

Insider Trading Act, 1998 (Act 135 of 1998) has been repealed by
Securities Services Act, 2004 (Act 36 of 2004) as of 1 February 2005



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GOVERNMENT GAZETTE

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KANTOOR VAN DIE PRESIDENT

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No. 1560.

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It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 135 of 1998: Insider Trading Act, 1998.

No. 135 van 1998: Wet op Binnekennistransaksies, 1998.

(English text signed by the President.)
(Assented to 20 November 1998.)

ACT

To prohibit individuals who have inside information relating to securities or financial instruments from dealing in such securities or financial instruments; to provide for criminal and civil law penalties for such dealing; to empower the Financial Services Board to investigate matters relating to such dealing, to institute proceedings in relation thereto and to administer the proof of claims and distribution of payments received as a result of any such proceedings; to establish the Directorate as a committee of the Financial Services Board for exercising the power to institute proceedings; to repeal a section of the Companies Act, 1973; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
- (i) “claims officer” means the person appointed by the Financial Services Board to be responsible for considering and determining claims in terms of section 6(6) and for the distributions referred to in sections 6(5) and 6(7); (v) 5
 - (ii) “Directorate” means the Insider Trading Directorate established by section 12; (iv)
 - (iii) “executive director” means a person appointed as such in terms of section 12(12); (xiii) 10
 - (iv) “financial instrument” means a financial instrument as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), and any instrument or right bearing substantially similar characteristics to any such financial instrument and which is dealt in on a regulated market; (vi) 15
 - (v) “Financial Services Board” means the board established by section 2 of the Financial Services Board Act; (x)
 - (vi) “Financial Services Board Act” means the Financial Services Board Act, 1990 (Act No. 97 of 1990); (xiv)
 - (vii) “inside information” means specific or precise information which has not been made public and which— 20
 - (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 securities or financial instrument; (iii)
 - (viii) “insider” means an individual who has inside information— 25
 - (a) through— 30
 - (i) being a director, employee or shareholder of an issuer of securities or financial instruments to which the inside information relates; or
 - (ii) having access to such information by virtue of his or her employment, office or profession; or
 - (b) where such individual knows that the direct or indirect source of the information was a person contemplated in paragraph (a); (ii)
 - (ix) “Minister” means the Minister of Finance; (viii)

Act No. 135, 1998

INSIDER TRADING ACT, 1998

- (x) "public sector body" means—
 (a) the government of the Republic or of any other country or territory;
 (b) a regional or local government in the Republic or outside the Republic;
 (c) the South African Reserve Bank; or
 (d) the central bank of any country or territory outside the Republic, 5
 but excludes the Public Investment Commissioners; (ix)
- (xi) "regional court" means a court established for a regional division under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944); 10
- (xii) "regulated market" means any market, whether domestic or foreign, which is regulated in terms of the relevant legislation of the country in which that market conducts business as a market for dealing in securities or financial instruments; (vii) 10
- (xiii) "rules" means the rules made under section 11(2); (xi)
- (xiv) "securities" means any securities including those defined as such in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), and any instruments or rights bearing substantially similar characteristics to such securities which are dealt in on a regulated market. (i) 15

Offences

2. (1) Subject to section 4(1), any individual who knows that he or she has inside information and who— 20
- (a) deals directly or indirectly, for his or her own account or for any other person, in the securities or financial instruments to which such information relates or which are likely to be affected by it; or
- (b) encourages or causes another person to deal or discourages or stops another person from dealing in the securities or financial instruments to which such information relates or which are likely to be affected by it, 25
- shall be guilty of an offence.

(2) Subject to section 4(2), any individual who knows that he or she has inside information and who discloses that information to another person, shall be guilty of an offence. 30

Publication

3. (1) For the purposes of this Act, information shall be regarded as having been made public in circumstances which include but are not limited to those when—
- (a) it is published in accordance with the rules of the relevant regulated market for the purpose of informing investors and their professional advisers; or 35
- (b) it is contained in records maintained by the relevant statutory regulator which by virtue of any enactment are open to inspection by the public; or
- (c) it can be readily acquired by those likely to deal in any securities or financial instruments—
 (i) to which the information relates; or 40
 (ii) of an issuer to which the information relates; or
- (d) it is derived from information which has been made public.
- (2) Inside information may be regarded as having been made public even though—
- (a) it can be acquired only by persons exercising diligence, or expertise or by observation; 45
- (b) it is communicated to a section of the public and not to the public at large;
- (c) it is communicated only on payment of a fee; or
- (d) it is only published outside the Republic.

