DISSERTATION

LIABILITY OF COMPANIES FOR MARKET ABUSE

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1. INTRODUCTION: GENERAL STATEMENT AND OVERALL PURPOSE OF DISSERTATION

1.1 Introductions and overview

With various forms of market abuse that exist, namely market manipulation, insider trading and false and deceptive statements, the question which must be asked is, how companies as juristic persons can be held liable for any of these forms of market abuse.

When considering this question it is important to note the changes in legislation, namely the repeal of the Insider Trading Act[1] and its replacement by the Securities Services Act[2] and subsequenly the Financial Markets Act.[3] While the first of these statutes did not include companies as possible perpetrators of market abuse, the two later statutes have made this possible, at least in theory.

This dissertation seeks to provide an in depth analysis on how the various provisions relating to the forms of market abuse as mentioned can be applied to companies. Further to this, it will also have to look at and consider how the elements of a crime can be applied to a company and the problems that present in the application of such elements.

For the sake of not being to broad and unspecific the dissertation will not delve into much detail regarding the liability of companies for all forms market abuse. It will mainly focus on liability of companies for insider trading, as this group of offences raises more complex issues than other forms of market abuse. This will enable the reader to gain in depth knowledge concerning one aspect of market abuse, namely insider trading and a short but thorough understanding on the other forms.

The dissertation will also consider the fact that these companies can only and do only act through certain organs and/or representatitives when carrying out their actions. It

[1] 135 of 1998.
[2] 36 of 2004.
[3] 19 of 2012.

will briefly discuss and consider at which point liability is not imputed to the individual acting for the company but rather on the company itself and then briefly look at instances where individuals have been held liable for insider trading where companies have been concerned.

Further to the above, the dissertation will look at the various sanctions which can be imposed for violation of market abuse provisions. What is important to consider when discussing this section would be to look at whether the criminal sanctions formulated for individuals are adequate in their application to companies and how these are applied to companies. The dissertation will therefore look at the discrepancies, in the event that they exist, in application of similar sanctions to both companies and individuals and suggest a way forward and possible reform to relevent sanctions to be imposed on companies.

The dissertation further aims to look at the various defences companies have at their disposal should they be charged with violating the market abuse provisions. In considering these defences, the dissertation will look at what flaws exist, if any, and what can be done about these. The desirability of introducing a so-called "Chinese wall" defence for companies will be discussed later in this dissertation.

When giving due regard to market abuse by companies this dissertation will seek to research how the United Kingdom deals with this situation. Taking into account the differences and the successes and/or failures of the United Kingdom, this dissertation will seek to draw from the positive experiences of this country and advise how South Africa could deal with this situation and implement measures so as to receive better results when dealing with market abuse by juristic persons. Important to note is that when such measures have been identified we cannot merely implement them in South Africa as we are still developing, we need to adapt them and revise them to fit into our developing system.

2. MARKET ABUSE OFFENCES AND DEFENCES

2.1 Introduction

It has been said that the intention of a market abuse regime is not merely to curb criminal behaviour but also to curb behaviour which undermines confidence in the market and which falls below reasonably expected standards.[4]

The act dealing with the various forms of market abuse is the Financial Markets Act 19 of 2012, which came into effect on 3 June 2013. The chapter of the Financial Markets Act which deals with and regulates market abuse is chapter 10. The main question of this dissertation is however how companies are held criminally liable for market abuse violations. This will be discussed in detail later in this dissertation.

The Insider Trading Act prohibited an "individual" from engaging in certain conduct. Its application was thus limited to a natural person. The Securities Services Act referred to a "person" rather than an individual. "Person" as contained in the Securities Services Act includes and/ or extends the application of this legislation to both natural and juristic persons. This terminology was carried over into the Financial Markets Act.

In section 77 of the Financial Markets Act "*person*" is defined as *"includes a trust and a partnership"*. Some authors have questioned whether companies are included, but they have illogically not questioned natural persons. When one considers the fact that the section only mentions trusts and partnerships, one could then also ask the question whether natural persons are covered.

This question as posed above will by its nature be superfluous because we already know that juristic persons are covered especially when we consider the definition of "*person*" as contained in the Interpretation Act 33 of 1957. One can thus from this

[4] Mngomezulu "The journey from insider trading to market abuse – have we succeeded in curbing the scourge?" http://www.chartsec.co.za/documents/2011SpeakerPresentations/TheRegulationOfInsiderTrading.pdf (September 2011) 14.

point take it that companies are also covered[5] by the Financial Markets Act and can thus be found to be criminally liable. Even though it can be taken that companies are indeed covered, the application of the requirments or elements to companies still raises issues and as said above, will be discussed later in this dissertation.

I will now proceed to provide an in depth discussion on one of the forms of market abuse in South Africa, namley insider trading coupled with a short discussion of the other forms of market abuse and discuss how these are regulated under the Financial Markets Act.

2.2. Offences and defences

2.2.1 Insider trading - offences and defences

Insider trading refers to the purchase or sale of a company's shares by insiders when in possession of inside information, which if generally known, would affect the price of those shares.[6] For the sake of clarity, it must be stated that there are other offences which flow from the main offence of insider trading and other sections of the Financial Markets Act, these offences do not necessarily require the purchase and sale of shares of a company.

In order to appreciate the difficulties in imposing liability on companies, this dissertation needs to consider the elements of these offences.

The terms "insider" and "inside information" form the core of the insider trading provisions and are defined in section 77 of the Financial Markets Act 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

[5] Walt and Laufer "Why personhood doesn't matter: corporate criminal liability and sanctions" 1991 *American Journal of Criminal Law* 263 265.
[6] Davis, Cassim, Loubser, Coetzee and Burdette *Companies and Other Business Structures in South Africa* (2011) 216.

(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)" and

"**inside information**" means 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."

Jooste remarks that the definitions for both insider and inside information as contained in the Financial Markets Act, which have both been carried over from the Securities Services Act are flawed. This so because inside information can only be held by a person who is an insider, but to be an insider you have to have inside information. As the definitions of both insider and inside information are co dependant and circular, these definitions remain unclear.[7]

In considering section 78 of the Financial Markets Act, which deals with insider trading, it is clear that this section caters for various offences and defences associated with insider trading.

2.2.1.1 Section 78(1) – Dealing for one's own account

The offence in section 78(1)(*a*)[8] deals with the situation where a person obtains inside information and proceeds to deal with the inside information for that person's own account. Section 73(1)(*a*) of the Securities Services Act also made it an offence to

[7] Jooste "A critique of the insider trading provisions of the 2004 Securities Services Act" 2006 *SALJ* 437 438.

[8] Section 78(1) of the Financial Markets Act provides:

a) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

b) An insider is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she—

i) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider; or

ii) was acting in pursuit of a transaction in respect of which—

aa) all the parties to the transaction had possession of the same inside information;

bb) trading was limited to the parties referred to in subparagraph (aa); and

cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information.

deal directly or indirectly for ones own account in securities listed on a regulated market to which inside the information relates.[9]

The defence for dealing for one's own account is contained in section 78(1)(*b*)[10] and states that a person would not be found guilty of insider trading under section 78(1)(*a*) in the event that the person became an insider after having given the instruction to the authorised user to deal and/or was acting in pursuit of any of the transactions as mentioned in subsection (b)(ii).[11] This defence must be proved on a balance of probabilities.

