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July 2016

### **A WARNING TO DIRECTORS AND COMPANY OWNERS: SHAREHOLDER ACTIVISM IS GROWING**

Recently a minority shareholder in Lewis Stores applied to the Court to have four of its directors declared delinquent, an action which the



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directors are reportedly opposing and which is sure to provide an interesting case study on how corporate stakeholders can protect their interests.



### ***Stakeholders – your remedies***

The “new” Companies Act (it came into effect in 2011) gave widespread powers to directors. As a counter to this, the framers of the Act put in place remedies for other stakeholders to challenge and hold directors to account.

One such remedy is to have the Court declare a director delinquent and another is to compel a company to undertake steps to legally protect itself.

### ***How does it work?***

A shareholder, director or a registered trade union representing employees may face the situation where they are aware that directors are not ensuring that the company is being correctly managed and these directors ignore attempts by stakeholders to get them to take corrective action. In this case a minority shareholder claims to have exposed deficiencies in the company’s lending policies. After a year the minority shareholder believed that no substantive action had been taken and the financial statements were thus materially misstated. He thus initiated his action to have the four directors declared delinquent.

Directors may approach a Court to have this action set aside as “frivolous, vexatious or without merit”. This the board of directors in this case have reportedly done.

If this is turned down the board are reportedly to set up an independent committee or person to investigate the matter. This investigation is to consider why the action, demanded in the Court application, came about, the costs of complying with the requests made in the application and what is in the best interests of the company. Within sixty days, the board is required to either state if it will follow the legal action required or if it decides not to follow the proposed remedy, it is to notify the complainant of this.

The essence of this process is the Courts will ensure the matter is followed through until there is resolution. If the application of the minority shareholder has no merit, the Court will end the process. But if the Court finds there is substance to the complainant’s application, the company will have to commission an investigation as shown above and take the appropriate action.

In the months ahead it will be interesting to see how this case unfolds.

This type of application is cost effective – to trigger the process all that is needed is for a letter to be delivered to the company setting out the grounds for the application.

We live in an era of growing shareholder activism. Be prepared particularly if you have minority shareholders, independent directors or if your workers are represented by a trade union.

### **BITCOIN: LEARN ABOUT IT NOW, IT IS HERE TO STAY**

***“Don’t miss the wave” (Old saying - not limited to surfers!)***

Bitcoin is a digital currency which has grown rapidly since its introduction in 2009. Recently the UK issued an e-money licence to a finance house and



Barclays Bank has become part of this process.

### ***What is Bitcoin?***

It is a digital currency whereby you can, say, pay anybody in the world without an intermediary (a bank) involved. It is thus much cheaper than using a bank and potentially just as effective.

### ***The main features and advantages***

The founder of Bitcoin (still anonymous) built a robust system:

- The number of Bitcoins is limited to 21 million. This helps ensure that the intrinsic value of Bitcoins rises and is a hedge against inflation
- The system is controlled by no one and is completely transparent. Thus, anybody can check all transactions at any time. This is called the blockchain. The system is thus self-regulating
- Sophisticated cryptography protects the integrity of transactions. It is not possible to issue the same Bitcoin twice. If you do, your system will be out of line with other users
- It is done on open source software which is not difficult to follow, is free and accessible
- The system is easy to use.

### ***What is the risk?***

Like any online system it is possible for cyber criminals to hack into the system. The value of Bitcoins is also subject to volatility, so there is no guarantee of value although it has recently appreciated against the dollar (after dropping sharply in 2014). There is also no legal protection for Bitcoin (as there is for example with “legal tender” like the Rand) so you use it at your own “sole and independent risk” (that’s a quote from the South African Reserve Bank). Users can hide their identity so the potential exists for income tax fraud and evading exchange controls – which could bring unwanted attention from governments.

### ***Applications in Africa***

In Africa it has the potential for widespread use. The fact that Africa has many unstable currencies and has limited infrastructure means Bitcoins could be a “leap technology” that enables the continent to fast track economic growth, especially considering the widespread use of smart phones in Africa.

Bitcoins are here to stay and many commentators are calling them the next financial/banking disruptor. **Don’t risk losing out – learn all about them now!**

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**RAGE - AN EFFECTIVE TOOL FOR ENTREPRENEURS AND YOUR STAFF**

***“Do not go quiet into that good night  
Rage rage against the dying of the***



*light”*  
*(Dylan Thomas)*



What is the defining moment when an entrepreneur starts a business? Very often it is rage. He/she is sick of not being listened to, is bored to tears with the opinions of the boss until something snaps within them.

Most entrepreneurs spend a long time thinking about and nurturing their idea. Very often it is rage which becomes that "..... existential moment: a choice of action over paralysis."

Rage is the enabler which allows people to break the bonds around them and go off on their path of entrepreneurship.

