

Opinion & Analysis

QUOTE OF THE DAY

You can make more friends in two months by becoming interested in other people than you can in two years by trying to get other people interested in you — Dale Carnegie (1888–1955), American writer

Pacak reaps benefit of Naspers share appreciation

BUSINESS WATCH

LAST WEEK the family trust of Steve Pacak, the finance director of Naspers, became richer — to the tune of R71 million — when it took delivery of 80 000 Naspers shares.

The shares were part of Pacak's remuneration package and were awarded to him when the media giant's shares were trading at R50 each. In terms of the rules of the share incentive trust, Pacak had to take delivery of the stock not later than the 10th anniversary of the offer date, which was September 9, 2004.

Pacak cashed in 10 000 of the shares in order to pay the trust R4.5m, which was the value of the 90 000 shares at the time they were awarded to him.

Unlike Naspers' chief executive, Koos Bekker, who receives neither salary nor bonus from the company, Pacak receives salary, bonus and pension contributions from the company. In 2013 this package, excluding whatever value should be attributed to the 54 000 shares allocated to him in that year, was worth R7.4m.

The shares awarded to Pacak during financial 2013 were priced at R484.70 and,

after easing back R12 yesterday, closed at R878.29. This highlights how far the share has moved in a relatively short period.

Of course, everyone's remuneration at Naspers tends to get overlooked because of the high drama effect of Bekker's uniquely structured arrangement and the fact that at any given time it seems to be valued in the billions of rand.

By comparison, chairman Ton Vosloo has a modest package. He is the man who backed Bekker and enabled him to carry out his high-risk strategy, which has taken Naspers from a small South African media company to a global internet player.

Fracking

The suggestion by the Graaff-Reinet Chamber of Commerce that one way of testing the attitude towards fracking in the Karoo could be to hold referendums in affected areas, as reported in Business Report last week, has created a bit of a storm in the Eastern Cape Town.

Derek Light, a lawyer representing Johann Rupert, the billionaire entrepreneur who has property interests in the town and in farming in the district, said yesterday that it was his view that a referendum would serve "little purpose" where the majority of residents were poorly informed and the issues complex.

It would serve only to create a platform for politicians and other interests groups to publish "often biased views" aimed at

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advancing their own interests, he argued.

Light said his firm represented landowners in the district whose properties and livelihoods were threatened by a potentially "very harmful activity", and a democracy was not always about majority or popular vote. "Our constitutional democracy seeks to protect the rights of individuals and minorities. Relevant to this matter, it also seeks to protect the environment."

Thus a "correct decision" was not necessarily the popular or majority decision.

A legally defensible decision "must be an informed decision and significant unknowns currently mitigate against informed decision-making by the government. Our voting public would be in no better a position," Light argued.

A formal administrative legal process which gave effect to the constitutional

considerations of administrative fairness within an adequate legal and regulatory framework remained the only mechanism to protect the rights of individuals and, therefore, the community and to advance the best interests of the country.

The only problem is that when the decision to frack is taken it will be by the Mineral Resources Department, which has already indicated that it is not against fracking in principle.

Whether it will reflect the democratic will or not, when the department finally takes a decision, will be a moot point.

Intellectual property

Médecins sans Frontières (MSF), the Treatment Action Campaign and Section 27, a public interest law centre, have made a passionate argument as to why the draft national policy on intellectual property, which was gazetted last week, is worth paying attention to.

Their argument hits directly at the scourge of the high cost of medicine. The policy drafted by the Department of Trade and Industry may affect the ability of medical aid schemes to pay for new cancer drugs for members. It may determine whether MSF can integrate crucial multidrug resistant tuberculosis medicine in its treatment programmes.

The policy could help secure access to the latest generation of antiretroviral medicines for the millions of HIV-positive

people in the country, the lobbying groups said yesterday. Consequently, the parties expect the cost of medicine to decrease.

Why has this not happened?

