DISPUTE RESOLUTION
ALERT

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CLIFFE DEKKER HOFMEYR

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IN THIS ISSUE

KENYA

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SOUTH AFRICA

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KENYA

The time crunch in challenging an arbitrator's jurisdiction

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In this case, Nyoro Construction Company Ltd entered into a contract with the University of Nairobi for the construction of proposed extensions to the university's Lower Kabete Campus. A dispute arose between the contracting parties and Nyoro Construction requested that the president of the Architectural Association of Kenya appoint an arbitrator. An arbitrator was duly appointed, and the parties held preliminary meetings and exchanged pleadings, but for unstated reasons the proceedings did not take off for close to four years. The university consequently challenged the arbitrator's jurisdiction on the grounds that the claim was time barred.

The arbitrator considered the parties' submissions and dismissed the objection. Aggrieved, the university filed an application to set aside the arbitral tribunal's decision. The application was filed three months after the arbitrator delivered the ruling. One of the issues that came up for consideration was the timeframe within which an applicant could approach the court to set aside a determination by an arbitrator on their jurisdiction. The court upheld the provision in section 17(6) of the Arbitration Act, which states that such an application challenging a ruling by an arbitrator on their jurisdiction must be made within 30 days of the ruling. In upholding the provisions of the act, the court held that it did not have jurisdiction to entertain a late application or extend the time for filing an application for the following reasons:

- section 10 of the Arbitration Act limits what a court can do in arbitration proceedings and an extension of time for filing such an application is not provided for;
- the Arbitration Act is a complete code and therefore the provisions of the Civil Procedure Act on time extensions cannot be relied upon unless expressly imported by the Arbitration Act;
- the intention of the time limit is to ensure that neither party frustrates the arbitration process; and
- parties to arbitration agreements make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

COURT INVOLVEMENT IN ARBITRATION PROCEEDINGS

In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, the Supreme Court stressed the importance of limiting the involvement by courts in arbitration proceedings. As such, parties to commercial agreements must abide by the rules set out in the Arbitration Act.

Earlier decisions of the High Court had provided that the time limit imposed by section 17(6) of the Arbitration Act could be cured by seeking leave from the court to

KENYA

The time crunch in challenging an arbitrator's jurisdiction

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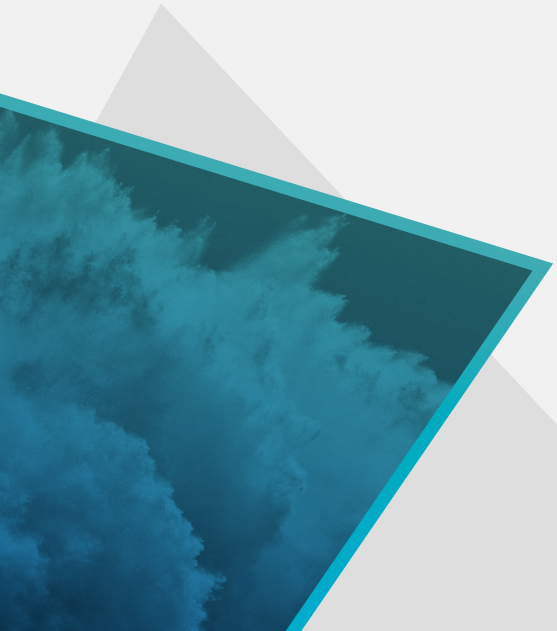
make the application out of time. For instance, in *Kenya Ports Authority v Baseline Architects and Three Others* [2014] eKLR, the court was of the view that there was no provision in the Arbitration Act barring an aggrieved party from making an application for leave to file the appeal out of time. The court was also enjoined to do substantial justice under section 3A of the Civil Procedure Act. Similarly, in *Royal Ngao Holdings Limited v N.K. Brothers Limited* [2020] eKLR, the court held that where an aggrieved party provided a reasonable explanation for failing to file an application within the 30-day limit the same could be allowed.

However, Justice Majanja's decision in this case is consistent with the Supreme Court's finding that the Arbitration Act is a complete code that deliberately limits instances of interference with the arbitral process to promote expediency and finality of arbitral awards. Therefore, any party to an arbitration dispute that desires to apply to the High Court to set aside a ruling by an arbitrator on their jurisdiction must file the application within 30 days of the arbitrator's decision, failing which they would have no recourse under the law.