The defence comes across as being quite restrictive in that it seems to imply that for a person to be found guilty of being an insider such person must have given the instruction to deal, directly to the authorised user. Thus even though "the offence covers indirect dealing, the defence contained in the section does not make it clear whether it would cover instructions given by agents or others".[12]

2.2.1.2 Section 78 (2) – Dealing on behalf of another

Section 78(2)[13] deals with the situation where a person deals on behalf of another. Section 78(2)(*a*) makes it clear that where a person knowingly has inside information and proceeds to deal directly or indirectly or through an agent for any other person in

[9] Cassim "Some aspects of insider trading- has the Securities Services Act 36 of 2004 gone too far ?" 2007 *SA Merc LJ* 44 58.
[10] n 8 above.
[11] Luiz and Van der Linde "The Financial Markets Act 19 of 2012: some comments on the regulation of market abuse" 2013 *SA Merc LJ* 458 463.
[12] *Ibid.*
[13] Section 78 (2) of the Financial Markets Act provides:
a) An insider who knows that he or she has inside information and who deals, directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.
b) An insider is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she—
i) is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time;
ii) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider; or
iii) was acting in pursuit of a transaction in respect of which—
aa) all the parties to the transaction had possession of the same inside information;
bb) trading was limited to the parties referred to in subparagraph (aa); and
cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information.

the securities listed on a regulated market to which the inside information relates, such person may be guilty of insider trading. In this case the person is not dealing for themselves but for someone else who may or not be an insider.

Section 73(1)(*b*) of the Securities Services Act contained a similar offence, however this offence has been extended in the Financial Markets Act by the inclusion of the phrase "through an agent" which was not included under the Securities Services Act.[14]

Section 78(2)(*b*) provides the insider with a defence and states that should the insider prove on a balance of probabilities that a) they were an authorised user acting on instructions from a client and did not have knowledge that the client was an insider at the time, b) only became an insider after they had given the instructions to deal and such instruction was not changed in any manner or c) were acting in pursuit of a transaction under 78(2)(*b*)(iii), such person would not be guilty of the offence as contemplated in section 78(2)(*a*).

A requirement for the defences as set out above is that the authorised user show that he did not know that the insider was an insider at the time. The defences can only be relied on by an authorised user who deals for another person and the defence "has to be established in relation to the authorised users own position."[15]

2.2.1.3 Section 78 (3) – Dealing for an insider through an agent

Section 78(3)[16] deals with the situation where a person deals for an insider. The section makes it clear that where a person deals for an insider and knows that the

[14] Cassim (n 9) 58.
[15] Luiz and Van der Linde (n 11) 466.
[16] Section78 (3) of the Financial Markets Act provides:
a) Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence.
b) A person is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if the person on whose behalf the dealing was done had any of the defences available to him or her as set out in subsection (2)(b)(ii) and (iii).

person they are dealing for is an insider, the person dealing will be guilty of an offence.

This new offence brought by the Financial Markets Act must be differentiated from the offence as contained in section 78(2). This offence does not require that the person dealing be an insider himself or herself or that they know that the information they are dealing with is insider information, it merely requires that the person knows that he, she or it is dealing for an insider who possesses inside information.[17]

The defence available to the person dealing on behalf of the insider is contained in section 78(3)(*b*). This defence allows the person trading on behalf of the insider to evade liability in the event that they can prove that the person on whose behalf they were dealing, namely the insider, had defences available to them. The defences in this case are clearly not related to the dealer himself but relate to the insider on whose behalf he dealt. It is clear from this that the dealer cannot rely on any defence that the insider does not have to his or her disposal.[18]

2.2.1.4 Section 78 (4) – Knowingly disclosing insider information

A further offence contained in section 78(4)[19] relates to the disclosure of inside information to another by a person who knows that such information is inside information. According to this section a person who discloses such inside information commits an offence.

[17] Luiz and Van der Linde (n 11) 467.
[18] Luiz and Van der Linde (n 11) 468.
[19] Section 78 (4) of the Financial Markets Act provides:
a) An insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence.
b) An insider is, despite paragraph (a), not guilty of the offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that he or she at the same time disclosed that the information was inside information.

According to section 78(4)(*b*) the only defence available to the discloser of information is if the discloser can prove that it was necessary to disclose the information in order to properly perform the functions of his/her employment.

2.2.1.5 Section 78 (5) – Encouraging or discouraging dealing

The last offence as recorded in section 78 is contained in section 78(5).[20] The section makes it clear that where a person knows that he or she has inside information and encourages or discourages another person to deal based on that insider information, such a person commits an offence.

2.2.2 Other forms of market abuse

Over and above insider trading there are other forms of market abuse in South Africa. These forms of market abuse are also dealt with in the Financial Markets Act and will be discussed shortly below.

2.2.2.1 Prohibited trading practices

Prohibited trading practices are a form of market abuse and are also dealt with in section 80 of the Financial Markets Act. This may also be referred to as market manipulation and these terms will be used interchangeably throughout this paper.

Public confidence in the fairness of markets enhances their liquidity and efficiency. market manipulation harms the integrity of and thereby undermines public confidence in, securities and derivatives markets by distorting prices and creating and artificial appearance of market activity.[21] This in short sums up what market manipulation is.

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[20] Section 78 (5) of the Financial Markets Act provides:
An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

[21] Johannesburg Stock Exchange "Insider trading and other market abuses (including the effective management of price sensitive information" (revised August 2013)

In order to be considered as a prohibited trading practice, the practice must however be one that creates or is likely to create a false or deceptive appearance of the supply of, demand for or trading activity in connection with the security.[22]

Now although stock markets are far better regulated today than in the nineteenth century, market manipulations by large investors and insiders still occur around the world. There is evidence that shows that large investors and corporate insiders possess market power which allows them to manipulate the market and prices.[23]

A prohibited trading practice constitutes an offence and is dealt with in terms of section 80 of the Financial Markets Act. The section contains a variety of prohibited trading practices, which are considered as market abuse. In terms of section 80(1)(*a*) of the Financial Markets Act, knowledge is a requirement for both prohibited use as well as participation in a prohibited practice.[24] Van der Linde and Luiz suggest that this approach regarding the requirment of knowledge as contrasted with the Securities Services Act is a fair one in that, it would be unfair to impose criminal liability on a person without the person having had knowlegde.[25]

Section 80 also contains contraventions that do not rely on the elements of knowledge, intention or purpose. This is specifically recorded in section 80(3)(*f*) where it is considered a contravention of section 80(1) to effect or assist in effecting a market corner. No intention, knowledge or purpose is required for this contravention however the existence of commitment, agreement or understanding does imply awareness.[26]

With regard to prohibited trading practices and how liability for contravention is imputed on the company, this will be discussed in the general discussion below. The discussion will deal with how knowledge and intention are imputed on the company

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https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf. 20.

[22] Luiz and Van der Linde (n 11) 477.

[23] Allen "Large investors, price manipulation, and limits to arbitrage: an anatomy of market corners" 2006 *Review of Finance* 645 645.

[24] Luiz and Van der Linde (n 11) 478.