Defences

4. (1) An individual shall not be guilty of any offence contemplated in section 2(1) if such individual proves on a balance of probabilities that he or she—

- (a) was acting on specific instructions from a client, save where the inside information was disclosed to him or her by that client; 5
- (b) would have acted in the same manner even without the inside information;
- (c) was acting on behalf of a public sector body in pursuit of monetary policy, policies in respect of exchange rates, the management of public debt or foreign exchange reserves; or
- (d) was acting in pursuit of the completion or implementation of an affected transaction as defined in section 440A of the Companies Act, 1973 (Act No. 61 of 1973). 10

(2) An individual shall not be guilty of the offence set out in section 2(2) if such individual proves on a balance of probabilities that he or she—

- (a) believed, on reasonable grounds, that no person would deal in the securities or financial instruments as a result of such disclosure; or 15
- (b) disclosed the inside information in the proper performance of the function of his or her employment, office or profession and at the same time disclosed that the information was inside information.

(3) The defences set out in subsections (1) and (2) are not intended to be the only defences available in any proceedings under this Act. 20

Penalty

5. Any individual convicted of an offence in terms of section 2 shall be liable to a fine not exceeding R2 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment. 25

Civil liability

6. (1) Any individual who knows that he or she has inside information and—

- (a) who deals directly or indirectly, for his or her own account in the securities or financial instruments to which such information relates or which are likely to be affected by it; 30
- (b) who profits or avoids a loss through such dealing; and
- (c) who fails to prove, on a balance of probabilities, any one of the defences set out in section 4(1) or any other defence available to him or her, shall be liable, at the suit of the Financial Service Board, to pay to the Financial Services Board the amounts contemplated in subsection (4)(a). 35

(2) An individual who knows that he or she has inside information and who—

- (a) discloses that information to an individual referred to in subsection (1) and fails to prove on a balance of probabilities any one of the defences set out in section 4(2) or any other defence available to him or her; or
- (b) encourages or causes another person to deal in the securities or financial instruments to which such information relates or which are likely to be affected by it and fails to prove on a balance of probabilities any one of the defences set out in section 4(1) or any other defence available to him or her; or
- (c) deals directly or indirectly in such securities or financial instruments for any person and fails to prove on a balance of probabilities any one of the defences set out in section 4(1) or any other defence available to him or her, shall be jointly and severally liable, together with the individual referred to in subsection (1), at the suit of the Financial Services Board to pay to the Financial Services Board the amounts set out in subsection (4)(a)(i), (iii) and (iv). 50

(3) The individual referred to in subsection (2) shall, in addition, be liable at the suit of the Financial Services Board to pay to the Financial Services Board such sum determined in the discretion of the court but not exceeding three times the amount calculated in terms of subsection (4)(a)(i), together with all commission or consideration for disclosing, encouraging, discouraging or dealing. 55

Act No. 135, 1998

INSIDER TRADING ACT, 1998

(4) (a) The Financial Services Board shall be entitled to sue by way of civil proceedings in any court of competent jurisdiction for payment of—

- (i) the amount by which the individual referred to in subsection (1) profited or the loss which he or she avoided as a result of such dealing; and
- (ii) a penalty, for compensatory or punitive purposes, in a sum determined in the discretion of the court but not exceeding three times the amount of the profit gained or the loss avoided as a result of such dealing; and
- (iii) interest; and
- (iv) costs of suit on such scale as may be determined by the court.

(b) The amount of the profit gained or loss avoided shall be determined in the discretion of the court which shall have regard to factors such as the consideration for the dealing referred to in subsection (1), the time between the relevant dealing and the publication of the inside information and any other relevant factors.

(5) Any amount recovered by the Financial Services Board as a result of the proceedings contemplated in this section shall be deposited by the Financial Services Board directly into a specially designated trust account and—

- (a) the Financial Services Board shall, as a first charge against the trust account, be entitled to reimbursement of all expenses reasonably incurred by it in bringing such proceedings and in administering the distributions made to claimants in terms of subsection (6) and an additional sum equal to 10% of the gross amount so recovered less any amount of costs actually recovered from the other party prior to the finalisation of the distribution account;
- (b) the balance, if any, shall be distributed by the claims officer to the claimants referred to in subsection (6) in accordance with the provisions of subsection (7);
- (c) any amount not claimed within three years from the date of the first distribution of payments to claimants, shall accrue to the Financial Services Board.

