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EMPLOYMENT LAW ALERT

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KENYA

Ethnicity and board structure

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The Employment and Labour Relations Court has quashed a state authority decision to appoint three members of one ethnic community to a board. In the recent case of *Law Society of Kenya v Chairman, Nairobi Metropolitan Area Council and Three Others; Mary Waithigieni Chege and Two Others (Interested Parties)* [2021] eKLR, the court held that it is unconstitutional, unlawful, and irregular to compose a board of members from one ethnic community, as this disregards the diverse fabric of Kenya and the national values espoused in the Constitution of Kenya, 2010. The court relied on Article 232 and Article 10 of the Constitution, reasoning that these provisions obligated the state authority to apply national values and principles of governance, such as social justice, inclusiveness, equality, integrity, non-discrimination and transparency.

The court's judgment related to state agencies; however, the legal basis of this decision, being the principles of non-discrimination and equality, may conceivably introduce a new standard for private employers to consider when structuring a board. Notably, the Employment Act, 2007 (Employment Act) does not set out board composition requirements for private employers. However, the Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011 (Regulations) set out some guidelines to be followed. For example, sections 3 and 4 of the Regulations provide that a board shall be composed of:

- persons who are fit and proper to hold such a position;

- persons who have undergone relevant training on corporate governance within six months of appointment; and
- at least one-third of directors who are not employed by the company, or associated with any of its management, advisers, or consultants, among other such requirements.

Although the Employment Act is silent on this matter, a wide view of the implications of this case, read alongside the provisions of the Constitution and the requirements in the Regulations, suggest that ethnic diversity may be a growing consideration for all when structuring a board. Therefore, even though this judgment was premised on Articles 10 and 232 of the Constitution, which relate to public entities, it is likely that the reasoning in this case can also be applied to private employers because the national values referred to, such as non-discrimination and equality, bind private employers as much as they do state agencies, as set forth in Article 27(5) of the Constitution.

We recommend that private employers take note of this decision and prepare to consider ethnic diversity as a possible factor when structuring a board. As stated by the learned judge in this case, doing so would ensure that "*the evils of old which Kenyans opted to do away with in the Constitution*", are indeed done away with.

We are happy to assist in creating and advising on board structure requirements and policies in light of this decision.

*Tyler Hawi and Rizichi Kashero-Ondego
Overseen by Njeri Wagacha*

KENYA

Removal of KRA income tax waiver: Implications for an employer

Banks, finance institutions, insurance, oil, and large manufacturing companies, as well as companies listed on the Nairobi Stock Exchange have enjoyed the right to waive section 15(7) of the Income Tax Act, 1975.

For the last 42 years, the Kenya Revenue Authority (KRA) has waived the requirement for banks and large companies to pay separate income taxes. This waiver allowed these entities to combine their various sources of income for the purpose of tax computation. Banks, finance institutions, insurance, oil, and large manufacturing companies, as well as companies listed on the Nairobi Stock Exchange have enjoyed the right to waive section 15(7) of the Income Tax Act, 1975 which provides that: *"the gains or profits of a person derived from rental income, capital gains, pension, agriculture, employment and investment income sources shall be computed separately from the gains or profits of that person derived from ... any other income of the person."*

This waiver has therefore enabled these entities to earn separate income sources outside of their core business and encouraged them to diversify their portfolios, free from any additional tax

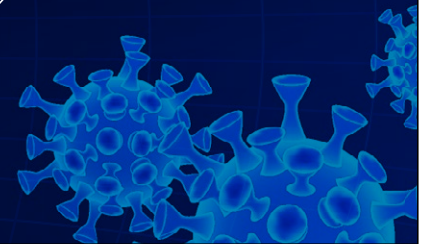
implications. This in turn has facilitated asset growth and financial stability amidst turbulent market changes. However, the recent KRA decision has sought to withdraw this four-decade-old waiver with effect from 1 October 2021. The KRA stated that this decision was premised on section 64(1) of the Tax Procedures Act, 2015 which authorises the KRA to withdraw a public ruling in whole or in part, by way of a notice in at least two newspapers of nationwide circulation. This notice was published and circulated on 22 September 2021.

Employers in these entities are set to incur greater overheads from 1 October 2021, as each of their income sources from the above specified categories will be computed separately. Employers need to be aware of the incoming changes and prepare to comply accordingly.

Tyler Hawi and Rizichi Kashero-Ondego
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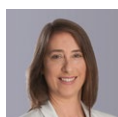
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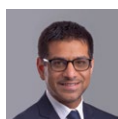
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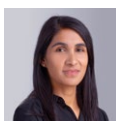
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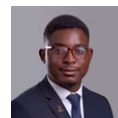
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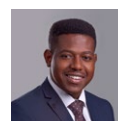
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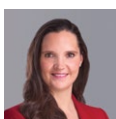
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