[25] *Ibid.*

[26] Luiz and Van der Linde (n 11) 485.

and what process is to be followed to find liability. It may be possible that the same issues that that exist with finding the company liable for insider trading may exist in finding a company liable for prohibited trading practices.

In the case of market manipulation the only problematic issue is how a company can be said to "know" or how it ought reasonable to have known. Knowledge is also an issue in insider trading and the solutions to both may be the same to impute liability on the company.

2.2.2.2 False, misleading or deceptive statements

The third form of market abuse is South Africa is known as false, misleading or deceptive statements. This offence is contained in section 81 of the Financial Markets Act and as per the section the false, misleading and or deceptive statements must be made with regard to a company whose securities are listed on a regulated market.[27]

Disclosure based market manipulation entails the dissemination of inaccurate information relating to the demand, supply, price or value of a security. Spreading false rumours has been said to be one of the most common manipulative devices in this regard.[28]

Like market manipulation the issuing of false statements can harm the integrity of and undermine public confidence in the markets. Incorrect published information regarding the financial state of a listed company may encourage investors to trade in the company's shares at prices that would not be sustainable were the true facts known.[29]

False statements may also concern matters that are not directly associated with the company's current finances, but may nevertheless inflate the share price, for example false claims regarding products developed or orders obtained. The prohibition could

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[27] *Ibid.*
[28] Cassim "An analysis of market manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 *SA Merc LJ* 177.
[29] JSE (n 21) 22.

also relate to the withholding of price- sensitive information from the market, often to avoid the negative effect it would have on the share price. [30]

The parties who share the responsibility with the company to ensure the accuracy of statements that are published are the directors of the company. It should thus be noted that this is not only an offence to intentionally make a false or misleading statement but a person could also be in contravention of the provisions of the Financial Markets Act if his negligence causes the misleading statements to be made.[31]

As part of section 81, more specifically section 81(2) of the Financial Markets Act, a further offence has been created. This offence is one that is committed where a person has made a false, misleading or deceptive statement "whilst unaware of the fact that it is false, misleading or deceptive and subsequently becomes aware that it is so but fails to publish without delay a a full and frank correction in respect of that statement".[32]

With regard to the liability of a company for false, misleading or deceptive statements, this will also be discussed in the chapter below.

2.3 Conclusion

This chapter has discussed the question whether market abuse legislation could be applied to companies. It has come to the conclusion that companies are indeed subject to these provisions and can indeed be held liable for any market abuse violations. The next chapter will deal with how exactly these companies can be held liable and how the criminal elements apply to them.

The chapter has also sought to provide the reader with a short but concise understanding of each of the offences and defences for insider trading in South Africa and the relevant legislation dealing with this. It has also shortly discussed the other forms of market abuse in South Africa and will discuss the liability of companies for those offences in the upcoming chapter.

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[30] *Ibid.*
[31] *Ibid.*
[32] Luiz and Van der Linde (n 11) 486.

It has been made clear that the application of certain provisions have been extended to apply to companies and companies can therefore be held liable for violation of market abuse violations and more specifically insider trading as discussed in this dissertation.

3. APPLICATION OF ELEMENTS FOR MARKET ABUSE TO COMPANIES AND ASSOCIATED PENALTIES

3.1 Introduction

After having discussed the offences and defences applicable to market abuse and more specifically insider trading, this chapter aims to discuss how liability is imposed on companies who have committed market abuse offences, more specifically the offence of insider trading and how the elements of a crime are applied to such companies. This chapter will discuss two of the problematic areas, namely knowledge and *mens rea.* These are not the only problematic areas but will be the ones that are focused on in this chapter.

Corporate criminal liability in South Africa was initially governed by common law but is currently mainly regulated by statutory provisions. The legislature first addressed the issue by enacting section 384 of the Criminal Procedure and Evidence Act[33] which provision was later repealed and replaced. Corporate criminal liability in South Africa at present is regulated by the Criminal Procedure Act[34], specifically section 332. This section is regarded as the primary authority on corporate criminal liability in South Africa. This section reads as follows:

> "1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law —
> a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
> b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

[33] 31 of 1917.
[34] 51 of 1977.

> in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."

This section makes it perfectly clear that a corporation may be prosecuted and subsequently convicted of criminal acts of its directors or servants. Statute allows for companies to be held criminally liable for statutory and common law offences committed by their directors and servants in furthering or endeavouring to further the interests of the corporation.[35] A company can and will be held vicariously liable for any offences committed by its employees, including its directors who act within the scope of their employment and with the necessary authority while furthering the interests of the company.[36]

This dissertation has already established that companies are capable of being held liable under the Financial Markets Act. To impute liability on companies due regard has to be given to the elements of a crime and how these elements are applied to companies in order to find liability. In so doing this dissertation will look at the problems which present in the application of these criminal elements to companies and suggest possible solutions to make the application of these elements, in aim to impose liability, smoother and more applicable to companies.

A remark which makes clear the importance of the development of regulation for criminal activities for juristic persons was made in *S v Coetzee,*[37] by Madala J where he states the following:

> "We are living in times of intense corporate activity which unfortunately is often accompanied by a proliferation of serious crimes like fraud by both corporations and directors. It is, in my view, of paramount importance that the social interest of seeing to the prosecution by the state of crimes such as fraud which are perpetrated by corporate bodies and directors be facilitated".

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[35] Farisani "The regulation of corporate criminal liability in South Africa: A close look (part 1)" 2006 *Obiter* 263 264.
[36] Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa: time for change? (part 1)" 2011 *TSAR* 452 453.
[37] 1997 (1) SACR 379 (CC) at 430H.

"This quote from Madala J highlights the fact that, like other countries, South Africa is riddled with corporate crime and it is in the interest of the country to see that there are measures in place to deal with corporations that commit crimes".[38]

In discussing the liability of companies, this chapter will also shortly consider the liability of natural persons and how finding them liable differs from that of juristic companies. It will further look at the reasons why one would either find the company, the person acting for the company or both parties liable and whether this is in the interest of fairness, fair on the the relevant party found liable.

3.2 Liability of companies

When we consider the Financial Markets Act we have already established that the definition of "person" covers companies. Companies can therefore be considered as persons for purposes of the Financial Markets Act and can therefore be held liable for the various forms of market abuse.

A first question which must be asked before we proceed in finding a company criminally liable, is when and how a company would be considered to have knowledge. A company can only be an insider if it "knows" that it has inside information. When would a company "know"? Would it be through its directors or its employees or both? Would it be sufficient if someone on the board of the company knows certain facts and someone else, perhaps a senior manager at a regional office knows another bit of information? To answer the above question we will have to look at section 332 of the Criminal Procedure Act.

