrity where the regulatory instruments are not robustly enforced.

The discussion is spread across seven component sections including introduction in Section 1; COVID-19 as public health emergency and impact on corporations presented in Section 2; insider trading/dealing: what it entails provided in Section 3; who is an insider in Section 4 inside information outlined in Section 5; insider trading offences presented in Section 6; and conclusion given in Section 7. The findings, which are drawn from existing literature, indicate a propensity by those entrusted with power in political offices to leverage business information available to them by virtue of such offices to deal in companies' stocks for their individual benefits and to the prejudice of the uninformed members of the public. The paper concludes by advocating a more stringent application of the law on insider trading in South Africa to guard against issues of stock market abuses in times of public health emergency.

2. COVID-19 AS PUBLIC HEALTH EMERGENCY AND IMPACT ON CORPORATIONS

Public health emergency refers to a “serious, sudden, unusual or unexpected”, an outbreak of disease that constitutes a real threat to public health (WHO, 2019). A health situation is regarded as an emergency where the potential impact is greater than the community's capabilities to contain it (Nelson, Lurie, Wasserman, & Zakowski, 2007). The South African President alluded to this in an address to the nation where, in reference to the impact of the COVID-19 pandemic, he stated that: “As a result of the measures we imposed — and the sacrifices you made — we have managed to slow the rate of infection and prevent our health facilities from being overwhelmed” (News24, 2020, p. 1). When the spread of such a disease transcends the boundaries of the state where it originates and requires a coordinated international response to contain it, the disease is classified as being of international concern (WHO, 2019). Some instances of public health emergency of international concern in recent history include “the 2009 H1N1 (or swine flu) pandemic, the 2014 polio declaration, the 2014 outbreak of Ebola in Western Africa, the 2015-16 Zika virus epidemic”, and the prevalent COVID-19 pandemic (“Public Health Emergency of International Concern (PHEIC)”, n.d.).

The COVID-19 is described as “a highly transmittable and pathogenic viral infection caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)” (Shereen, Khan, Kazmi, Bashir, & Siddique, 2020, p. 91). The recent outbreak of the disease was first recorded in Wuhan city, Hubei province in China, and has continued to spread around the world. Report from John Hopkins University as of 17 June 2021 indicates 177,039,063 and 3,832,951 confirmed global infections and deaths respectively (Coronavirus Resource Center, 2021). The published data of infections and deaths in South Africa as of 17 June 2021 stand at 1,774,312 and 58,223 respectively (Worldometer, 2021). As governments in different parts of the world have continued to employ different levels of lockdown measures to contain the spread of the virus, the adverse impacts on corporate enterprises have continued to be as exponential as they are on human lives.

Companies are recording the high cost of doing business as revenues have decreased due to significant changes in consumer's behavior. Consumers seem to accord preference to immediate and pressing needs than ostentatious goods (Accenture, 2020). Stock markets around the world were reported as having the “worst day since the 2008-9 financial crisis on 9 March, with such a dramatic fall in prices that the day was dubbed ‘Black Monday’ — a reference to the sharp drop in oil prices that kicked off the plunge” (Investec, 2020). According to the report:

“Black Monday saw US stocks close down nearly 8% after circuit breakers paused trading for a while. In London, the FTSE 100 closed down 7.7%. In Asia, equity markets bounced back. S&P futures point to a rise of more than 3%. Bond yields also found a floor after the rate on 10-year US Treasuries slid to a low of 0.318%. In South Africa, the JSE... suffered one of its biggest crashes on record, with its all share index losing more than 12% of its value,

wiping billions off the balance sheets of South Africa's biggest companies. The driver of Black Monday's turmoil was concern over the depth and spread of Covid-19 and with it the economic implications this brings" (Investec, 2020).

Corporations must respond to the "new normal" to guarantee their survival and sustainability. The responsive measures, which may include downsizing of corporate objectives, mergers, and takeovers, have the potentials to impact on company's shares. Those measures could prove daunting for the profit-minded company's boards and other substantial investors whose connections within and outside the corporate organization would have guaranteed them access to expert information on the potential impact of the COVID-19 pandemic on the stock market. There is always the urge on such investors to adjust their investments before the occurrence of such an event to safeguard themselves against the expected adverse impact on the value of their stock but that is exactly what the law forbids.

