Dispute Resolution

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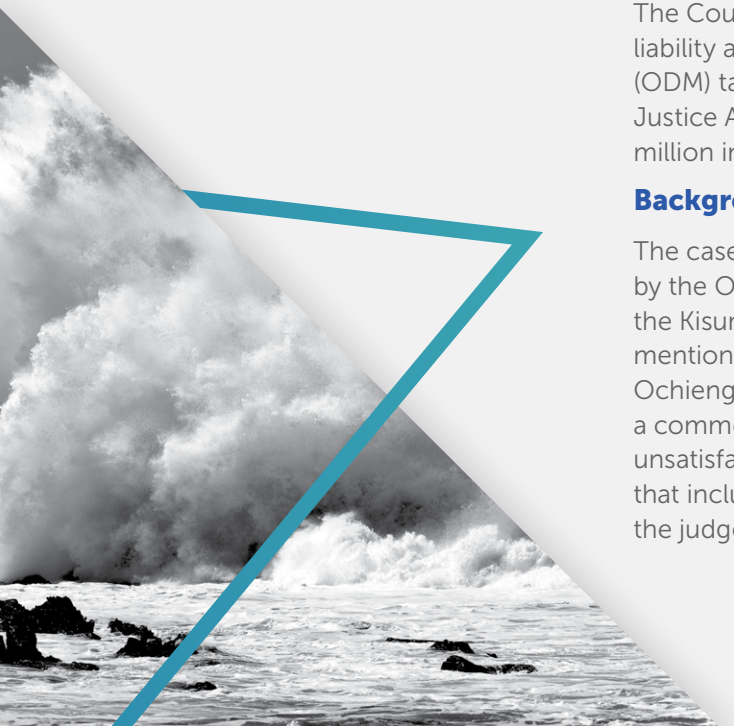
Key highlights from the Court of Appeal's ruling on defamation and responsible journalism



The Court of Appeal has reinforced critical principles in defamation law and the standards of responsible journalism in its decision in *Ongwen and Five Others v Omollo and Six Others* (Civil Appeal 133 & 150 of 2018) [2023] KECA 1444 (KLR), clarifying the duty of care journalists owe when reporting on sensitive matters.

The court emphasised the importance of upholding reputations in a free and rational society, as per P.O. Kiage, Judge of Appeal:

> *"All who would publish words of and concerning others must do so while mindful not to defame. The duty to respect and uphold the reputation of our fellows is a reasonable one in a free and rational society."*

The Court of Appeal upheld the High Court's finding of liability against both the Orange Democratic Movement (ODM) taskforce and *The Star* newspaper for defaming Justice Anne Omollo and confirmed an award of KES 6 million in general damages.

Background

The case arose from a 2015 report by a taskforce appointed by the ODM party investigating the impeachment of the Kisumu County Assembly Speaker, which adversely mentioned Justice Ann Omollo. The journalist, Justus Ochieng of *The Star* newspaper, contacted the judge for a comment. However, after receiving a response he found unsatisfactory, Ochieng proceeded to publish an article that included allegations of financial misconduct involving the judge.

Key issues addressed by the court included whether a defamatory statement could be made even without directly naming the individual in question, whether offering the right of reply alone was sufficient to discharge the duty of care, and the scope of the defence of qualified privilege.

Key points from the court's ruling

Defamation without direct reference by name

The court held that a statement does not need to directly name the claimant to be defamatory. It is sufficient if the publication "*inescapably points*" to the individual. Evidence demonstrated that the references to "*Anne Omollo*" in the ODM Taskforce's report and the subsequent newspaper article were understood to refer to Justice Omollo.

Responsible journalism

The court emphasised that responsible journalism involves more than just reporting third-party allegations. When a journalist goes beyond mere reporting and specifically identifies an individual (as in this case, naming the judge), they assume a heightened duty to verify the accuracy of their claims. The journalist's duty includes more than offering an individual a right of reply; it requires a reasonable effort to verify the truth of the statements.