(6) The balance referred to in subsection (5)(b) shall be distributed to all claimants who are affected by the dealings referred to in subsection (1) and who prove to the reasonable satisfaction of the claims officer that—

- (a) in the case where the inside information was made public within a week after the individual referred to in subsection (1) dealt, they dealt in the same securities or financial instruments at any time after the individual referred to in subsection (1) so dealt and before the inside information was made public;
- (b) in every other case, they dealt in the same securities or financial instruments on the same day as the individual referred to in subsection (1).

(7) Subject to subsection (8), a claimant shall receive an amount—

- (a) equal to the difference between the price at which the claimant dealt and the profit gained or loss avoided as determined in terms of subsection (4)(b); or
- (b) equal to the *pro rata* portion of the balance referred to in subsection (5)(b), calculated according to the relationship which the amount contemplated in paragraph (a) bears to all amounts proved in terms of subsection (6) by claimants,

whichever is the lesser, unless the claims officer on good cause shown determines that the claimant should receive a lesser or no amount.

(8) Any amount awarded in proceedings contemplated in section 10 shall be deducted from any amount claimed in terms of this section.

(9) Any person aggrieved by a decision of the claims officer, shall be entitled to be furnished with the reasons for the decision and may appeal against such decision to the board of appeal established by section 26 of the Financial Services Board Act.

(10) Notification of amounts recovered in terms of this section, the administration of trust accounts, the procedure for the lodging and proof of claims and the distribution of payments in respect of claims shall be in accordance with rules made from time to time by the Financial Services Board.

(11) The common law principles of vicarious liability apply to the civil liability established by this section.

Assessment of fines and penalties

7. (1) In the assessment of any penalty in terms of section 5, the court shall take into account any award previously made under section 6 which arises from the same cause.

(2) In the assessment of any award under section 6, the court shall take into account any penalty previously imposed in terms of section 5 which arises from the same cause. 5

Attachments and interdicts

8. (1) On application by the Financial Services Board, it shall be competent for a court to order the attachment of assets or evidence to prevent their concealment, removal, dissipation or destruction.

(2) The Financial Services Board may institute any interdict or interlocutory proceedings against a person who profited or avoided a loss or who the Financial Services Board reasonably believes may have profited or avoided a loss as contemplated in section 6. 10

(3) Such proceedings may include proceedings to obtain an interdict to prevent the disposal of assets or of evidence. 15

Jurisdiction

9. (1) Only a High Court or a regional court shall have jurisdiction to try any offence mentioned in section 2 and to impose a penalty up to the maximum set out in section 5.

(2) For the purposes of sections 6(4) and 9(1), a court of competent jurisdiction shall include the court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing occurred and it shall not be necessary to make any attachment to found or confirm jurisdiction. 20

Protection of existing rights

10. Nothing in this Act shall prejudice the common law rights of any person aggrieved by any dealing contemplated in this Act to claim any amount save to the extent that any portion of such amount has been recovered by such person under section 6. 25

Powers and duties of Financial Services Board

11. (1) The Financial Services Board shall be responsible for the regulation of insider trading.

(2) In addition to its powers in terms of the Financial Services Board Act, the Financial Services Board may— 30

- (a) investigate any matter relating to insider trading, including but not limited to, insider trading in terms of this Act and section 440F of the Companies Act, 1973;
- (b) institute such proceedings as are contemplated in this Act; 35
- (c) administer the proof of claims and distribution of payments in terms of section 6;
- (d) summon any person who is believed to be able to furnish any information on the subject of any investigation or to have in his or her possession or under his or her control any book, document or other object which has bearing upon that subject, to lodge such book, document or other object with the Financial Services Board, or to appear at a time and place specified in the summons, to be interrogated or to produce such book, document or other object; 40
- (e) interrogate any such person under oath or affirmation duly administered, and examine or retain for examination any such book, document or other object: 45
Provided that any person from whom any book, document or other object has been taken and retained under this subsection shall, so long as such book, document or object is in possession of the Financial Services Board, at his or her request be allowed, at his or her own expense and under the supervision of