When considering the application of criminal law to companies, it is important to keep in mind that criminal law was not developed for and with companies in mind but rather for individuals. When the rules relating to criminal liability were developed "the nature of corporate bodies was not taken into account to design these principles of criminal law".[39] When we consider the common law as well as the legislative position regarding the criminal liability for companies it is clear that companies can

[38] Farisani (n 35) 263.
[39] Borg - Jorgensen and Van der Linde (n 36) 453.

indeed be convicted of criminal offences where *mens rea* is required.[40]

The fact that the company can also be held liable for actions of the servant or director acting outside the course and scope of his employment but who had the intention to further the interests of the company shows us that the scope of section 332 of the Criminal Procedure Act has been extended further than the original application of vicarious liability.[41]

"A corporation can only act through its employees and consequently, the acts of its employees, within the scope of their employment constitute the acts of the corporation".[42] This would be considered vicarious liability. A notable exception to vicarious liability was proposed in *United States v Bank of England* (1987) where the First Circuit Court of Appeals ruled that a bank may be presumed to have that knowledge representing the collective knowledge of all employees.[43]

A company, not being a real person can only act through its employees for whom it should be responsible. But the simple application of vicarious liability principles can have far reaching effects. "Courts applying federal common law have upheld convictions based on vicarious criminal corporate liability even where the agent was acting contrary to express corporate policy and where a bona fide compliance program was found to be in effect".[44] Thus the requirement that an employee act for the benefit of the company has been relaxed by a permissive interpretation; under the current doctrine, it is not necessary that the employee be primarily concerned with benefitting of the corporation, because courts recognize that many employees act primarily for their own personal gain.[45]

Traditionally only natural persons were held criminally liable for market abuse offences due to the fact that natural persons have the ability to perform an unlawful

[40] Wilkinson "Corporate criminal liability-the move towards recognising genuine corporate fault" 2003 *The Canterbury Law Review* 142 148.
[41] Borg - Jorgensen and Van der Linde (n 36) 457.
[42] Laufer "Culpability and the limits of the law" 1996 *Business Ethics Quarterly* 311 312.
[43] *Ibid*.
[44] Weissmann "A new approach to corporate criminal liability" 2007 *American Criminal Law Review* 1319.
[45] Weissmann (n 44) 1320.

act and to have a blameworthy state of mind.[46] The elements which are usually used to impose liability in criminal cases as they pertain to individuals do not present with problems, however when those elements are to be applied to juristic persons, certain problems start to surface.

When we look at the criminal liability of companies for various offences we must understand that the same principles that are applied to natural persons to impose liability is applied to the agents of the company to find the company's liability. The question then beckons why not then merely hold the natural person liable as the acting party. It would be easier to hold the natural person liable and impose an appropriate sanction of imprisonment on them because companies by their nature cannot be imprisoned. Also when one considers the high turnover of certain companies the question must be asked whether "corporate criminal liability in the form of fines only (is) the best way to influence corporate behaviour".[47]

The actions and conduct of companies have consequences and such actions may have larger financial implications than those of an individual. The law should therefore set limits on the behaviour of companies as it does for individuals. "It is therefore important and has also become common place for federal and state governments to seek to impose criminal liability upon corporation for their actions in areas such as tax, securities, antitrust, insurance and environmental law."[48]

"Section 332 of the Criminal Procedure Act extends to crimes based on fault as well as strict liability. Where a crime is based on fault the criminal intent or negligence of the director or servant is deemend to be that of the company ".[49]

[46] Jordaan "New perspectives on criminal liability of corporate bodies" 2003 *Acta Juridica* 48.
[47] Khanna "Corporate criminal liability: what purpose does it serve" 1996 *Harvard Law Review* 1477 1478.
[48] Friedman "In defense of corporate criminal liability" 2000 *Harvard Journal of Law and Public Policy* 833.
[49] Borg - Jorgensen and Van der Linde (n 36) 456.

3.2.1 Knowledge

Knowledge is a common element of all offences. A person committing an offence must know that they are committing an offence.[50] How then will this knowledge be attributed to the company because a company itself cannot have knowledge?

Section 332(1) applies to the acts and omissions by directors or servants and extends to crimes based on fault as well as strict liability. Where a director or servant of a company either acts or fails to act, such action or failure to act is imputed on the company and the company is therefore held liable. This criminal liability imputed on the company does not only relate to actions where the director or servant acted within his or her authority but also where the director or servant acted outside of the scope of their authority but where such actions were carried out in order to further the interests of the company. In this instance, knowledge by the company or its members is not a consideration to find the company criminally liable.[51]

Considering the element of knowledge in deciding on the commission of a crime by a company in relation to market abuse, specifically inside information, the premise is that the person must know that he or she has inside information[52]. How do we know and prove that a juristic person has knowledge of the particular information? How do we give due regard to the company's state of mind, as it has no mind of its own? Liability of a company is based on the actions of its servants and directors, therefore in order to establish the state of mind of the company, we need to look at the state of mind and intention of the controlling minds behind the company.

A problem which also results in attributing liability to a juristic person is the lack of mental and physical faculties of a company. This has been overcome by the courts by imputing the intention, acts and knowledge of directors, employees and agents to the company. Importing the qualities of a natural person to companies is of utmost importance for the operation of criminal law as applied against companies.[53] "The actions and intentions constituting the *actus reus* and *mens rea* of the crime, must be

[50] Jooste (n 7) 442.
[51] Borg - Jorgensen and Van der Linde (n 36) 456.
[52] Jooste (n 7) 442.
[53] Wilkinson (n 40) 145.

those of a natural person, as a juristic person cannot itself commit the constructive elements of a crime."[54]

Director in terms of section 332(10) of the Criminal Procedure Act is defined as; "any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body". "Although the meaning of servant is not defined it apparently includes any person who performs his or her work under the control of the company."[55]

This makes it clear that employees are also included. Persons acting on instruction or permission (express or implied) of a director, have also been included by the legislature. The courts have however interpreted this provision restrictively by requiring a degree of control by the company.[56]

3.2.2 *Mens rea*

We have above established when knowlegde is imputed on the company and also which group of persons' knowledge would be considered as that of the company to find the company liable. Over and above that we have to look at how intention is imputed on the company.

As said above the company cannot act for itself, it needs to have a representative act for it. When being convicted of a crime the perpetrator has to have some form of intention behind the crime committed. This makes it easier to find an individual liable as opposed to a company. One is able to ascertain the state of mind of the individual as one of the considerations, which is very difficult, if not impossible to ascertain when one applies it to companies. "The essential problem therefore with prosecuting a company stems from the dissimilarities between a natural person and a corporation".[57]

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[54] *Ibid.*
[55] Borg - Jorgensen and Van der Linde (n 36) 457.
[56] *Ibid.*
[57] Wilkinson (n 40) 148.

Section 332 of the Criminal Procedure Act will also apply here as well. Where *mens rea* is a requirement for an offence, the criminal intent of the director or the servant is attributed to the company.[58]

3.2.3 Constitutionality of section 332(1)

One of the challenges faced by most companies is one where the actions of its directors or servants are imputed on it in order to find liability on the part of the company. Considering the fact that these actions may, as discussed above, be attributed to the company whether the director or servant has acted within or outside the scope of their powers, this leaves the company in an unfair position.

For instance where a company has explicitly limited a director or servant's powers and said director or servant acts outside the scope of those powers, the company may still be held liable and will have to deal with the relevant director or servant internally. The question which must then be asked is whether this is constitutional.