Qualified privilege defence

The court clarified that the defence of qualified privilege – available for publications on matters of public interest – is contingent on adherence to responsible journalism practices. This includes verifying the information and seeking comment from the claimant. Simply believing in the truth of the statement does not justify the defence of qualified privilege.

Key highlights from the Court of Appeal's ruling on defamation and responsible journalism

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Apportionment of liability

The court held that both the taskforce and *The Star* were equally culpable under the "*repetition rule*," which treats repetition of defamatory statements as equivalent to their original publication. Distinguishing their roles was deemed impractical as the defamatory context of the taskforce's report was amplified by *The Star's* publication.

Damages and apology

The Court of Appeal upheld the High Court's award of KES 6 million in damages, noting that *The Star* had failed to issue an apology in a timely manner. The court stressed the importance of promptly publishing an apology, which could mitigate the damage to the claimant's reputation and reduce the damages payable. A belated apology, as in this case nine years later, may not effectively repair the harm caused and hence damages alone cannot be adequate. The court also emphasised the restorative value of a court-ordered apology, requiring *The Star* to publish an apology for three consecutive days.

Key takeaways for public entities and the media

Public taskforces must verify facts before publication, especially when dealing with sensitive allegations that may harm reputations, even if the information is sourced from reliable channels.

Media entities cannot rely solely on third-party reports without independent verification when publishing serious accusations.

The judgment underscores the serious consequences of defamation, including significant monetary awards and court-mandated apologies. Offering the right of reply alone does not absolve the journalist of responsibility for defamatory content. Journalists must adhere to responsible reporting standards to invoke the defence of qualified privilege, and a timely public apology can significantly reduce damages in defamation cases.

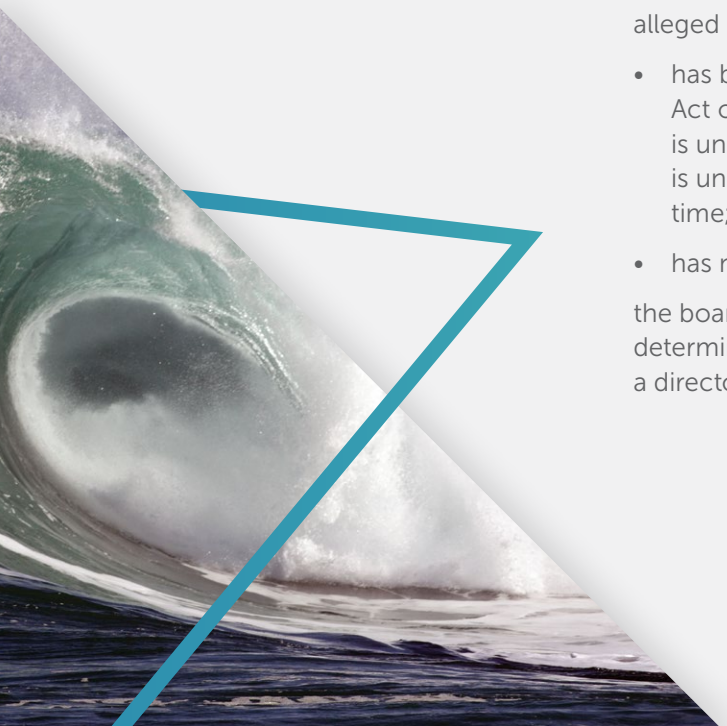
Conclusion

The judgment in *Ongwen* serves as a reminder of the delicate balance between freedom of expression and the right to reputation. Both investigative bodies and the media must exercise caution and adhere to principles of responsible publication to avoid liability for defamation.

Desmond Odhiambo, Daniel Kiragu, and Nicholas Owino

DISPUTE RESOLUTION
ALERT

Tribunal takes no nonsense with director removals



Section 71 of the Companies Act 71 of 2008 (Act) sets out the process of removing a director of a company. Usually, subsections 3 and 4 would apply, which prescribe (i) a shareholder or board resolution authorising such removal; and (ii) prior notice of such resolution being given to the affected director. In the case of *Howard N.O v Powell and Another* (CT01682ADJ2024) [2024] COMPTRI 57 (24 May 2024), the Companies Tribunal (Tribunal) confirmed the process of the alternative mode of removal of a director when there are fewer than three directors in the board.