In the US for instance, the Securities and Exchange Commission had cautioned that it would intensify the scrutiny of transactions in the stock market to identify any signs of insider trading and other dishonest transactions that may prejudice the investors (Meshulam, Hausfeld, & Christofferson, 2020). That note of caution was in realization of the fact that non-public information could be at the disposal of persons dealing in companies' securities on the market. Moderna Inc, a US pharmaceutical company that announced the discovery of a vaccine that bears the potential to provide a cure for Covid-19 is an example. The announcement prompted an increase in the market value of the company's shares by 30%. The company's chief financial officer and the chief medical officer having anticipated such an exponential rise in the value of the company's shares exercised options to purchase shares valued at \$3 million and \$1.5 million which they subsequently sold and made profits of \$16.8 million and \$8.2 million respectively (Egan & Isidore, 2020).

Another instance is that of a US Senator, Richard Burr, and his wife who is being investigated for insider trading as of the time of writing, for selling \$1.7 million of equities between January and mid-February, shortly before the impact of the COVID-19 pandemic on the stock market became a public issue. The stocks were allegedly sold on the strength of non-public information, which the senator acquired by virtue of his office (BBC News, 2020).

In South Africa, the former Steinhoff International Holdings NV Chief Executive Officer (CEO), Markus Jooste, was alleged to have advised friends to sell their shares in the company based on information at his disposal arising from the negative audit report on the company's financial records by Deloitte LLP. A mobile phone text message was allegedly sent by the CEO to some persons alerting the recipients of impending bad news. The tip-off coincided with dramatic trading in the company's shares as 47.8 million shares were traded within a short period and prior to the disclosure to the market of the irregularities in the company's account (Cameron, 2020).

The UK Court of Appeal has strong words for those who abuse inside information. In *R v. McQuoid* (2009, para. 8) Lord Judge CJ stated that:

"Those who involve themselves in insider dealing are criminals: no more and no less. The principles of confidentiality and trust, which are essential to the operations of the commercial world, are betrayed by insider dealing and public confidence in the integrity of the system which is essential to its proper function is undermined by market abuse.... Those who are entrusted with advance knowledge are entrusted with that knowledge precisely because it is believed that they can be trusted. When they seek to make a profit out of the knowledge and trust reposed in them, or indeed when they do so recklessly, their criminality is not reduced or diminished merely because they are individuals of good character".

A piece of information, which if not made public, could confer an advantage on persons who have knowledge of such information (Kruger, 2019). Where such information relates to or has the potential to affect the value of a company's securities, it must be handled and utilized as prescribed by law. These realities are the basis upon which the consideration of the insider trading law in South Africa is discussed in this paper.

3. INSIDER TRADING/DEALING: WHAT IT ENTAILS

A statutory definition of insider trading has remained elusive in South Africa (Chitimira, 2016). As a business term, ascribing a legal meaning to that term may not satisfy all the expectations of the business community. However, a definition must be found even as a working guide in dissecting the subject matter. One of such definitions of insider trading, as proffered by Girvin, Frisby, and Hudson (2010), is as follows:

"Insider dealing occurs where an individual or organisation buys or sells securities while knowingly in possession of some piece of confidential information which is not generally available and which is likely if made available to the general public, to materially affect the price of these securities" (p. 592).

The authors illustrated that definition with an instance of a director who traded his shares having gained knowledge that the company is in a precarious financial position, or where a director acquires additional shares of the company from the market being aware of the discovery of valuable minerals in the company's concession and the potential positive impact such a discovery would have on the company's securities when made public (Girvin et al., 2010). A wider approach to that subject was demonstrated in *Gihwala and Others v. Grancy Property Ltd and Others* (2016, para. 143) where the South African Supreme Court of Appeal considers insider trading as arising where "a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others." Those instances are not different from that of a director who is aware of public health emergency spawn by the COVID-19 pandemic and its potential impact on the corporate enterprise and company's securities rushes to sell or buy securities of that company to avoid losses or gain profits attendant the changes in the value of such securities. Such a practice is, from a business perspective, seen as morally wrong as "no shareholder expects to be so treated by the director he selects, no director will urge his friends to select

him for that reason” (Wilgus, 1910, p. 297). The moral indignation attendant such dealings informed the observation by Lambe (2012) that the principal reason for the prohibition of insider trading “is to protect the interests of uninformed investors against more informed opposite parties” (p. 26).