The South African constitution[59] in the bill of rights, specifically in terms of section 8(4) provides for the protection of juristic persons. Section 332(1) of the Criminal Procedure Act is a very broad provision and has as yet not been constitutionally challenged. In the event that section 332(1) Criminal Procedure Act is challenged it may possibly be found to be inconsistent with the constitution[60] on the basis that it infringes fundamental rights that are guaranteed to juristic persons in the constitution.[61]

The problem with the liability placed on companies in terms of section 332(1) of the the Criminal Procedure Act is that a company may be held liable for a crime even though the company had reasonable measures and precautions in place to prevent the occurrence of a crime. The company in this instance would not be able to raise a

[58] Loxton "Criminal Liability of Companies Survey" 2008 https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Crim_Liability_South%20Africa.pdf.
[59] Constitution of the Republic of South Africa, 1996.
[60] Borg - Jorgensen and Van der Linde (n 36) 457.
[61] *Ibid.*

defence that it acted with due diligence.[62] Thus a company may be held vicariously liable for the guilt of an individual even if the company itself was not at fault and its blameworthiness is in doubt.[63]

To establish the possible violation of a company's right to a fair trial as contained in section 35(3) of the South African constitution and the right to be presumed innocent until proven guilty as contained in section 35(3)(*h*) of the South African constitution a two stage inquiry must be held. The first stage of this enquiry entails determining whether the company is the bearer of these rights and whether said rights come with a corresponding duty on the state of said rights.[64]

The second stage of this enquiry requires that the state justify the infringement of the rights by relying on the limitation clause, namely section 36 of the South African constitution. "The state must, in its application of this clause show that the importance of the purpose of the infringement and the relation between the infringement and its purpose is significant."[65] In most cases this may prove difficult especially if the purpose can be achieved by less restrictive means.

When considering the adequacy and constitutionality of section 332(1) of the Criminal Procedure Act the opinion is that this section may be inadequate and unconstitutional in light of the immense corporate development in South Africa. Due to the fact that criminal liability on the part of companies is entrenched in South African law, it cannot merely be disposed of at this stage as it may cause uncertainty.[66] The legislature must therefore reform the position and implement adequate measures that will apply to the liability of companies

3.3 Different theoretical approaches

When we consider corporate criminal liabilty we note that there are various bases for corporate criminal liability the first one being *vicarious liability*. In this case it

[62] Borg - Jorgensen and Van der Linde (n 36) 458.
[63] *Ibid.*
[64] *Ibid.*
[65] Borg - Jorgensen and Van der Linde (n 36) 459.
[66] Borg - Jorgensen and Van der Linde (n 36) 465.

justifies holding a corporation liable for crimes committed by its members, directors and employees in the process of furthering the interests of the corporation. In terms of this theory, a corporation may be held criminally liable for criminal actions committed by directors and employees alike as long as it is shown that the crime was committed in the process of furthering, or endeavouring to further the interests of the corporation.[67]

The second theory is the *identification theory*, which is adopted by many jurisdictions from a line of English court decisions. It normally applies to serious offences and states that a company could be held criminally liable only if a high ranking officer or employee of the company satisfies the fault element of the offence. The act must be committed in furthering of endeavouring to further the interests of the corporation.[68]

The third and final theory is the *derivative theory*. This theory is applied in South Africa and regards the fault of the directors or servants of the corporations as the fault of the corporation itself. The fault or *mens rea* of the individuals within the corporation is thus imputed to the corporation.[69]

It is clear from the above that a company has its own identity which can distinguish it from other persons (companies and individuals). This is notion which flows from the realist theory is becoming more prevelant as the view adopted by the public and is supported by the actions of companies when they show off their indvidualistic characteristics when they market themselves.[70] "The realist approach makes it possible to hold corporate bodies liable for their own acts, omissions and faults".[71]

3.4 Penalties imposed in terms of the Financial Markets Act

In South Africa, under the Financial Markets Act[72] the penalty imposed for committing an offence of market abuse is a maximum fine of R50 million and/or

[67] Farisani "Corporate homicide: what can South Africa learn from the recent developments in english law?" 2009 *CILSA* 210 212.
[68] Farisani (n 67) 213.
[69] *Ibid*.
[70] Borg – Jorgensen and Van der Linde (n 36) 454.
[71] *Ibid*
[72] Section 109 of the FMA.

imprisonment for a maximum period of 10 years or both such fine and imprisonment. The Securities Services Act imposed statutory civil liability for market abuse and insider trading.[73] This has been echoed in the Financial Markets Act where persons who are found to be liable for insider trading may be sanctioned to pay administrative penalties.[74]

The Securities Services Act has also set up an enforcement committee which is empowered to impose an administrative penalty payable to the Financial Services Board, by a person who has contravened the Securities Services Act or has failed to comply with the Securities Services Act.[75] This too is echoed by section 10A of the Financial Services Board Act[76] and the Financial Instititutions (Protection of Funds Act).[77] Since all the sanctions and/or penalties as contained in the Financial Markets Act are similar to those as were previously contained in the Securities Services Act some of the writings and or comments related to or leveled against the Securities Services Act will still apply to the Financial Markets Act.

The problem which is faced is that even though these provisions for sanctions exist, there has to date not been any successful prosecution for insider trading in South Africa. "However credit must be given to the Financial Services Board for collecting out of court settlements from insiders, which may have had the effect or deterring insider trading to some extent".[78] Out of court settlements however may not be sufficient to discourage insider trading as the terms of the settlement agreement may allow the parties concerned to remain free from prosecution and as many settlements are reached without any admission of liability.[79]

It must be said that the penalties as contained in the Securities Services Act and the Financial Markets Act are applicable to both individuals and juristic persons alike. The penalties were formulated to apply to individuals and as extension of criminal

[73] Section 77 of the SSA.
[74] Section 82 of the FMA.
[75] Section 97 of the Securities Services Act.
[76] 97 of 1990.
[77] 28 of 2001.
[78] Cassim (n 9) 68.
[79] *Ibid.*

liability to juristic persons increased, the penalties were then merely extended in their application to juristic persons.[80]

When we consider the fact that these penalties were developed with the individual in mind, and are now made applicable to a juristic person[81], whose profit in certain instances may be more than the economy of a small country the question has to be asked whether these penalties are in fact sufficient in their application to juristic persons. Do these penalties actually deter these juristic persons from future violations or are they merely seen as a slap on the wrist which juristic persons have no problem dealing with?

The administrative penalty looks at the profit made or loss avoided so it has a transactional focus and companies would then be able to enter into larger deals, automatically increasing the potential penalty. Thus even though the criminal fine is constant (and there is the risk of imprisonment) the same criticism might not be fair when it comes to the administrative penalty.

Juristic persons know that there is no way that they can be put in jail for the crime that has been committed and therefore the only criminal sanction that it may be susceptible to is a fine.[82] Does the juristic person merely continue with its violatary behaviour in the knowledge that a fine to be imposed will not really affect it? Should the Financial Markets Act not contain a further penalty to be imposed on the juristic person, so as to level out the playing field of sanctions imposed on individuals and juristic persons? It is submitted that punishing a juristic person by means of a fine only, may not be an effective method of preventing or reducing market abuse cases. The size of the fine in addition to other sanctions such as public shaming and possible prevention of trading for period may be more appropriate.[83]

We also have to look at the fact as to whether imposing criminal rather than civil liability on a juristic person is desirable and whether the benefits of corporate civil liability outweigh the benefits of imposing alternative liability stratergies. These two

[80] Khanna (n 47) 1478.
[81] Wilkinson (n 40) 148.
[82] Farisani (n 67) 218.
[83] *Ibid.*

forms of liability share one common goal, that being, to deter the juristic person from corporate misconduct.[84] Taking into account the above we have to develop a system encompassing both and achieve the same aim with greater effect. Possible suggestions would be separate and much higher penalties for juristic persons than those for natural persons.