The challenge is South Africa's inability to examine patent applications, which is a weakness that the policy identifies. "South Africa uses a registration system that is not per se able to scientifically critique 'newness, novelty, obviousness, and usefulness' in trade and agriculture," the policy document states.

Shrewd pharmaceutical companies have identified the gap and have gained multiple patents on the same drug, including for inventions that do not occur under the country's definition of innovation.

These firms effectively extend the life span of their dominance, keep competition from generic manufacturers at bay and charge high prices for medicine in the public and private sectors, the groups argue.

Profit-hungry corporates have realised that there is money to be made in the sector. By 2025, the number of patients on chronic medication is expected to grow to 8.6 million from 6.6 million, as recorded by the Actuarial Society of SA in 2003.

The draft policy deals with four types of intellectual property: trademarks, copyright, patents and designs. It is open for public comment until October 5.

Edited by Banele Ginindza. With contributions from Ann Crotty, Donwald Pressly and Asha Speckman.

King still on the hook for insider trading?

COMPANY MATTERS

Allan Greenblo

HERE are two King codes on corporate governance. The one, more famous, is endorsed by the Institute of Directors and resonates in the Companies Act on good governance. The other, now infamous, emerges from the actions of Dave King whose attempts to diddle the taxman represent a textbook case on how an erstwhile JSE-listed company should not be governed.

The supine mea culpa issued by King, in agreeing to the settlement with the SA Revenue Service (Sars) at R707 million (addional to the R350m from the sale of attached assets), sharply contradicts the arrogance displayed during his decade-long battle. But it isn't only this that makes his statement remarkable. It's the implicit admission that Ben Nevis and King are effectively one and the same.

There could be implications, and there should be. Ben Nevis, a company registered in the British Virgin Islands and purportedly owned by a Guernsey-registered trust, was integral to King's tax avoidance structure. It enabled him to contend that Ben Nevis and not he was the controlling shareholder of Specialised Outsourcing Limited (SOL). Exposure of the hoax opens a Pandora's box of insider trading.

Shares in SOL, founded by King, were placed at 50c. Based on what the National Prosecuting Authority (NPA) described in 2010 as "alleged deliberate manipulation of financial statements, financial reports and recorded earnings... with a view to enhance the growth profile and share price of the company", the share price peaked at R70 and subsequently fell out of bed.

SOL, of which King was chief executive, was not in the 1990s obliged by JSE rules to disclose directors' dealings. So the extent of his offloading, in the guise of Ben Nevis, was not publicly known. The controlling shareholder had sold its 70 percent stake at a R1.2 billion profit, rapidly dispatched to King's offshore accounts.

The NPA's intended prosecution was instituted after a series of complaints by institutional investors in SOL. These included Old Mutual, Sanlam, Coronation and Southern Life. That the prosecution did not proceed reflects more on the NPA's competence than on King's innocence.

Of the charges that were to have been brought, none was for insider trading. Of the R12m in fines he must pay as part of the Sars settlement, none is for insider trading.

Yet in 2004, the directorate of market abuse at the Financial Services Board (FSB) had investigated SOL for insider trading and handed its files to the criminal investigation authorities. It said at the time: "The directorate could not consider the possibility of a civil action against any party with regard to SOL as the transactions which were investigated occurred before the Insider Trading Act came into operation."

Insider trading was illegal under the 1973 Companies Act. Criminality aside, new legislation provides for civil proceedings where fines of up to four times the gains made from a trade may be levied. The FSB is empowered to pursue transgressors and to compensate those who might have been prejudiced by the offending transactions; in this case, the institutions invested in SOL on behalf of clients.

What counts in King's favour is the argument that civil claims against him have been prescribed by the time limit during which they should have been brought. But from when does prescription run? From the time the insider trading took place, or from the time the regulator and the prejudiced institutions could identify the transgressor? If the latter, then the evidence is in King's admission that he was Ben Nevis.

