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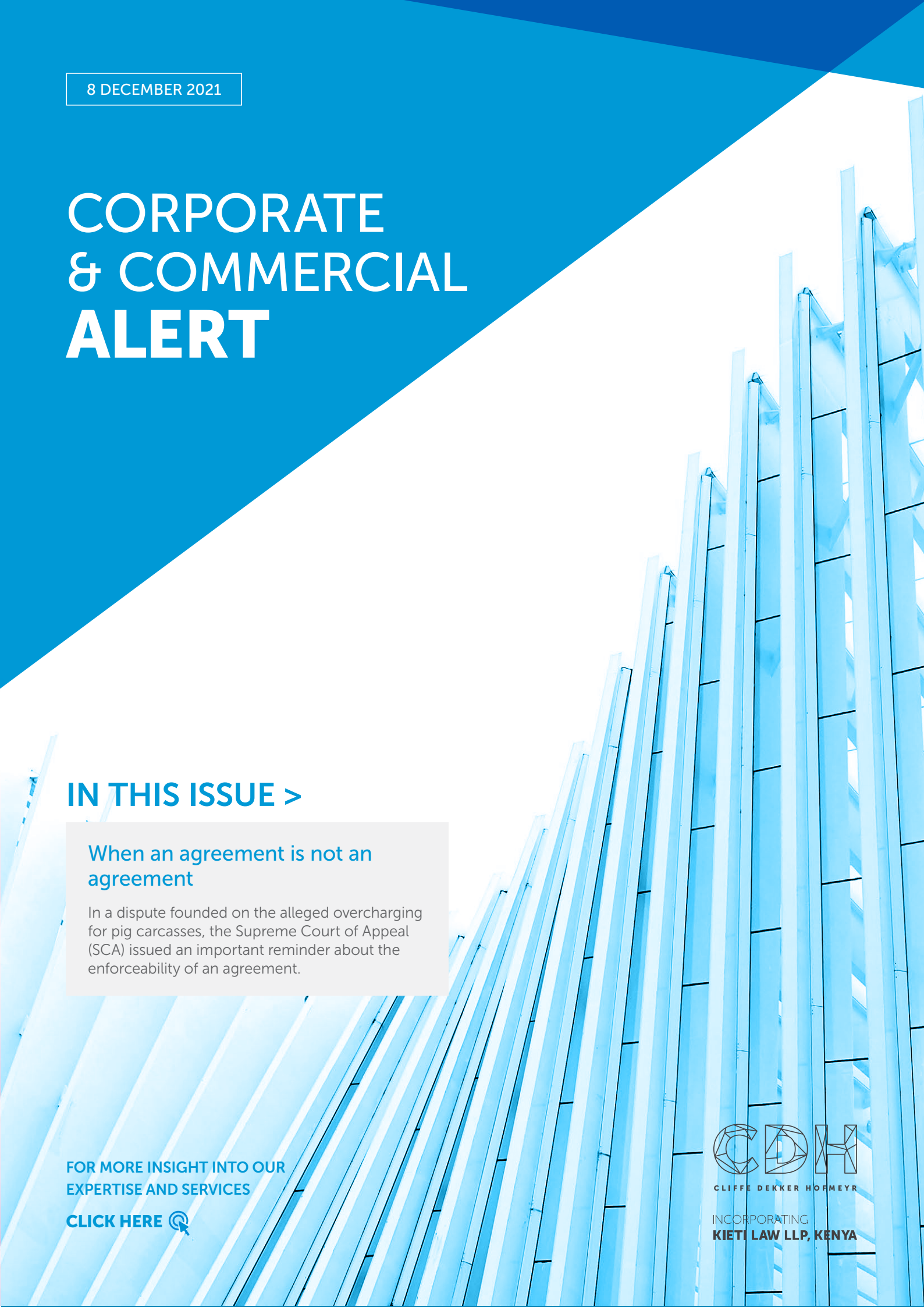
CORPORATE & COMMERCIAL **ALERT**



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When an agreement is not an agreement

In a dispute founded on the alleged overcharging for pig carcasses, the Supreme Court of Appeal (SCA) issued an important reminder about the enforceability of an agreement.

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When an agreement is not an agreement

This position has been entrenched in our common law by the Constitutional Court which held that an *"agreement to agree"* or to negotiate in good faith is void unless it is coupled with an express deadlock-breaking mechanism.

In a dispute founded on the alleged overcharging for pig carcasses, the Supreme Court of Appeal (SCA) issued an important reminder about the enforceability of an agreement.

The matter of *Van der Merwe v Bonnievale Piggery (Pty) Ltd* (749/202) [2021] ZASCA 162 has its genesis in a business arrangement that was orally agreed between the two parties and comprised i) a contract of sale, ii) an exclusive supply agreement, and iii) a sole distributorship agreement. The business arrangement was for an indefinite duration and terminable at the instance of either party.

Under the exclusive supply agreement, Bonnievale agreed to supply pig carcasses to Van der Merwe at *"reasonable, market related wholesale prices that would follow market fluctuations"*. Such prices were negotiated and agreed by the parties at least four times per annum for the duration of the business arrangement which endured from 2005 to 2012.

In mid-2012 the parties failed to reach agreement on the price of 1,300 pig carcasses that needed to be moved from Bonnievale's premises. This gave rise to Van der Merwe alleging that Bonnievale had breached the business arrangement by refusing to adjust its prices downwards in accordance with prevailing market trends, and thereafter had unlawfully competed with Van der Merwe by selling pork products directly to Van der Merwe's customers.

The SCA had to consider what would happen to the business arrangement if the parties failed to agree the price of the pig carcasses, noting that it was common cause that the price of the pig carcasses was never fixed and had to be market related.

The SCA held that the parties' price determination model was an *"agreement to agree"* and, when the parties failed to agree, the business arrangement came to an end without fault on behalf of either party.

It is a requirement under our law that the material terms of an agreement are determined or determinable and, as a consequence, the parties' *"agreement to agree"* would invalidate their business arrangement (when they fail to agree) given the absence of an objectively determinable mechanism to resolve their deadlock.

Relevantly, the SCA sought to differentiate between an external standard against which a price would be negotiated (e.g. the market price) and a deadlock mechanism that would definitively resolve an impasse between the parties.

This position has been entrenched in our common law by the Constitutional Court which held that an *"agreement to agree"* or to negotiate in good faith is void unless it is coupled with an express deadlock-breaking mechanism such as a formula or the appointment of an expert to make a binding determination (see *Makate v Vodacom Ltd* [2016] (6) BCLR 709 (CC)).

When an agreement is not an agreement...*continued*

An *"agreement to agree"* is often used as a means to create flexibility in relation to unpredictable commercial matters, but it concomitantly creates legal challenges as it is near impossible for a court to enforce open-ended terms that vest in contracting parties an absolute discretion to agree or disagree.

A general arbitration or dispute provision will generally not meet the criteria applied by the Constitutional Court as it is a means of resolving a dispute relating to an existing agreement and not the determination of a material term of a prospective agreement (see *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] JOL 46393 (SCA)).

An *"agreement to agree"* is often used as a means to create flexibility in relation to unpredictable commercial matters, but it concomitantly creates legal challenges as it is near impossible for a court to enforce open-ended terms that vest in contracting parties an absolute discretion to agree or disagree.

Contracting parties that wish to negotiate and agree material terms prospectively by *"agreeing to agree"* should take heed of the SCA's reminder and incorporate an appropriately drafted deadlock-breaking mechanism to guard against their agreement being invalid and unenforceable in law.

Darryl Jago

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