The above analysis lends justification to the South African statutory declaration of insider trading as an offence in section 78(1) of the Financial Markets Act 19 of 2012 (FMA) in similar terms as part V of the UK Criminal Justice Act of 1993. However, the definition proffered by the authors may have dealt with only one aspect of the meaning of insider trading when considered in the South African statutory context. As would become clearer shortly, insider dealing extends to unauthorised disclosure of inside information, counselling others to deal and even transactions conducted through fronts or agents.

The genesis of insider trading legislation in South Africa was explicitly captured in the judgment of the Supreme Court of Appeal in *Pather and Another v. Financial Services Board and Others* (2017) where Ponnar JA identified the first legislation as having featured in the Companies Act 61 of 1973. Distinct legislation on insider trading was enacted subsequently as the Insider Trading Act 135 of 1998 (ITA) to accord greater visibility and operational efficacy to the law. The ITA established Insider Trading Directorate and conferred power on the Financial Services Board to institute a civil action against offenders. The ITA was repealed in 2005 and replaced by the Securities Services Act 36 of 2004 (SSA). The SSA replaced the Insider Trading Directorate with the Directorate of Market Abuse. The powers of the new directorate were expanded to cover three forms of market abuse arising from insider trading, market manipulation, and false statements. The SSA has since been amended by the Financial Services Laws General Amendment Act 22 of 2008 (the Amendment Act). The need to align the law with international standards especially in response to the financial crisis of 2008-2009 led to the enactment of the current legislation, i.e., Financial Markets Act 19 of 2012 (FMA) which was assented to by the President on 30 January 2013. The FMA repealed the SSA. Chapter X of the FMA bears provisions on insider trading which is the focus of this paper.

Suffices to state that the extant legislation preserves freedom of trade but only prohibits insider trading to the extent that it seeks to prevent persons who are connected with a company in a special way from using confidential information which they have gained by virtue of their positions in that company or any other office or profession to benefit themselves at the expense of other interested parties. Such connected persons, i.e., insiders, can always deal in securities of the company once the information is published or to the extent permitted by law. In these manners, the law assumes, dealings in companies’ securities would be conducted at arm’s length.

4. WHO IS AN INSIDER?

Directors are generally assumed to be insiders being persons vested with the managerial powers of a company in the context of section 66 of the South

African Companies Act 71 of 2008. However, “insider” does not exclude others who are not directors. The statutory definition of insider lays greater emphasis on possession of inside information than the status of a person. That inference arises from section 77 of the FMA that reads as follows:

“Insider’ means a person who has inside information —

(a) through —

(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or

(ii) having access to such information by virtue of employment, office or profession; or

(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)”.

This provision reveals two groups of insiders. The first are those that could be referred to as primary insiders. Within that group are directors, employees, shareholders, and other persons, who by virtue of their office or profession have access to inside information about securities of a company listed on the regulated market. This category of persons would include a company’s auditors, brokers, solicitors, accountants, secretaries, and engineers as professionals. In *R v. McQuoid* (2009) the UK Court of Appeal accepted that a solicitor and former general counsel of a company who had acquired inside information about a proposed takeover which he passed to a second company leading to the purchase of shares in the target company from which profits were made, could be held liable as an insider.