It's easier to show insider trading in civil actions, on a balance of probabilities, than in criminal actions, where it must be proven beyond reasonable doubt. At least the balance of probabilities suggests that King committed insider trading on a grand scale, by selling securities on the basis of non-public information, severely to the detriment of investors not privy to it.

King's newly found morality compensates Sars. It does not extend to others at the receiving end of financial damages in the collapse of SOL's share price. Although the 1999 Insider Trading Act is not retrospective, it does allow the FSB directorate to investigate and prosecute alleged insider trading offences under the old Companies Act. Where actions are criminal, there's no time constraint on prosecution.

Perhaps it would be a good idea for King not to put aside his cheque book just yet.

Transatlantic battle against tax evasion is long overdue

PAYING ONE'S DUES

Stephan Richter

WHY is combating tax evasion so important in the globalisation debate? Atlanticists have been looking far and wide for ways to resuscitate the transatlantic relationship and give it a much-needed energy boost. They have looked at ganging up against China or at coalscaping over the shale gas revolution.

And yet, for all the intensity of their search, they only stumbled upon what, in this age of globalisation, may easily prove to be the most effective way to underline the ongoing relevance of intensive policy co-operation between Europe and the US in the eyes of the public at large.

As the result of what are two investigative accidents of history, an epoch-making transatlantic (if not yet global) battle against tax evasion has been joined.

Better yet, unlike what happens so often on such a controversial issue, this is not a transatlantic battle over tax evasion (where both sides find themselves at diametrically opposed ends), but a common crusade against tax evasion.

The two dots in the global landscape were, first, the Bradley Birkenfeld whistleblower case. The former UBS private banker started to tell on his bank's illegal practices regarding its US clients by providing the US Internal Revenue Service with disks that contained their names.

The second dot was a series of CDs with banking customer data detailing tax evasion cases, mainly in Switzerland, Luxembourg and Liechtenstein. These data sets were offered for sale to the proper authorities in Europe, predominantly in Germany.

Legally dubious or self-interested as these data sharers' actions may have been, they did lead to the desired public policy result. They caused many more wealthy people, *ex post facto*, to comply speedily with US, German and other nations' tax laws under the amnesty terms offered.

And they may have turned the tide

against the shady practice as such. Tax evasion is no longer considered a "gentleman's crime", worthy of no more than a slap on the wrist, if that. The people that triggered this budding revolution were not exactly Robin Hoods. But they did bring about a crucial — and much-needed — element of creating economic and social justice.

If someone brings to account thousands of people who are wealthy enough to avail themselves of what at best are artful tax "circumvention" services, that is to be welcomed.

After all, we live in an era when the rapid integration of the global economy causes great stresses in the lives of many people around the world.

It is politically explosive — and in a democracy self-defeating — to let some individuals believe that they do not have to play by the rules.

Manufacturing workers, regardless of location and nationality, can lose their jobs in large numbers if the facility where they are employed is no longer productive enough. And in many a country, social benefits are being trimmed constantly in an effort to make the welfare state sustainable during conditions of rapid population aging.

Under such circumstances, it is politically explosive — and in a democracy ultimately self-defeating — to let some individuals go on in their belief that they unlike most regular tax-paying citizens, do not really have to play by the rules.

In such a world, it is pivotal that people live and operate under the same set of rules. There cannot be one set for all regular wage earners, who have their taxes and other charges automatically withdrawn from their monthly wages, and another set for people who enjoy great "flexibility".

True enough, there is a whole raft of prominent banking institutions, accounting firms and law firms — never mind the myriad shady operators in this field with

much lesser names and completely dubious reputations — who make a rich living indeed from setting up and operating this netherworld of tax evasion.

But their activities do not happen in a social and political vacuum. Economic globalisation has brought about a significant increase in terms of income inequality in most Western societies. That is even true in countries that traditionally put more emphasis on equality and solidarity, as is the case throughout Scandinavia.