DESMOND ODHIAMBO, CHRISTINE MUGENYU AND JANETTE NYAGA



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BACKGROUND

The appellant, Bool Smuts, a wildlife conservationist and activist, published photographs of dead animals trapped on Herman Botha's farm on the Landmark Leopard & Predator Project - South Africa

The caption of the Facebook post read as follows:

> *"While we spend our efforts trying to promote ecologically acceptable practices on livestock farms to promote ecological integrity and regeneration, we are inundated by reports of contrarian practices that are unethical, barbaric and utterly ruinous to biodiversity.*
>
> *These images are from a farm near Alicedale in the Eastern Cape owned by Mr Herman Botha of Port Elizabeth, who is involved in the insurance industry. The farm is Varsfontein.*
>
> *This is utterly vile. It is ecologically ruinous. Mr Botha claims to have permits to do this – see the WhatsApp conversation with him attached.*
>
> *The images show a trap to capture baboons (they climb through the drum to get access to the oranges – often poisoned – and then cannot get out). See the porcupine in traps too. Utterly unethical, cruel and barbaric."*

Smuts had also included a photograph of Botha holding his six-month-old daughter along with a Google search of Botha's business and home addresses and telephone numbers.

Naturally, the post attracted much reprisal from members of the public who shared Smuts' sentiments, with users suggesting that Botha *"should be in that cage"* and that he should be *"paid a visit"*. One person suggested that Botha's business should be boycotted and a campaign launched to name and shame him and his insurance brokerage business.

Botha instituted an urgent application in the High Court of the Eastern Cape Division, Port Elizabeth (the High Court) for an interim interdict prohibiting Smuts and Landmark Leopard (collectively, the appellants) from publishing defamatory statements about him. Botha was successful in the High Court and Smuts and Landmark Leopard (the appelants) were ordered to remove the photographs of Botha and certain portions of the Facebook post that referred to Botha, his business, its location and the name of Botha's farm. The appellants were also prohibited from publishing further posts making reference to Botha, his family and his business. The photograph of Botha and his daughter was removed by Smuts before the interim order was granted.

The High Court concluded that although Smuts and Landmark Leopard were entitled to publish the photographs of the lifeless animals

SOUTH AFRICA

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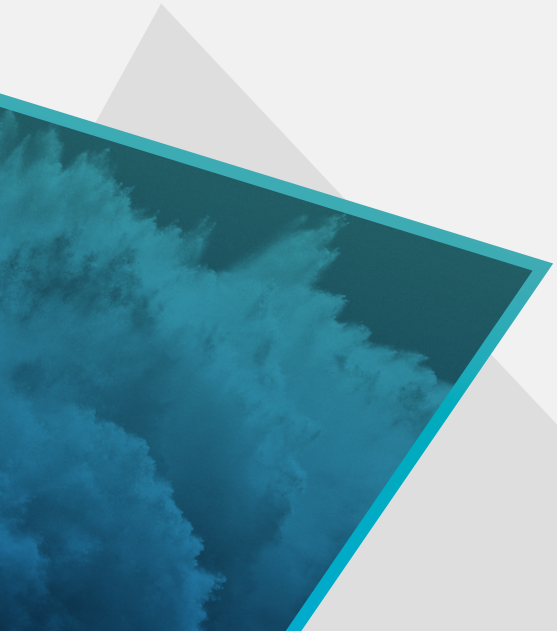

and to comment on them, they were not entitled to publish the fact that the photographs were taken on a farm belonging to Botha.

The High Court further held that the name of the farm and Botha's identity constituted personal information protected by his right to privacy. The court adopted an approach that the public interest lay in the topic and not in Botha's personal information.

THE SCA'S DECISION

In its judgment, dated 10 January 2022, the SCA upheld the appellants' appeal and set aside the order of the High Court.

The issue at the centre of the appeal was whether the publication of the Facebook posts by Smuts was protected by the right to freedom of expression.

CONFLICTING INTERESTS

The SCA held that both the rights to privacy and freedom of speech are cardinal to the protection of human dignity and the promotion of a democratic society. However, neither of these rights are absolute.

The SCA referred to *Bernstein and Others v Bester NO and Others* [1996] (2) SA 751 (CC), in which the Constitutional Court (CC) held that the scope of privacy extended *"to those aspects in regard to which a legitimate expectation of privacy can be harboured"*. The CC held that a legitimate expectation of privacy has two component parts – (i) a subjective expectation of privacy that is (ii) recognised by society as objectively reasonable.