Officeholders as referred to in the Act would include government officials that regulate the operations of the securities market. The conduct of Chief FS Okotie-Eboh, an erstwhile Nigerian Minister of Finance, who bought shares in a shoe company in anticipation of his plan to grant certain tax concessions to shoe companies in Nigeria, was cited in a public lecture as an example of insider trading (Olawoyin, 1977). The earlier reference to the US Senator Richard Burr who allegedly sold his shares to avoid losses by depreciation in the value of shares resulting from the potential adverse impact on the corporate enterprise by COVID-19 provides yet another example (BBC News, 2020). The effect of insider trading on a stock market was captured in a study by Ulrich and Anselmann (2021) with statistics that suggest that the conducts of insiders have a significant impact on the value of traded stocks.

In South Africa, the National Coronavirus Command Council (NCCC) (the COVID-19 response team), consisting mainly of cabinet ministers, selected top government officials, and experts in health science, bear the responsibility of coordinating all aspects of the country’s extraordinary emergency response to the COVID-19 pandemic. The documents relating to the work of the NCCC are said to be “secret” (de Vos, 2020), suggesting that they cannot be made public, yet the NCCC takes and implements decisions that have a material impact on corporate operations in the country, especially those in the tobacco and alcohol industries, that have elicited public criticisms (Businesstech, 2020a). Every member of the NCCC could rightly be assumed, by their offices, to have access to inside information on the potential

impact of decisions taken by the NCCC on companies' securities. Thus, dealings in securities of any company on the securities exchange by any member of the NCCC would be tainted by the statutory prohibition on insider trading, being insiders by their offices, and information at their disposal that is not made public.

The other group of insiders envisaged by the provision in section 77 of the FMA, and could be referred to as secondary insiders, are those who receive inside information either directly or indirectly from any of the primary insiders. Among this group are spouses, friends, colleagues, and other acquaintances of the primary insiders. That provision restrains such persons from acting on any information relating to the values of securities on the stock market, which they may receive from the primary insiders at this period of COVID-19 induced public health emergency. Where the insider is a shareholder, it is irrelevant whether the insider is a majority or minority shareholder. This constitutes an important deviating from the provision contained in section 16(b) of the US Securities Exchange Act of 1934. The US provision defines insider as including holders of 10% of any class of shares in a company. Leahy J applied that provision in *Speed v. Trans-American Corporation* (1951) where the judge held that it is unlawful for a majority stockholder who is an insider, to purchase the stock of the minority stockholders without disclosing material information that affects the value of the stock, which is known to the majority stockholder by their insider position but not known to the selling minority stockholders, where the information would have affected the decision of the minority stockholder. In South African where the legislation does not lay emphasis on the number of shareholdings, the provision would have been enforced by simply stating that it is unlawful for a shareholder who is an insider to purchase the shares of another shareholder without disclosing inside information affecting the value of the shares that is not known to the seller.

5. INSIDE INFORMATION

The knowledge of inside information is the reason the law prohibits insider trading. An insider who makes use of such inside information takes advantage of the ignorance of the persons the insider is dealing with. The law considers such transactions as immoral due to the unfairness and illegal as being in breach of the statute. The FMA defines "inside information" in section 77 as:

"Specific or precise information, which has not been made public and which —

(a) is obtained or learned as an insider; and

(b) if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market".

The major requirements in that provision are that the information must be "specific" or "precise", and would impact "materially" on the price or value of any security listed on the regulated market. The Act does not provide any assistance in defining those key terms. It would seem that the facts and peculiarities of each case will determine the applicability of that provision. A similar

provision is found in section 56(1) of the UK Criminal Justice Act of 1993, which provides that:

"Inside information means information which—

(a) relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally;

(b) is specific or precise;

(c) has not been made public; and

(d) if it were made public would be likely to have a significant effect on the price of any securities".

The paragraph (a) of the UK Act provision has been interpreted as implying that "information relating to a particular company or sector of the economy is covered, but not information which applies in an undifferentiated way to the economy in general" (Davies, Worthington, & Micheler, 2016, p.1036). That part of the UK provision is omitted from the South African definition of inside information. The omission of that paragraph from the South African provision is an indication that a different interpretation is intended in the application of the South African provision. It would not, for instance, be of any consequence in the South African context, that the information applies to the economy in general, so long as the information "is likely to have a material effect on the price or value of any security listed on a regulated market" (UK Criminal Justice Act 1993, section 56(1)(d)). That distinction is vital in assessing the effect of inside information emanating from the COVID-19 impact on the corporate sector. It cannot, for instance, afford a defence to an insider that the information is in broad terms and not directed to the securities of any company or issuer as it would have been in the UK context.

The restrictive part, which appears in the provisions in both jurisdictions, is the requirement that the information should be "specific" and "precise". These presuppose that the information should be "detailed and exact" and must be "clear and accurate" (Hornby, 2010, p.1430). Those requirements would eliminate bare rumours and guesses from the realms of inside information but do not require that all aspects of the deliberation must have reached finality. This analysis is illustrated by the South African court decision in *Zietsman and Another v. Directorate of Market Abuse and Another* (2016). The appellants in that case purchased substantial shares of the company on the securities market with the knowledge that the company was negotiating a loan from a bank to rescue it from the financial crisis. In an action against the appellants for insider trading, the appellants argued that the loan was still being negotiated and as such the information at their disposal did not meet the requirements of "precision and specificity" as required by law. The court held that the mere fact that final loan agreements have not been signed is not a sufficient reason to describe the information known to the appellants as not being "specific" and "precise". The court described obtaining a loan as a process that would realistically or on the probabilities materialise. Therefore, the knowledge by the appellants of that information before it was made public satisfied the requirements of inside information.

It has been suggested that the crucial effect of this restriction is that it apparently relieves directors and senior managers of the company and analysts

who have made a special study of the company from falling foul of the legislation simply because they have a generalised informational advantage over other investors (Davies et al., 2016). That illustration should, however, be distinguished from an instance where a member of the COVID-19 response team and their acquaintances, armed with information yet to be made public, that the president would announce certain palliatives, relax or lift lockdown measures on some sectors of the economy on a specific date and rushes to buy or sell securities in anticipation of the impact of such announcement on the securities market. The latter conduct will certainly attract liability under the law as the dealing is prompted by inside information and not from a study of the company's business pattern.

In the UK statute, the word "significant" is preferred to the word "material" as found in the South African provision. The meaning ascribed to "material" by the South African Constitutional Court in *Joseph and Others v. City of Johannesburg and Others* (2010) in a different context indicates that "material" is synonymous with "significant" as against "trivial" effect. However, whether the effect of inside information on the price or value of a company's securities is significant or trivial should remain a relative concept, which should be assessed objectively. In *Zietsman and Another v. Directorate of Market Abuse and Another* (2016, para. 57) it was found by the court that:

"The information had the capacity to materially affect the share price. The loan represented a significant lifeline to the embattled ACT and the amount of R99 million would be viewed by the reasonable investor as sufficient for a small company requiring funding. Further, the fact that the lender was the IDC would mean to the reasonable investor that terms less onerous than those of a commercial bank would probably be imposed. This would therefore have a positive effect on the share price [emphasis added]."

The reference to "reasonable investor" in that decision demonstrates the objective element in the assessment of the impact or "materiality" of the information, which is known to the insider. It is therefore irrelevant that the insider does not consider a piece of information as "material" if a "reasonable investor" would in the prevailing circumstances have considered such information as "material". Additionally, the provision refers to the "likely" effect of the information. The word "likely" was construed by the court as "less than a probability but more than a mere possibility" (*Tshishonga v. Minister of Justice and Constitutional Development*, 2007, para. 180). The law does not require a "certainty" of impact, it is sufficient that an objective assessment of the information would yield a positive inference of impact on the price or value of listed security. A decrease in the price of shares by a few cents resulting from the likely effect of the public health emergency on the securities market, for instance, may seem insignificant to an insider who trades a few shares to avoid losses, but quite significant when the shares are in thousands or millions. However, the same result could emerge on the objective assessment of both circumstances. The only safe route, therefore, is for the insider to wait until the information is made public as required by law.