When that happens, public policy must take appropriate measures to ensure a clear sense of tax fairness and equity in domestic society. And if the effort to ensure that requires resorting to extraordinary and, yes, in the minds of some, illegal measures, then that is simply what is required.

The law is never an absolute category. It is ultimately the codification of a set of moral choices between various layers of conflict situations, as they are either known or anticipated to exist.

When tax authorities can obtain information that penetrates the otherwise impenetrable world of tax evasion, then clearly any government acts within its proper rights if it chooses to enforce against the truly immoral choice.

That truly immoral choice is not paying one's proper tax obligations, as required under the public laws of the land, no matter how clever, conniving and reassuring one's bankers, lawyers and accountants are.

In such cases, it is immoral, and ultimately illegal, to protect the tax offenders for their claimed right to "privacy" or, more stupefying yet, protection under the "rule of law".

Anybody seriously considering the alternative just needs to ask this question: what happens to the internal fabric and moral fibre of a society where the vast majority plays by the rules (if only because they have no other choice), but a very small minority, already privileged with a high level of economic success, does not?

Under those circumstances, how can even the most basic notions of social and economic equity be upheld?

Is it desirable in any conceivable way to have such an unfortunate separation between the law-abiding "losers" who are merely treading in place (that is, the many) and those who consider themselves above the law (that is, the few)?

If the answer to any of those questions



Bradley Birkenfeld, a former UBS banker, turned over information on the bank's tax evasion schemes to the US Internal Revenue Service. Although he was sentenced to a 40-month prison term for his involvement in the scheme, his efforts are seen as key to getting more wealthy people to comply with US tax laws under an amnesty. PHOTO: BLOOMBERG

is no, then one must act accordingly.

It is issues such as combating tax evasion that give the all-important, but abstract sounding goal of advancing the broader cause of global governance its real-life meaning.

Proper governance and the global economy means more than just rectifying the voting right in international financial institutions such as the World Bank and International Monetary Fund, overdue as that rectification is.

For this important endeavour to find resonance among the wider public, the

reform efforts must yield effects in their daily lives.

Combating tax evasion is precisely such an issue and a cause. It promotes the sense of fairness and a lived practice by all citizens to operate under the same rules and be wedded to advancing the life opportunities of all citizens and not just the most fortunate ones.

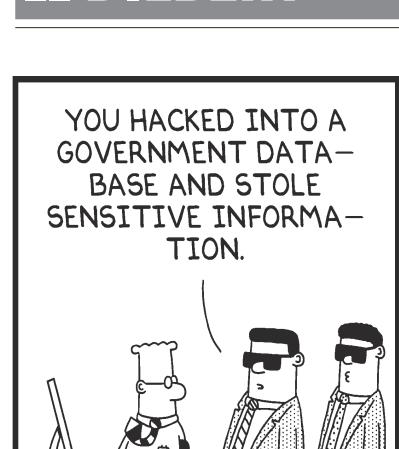
Few things are more vital to promoting and sustaining democracy over the long haul.

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DILBERT



DIARY

IN DESIGNER-OBSESSED Hong Kong, keeping up appearances can be hard on the purse. One company has an answer: cash-strapped shoppers can get money quickly by pawning their Gucci, Chanel, Hermès or Louis Vuitton luxury handbags.

Yes Lady Finance, a mortgage brokerage, offers loans within half an hour of up to half of a bag's new value, with four months to repay at an interest rate of 4 percent.

If the client fails to pay back the loan, the bag is sold by the company's retail arm, Milan Station Holdings, at one of its second-hand designer stores.

But most people repay to retrieve their prized possessions, said Byron Yiu, Yes Lady Finance's chairman and chief executive. One client brought in a crocodile-skin handbag and got a loan for HK\$250 000 (R320 000). — Reuters

Allan Greenblo is the editorial director of Today's Trustee (www.totrust.co.za), a quarterly magazine mainly for trustees of retirement funds.