Relevant background

Section 71(3) of the Act states that if a company has more than two directors, and a shareholder or director has alleged that a director of the company:

- has become (i) ineligible or disqualified in terms of the Act or (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or
- has neglected the functions of director,

the board (excluding the director concerned) must determine the matter by resolution, and may remove a director.

Section 71(4) of the Act states that before the board of a company may consider a resolution contemplated in subsection 3, the director concerned must be given (i) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response and (ii) a reasonable opportunity to make a presentation, in person or through a representative, at the meeting before the resolution is put to a vote.

Section 71(8), however, states that if a company has fewer than three directors then subsection 3 does not apply. However, any director or shareholder of the company may apply to the Tribunal to remove the relevant director on the same grounds as those listed in subsection 3.

Regulation 143 of the Act sets out the procedure for respondents to follow should they oppose the relief sought under section 71(8) of the Act. The procedure includes the filing of an answering affidavit in response to the complaint.

Facts

The second respondent in this case was Hahn Collections (Pty) Ltd (the company). The applicant was Gordon Vaughan Howard, a shareholder of the company. The first respondent was Graham Dudley Powell, a director of the company, whom the applicant was trying to remove from that position.

Tribunal takes no nonsense with director removals

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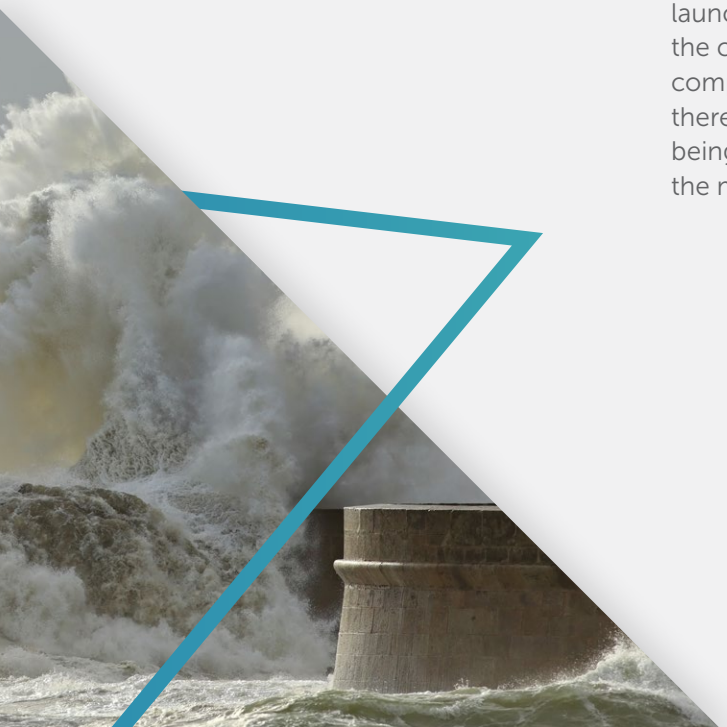

As the company had fewer than three directors, the applicant applied to the Tribunal to, amongst other things, remove the first respondent as a director of the company in terms of section 71(8) of the Act. The applicant alleged that the first respondent had neglected his fiduciary responsibilities towards the company in that he failed to ensure that the company adhered with a compliance notice issued by the Companies and Intellectual Property Commission.

The first respondent and the company (as the second respondent) (collectively the respondents) argued that:

- The section 71(4) notice under the Act was peremptory before launching an application to the Tribunal and had not been complied with.
- The Tribunal lacked the jurisdiction to adjudicate the matter since, subsequent to the proceedings being launched, two further directors had been appointed to the company's board. This, it was argued, meant that the company no longer had fewer than three directors and therefore section 71(8) was no longer applicable. That being the case, the Tribunal had lost its jurisdiction in the matter.