The SCA concluded that the High Court erred in three respects:

> *"Firstly, it disregarded the content of Mr Smuts' post and focused on the response by members of the public. This approach, has far-reaching implications on activists like Mr Smuts because it stifles the debate and censors the activists' rights to disseminate information to the public. In so doing, it denies citizens the right to receive information and a platform for the exchange of ideas, which is crucial to the development of a democratic culture. Secondly, it interferes with the right of freedom of expression and activism and fails to strike a proper balance between personal information and the right to privacy. Thirdly, it failed to recognise that publicising the truth about Mr Botha's animal trapping activities, to which the public have access and interest, does not trump his right of privacy."*

While Botha argued that the Facebook posts violated his right to privacy by disclosing his identity, family, home address and business address, all this information was already in the public domain – some of which he had published online himself. As such, it could not be said that he had any legitimate expectation of privacy – at least not in relation to the published information. No effort had been made by Botha to keep this information or his animal trapping activities private. The SCA stated that the public interest in the treatment of animals apart from the lawfulness of the trapping

SOUTH AFRICA

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must accordingly enjoy protection over Botha's personal information. To give context to this matter, the issue relates to the ethics, cruelty and vile treatment of the animals. Apart from the unlawfulness, the public has a right to know about the activities of Botha's business that directly impact animals.

The SCA further held that the comments expressed in the Facebook post constituted fair comment that was in the public interest and best publicised rather than being oppressed. Smuts had a right to expose what he considered to be the cruel and inhumane treatment of animals at Botha's farm. So too did the public have a right to be informed of the humane or inhumane treatment of animals at the farm.

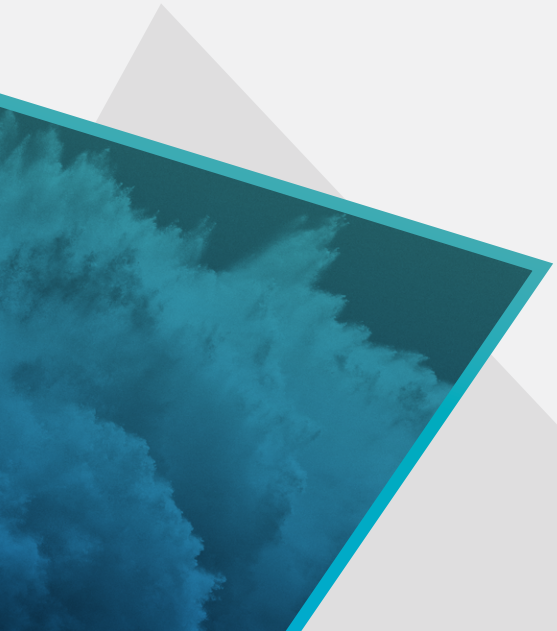
The SCA emphasised that "*it is in the public interest that divergent views be aired in public and subjected to scrutiny and debate*". It is not for courts to censor or sanitise the manner in which people may express themselves on public interest matters. Considering that the information was true and never denied nor hidden by Botha, the test was not whether Smuts could have posted more cautiously, but rather whether Botha had any claim to privacy in respect of the information posted. In light of the circumstances, Botha's claim was weak.

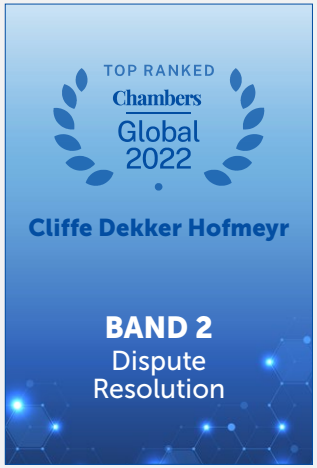
CONCLUSION

Any voluntary disclosure of private information of the owner in the public domain undermines any legitimate expectation of privacy. An individual's claim to privacy weighs more heavily where the details sought to be kept private are indeed private and have been kept from others by the relevant owner.

Privacy is thus exercised first by oneself, then by others.

ANJA HOFMEYR AND
OMOLOLA BOTSANE





OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:

Tim Fletcher
Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Joint Sector Head
Government & State-Owned Entities
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Sector Head
Industrials, Manufacturing & Trade
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Sector Head
Business Rescue, Restructuring
& Insolvency
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Sector Head
Gambling & Regulatory Compliance
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Sector Head
Construction & Engineering
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA