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

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Abstract

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

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

1. Introduction

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

2. These activities usually give rise to a host of other negative effects such as low investor confidence and poor market integrity in the affected financial markets.
5. Henning & Du Toit 2000 for Juridical Science 159; Myburgh & Davis (25-03-2004) 11, available at <http://www.genesis-analytics.com/public/gFSBReport.pdf> (accessed 09-07-2013). Notwithstanding the fact that this Myburgh and Davis report was published in 2004 before the Securities Services Act 36 of 2004 and the Financial Markets Act 19 of 2012 came into effect and the fact that it was somewhat influenced by the opinions of the interviewees, it shall be referred to in this article where necessary, not as the only basis or evidence of the existence of market abuse activity in the South African financial markets but as a pointer on how market abuse laws were enforced in South Africa prior to the enactment of the Securities Services Act 36 of 2004 and the Financial Markets Act 19 of 2012. Moreover, the Myburgh and Davis report and a few other selected and available reports and/or sources will be referred to throughout this article because there are currently very few new sources on the regulation and enforcement of the market abuse prohibition in South Africa, especially under the Financial Markets Act 19 of 2012.
It is against this background that this article analyses the use of selected and available remedies for market abuse victims as stipulated in the Financial Markets Act in order to investigate the adequacy of such remedies as regards the affording of adequate damages to the affected persons and the combating of market abuse practices in South Africa. To this end, the article provides an overview analysis of compensatory damages, administrative damages and actual calculable damages that are employed under the Financial Markets Act in a bid to provide appropriate and equitable redress to the victims of market abuse practices in South Africa. Moreover, where possible, the article will also provide a comparative analysis of these remedies and those that were provided under the Securities Services Act. This is done to examine whether the market abuse remedies that were re-introduced under the Financial Markets Act have now adequately resolved the flaws and gaps that were associated with similar remedies under the former Act. This is further done to recommend, where possible, other measures that can be employed to combat such flaws in South Africa. In order to achieve this, the article will, firstly, provide the definition of selected key terms and concepts. Secondly, the available market abuse remedies under the Financial Markets Act will be outlined. Thirdly, the adequacy of the available market abuse remedies under the Financial Markets Act will be discussed. Fourthly, an overview comparative analysis of the market abuse remedies that were given under the Securities Services Act and those that are available under the Financial Markets Act will be provided. Lastly, possible measures that can be employed to combat market abuse in South Africa will be recommended, and some concluding remarks will be provided.

2. The Definition of Selected Key Terms and Concepts

2.1 The Concept of Market Abuse

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


European Union Directive on Insider Dealing and Market Manipulation\(^{12}\) generally uses the term “market abuse” to refer to transaction and/or trade-based market manipulation as well as disclosure and/or information-based market manipulation and insider trading, it does not expressly define the concept of market abuse to cover all these forms of prohibited trading practices. Moreover, the concept of market abuse is not defined in the United States of America. However, in the Cargil Inc v Hardin case\(^ {13}\) market abuse was defined as an act involving market manipulation or any activity, scheme or artifice that deliberately influences the price of a financial asset, resulting in a price other than the one that would have resulted in the absence of such intervention. This definition is once again narrow and does not expressly apply to insider trading and hence it has attracted similar criticisms from some scholars.\(^ {14}\) Despite these definitional deficiencies, all the forms of market manipulation and insider trading are generally treated as “market abuse” in the United States of America.

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

Similarly, in South Africa and for the purposes of this article, as earlier stated,\(^ {18}\) the term “market abuse” is used as a generic term referring to insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive promises, statements or forecasts (disclosure-based market manipulation).\(^ {19}\) Therefore, although the Financial Markets Act does not expressly define the concept of market abuse, this article employs the term “market abuse” to refer to all the forms of market manipulation and insider trading as outlawed in the Financial Markets Act and other jurisdictions such as the United States of America, Australia, the United Kingdom and the European Union for consistency and eradication of unnecessary confusion. As noted above, market abuse is not expressly defined in the Financial Markets Act. However, a number of practices that could give rise to criminal and civil liability for market abuse are merely stated in the Financial Markets Act.\(^ {20}\) For instance, three forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation relating to listed securities are prohibited under the Financial Markets Act. This status quo was directly borrowed from the Securities Services Act\(^ {21}\) without any useful changes and/or definitions of the concepts of insider trading,\(^ {22}\) market manipulation\(^ {23}\) or market abuse. Thus, notwithstanding the fact that insider trading is specifically prohibited in the Financial Markets Act;\(^ {24}\) it is still not expressly defined in this Act. For instance, any person who knew that he or she had


\(^{13}\) (1971) 452 F2d 1154 1163; 1167-1170.


\(^{15}\) The same approach was adopted in the United Kingdom, where the concept of market abuse was widely defined as a practice by which one person armed with price-sensitive non-public (confidential) information, unlawfully contacts or makes or uses of a financial asset, resulting in a price other than the one that would have resulted in the absence of such intervention. This definition is once again narrow and does not expressly apply to insider trading and hence it has attracted similar criticisms from some scholars.\(^ {14}\) Despite these definitional deficiencies, all the forms of market manipulation and insider trading are generally treated as “market abuse” in the United States of America.

\(^{16}\) See paragraph 1 above.

\(^{17}\) See ss 77; 78; 80; 81 and 82 and other relevant provisions in Chapter X entitled “Market Abuse” of the Financial Markets Act.

\(^{18}\) See ss 77; 80; 81 and 82.

\(^{19}\) See ss 73; 75; 76 and 77.

\(^{20}\) Be that as it may, for the purposes of consistency and eradication of unnecessary confusion in this article, the concept of "insider trading" shall be referred to, and defined as a practice by which one person armed with price-sensitive non-public (confidential) information, unlawfully concludes transactions in securities or financial instruments to which that information relates without sharing that information with others, to the detriment of such persons or other innocent and unwitting investors. See further Osode “Defending the Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory” in Okpaluba (ed) Law in Contemporary South African Society (2004) 303; also see generally Milne et al Henochsberg on the Companies Act (1975) 404-405.

\(^{21}\) Nevertheless, for the purposes of this article, the concept of "market manipulation" shall be defined to, inter alia, include the misuse of material information (price-sensitive inside information); the dissemination of false, deceptive or misleading information and practices which abnormally or artificially affect, or are likely to affect, the formation of prices or volumes of trading of any securities or financial instruments by issuers or other persons who have such price-sensitive inside information to the detriment of other innocent and unwitting investors. See further the FESCO (2008), <http://www.europefesco.org> (accessed10-05-2013) for related comments and detailed discussion.

\(^{22}\) See ss 78 and 82.
non-public price-sensitive information and who improperly disclosed it or encouraged or discouraged another person from dealing or who dealt directly or indirectly for his or her benefit or for the benefit of any other person in securities to which such information relates or where the price of such securities was likely to be affected by such dealing will incur criminal or civil liability for insider trading. The same practices were also outlawed in the Securities Services Act and later reintroduced in the Financial Markets Act without providing any new insider trading-related definitions or offences such as an "attempted insider trading offence" and/or a specific "tipping" offence.

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

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

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

2.2 The Meaning of Remedies

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

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

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

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

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

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


43 See s 82 of the Financial Markets Act.


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

47 See s 82.

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

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

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

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

Apart from administrative damages, the Financial Markets Act also provides compensatory damages to the market abuse victims. Precisely, any person affected by insider trading activities may claim part of the proceeds or the available R1 million compensatory damages from the FSB. Furthermore, any person affected by insider trading may claim part of the treble damages proceeds, namely a compensatory amount that is up to three times the profit made or loss avoided by the offender from the FSB after it has recouped its costs. Insider trading victims may also recover part of the proceeds obtained from the offenders by the FSB, in respect of any interests, investigation costs, legal costs and losses avoided by the offender from the FSB after it has recouped its costs. Notably, this amount must be annually reviewed by the Registrar of Securities Services to ensure that it is consistent with the Consumer Price Index as published by the Statistics South Africa.

60 See s 82(1)(a); (2)(a).
62 Notably, this amount must be annually reviewed by the Registrar of Securities Services to ensure that it is consistent with the Consumer Price Index as published by the Statistics South Africa.
63 See s 82(1)(b); (2)(b).
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71 See s 82."
The Financial Markets Act further provides actual calculable damages which may be utilised by those who fall victim to insider trading practices. Accordingly, any person prejudiced by insider trading may, (a) claim an amount equal to the difference between the price at which that person dealt and the price (as determined by the EC) that he or she might have dealt at if the inside information had been published at the time of dealing. Likewise, any person prejudiced by insider trading may (b) claim an amount equal to the pro rata portion of the balance of R1 million plus three times the profit made or loss avoided by the offender, calculable with regard to the amount contemplated in paragraph (a) above, and/or other amounts proved by the affected person, whichever is the lesser.

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

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

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

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

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

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

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

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

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

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

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

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

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79 Notably, it is merely stated that the claimants must prove their insider trading claims to the reasonable satisfaction of the claims officer. See s 82(5)(b) of the Financial Markets Act.
84 See s 87 of the Financial Markets Act.
85 See s 82 read with ss 80 and 81. Put differently, the Financial Markets Act does not specifically provide civil and administrative remedies for market manipulation as it does in respect of insider trading. Seemingly, civil and administrative remedies in the context of market manipulation are provided in the Financial Institutions (Protections of Funds) Act 26 of 2001 as amended, hereinafter referred to as Protections of Funds Act. See s 6A read with ss 6B to 6I of the Protections of Funds Act which inter alia empowers the EC to deal with such matters on a referral basis; also see Luiz “Market Abuse and the Enforcement Committee” 2011 SA Merc LJ 151 154-172. See further, s 99 of the Financial Markets Act which authorises the Registrar of Securities Services to refer contraventions of the aforesaid Act to the EC. Be that as it may and notwithstanding the fact that insider trading and market manipulation activities are different, it is submitted that the Financial Markets Act should have provided appropriate civil and administrative remedies in respect of both insider trading and market manipulation to enhance consistency in the enforcement of the market abuse ban in South Africa.
86 See s 87 of the Financial Markets Act.
87 See s 82(7) read with s 87.
88 See s 82.
89 See s 77.
90 See s 82(1)(a); (2)(a).
91 See s 77(1)(c)(i); (2)(c)(i); (3)(b)(i); (4)(a) of the Securities Services Act.
92 See s 82(1)(b); (2)(b).
borrowed from the Securities Services Act. Thus, as was the position under the Securities Services Act, any person affected by insider trading activities may institute a claim for part of the proceeds and/or compensatory damages from the FSB under the Financial Markets Act. It is, however, important to note that the Financial Markets Act now allows the affected persons to claim extra compensatory damages proceeds for an amount of up to R1 million from the FSB. This could imply that no “penalty for compensatory and punitive purposes” damages are available for market abuse victims under the Financial Markets Act. It could also suggest that the available market abuse damages under the Financial Markets Act are no longer punitive and/or mainly imposed upon the defendant in order to punish him or her for committing certain prohibited practices.