Ruling

The Tribunal confirmed that the wording of section 71(8) of the Act indicates the legislature's intention. It states that if a company has fewer than three directors, then section 71(3) does not apply to the company, and any director or shareholder would then have to apply to the Tribunal to remove director(s) under subsection 8. The Tribunal found that:

- the removal of a director contemplated in subsection 8 is an alternative mode of removal to that in subsection 3; and
- the wording of subsection 4 – being that before the board of a company may consider a resolution contemplated in subsection 3, the director must be given notice of such a meeting under subsection 4 – means that subsection 4 is only a requirement when following the process in subsection 3. Therefore subsection 4 does not apply when following the process in subsection 8.

The respondents failed on their subsection 4 argument.

In relation to the respondents' argument regarding the appointment of further directors, which affected the Tribunal's jurisdiction, the Tribunal found that:

- these appointments were made subsequent to the launching of the proceedings before the Tribunal and hours before the hearing by the Tribunal;

Tribunal takes no nonsense with director removals

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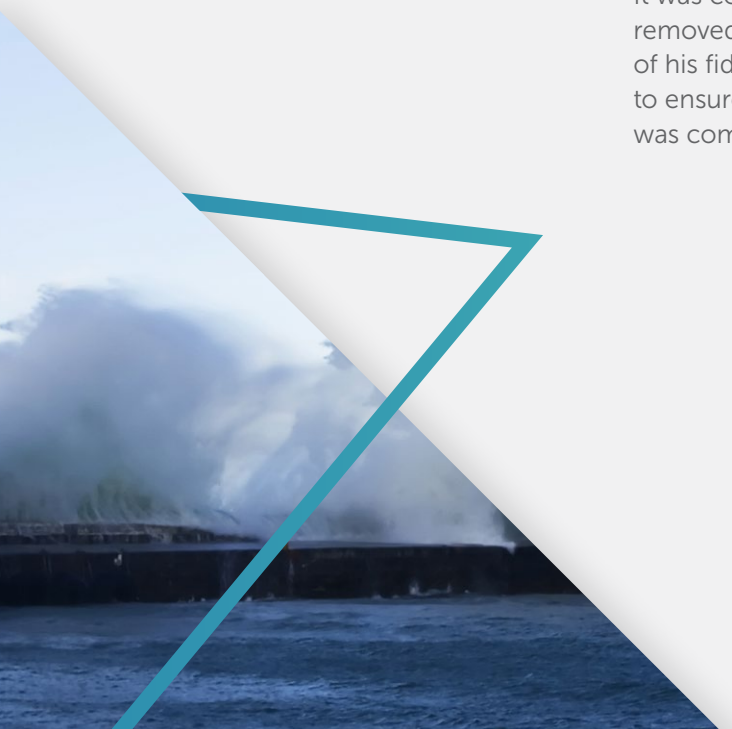
- the only inference to be drawn from these actions was that they were done to circumvent the Tribunal from hearing the matter; and
- the Tribunal could only consider the papers filed before it, and it was therefore not bound to consider the appointment of new directors in the ongoing proceedings.

Accordingly, the Tribunal maintained its jurisdiction notwithstanding the new appointments and the respondents failed in their jurisdiction argument.

Having confirmed its jurisdiction and that the applicant followed the correct procedure in terms of the Act, the Tribunal ruled in favour of the applicant on the merits (the respondents having failed, by choice, to file an answering affidavit).

It was consequently ordered that the first respondent be removed as a director of the company due to the breach of his fiduciary duties to the company in that he had failed to ensure that the financial reporting of the company was compliant.



Conclusion

It is submitted that the Tribunal was fair in its finding.

The intention of the process stipulated in section 71(4) of the Act is to give effect to the legal principle of *audi alteram partem*, which means that both sides must be given an opportunity to be heard. A director has an opportunity to make representations and state their case at the relevant meeting before a vote is taken for their removal.

Although section 71(4) does not apply to section 71(8) the principle of *audi alteram partem* is protected by Regulation 143 of the Act, which allows a director to state their case by way of an answering affidavit before the Tribunal hears the matter. Neither the Tribunal nor the applicant can be found wanting if the respondents forsake their opportunity to file an answering affidavit, as occurred in this matter.

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