### ***Can I use this in my business?***

Ideas drive innovation and people, not companies, are the ones with ideas. In our rapidly changing world, these ideas could be the lever that drives your business forward.

### ***Yet ...***

Reportedly 85% of people in companies have worries and feel differences on important topics but they never voice these concerns.

Not many businesses can afford to lose staff who have the potential to be entrepreneurs (think of the value they can add if their energy and ideas are harnessed). Work on your organisational culture so that staff are not only actively encouraged to vocalise their issues and ideas, but they know their ideas will be taken seriously. Many of today's successful organisations, such as Google, have done precisely this and have seen rising profits and a stable work force.

Tim Cohen's excellent opinion piece "Point of Order: Rage can stimulate entrepreneurial success" on the Business Day [website](#) is worth reading for more on this concept.

**Channel the potential rage of your staff members into ideas that can help your business prosper.**

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## **EMPLOYERS: IS IT PAY DISCRIMINATION TO DIFFERENTIATE ON LENGTH OF SERVICE?**

In the Employment Equity Act (EAA) there is a wide definition of unfair discrimination which lists gender, race, religion and so on. Recently a phrase was tagged onto this discrimination clause which says "... or on any other arbitrary ground".



Recently, this phrase was relied on in a case of unfair discrimination against an employer. The employer paid newly employed workers 80% of the full wage for the first two years of employment. Thereafter they moved up to the full wage.

Some newly employed staff (via their union) took the employer to the CCMA and alleged unfair discrimination in that they did exactly the same work as other employees who had been there two years or more. The employees won their case at the CCMA but this was reversed on appeal to the Labour Court, which held that: "The differentiation complained of was not irrational; was not based on an arbitrary unlisted ground; and was not unfair."

### ***What must the complainant prove?***

The judgment set out what a complainant must prove to establish pay discrimination:

- The work performed by the complainant is equal or of equal value to that of a more highly remunerated comparator; and
- Such difference in pay is based on a prohibited ground of discrimination.

To show unfair discrimination on an arbitrary ground, the complainant, held the Court, must identify the arbitrary ground, prove that it is the reason for the disparate treatment and show that:

- a) The conduct complained of is not rational;
- b) The conduct complained of amounts to discrimination; and
- c) The discrimination is unfair.

The judgment gave weight to the government's Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value which states that it is not unfair discrimination if the difference is fair and rational and based on "the individuals' respective seniority or length of service". It also specifically recognises length of service as a factor justifying differentiation in pay.

Thus in appropriate circumstances it is permissible to pay your staff based on their period of employment. **As always however, take full advice on your particular circumstances – our labour laws are complex and the consequences of non-compliance severe.**

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### **SMALL BUSINESSES: SPEED UP SME-FRIENDLY REFORM!**

As you know, the small and medium business sector is held out to be the only sector that can produce the growth and job creation that our country so sorely needs.



The South African Institute of Chartered Accountants (SAICA) has once again commissioned a study into how SMEs see their businesses and their challenges, and where support will be most meaningful. It will identify how SAICA can intercede with government to make it easier for you to do business and to create jobs.

Specifically:

- They want to understand what it is that will help small and medium sized businesses to be more successful, so that they can lobby on your behalf with both Government and Big Business

- They are interested to know what products and services the Accounting Profession can produce that will stimulate the growth of SMEs or make their lives easier and more profitable.

### ***Tell government and big business what you need***

For the research to be successful a strong level of participation from SMEs is needed.

It won't take long – click on this link [“2016 SMME Insights Survey”](#) to get started.

**Don't delay, there is a deadline here – the survey closes on 15 July 2016.**

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### **YOUR TAX DEADLINES FOR JULY**

The period for individuals to submit tax returns for the 2015/2016 period begins on 1 July. Important dates to remember for the 2015/2016 tax year are:



- 23 September 2016 is the due date for manual and postal income submissions.
- 25 November 2016 – eFiling if you are a non-provisional taxpayer. If you plan to submit from a SARS' office this is also the due date for filing (non-provisional).
- 31 January 2017 – provisional taxpayers via eFiling.

### ***If your IRP5 is wrong***

Note that if you are an employee you will no longer be allowed to make any corrections to pre-populated IRP5 details. If you disagree with the information in your return you will have to approach your employer to correct it with SARS - your employer is by law obliged to do so.

### ***Before you lodge a return at all, check that you are obliged to do so***

Per SARS: “If you earn under R350,000 for a full year from one employer (that's your total salary income before tax) and have no other sources of additional income (for example, interest or rental income) and no deductions that you want to claim (for example medical expenses, travel or retirement annuities), then you don't need to submit a return” – but that's just an overview and **in any doubt ask your accountant for advice – the penalties for non-compliance are severe.**



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