- the person in charge of the investigation, to make copies thereof or to take extracts therefrom at any reasonable time;
- (f) in relation to a matter investigated in terms of paragraph (a), on the authority of a warrant, at any time without prior notice—
- (i) enter any premises and require the production of any document; 5
 - (ii) enter and search any premises for any documents;
 - (iii) open any strongroom, safe or other container which it suspects contains any document;
 - (iv) examine, make extracts from and copy any document or, against the issue of a receipt, remove such document temporarily for that purpose; 10
 - (v) against the issue of a receipt, seize any document;
 - (vi) retain any seized document for as long as it may be required for criminal or other proceedings,
- but the Financial Services Board may proceed without a warrant, if the person in control of any premises consents to the actions contemplated in this paragraph; 15
- (g) make rules—
- (i) concerning the administration of this Act by the Financial Services Board and the Directorate;
 - (ii) concerning the manner in which investigations in terms of this Act are to be conducted; 20
 - (iii) concerning the notification of amounts received in terms of section 6, the procedure for the lodging and proof of claims, the administration of trust accounts and the distribution of payments in respect of claims;
 - (iv) concerning meetings of the Directorate; and 25
 - (v) which are generally designed to ensure that the Financial Services Board and the Directorate are able to perform their functions in terms of this Act;
- (h) make rules or guidelines dealing with the manner in which inside information should be disclosed and, generally, with the conduct expected of persons with regard to such information; 30
- (i) in consultation with the relevant regulated markets in the Republic, require such markets to implement such systems as are necessary for the effective monitoring and identification of possible contraventions of this Act.
- (3) (a) A warrant contemplated in subsection (2)(f) may be issued, on application of the Financial Services Board, by a judge or magistrate who has jurisdiction in the area where the premises in question are located. 35
- (b) Such a warrant may only be issued if it appears from information under oath that there is reason to believe that a document relating to the matter being investigated in terms of subsection (2)(a), is kept at the premises in question. 40
- (c) Any person from whom a document has been seized under subsection (2)(f), or his or her authorised representative, may examine such document and make extracts therefrom under the supervision of the Financial Services Board during normal office hours.
- (4) Notwithstanding subsection (1)— 45
- (a) the power to institute any civil proceedings under this Act vests in the Directorate;
 - (b) no rule may be made or amended without the prior consent of the Directorate;
 - (c) the Directorate shall also have the powers contemplated in subsection (2)(d), (e) and (f). 50
- (5) The Financial Services Board may, subject to such conditions as it may determine, delegate the power to investigate an alleged contravention of this Act to such person as it deems fit and such person shall have the powers set out in subsection (2)(d), (e) and (f).
- (6) The Financial Services Board shall cause the publication in the *Gazette* of a notice of any proposed rule or amendment of a rule, calling upon all interested persons who have any objections to the proposed rule or amendment, to lodge their objections with the Financial Services Board within a period of 30 days from the date of publication of the notice. 55

(7) If there are no such objections or if the Financial Services Board has, in consultation with the Directorate, considered the objections and has decided to introduce the proposed rule or amendment in the form published in the *Gazette*, the rule shall come into effect on the expiry of a period of 10 days after the last date on which objections could have been lodged in terms of the notice. 5

(8) If the Financial Services Board has, after considering such objections, decided in consultation with the Directorate to amend the proposed rule, subsections (6) and (7) shall apply to such amendment.

(9) Any rule, but not a guideline, made under subsection (2) shall be binding on all members of the public. 10

(10) In the event of the Attorney-General declining to prosecute for an alleged offence in terms of this Act, the Financial Services Board may prosecute in respect of such offence in any court competent to try that offence and the provisions of section 8(2) and (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall not apply.

(11) Aside from its other duties the Financial Services Board shall, at the request of the Directorate, be obliged to investigate any matter and summon and interrogate any person in respect of the matters referred to in subsection (2)(a), (d) and (e). 15

Establishment and powers of Directorate

12. (1) The Insider Trading Directorate is hereby established as a committee of the Financial Services Board to exercise the power of the Financial Services Board to institute any civil proceedings as contemplated in this Act in the name of the Financial Services Board. 20

(2) The Minister shall appoint as members of the Directorate—

- (a) the executive officer of the Financial Services Board or his or her deputy;
- (b) one person and an alternate nominated by each of the regulated markets in the Republic; 25
- (c) one commercial lawyer and an alternate of appropriate experience nominated by the Law Society of South Africa;
- (d) one accountant and an alternate of appropriate experience nominated by the South African Institute of Chartered Accountants; 30
- (e) one person and an alternate of appropriate experience nominated by the insurance industry;
- (f) one person and an alternate of appropriate experience nominated by the banking industry;
- (g) two business persons and alternates. 35

(3) The Minister may, in addition, appoint two other persons of appropriate experience to serve as members of the Directorate.