Taking into consideration what has been said in this section with regard to the sanctions, it is clear that there are different ways of dealing with companies and imposition of fines on those companies South Africa will hopefully assist in deterring these companies from market abuse violations.

As set out above instead of fines being the only option, it is important to note that juristic persons also have a reputation and rely heavily on that. When a reputation of a company is affected it affects its market dealings and business relations with various role players, which in turn affects its profits. This, although not a monetary or criminal sanction, also acts as a deterrent and hopefully stops companies from future market abuse violations.

Further to this it has also been discussed that considering the fact that the fines are in actuality the only forms of punishment that you can impose on a company for market abuse violations, it is suggested that further sanctions be developed to deter juristic persons from violation of market abuse rules. It may be that if this is done and the field within which sanctions applicable to individuals and juristic persons is levelled, juristic person will actually feel the effect of the sanctions imposed on them, then only would we see change as a greater deterrent has been introduced, companies would themn realise the importance of compliance with these laws.

Even though this framework exists it is clear that is not without flaws which need to be corrected so as to have real force against juristic persons. There has to be an overall review of the framework and penalties need to be specifically developed for juristic persons and to their application. Until this is done, we risk being faced with the same problems as discussed above for a long time to come.

[84] Khanna (n 47) 1492.

In conclusion and after having discussed the various sanctions which could be imposed on and the defences available to juristic persons it is clear that although not really adequate, these are at this point the only means of punishment for juristic persons.

3.5 Conclusion

This chapter has discussed information relating to a company being held criminally liable for market abuse violation as well as the sanctions imposed on those companies if they are found to be liable for market abuse violations.

The chapter has further discussed how criminal liability has been imposed on both the companies and in certain instances their agents, directors or servants. It is clear that a company can be held criminally liable through the actions of its agents even though they are not acting in scope of employment. It is however clear that there are problems which present themselves in the process of application of criminal law to companies.

The only way for the application of criminal law concepts to work in their application to companies is if the process of looking at mind the directors and /or servants is followed. The company will only be held liable in the circumstance where the controlling mind acted in furtherance of company objectives, where the person acts in their own interests, they will be held liable solely and the company will not be party to this.

This makes it clear that even though there are a few issues in applying criminal law concepts to juristic persons as a whole, those problems or issues are not that difficult to solve. The ultimate is to be able to apply criminal law concepts to juristic persons and in so doing, possibly finding them criminally liable for various breaches market abuse, in our case specifically for insider trading.

4. CHINESE WALL DEFENCE

This dissertation has above discussed the offences and defences as contained in the Financial Markets Act relating to insider trading. In addition to the defences as contained under the Financial Markets Act this section of the chapter aims look at an additional defence, namely the Chinese wall defence.

The Chinese wall defence could be described as one of the primary weapons which can be used by companies to combat the problem of insider trading.[85] This defence would be fair if introduced where the law allows a company to aggregate information held by different persons and divisions within a company as well as the knowledge and conduct of different persons in a company. Where the law restricts itself to the directing mind in the company this defence can play no role.

A Chinese wall is a mechanism as well as a defence which can be used by companies to keep information relating to various departments within the company separate from the exposure to other deparments within the company.[86] The mechanism of a Chinese wall requires that processes be set up to ensure the operational and physical segregation of functions in a company. This segretation is primarily done so that the flow of information from one department to another in a particular company is prevented.[87]

Organisations that trade in shares, such as investment banks, are also involved in roles as advisors to companies during corporate actions. Chinese walls should be imposed to avoid the possibility that any type of sensitive information becomes available to other trading divisions. When this sensitive information is made available under a confidentiality agreement to one division, Chinese walls if applied correctly ensure that the sensitive information is kept from disclosure to other divisions.[88]

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[85] Gorman "Are chinese walls the best solution to the problems of insider trading and conflict of interest in broker- dealers" 2004 *Fordham Journal of Corporate and Financial Law* 475 482.
[86] *Ibid.*
[87] Cassim (n 28) 190.
[88] JSE (n 21) 16.

The issue with the Chinese wall defence is not whether every company will be able to put up such structures or whether it should be easy for a company to prove this but rather whether it may sometimes in certain companies not provide one at all as it would be difficult to prove this.

In South Africa Chinese walls are not a statutory requirement. In the United States of America the use of Chinese walls were initially voluntary policies and procedures established by broker - dealers themselves but the SEC eventually made them a statutory requirement for all firms.[89]

The reason behind the Chinese wall defence is to protect the company from incurring liability being attributed to it in law for insider trading as a result of the knowledge available to their employees which may be used by another employee for market abuse purposes. The company can use this defence and assert that it had done all that it could to prevent the insider trading when it is faced with such a charge. This would therefore not be a defence when the actions of the controlling mind of the company are looked at.[90]

Chinese walls come with a few advantages. They are an important weapon in the battle against insider trading. Because they attempt to prevent insider trading by preventing the flow of material, non public information.[91]

As adequate as this defence is it also has its disadvantages. For instance the effectiveness of the Chinese wall defences will decrease where decisions concerning different areas of a firms business are made by the same persons. In these instances you would of course not want the defence to work. Also a Chinese wall cannot prevent the intentional disclosure of inside information. The Chinese wall is dependent on the honour system and the ethical values of the persons involved.[92]

Over and above this, "with modern information technology and the involvement of personnel with specialist knowledge of particular financial instruments in both

[89] Gorman (n 85) 483.
[90] Jooste "Insider dealing in South Africa" 1990 *SAJL* 588 597.
[91] Gorman (n 85) 487.
[92] Cassim (n 9) 51.

research and trading, the distinction between functions is becoming blurred."[93] With functions becoming blurred and the same people working with the same set of skills for different departments this means that information will indeed be transferred through departments, rendering the application of the Chinese wall defence quite problematic. It should in any event not be made available to the company in these circumstances as there is more of a chance of breach than not.

Chinese walls are also partly unsuccessful in their application because of lack of strong incentives for brokers- dealers to establish and supervise compliance with them. "If a large firm is unable to share information among its different departments, there are several advantages that are lost. These include cost saving, opportunities for collective thinking and other synergies of combining and integrating departments."[94]

Although Chinese walls are a good defence to avoid liability, they are not an absolute defence to liability. They make it less likely that the Securities Exchange will prosecute the firm for insider trading if such measures have been put up.[95] The Chinese wall is not legislated in South Africa as it is in the United States of America and Australia.[96]

When we consider the disadvantages and various problems that come with the application of the Chinese wall defence, it is clear that the disadvantages outweigh the advantages. The inclusion of this defence into statute in South Africa will therefore not be advisable.[97]

[93] Cassim (n 9) 52.
[94] Gorman (n 85) 493.
[95] Gorman (n 85) 487.
[96] Cassim (n 9) 53.
[97] *Ibid.*

5. COMPARATIVE PERSPECTIVE

5.1 Introduction

At the introduction of this dissertation it was advised that a comparative perspective would be done between the South African position and that of the United Kingdom. This section of the dissertation seeks to look at the position of these two jurisdictions and observe how they have handled the position in relation to criminal liability of juristic persons insofar as it relates to market abuse.