6. INSIDER TRADING OFFENCES

The acts or conducts that the law regards as offences of insider trading have been alluded to in general terms in the earlier discussions without specific reference to the relevant statutory provisions. There are, however, specific provisions in the FMA that place prohibitions on insiders in dealings involving company securities that are listed on the regulated market. It should be emphasised that what the law prohibits is the use of inside information known to the insider but not known to the seller. Thus, an insider cannot justifiably make use of such information simply by resigning, or even upon being removed from a position that availed the information to the insider (Davies et al., 2016). This point is worth noting as South Africa has witnessed the suspension by the President of a minister who is a member of the COVID-19 response team for breaching the lockdown rules (Nicolson, 2020). Such a minister cannot assume that inside information that was gained while an active member of the response team is now available for personal use without contravening the law against insider trading. The preceding discussions on the specific prohibitions placed by the FMA on the use of inside information are limited to those aspects of section 78 as considered adequate in portraying the link between the COVID-19 induced public health emergency and insider trading. Section 78 of the FMA bears the following prohibitions.

6.1. Dealing in the securities listed on a regulated market

A person who has inside information is prohibited from "dealing either directly or indirectly or through an agent, for his or her own account or even on another person's account in the securities listed on a regulated market". "Deal" is defined in section 77 of the FMA as including "conveying or giving an instruction to deal". A more expansive definition is found in section 55 of the UK Criminal Justice Act of 1993 as "(a) acquiring or disposing of the securities (whether as principal or agent); or (b) procuring, directly or indirectly, an acquisition or disposal of the securities by any other person". The South African definition, economical as it may seem, would also extend to those conducts specifically mentioned in the UK Act when read in the context of section 78(1) of the FMA. The legislative intention is to cover all transactions by an insider, whether directly or indirectly, in company securities listed on the securities market. The advantage, however, in the elaborate definition is that it narrows the room for doubts and legal arguments. The UK Court of Appeal decision in *R v. McQuoid* (2009) where a solicitor, an insider, passed inside information to a company that purchased the shares and the profit was paid into the account of the solicitor provides a good illustration of indirect dealing. Such a decision should stand as a warning to the members of the COVID-19 response team and others who may have access to inside information that the prohibition cannot be circumvented by dealing in listed securities through corporate entities. This is also an area where the provision of section 20(9) of the South African Companies Act 71 of 2008 that refers to unconscionable abuse of corporate personality could be invoked to hold the insider personally liable on a dealing, which is cloaked as a company's transaction.

6.2. Dealing on behalf of another person in the securities listed on a regulated market

Persons, who are prohibited from dealing in the securities listed on a regulated market for knowing inside information, cannot deal in those securities on behalf of other persons. This provision could be described as a double-barrel prohibition. It accords with the common saying that “what I must not do for myself, I must not do for another”. The provision targets professionals such as brokers, accountants, auditors, solicitors, and others, who usually act on behalf of their clients or employers on matters relating to dealings in company’s securities on the securities market. Such persons could by their positions be exposed to inside information relating to the listed securities on the market. The law prohibits them from using such information to benefit their clients.

6.3. Disclosure of inside information to another person

An insider is prohibited from disclosing inside information to another person. Mere disclosure of the information would be sufficient to incur liability under this provision. It is immaterial that the person who receives the disclosure does not deal with the strength of the information. Disclosure of information need not be in detail, simple tip-off is sufficient. An instance is an issue earlier referred to the Steinhoff International Holdings NV CEO who was alleged to have advised friends through mobile phone text message to sell their shares because of the company’s unfavourable financial records that was uncovered by the auditors, which the CEO believed would impact on the company’s shares value when made public.

The preservation of market integrity demands that information relating to listed securities should proceed from the authorised source. Improper disclosure of information could harm the market by creating an advantage for some over others. In the US case of *Oliver v. Oliver* (1934) the court held that the duty of a director to the company to keep information secret, overrides any obligation such a director owes to the shareholder and that if a director cannot disclose the information to the shareholder, such a director must not deal with the shareholder. Similarly, in *SEC v. Texas Gulf Sulphur* (1968) the court held that if the exigencies of business require a period of non-disclosure, the insider should refrain from dealing in the securities during that period.