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

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

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

93 See s 77(1)(c)(i); (2)(c)(i); (3)(b)(i); (4)(b).
94 See s 77(1)(c)(i); (2)(c)(i); (3)(b)(i); (4)(b).
95 See the related discussion under paragraph 3 above.
96 See s 82(1)(b); (2)(b).
97 See s 77(1)(c)(i); (2)(c)(i); (3)(b)(i); (4)(b).
98 See further related discussion on punitive damages in paragraphs 2.2 and 2.3 above.
99 See further s 77(1)(c)(i) and (iv); (2)(c)(iii) and (v); (3)(b)(iii) and (v); (4)(c) and (e); s 77(2)(c)(iv); (3)(b)(iv); (4)(d).
100 See s 82(2)(e).
101 See s 82(1)(c) and (d); (2)(c) and (d); see further related discussion in paragraph 3 above.
102 See s 77.
103 See s 82.
104 See paragraph 3 above.
105 See s 82(6)(a) and (b).
106 See further related remarks under paragraph 3.1 above.
107 See s 82(5)(b) of the Financial Markets Act; see further related remarks under paragraph 3.1 above.
108 See s 82(7) read with s 87; see further related remarks under paragraph 3.1 above.
109 See s 77.
110 See s 82.
111 See further related remarks under paragraph 3.1 above.
112 See s 87.
113 See s 82 read with ss 80 and 81 of the Financial Markets Act.
114 See ss 85; 77 read with ss 75 and 76.
115 See s 77(10) read with s 85.
117 See s 82(7) read with s 87; see further related remarks under paragraph 3.1 above.
Africa. Nonetheless, as it was under the Securities Services Act, other alternative market abuse remedies such as specific civil pecuniary penalties, punitive damages, class actions and private rights of action are still not considered under the Financial Markets Act.

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

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

5. Concluding Remarks

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

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

The article further provided an overview comparative analysis of the market abuse remedies that were given under the Securities Services Act and those that are available under the Financial Markets Act. Nonetheless, it was indicated that the Financial Markets Act recycled most of the market abuse-related flaws that were previously embedded in the Securities Services Act. For example, as was the position under the Securities Services Act, Internet-related manipulative disclosures are still not expressly outlawed in the Financial Markets Act. In this regard, it is submitted that the Financial Markets Act should be amended to enact provisions that expressly prohibit Internet-related market manipulation practices and provide sufficient remedies to those prejudiced by such practices. It was also highlighted that the market abuse practices which were previously outlawed in Securities Services Act were re-introduced in the Financial Markets Act without providing any new insider trading-related definitions or offences such as an “attempted insider trading offence” and/or a specific “tipping” offence. Consequently, it is suggested that the Financial Markets Act should be amended to enact additional provisions for new market abuse-related definitions and/or offences such as an “attempted insider trading offence”, “attempted market manipulation offence” and a specific “tipping” offence. It is further submitted,
as highlighted earlier,133 that enacting a statutory provision in the Financial Markets Act for a definition of the concept of “market abuse” involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa.

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

In a nutshell, the article has revealed that the market abuse remedies stipulated in the Financial Markets Act are still very few and/or less dissuasive for the purposes of combating market abuse practices in South Africa consistently. Moreover, given the fact that the Financial Market Act’s market abuse provisions recycled some of the flaws previously contained in the Securities Services Act, it remains questionable whether the Financial Markets Act’s market abuse prohibition will enhance the combating of market abuse in South Africa. Accordingly, it is hoped that the recommendations as enumerated in this article will be utilised by the relevant stakeholders in the future to enhance the combating of market abuse activities in South Africa. In relation to this, other academics are further encouraged to conduct more legal research on anti-market abuse measures and remedies as well as the challenges associated and/or faced by market abuse victims in order to increase awareness on the part of the general public, policy makers and other relevant stakeholders and to innovate possible solutions that could be employed to enhance the enforcement of the market abuse ban in South Africa.

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133 See related remarks in paragraph 2.1 above.
134 See related remarks in paragraph 3.1 above.
135 See related remarks in paragraph 3.1 above.