The reason for the comparative being done with the United Kingdom is because South African company law has been greatly influenced by English law and English law has also developed well regarding the rules relating to criminal law insofar as it pertains to juristic persons.[98] The other reason is that the United Kingdom is widely regarded as being amongst the leaders in insider trading legislation.[99]

This section also shortly aims to look at the experiences of the United Kingdom and in the end aims to draw from those experiences and see whether the ways adopted could be customised and tailored to fit into our South African system in order to formulate a way forward.

We have already shortly discussed a comparative perspective in a few of the chapters above with regard to matters pertaining to that specific chapter. This section aims to provide a comparison of the actual market abuse systems as carried out by the jurisdiction as mentioned as well as how they find companies liable and advise how South Africa can learn from those and also how these systems are already alike and how they can work together.

With the above being stated as well as previous discussion on various bodies responsible for the enforcement and regulation of market abuse violations, this chapter also aims to look at the bodies that deal with the regulation of market abuse in the United Kingdom. This chapter will also provide a comparative perspective on how

[98] Farisani (n 67) 210.
[99] JSE (n 21) 4.

the United Kingdom has dealt with the concept of market abuse violations by companies. It will look at how far these jurisdictions have come, what measures they have put on place that have worked and how we can learn from these jurisdictions.

The overall purpose of this chapter is to provide the reader with well rounded opinion on how these jurisdictions find companies liable and what market abuse regulation systems are applied by other jurisdictions. It will also shortly discuss what punishments are applied to market abuse violations in these jurisdictions and how these are applied to companies.

5.2 The United Kingdom

In the United Kingdom market abuse includes the misuse of information , misleading practices and market manipulation relating to investments traded on the prescribed United Kingdom markets.[100] This act also applies to those persons who require or encourage others to engage in conduct that would amount to market abuse.[101]

The primary legislation dealing with market abuse in the United Kingdom is the Financial Services and Markets Act 2000 which provides the statutory framework for its market abuse regime. The section in the Financial Services and Markets Act 2000 dealing with the various forms of market abuse in the United Kingdom are sections 118 – 123. Section 118 of the Financial Services and Markets Act 2000 sets out various types of behaviour which could be considered market abuse. Section 118 (A)(5) sets out the defences or instances where these behavious are not considered as market abuse.

Insider dealing in the United Kingdom is a criminal offence and is dealt with in terms of part V of the The Criminal Justice Act 1993. This is in contrast to the market abuses as set out in section 118 -123 of the Financial Services and Markets Act 2000 which are civil offences.[102]

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[100] Alexander "Insider dealing and market abuse: The Financial Services and Markets Act 2000" 2001 http://www.cbr.cam.ac.uk/pdf/wp222.pdf. 1
[101] *Ibid.*
[102] *Ibid.*

In the United Kingdom the basis of corporate liability is derivative liability.[103] This is based on the identification theory, also known as the alter ego theory in terms of which a corporation is blamed for the criminal acts committed only by its senior employees or controlling officers. The conduct and state of mind of these senior employees or key individuals are deemed to be that of the company. These individuals must however be acting within the scope of their employment or with the requisite authority fo rthe company to be held liable.[104]

The difficulty posed by this theory is when a large corporation is involved, identifying the senior officer who is deemed to be responsible for the offence is virtually impossible. Another weakness of this theory is its restrictive ambit.

This theory has been criticised as being too restrictive as well as biased due to the fact that there have not been much successful prosecutions. The theory has been formulated quite narrowly and thus makes it ineffective when applied in companies with complex management structures.[105]

In developing the law of corporate criminal liability the courts have questioned the restrictive ambit of this theory and have in certain cases chosen not to rely in it. They would simply impose liability on the company without identifying the senior or controlling officers. As a way to overcome the obstacles of this theory, there has also been a move by the courts to hold the company vicariously liable, even in circumstances where it would not be possible to do so, had the courts applied the identification theory.[106]

The Financial Services and Markets Act 2000 with its effective date being 1 December 2001, provides the Financial Services Authority with substantial powers to punish unregulated market participants who do not comply with acceptable standards. This act entitles the Financial Service Authority to regulate and discipline issuers of

[103] Borg – Jorgensen and Van der Linde "Corporate criminal liability in South Africa: time for change? (part 2)" 2011 *TSAR* 684.
[104] Borg – Jorgensen and Van der Linde (n 103) 685, 686.
[105] Borg – Jorgensen and Van der Linde (n 103) 686.
[106] Farisani (n 67) 223.

United Kingdom listed securities and their directors and also to impose penalties in the form of fines should a person commit any market abuse violations.[107]

The Act originally enacted 3 types of market abuse namely, misuse of non public material information, the creation of false and misleading market impressions and market distortion.[108] When one looks at these 3 types of market abuses and compares them to the forms of market abuses as contained in the Financial Markets Act in South Africa, one will note that they are exactly same save for the difference in wording.

In the United Kingdom inside information is defined in section 118C[109] of the Financial Services and Markets Act 2000. An insider in terms of the act is any person who has inside information. An insider may therefore be part of management, an employee or a shareholder.[110] The punishment for insider trading or any form of market abuse is a maximum of seven years imprisonment or an unlimited fine.[111]

In so far as relates to insider trading in the United Kingdom, it creates civil offences. The crime of insider trading is limited to individuals and its law contains a defence "which protects an individual who had reasonable grounds for believing that the information in his possession was disclosed widely enough to ensure that none of the counter parties to the transactions would be prejudiced".[112] South Africa has no such defence. There is no mention of companies being held liable for insider trading as this

[107] Alexander (n 100) 3.
[108] Slaughter and May "The EU/UK Market Abuse Regime – Overview" 2011 http://www.slaughterandmay.com/media/39260/the-eu-uk-market-abuse-regime-overview.pdf
[109] Inside information
(1) This section defines "inside information" for the purposes of this Part.
(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which—
(a) is not generally available,
(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and
(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.
[110] Thompson "A global comparison of insider trading regulations" 2013 *International Journal of Accounting and Financial Reporting* 1 6
http://www.macrothink.org/journal/index.php/ijafr/article/viewFile/3269/2976
[111] *Ibid.*
[112] Jooste (n 7) 447.

defence only relates to individuals, on this basis the United Kingdom legislation cannot assist us in applying its measures to related to insider to companies.