The preservation of secrecy is one of the ethos of public office. Ensuring that the publishing of information proceeds, not only from one source but also from the right source, guarantees a coordinated response and consistency in market activities. The contrary is a recipe for distortions and rumours that could be harmful to the integrity of a regulated market.

6.4. Encouraging or discouraging any other person to deal in the securities listed on a regulated market

A person that knows inside information is prohibited by law from encouraging or discouraging others to deal in the securities listed on a regulated

market. Liability could ensue even when the insider might not consciously or intentionally be engaging in prohibited conduct. The essence of the prohibition, as observed by writers, is to discourage over-enthusiastic presentations by company representatives to meetings of large shareholders or analysts (Davies et al., 2016). It is not unusual to hear “over-enthusiastic” members of the COVID-19 response team making statements in public that touches on sensitive matters in sectors of the economy. The contradictory pronouncements by the President of South Africa and the Minister of Cooperative Governance and Traditional Affairs, both of whom belong to the COVID-19 response team, on restrictions on the sale of cigarettes and alcohol, and the potential for such statements to impact the securities of companies dealing in those products cannot be underestimated (Ryan, 2020). A study by Tomlin (2009) indicates that the announcement by the government of the proposed ban on the sale of cigarettes impacted significantly the market value of shares of those firms that deal in tobacco products and other hospitality industries (Tomlin, 2009). A decrease in the market value of listed securities suggests that the investor enthusiasm is watered down prompting a trade-off of shares in the affected companies. An immediate result of the contradictory pronouncements which demonstrated the seriousness with which such pronouncements by persons in authority were received by the affected companies was the instituting of legal action by the companies against the government (Ryan, 2020). Suffices to the state by way of argument that such contradictory pronouncements constitute an indirect encouragement of the investors to divest their investments, and a discouragement from investing in companies dealing in such products as the pronouncements create uncertainties on the sustainability of the affected companies operations. Where such divestment occurs, the affected companies’ worth is deflected. This impacts directly on the companies listed securities on the stock market.

7. CONCLUSION

In *R v. Spearman* (2003) Hughes J remarked that insider trading is generally a serious matter as such conduct tends to corrupt the whole of the stock market in the capital. It is on that premise that the law insists that those entrusted with information because of their privileged positions must not use it to benefit themselves or connected persons by dealing in company securities that are listed on the regulated market while the country strives to find solutions to the spread of the COVID-19 disease. The COVID-19 pandemic meets all the requirements of a public health emergency. The disease has impacted tremendously and continues to impact, not just on human lives and livelihoods, but also on corporate enterprises and the stock market.

Information is shared among persons charged with the making and implementation of policies to contain the spread of the disease. The law treats those persons as insiders where the information they receive is as such as would likely have a material impact on company’s securities. As bearers of inside information, the insiders are by law

prohibited from dealing in the securities listed on a regulated market, dealing on behalf of another person in the securities listed on a regulated market, disclosure of inside information to another person, and encouraging or discouraging any other person to deal in the securities listed on a regulated market. These prohibitions are treated as offences that attract sanctions under section 78 of the FMA in recognition of the seriousness of such conduct in the eyes of the law. The urge to deal, as revealed in this article, is real, the US Senator under investigation provides a striking example, the Moderna Inc, Nigerian Minister of Finance, and the South African Steinhoff CEO are other instances. The potential to deal through cronies and to provide tip-offs to friends and associates are all demonstrated. Closer scrutiny should be directed at the business engagements of those insiders who are created in the quest to contain the prevailing issues of public health emergency resulting from

the COVID-19 pandemic. This would ensure that their conducts meet the demands of probity in handling inside information that has the potential to impact materially on companies' securities that are listed on the regulated market.

The paper has articulated the legal concept of insider trading and how the legal instrument could be deployed to monitor the business conducts of those vested with the responsibility of steering the affairs of government in combating the menace of the COVID-19 pandemic. As a doctrinal study, limitations are envisaged in the area of statistics, which are more amenable to empirical research. A future study could, therefore, seek to discover, by empirical approach, how the conducts of those state officials have impacted the stock market and the effectiveness of the law in curtailing identifiable abuses.

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