(4) The persons referred to in subsections (2) and (3) shall be nominated by reason of their availability and knowledge of financial markets and may not be practising members of a regulated financial market or stockbrokers, financial instrument traders or financial instrument principals. 40

(5) The chairperson of the Directorate shall be a member of the Directorate nominated by the Directorate to exercise the powers and perform the duties of the chairperson.

(6) The members of the Directorate shall be entitled to co-opt one or more persons as additional members of the Directorate. 45

(7) All members of the Directorate, other than the additional members, shall have one vote in respect of matters considered by the Directorate, but alternate members shall only have a vote in the absence from a meeting of the member whom the alternate is representing.

(8) The meetings of the Directorate shall be held at such times and places as the chairperson may determine, but four members of the Directorate may by notice in writing to the chairperson of the Directorate demand that a meeting of the Directorate be held within seven business days of such notice. 50

(9) The person presiding at a meeting of the Directorate shall determine the procedure of such meeting. 55

(10) The decision of a majority of the members of the Directorate at any meeting at which there are at least four members present shall constitute the decision of the Directorate.

(11) No proceedings of the Directorate shall be invalid by reason only of the fact that a vacancy existed on the Directorate or that any member was not present during such proceedings or any part thereof.

(12) The Directorate shall, in the performance of its functions, be assisted by an executive director, appointed by the Financial Services Board in consultation with the Directorate, who shall be entitled to attend all meetings of the Directorate but shall not be entitled to vote at such meetings. 5

(13) The Directorate shall be entitled to withdraw, abandon or compromise any civil proceedings instituted in terms of section 6, but any agreement of compromise must be made an order of court and the amount of any payment made in terms of such compromise must be made public. 10

(14) Where civil proceedings have not been instituted, any agreement of settlement may, on application to the court by the Financial Services Board after due notice to the other party or parties, be made an order of court.

Financing of Directorate

15

13. The costs of performing the functions of the Financial Services Board and those of the Directorate in terms of this Act shall be paid out of the funds contemplated in section 16(1)(b) of the Financial Services Board Act.

Confidentiality and sharing of surveillance information

14. (1) No person shall, except for the purposes of performing his or her functions in terms of this Act or for the purpose of any legal proceedings under this Act or when required to do so by a court or any other law, disclose to any other person any information acquired by him or her in the performance of his or her functions under this Act. 20

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment. 25

(3) Notwithstanding any provision to the contrary, the institutions which have nominated persons to the Directorate, the Securities Regulation Panel and the South African Reserve Bank shall be entitled to share information concerning insider trading, market practices and abuses with each other and with the persons whether inside the Republic or elsewhere responsible for prosecuting such abuses so as to assist them in fulfilling their regulatory and statutory responsibilities. 30

Limitation of liability

15. Neither the Financial Services Board, the Directorate nor any officer, employee, representative or committee member of the Financial Services Board or the Directorate shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the officer, employee, representative or committee member in the *bona fide* but not grossly negligent performance of any function in terms of this Act or the rules. 35 40

Failure to appear, give evidence or produce books, documents or other objects

16. Any person who, without sufficient cause, fails to appear or to give evidence or produce any book, document or other object as contemplated in section 11(2)(d) and (e), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment. 45

Repeal of section 440F of Act 61 of 1973

17. Section 440F of the Companies Act, 1973, is hereby repealed.

Transitional provisions

18. (1) Notwithstanding the repeal of section 440F of the Companies Act, 1973, the Financial Services Board shall be responsible for investigating offences in terms of that section, allegedly committed before such repeal, and for that purpose it shall have the powers and duties contemplated in section 11. 5

(2) The Securities Regulation Panel constituted in terms of section 440B of the Companies Act, 1973, may disclose to the Financial Services Board all information in its possession relating to an alleged offence in terms of section 440F of the Companies Act, 1973, or in terms of this Act.

(3) The Financial Services Board may disclose information received in terms of subsection (2) to any of the institutions or persons contemplated in section 14(3). 10

Short title and commencement

19. This is the Insider Trading Act, 1998, which takes effect on a date fixed by the President by proclamation in the *Gazette*.