In addition to the Financial Services and Markets Act, the Criminal Justice Act 1993 Part V section 52 provides for the offence of insider dealing. This offence seeks to prevent individuals from engaging in three classes of conduct, namely dealing in price affected securities on the basis of inside information, prohibiting the encouragement of another person to deal in price affected securities on the basis of inside information and disclosing inside information.[113] "Criminal liability for each of these offences may only attach to an individual because the term individual is defined to exclude corporations and other entities".[114] A company can however be held liable for insider dealing by committing a secondary offence of encouraging another person to deal.[115]

A further defence is the defence of reasonable belief and reasonable care which is contained in Section 123(2) of the Financial Services and Markets Act[116] which provides that the Financial Services Authority may not impose a penalty on a person who has engaged in market manipulation if, after having considered representations made by that person in response to a warning notice sent to them by the Financial Services Authority, it finds that on reasonable grounds that his/her behaviour did not amount to market manipulation or that that person had taken all reasonable precautions and exercised all due diligence to avoid such behaviour.[117]

When we consider the United Kingdom market abuse framework it is not much different from that of South Africa. The fact that companies cannot be held liable for certain market abuse offences except where they are secondary participants makes it problematic in its application to South Africa. We could however learn from the fact that penalties in the form of fines are unlimited an that may be something South

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[113] Alexander "UK insider dealing and market abuse law: strengthening regulatory law to combat market misconduct" 2003 403 411 http://www.rwi.uzh.ch/lehreforschung/alphabetisch/alexander/person/publikationen/2013Insider.pdf
[114] *Ibid.*
[115] *Ibid.*
[116] 2000.
[117] Cassim (n 27) 189.

Africa would want to consider applying to companies coupled with any other sanctions.

5.3 Conclusion

This chapter has sought to provide a comparative perspective of the market abuse regime of the United Kingdom as compared to that of South Africa. We have seen that although the market abuse offences in the United Kingdom are similar to those in South Africa, there are a few differences between the two countries.

With globalisation and in this era of rapid change, the idea of comparative law as "a tool of reform"- a mechanism by which law can adapt to, or promote, social change- is an appealing one.[118]

Due to the increasing global nature of trading in listed instruments, South Africa through the Financial Services Board has forged co-operation agreements with similar authorities elsewhere in the world, such as the Financial Conduct Authority in the United Kingdom. This allows the Financial Services Board to track the activities of insider trading suspects using their jurisdiction to contravene South African Laws[119]

At this point it must be stated that, globally, criminal prosecution for insider trading is rare. "Even in the United States and United Kingdom, widely regarded as being amongst the leaders in insider trading legislation, only a handful of cases have been referred to criminal prosecution."[120]

One of the ways forward which South Africa should consider is organisational models of corporate criminal liability. This model entails that organisations function as real entities, in ways that are not reducible to propositions about individuals. In other words corporations can acquire 'a momentum and a dynamic of their own which temporarily transcend the actions of their officers' and in that state incur criminal liability of their own. In this instance the aims, intentions and knowledge required for

[118] Hill "Corporate criminal liability in Australia: an evolving corporate governance technique?" 2003 *The Journal of Business law* 1 2.
[119] JSE (n 21) 24.
[120] Wilkinson (n 40) 148.

criminal liability may be located in the policies, regulations, standing orders and institutionalised practices of corporations and are not reducible to the aims, intentions and knowledge of the individuals within the corporation. [121]

6. CONCLUDING REMARKS

The main aim of this dissertation was to discuss the criminal capacity of juristic persons and whether such juristic persons could be held liable criminally for the various forms of market abuse. When providing the reader with an answer to this question the dissertation had to address the various issues which come to the fore in the application of criminal law to juristic persons one of them being how this liability which taken from a system, namely criminal law which is applied to individuals would and/or could be applied to companies.

Throughout the paper we have referred to the various sections which govern market abuse and how these would apply to companies and/or juristic persons. We have cited cases where criminal liability rules have been applied to juristic persons and/or companies and how this has affected companies.

In looking at the structures and institutions which deal with these market abuse violations we have also looked at the different laws which are applied to these market abuse regulations as well as provided a comparative perspective with the United Kingdom in this regard and what we in South Africa can learn from them.

This dissertation has discussed the various offences and defences related to insider trading and shortly the other forms of market abuse, and on what basis companies can be held criminally liable for them. It has proceeded to discuss the defences which persons can use to avoid liability as well as the strength of those defences. With that having been said this was all done in the scope of the dissertation to find criminal liability on companies for these abuses.

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[121] Kalima "Corporate criminal liability in environmental protection: options for Malawi" 2009 *SA Merc LJ* 344 358.

When the dissertation discussed corporate criminal liability it looked at the challenges which are faced when applying criminal law rules, which have been historically formulated for individuals and not companies. It also looked at the punishments that come with the application of criminal law and noted that some of these punishments, ie imprisonment would not be suitable in its application to companies for obvious reasons.

Corporate civil liability may be the way that South Africa should consider going as the main source of liability for companies. South Africa was in any event the first country to initiate prosecution of insider trading with the added advantage of compensation[122], maybe that is the way forward. Considering the route followed by the United Kingdom which imposes only civil liability on companies as opposed to criminal liability which is reserved for individuals, corporate civil liabilty as stated above may be the way forward for South Africa.

There may have been some justification for corporate criminal liability in the past when civil enforcement techniques were not well developed but from a deterrent perspective very little supports the continued imposition of criminal rather than civil liability on corporations. From a deterrence point of view the purpose served by corporate criminal liability is none.[123]

Although personhood can be ascribed to corporations, doing so is unnecessary for the assignment of criminal or moral responsibility. "Assigning criminal or moral responsibility only requires reference to features of entities, whether individual or corporate. Nothing follows concerning a justifiable form of sanctions from an assignment of criminal liability."[124]

Section 332 of the Criminal Procedure Act makes it clear that a corporate body can incur liability and even where an employee is not acting within the course and scope of its employment. Liability can be based on the fact that the employee was furthering or endeavouring to further the interests of the corporate body. However the fact that

[122]JSE (n 21) 4.
[123] Friedman (n 48) 857.
[124] Walt and Laufer (n 5) 287.

liability can be criminally imputed does not translate into the fact that the sentences applied from a criminal perspective will be sufficient for the company to desist from its abuses. Thus the question arises whether criminal liability is really worth it?

Another aim of this dissertation was also to provide the reader with a comparative perspective. In providing the comparative perspective, the paper sought to establish what other countries have experienced, how their experiences relate to what South Africa has experienced and how we could use those experiences and solutions, customise them to our country and adopt solutions more suited to South Africa and implement those solutions.

"Corporate criminal liability under environmental, antitrust, securities and other laws has grown rapidly over the last two decades in various countries."[125] Although the imposition of criminal liability on corporations as opposed to managers and employees has generated considerable debate, commentators have not comprehensively analysed why corporate criminal liability exists. Furthermore it is not clear that corporate criminal liability is the best way to influence corporate behaviour.[126]

This paper has discussed all the various aspects which play a role in the greater scheme of corporate criminal capacity and market abuse, more specifically insider trading. It has provided with various options for reform and it is up to the legislature to implement these various suggestions in order to better or regulation regarding the particular issue at hand.

Many measures have been put in place by South Africa for market abuse regulation and finding liability on the part of companies. These measures are all good and well but are not on par with the likes of the United States of America and United Kingdom who are leaders in this field. The crux of the paper has been proven, criminal liability on the part of companies and/or juristic person for market abuse offences is possible, but the question which remains is whether this kind of liability is suitable, useful or adequate if applied in isolation or if applied at all.

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[125] Khanna (n 47) 1478.
[126] *Ibid.*

There are many options available to South Africa. It is not bound by the current regulation methods and should therefore consider and/ or create reform sooner rather than later.

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